Tax authority immunity in a digital tax administration world

John Bevacqua*

Abstract

Tax authorities in developed common law countries such as the United States, Australia and Canada are increasingly moving to digitise and automate tax administration. The move is rapid and multi-faceted, extending to core functions including tax compliance and investigation activities. However, this increasing reliance on digitisation, automation and artificial intelligence raises fundamental questions concerning tax authority accountability and the ability of taxpayers to exercise their rights to take legal action in the event of defective tax administration. To date, these questions have garnered little attention in the evaluation of the merits, efficiencies and goals of the push to digitise and automate. This article considers these questions and posits that the answers indicate a need to rethink the key public policy principles underpinning the legal rules which govern the limits of tax authority susceptibility to taxpayer suit.

Key words: artificial intelligence, public policy, tax administration

---

* Senior Lecturer, Department of Business Law and Taxation, Monash University, Australia. The author thanks the two anonymous referees for their helpful suggestions for improving this article.

1.   INTRODUCTION

Tax authorities across the common law world, particularly in developed economies such as the United States, Canada, and Australia, have committed to digital tax administration transformations.[1] For example, in Australia, in 2015 the Australian Taxation Office (ATO) expressly committed itself to a 'digital by default' approach to interacting with taxpayers.[2] Equally, the 2019-20 Canada Revenue Agency (CRA) Department Plan affirms '…the CRA's goal to create a digital service experience for Canadians that is user-centric, secure and digital from end-to-end'.[3] In the United States, the Internal Revenue Service (IRS) in 2019 committed itself to four 'modernization pillars' extending to commitments to adopt new technologies including artificial intelligence, analytics, cloud 'and other emerging technologies' to 'enable an end-to-end view of taxpayer cases and interactions'.[4]

Calls for caution have also accompanied the push to digitise and automate tax administration functions. Some of these calls have centred on potentially adverse effects of digitising tax administration customer service on vulnerable taxpayers, particularly if traditional avenues for interacting are not retained.[5] Concerns have also been raised about the privacy and confidentiality implications of automated collection and analysis of taxpayer personal and financial information.[6] There have also been challenges to the legal validity of automated tax administration decision-making. These challenges have brought about legislative change and attracted academic attention.[7]

However, largely absent from the discussion to date is dedicated consideration of the effect digital transformation might have on the trade-off between taxpayer rights and

---

[1] This shift in the common law world is not confined to these three developed common law countries. However the focus in this article is on these countries as they are three of the largest developed common law countries in economic terms and are significantly further along the path to a 'digital by default' approach to tax administration than most other common law countries.

[2] Australian Taxation Office, 'ATO Leads Digital By Default' (30 November 2015), https://www.ato.gov.au/media-centre/media-releases/ato-leads-digital-by-default/.

[3] Canada Revenue Agency, *2019-20 Departmental Plan* (11 April 2019) 23, https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/departmental-plan/departmentalplan2019-20.html.

[4] Internal Revenue Service, *IRS Integrated Modernization Business Plan* (April 2019) 21, https://www.irs.gov/pub/irs-utl/irs_2019_integrated_modernization_business_plan.pdf.

[5] See Mike Nestor, Tom Beers and Carol Hatch, 'Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups' in National Taxpayer Advocate, *2016 Annual Report to Congress – Vol II* (2016) 1. For discussion, see John Bevacqua and Victor Renolds, 'The Digital Divide and Taxpayer Rights – Cautionary Findings from the United States' (2019) 16(3) *eJournal of Tax Research* 714.

[6] For an excellent summary of these concerns in the United States context, see Kimberly A Houser and Debra Sanders, 'The Use of Big Data Analytics by the IRS: Efficient Solutions or the End of Privacy as We Know It?' (2017) 19(4) *Vanderbilt Journal of Entertainment and Technology Law* 817.

[7] In New Zealand, section 105 of the *Tax Administration Act 1994* (NZ) expressly confirms the validity of automated notices of assessment. There has been academic commentary calling for the introduction of similar legislation in Australia. See Kalmen Datt, 'Computer Generated Assessments: A Charm of Powerful Trouble' (2020) *Australian Tax Forum* (forthcoming). In the United Kingdom, legislation is slated for introduction in 2020 to amend the law to 'put beyond doubt' the fact that 'HMRC's use of large-scale automated processes to give certain statutory notices, and to carry out certain functions is, and always has been, fully authorised by tax administration law': see Financial Secretary to the Treasury, United Kingdom (Jesse Norman), 'HMRC: Automation of Tax Notices', Written Statement, *House of Commons Hansard* Vol 667 (31 October 2019), https://hansard.parliament.uk/Commons/2019-10-31/debates/19103131000017/HMRCAutomationOfTaxNotices.

tax authority accountability.[8] In particular, there has been no discussion of the question of the extent to which the move to digitise might necessitate revisiting the boundaries of immunity from suit traditionally afforded to tax officials and tax authorities. These issues are the primary focus of this article.

Specifically, the next section of the article will set out what is meant by a 'digital' tax administration environment. The efforts of Australian, Canadian, and United States tax authorities respectively to transition to a digital tax administration environment will be elaborated and discussed. In the third section of the article attention will shift to identifying and isolating the core common public policy underpinnings of the various judicial and statutory immunities from taxpayer suit currently afforded to tax officials and tax authorities in Canada, Australia, and the United States respectively.[9] The analysis will identify three common public policy concerns – justiciability, indeterminacy, and over-defensiveness.[10]

Building upon this foundation, the remaining three sections of the article will, in turn, address the likely impacts of a shift to a fully digitised tax administration environment on each of these three core common public policy underpinnings of taxpayer immunity from suit. The analysis will show the many uncertainties and challenges digitisation poses to traditional applications of these policy concerns and the legal principles and approaches which they underpin.

The article will conclude by calling for policy-makers and tax authorities to pause to consider and factor into the merits of the case for wholesale and rapid adoption of digital approaches to tax administration the many uncertainties and difficulties identified.

2.   A DIGITAL TAX ADMINISTRATION WORLD – THE BASICS AND THE JOURNEY SO FAR

The most important concept to understand in order to grasp the fundamentals of a digital tax administration world is the concept of 'artificial intelligence' (AI).[11] The concept of artificially intelligent or 'thinking' machines is not new – they were mooted by Turing in the 1950s.[12] Over time, however, AI has become an ubiquitous and flexible umbrella term capturing a range of data analytics techniques of various levels of sophistication. These various techniques endow machines with capabilities for independent problem-solving and decision-making which, to varying degrees, enhance or replicate human intelligence.[13]

---

[8] Duncan Bentley, 'Timeless Principles of Taxpayer Protection: How They Adapt to Digital Disruption' (2018) 16(3) *eJournal of Tax Research* 679.

[9] The discussion will be predicated on a presumption that automated or digitised processes and decisions are legally valid. This is a reasonable assumption given legislative willingness to enact legislation to affirm their validity as evidenced by the legislative developments in New Zealand and the United Kingdom noted at n 7 above.

[10] While these are treated as separate concerns, it is conceded that significant overlap and interrelationships exist between these three public policy issues.

[11] For a good introduction to the concept of artificial intelligence see Wolfgang Ertel, *Introduction to Artificial Intelligence* (Springer International, 2nd ed, 2017).

[12] A M Turing, 'Computing Machinery and Intelligence' (1950) 59(236) *Mind* 433.

[13] The European Union recently adopted the following definition of AI: 'Artificial intelligence (AI) refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from this data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal': see European Commission, High-Level Expert Group on Artificial Intelligence, *A

AI is sometimes alternatively referred to as 'machine learning'.[14] Underpinning both concepts is the use of algorithms[15] to analyse data, learn from that data and make predictions based on that data. What distinguishes machine learning from, for example, an Excel spreadsheet, is that unlike spreadsheet formulae, the algorithms in machine learning adapt and change to become more accurate and efficient as data is processed. In effect, they evolve beyond the initial programmed instructions and parameters through learning from processing the data. In this sense, a learning machine programs itself.[16]

More sophisticated forms of AI technology are sometimes referred to as 'cognitive computing'.[17] These rely on very large and fast computing capabilities. Improvements in these capabilities have led to the recent dramatic and continuing growth in the development and use of these more sophisticated AI technologies.[18] The very large data banks possessed by tax authorities provide the perfect data platform for applying these sophisticated forms of AI/machine learning technologies.[19]

Definition of AI: Main Capabilities and Scientific Disciplines (18 December 2018), https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=56341.

[14] Although some see machine learning as a step on a continuum toward pure artificial intelligence. For example, see Cas Milner and Bjarne Berg, 'Tax Analytics, Artificial Intelligence and Machine Learning – Level 5' (PricewaterhouseCoopers Advanced Tax Analytics and Innovation paper, [2017]), https://www.pwc.com/us/en/tax-services/assets/artificial-intelligence-and-machine-learning-final1.pdf. See also Mark A Lemley and Bryan Casey, 'Remedies for Robots' (2019) 86(5) *The University of Chicago Law Review* 1311, 1321. For further introductory discussion of machine learning, see M Jordan and T Mitchell, 'Machine Learning: Trends, Perspectives, and Prospects' (2015) 349(6245) *Science* 255.

[15] In its most rudimentary sense, an algorithm is simply a finite set of instructions programmed into a computer to allow the computer to solve a particular problem. See Merriam-Webster Dictionary, 'Algorithm', https://www.merriam-webster.com/dictionary/algorithm. For a more technical analysis, see Yuri Gurevich, 'What is an Algorithm?' (Microsoft Research Technical Report MSR-TR-2011-116, July 2011), https://www.researchgate.net/publication/221512843_What_Is_an_Algorithm/link/0f31753722c3914da9 000000/download.

[16] For further discussion see Lemley and Casey, above n 14, especially at 1324-1325.

[17] Cognitive Computing has been described as 'systems that learn at scale, reason with purpose and interact with humans naturally. It is a mixture of computer science and cognitive science – that is, the understanding of the human brain and how it works. By means of self-teaching algorithms that use data mining, visual recognition, and natural language processing, the computer is able to solve problems and thereby optimize human processes': Peter Sommer, 'Artificial Intelligence, Machine Learning and Cognitive Computing', *IBM Digital Nordic* (20 November 2017), https://www.ibm.com/blogs/nordic-msp/artificial-intelligence-machine-learning-cognitive-computing/ (accessed 6 September 2020).

[18] This is one of numerous factors leading to the recent growth in AI technology applications and interest. For discussion see M Brundage et al, Future of Humanity Institute, University of Oxford, Centre for the Study of Existential Risk, University of Cambridge, Center for a New American Security, Electronic Frontier Foundation and OpenAI, *The Malicious Use of Artificial Intelligence: Forecasting, Prevention, and Mitigation* (Future of Humanity Institute, University of Oxford, Centre for the Study of Existential Risk, University of Cambridge, Center for a New American Security, Electronic Frontier Foundation and OpenAI, February 2018), https://maliciousaireport.com/. The authors observe, at 12, that factors explaining the recent growth 'include the exponential growth of computing power, improved machine learning algorithms (especially in the area of deep neural networks), development of standard software frameworks for faster iteration and replication of experiments, larger and more widely available datasets, and expanded commercial investments'.

[19] For a detailed discussion of the use of data by tax administrations and the opportunities available from doing so, see Organisation for Economic Co-operation and Development (OECD), *Technologies for Better Tax Administration: A Practical Guide for Revenue Bodies* (OECD Publishing, 2016).

The potential use of artificial intelligence in a tax context has long been recognised. Experiments were already well underway in the 1970s.[20] In a tax administration context, the potential uses of AI have been touted as including assistance to collect and organise tax data, to predict and detect tax avoidance, and to analyse tax trends and indicators.[21] The Organisation for Economic Cooperation and Development (OECD) has asserted that '[t]he successful application of information technology will determine the success of revenue bodies in managing compliance risks and meeting rising service expectations'.[22]

These dual taxpayer compliance and customer service drivers for increased automation and digitisation are reflected in the strategic commitments of tax authorities in major developed common law economies. For example, the CRA has made a commitment to use disruptive technologies, such as artificial intelligence 'to meet service expectations and still protect Canada's revenue base'.[23]

In the United States, the IRS has set a customer service 'modernization' goal '…to enable an end-to-end view of taxpayer cases and interactions, in part, by aggregating customer experience data across different taxpayer touchpoints with the IRS. These touchpoints allow us to trace customer engagement throughout the tax system and enhance overall service'.[24]

In his foreword to the *2019-20 ATO Corporate Plan*, the Australian Commissioner of Taxation acknowledged the increasing investment in the use of 'automation and artificial intelligence to enhance the client experience and integrity in the system'.[25]

Some of the most prevalent uses of machine learning to date have also involved 'robotic process automation' (RPA). The benefits have been described as follows:

> (RPA) – can automate tasks across multiple tax processes. Calculation, tax returns, and Treasury processes can all be streamlined, leaving the less tedious, time-intensive work for human tax professionals.[26]

However, AI is also already being applied to some higher-level tax administration tasks. In a number of jurisdictions there has been a significant shift away from reliance on traditional avenues of investigation such as physical audits in favour of developing and refining algorithms and automated e-audit processes to validate taxpayer and third party

---

[20] For example, research considering the application of computer problem-solving systems in the context of taxation of corporate restructures in the United States was reported in L Thorne McCarty, 'Reflections on *Taxman*: An Experiment in Artificial Intelligence and Legal Reasoning' (1977) 90(5) *Harvard Law Review* 837.

[21] For a comprehensive summary of the potential uses and benefits of AI in a tax administration context see Zhuowen Huang, 'Discussion on the Development of Artificial Intelligence in Taxation' (2018) 8(8) *American Journal of Industrial and Business Management* 1817, 1820-1821.

[22] OECD, above n 19, 3.

[23] Canada Revenue Agency, *2019-20 Departmental Plan*, above n 3, 35.

[24] Internal Revenue Service, *IRS Integrated Modernization Business Plan*, above n 4, 21.

[25] See Chris Jordan (Commissioner of Taxation), 'Commissioner's Foreword', in Australian Taxation Office, *ATO Corporate Plan 2019-20* (31 July 2019), https://www.ato.gov.au/About-ATO/Managing-the-tax-and-super-system/In-detail/Corporate-plan---current-and-previous-years/ATO-corporate-plan-2019-20/.

[26] John Viglione and David Deputy, 'Your Tax Data is Ripe for Artificial Intelligence: Are you Prepared?', *Tax Executive* (21 September 2017), https://taxexecutive.org/your-tax-data-is-ripe-for-artificial-intelligence-are-you-prepared/ (accessed 6 September 2020).

information and to identify high risk audit targets. For example, the United States IRS has committed itself to a range of digital efforts to improve compliance and protect the Revenue including commitments to an 'Enterprise Case Management' system to digitise case information and automate work selection, a 'Return Review Program' aimed at integrating data from multiple sources to detect systematic anomalies and potential taxpayer fraud or non-compliance, 'Real-Time Tax Processing' and the implementation of additional databases and applications to improve document matching.[27]

This push has, in part, been driven by economic constraints and the presumption that these emerging digital tools for carrying out core tax compliance monitoring functions are more cost effective than their traditional counterparts. For example, in the United States, one author has recently observed: 'Most of the changes the IRS has made to address their budget shortfall rely on the increased use of technology'.[28]

In Australia, the ATO is also increasingly turning to non-physical means of ensuring taxpayer compliance including the use of 'e-audit'[29] approaches and 'use of automation to review individuals' income tax returns'.[30] The ATO asserts that this will allow them to 'realise process efficiencies'.[31] Automation is also touted by the ATO as facilitating better use of data to allow for 'early engagement with our clients to help them get things right from the start'.[32]

Potential further applications of AI to additional and even higher-level tax functions are also on the digital tax administration horizon. For example, it has been posited:

> At higher levels of tax functions, tax applications may address more complex, human-judgment tasks like answering subtle legal and taxation questions from legal documents or detecting sophisticated fraud strategies, thereby possibly assisting government oversight.[33]

These types of decision-making applications have also been described as 'expert systems'. In a report to the Australian Attorney-General, the Australian Administrative Review Council observed that '[e]xpert systems can play a significant and beneficial role in administrative decision making, particularly in areas where high volumes of decisions are made. Their potential to offer cost savings and improve efficiency and

---

[27] Internal Revenue Service, *IRS Integrated Modernization Business Plan*, above n 4, 23.

[28] See Houser and Sanders, above n 6, 832. For further discussion see: Chuck Marr and Cecile Murray, 'IRS Funding Cuts Compromise Taxpayer Service and Weaken Enforcement, Center on Budget and Policy Priorities', *Center on Budget and Policy Priorities* (4 April 2016), https://www.cbpp.org/research/federal-tax/irs-funding-cuts-compromise-taxpayer-service-and-weaken-enforcement; Joshua P Law, 'Balancing Efficient IRS Administration and Taxpayer Rights' (2019) 43(2) *Seton Hall Legislative Journal* 338, 358-360.

[29] For discussion see Australian Taxation Office, 'Computer Assisted Verification: e-Audit and Risk Assessment' (12 February 2018), https://www.ato.gov.au/General/Gen/Computer-assisted-verification--e-Audit-and-risk-assessment/.

[30] Commissioner of Taxation, *Annual Report 2017-18* (October 2018) 28. E-audits involve the use of computer assisted verification techniques to analyse taxpayer records. For a full explanation of the e-Audit process see Australian Taxation Office, 'Computer Assisted Verification: e-Audit and Risk Assessment', above n 29.

[31] Australian Taxation Office, *ATO Corporate Plan 2019-20*, above n 25, 10.

[32] Ibid 10.

[33] Milner and Berg, above n 14, 5.

accuracy means it can be expected that the systems will become increasingly important tools of government'.[34]

A good example of applying expert systems to tax administration is through the use of 'data mining' to identify audit targets. Data mining is '…the *process* of discovering interesting patterns and knowledge from *large* amounts of data. The data sources can include databases, data warehouses, the Web, other information repositories, or data that are streamed into the system dynamically'.[35] Data mining experiments have been undertaken in a number of jurisdictions with impressive results. For example, in a pilot experiment conducted with the cooperation of the Minnesota Department of Revenue, the data mining-based approach to audit target selection achieved an increase of 63.1 per cent in efficiency over human target selection.[36] Data mining of taxpayer private social media information by the IRS has also attracted recent media attention in the United States.[37]

These examples demonstrate that use of AI in the tax administration context is rapidly evolving without signs of abatement. The scope, speed, and depth of this transition to a digital tax administration environment will likely require a corresponding similarly significant and rapid transition or evolution in the legal rules establishing the boundaries of tax authority and tax official immunity from suit. At a minimum, the potential need for any such legal transition or evolution warrants dedicated consideration. As one advisory firm has recently observed: 'Regulatory agencies, lawmakers, and government policy-crafters have not yet addressed the implications of an AI-rich world. Given the pace of AI adoption, they may soon need to accelerate their work'.[38]

However, to do this it is necessary to understand the rules which have developed in the traditional 'analogue' legal environment and which currently apply. Providing this understanding in the context of the rules which apply to set the limits of tax authority immunity from taxpayer suit is the focus of the following section of this article.

---

[34] Administrative Review Council, *Automated Assistance in Administrative Decision Making – Report No 46* (November 2004) vii.

[35] Jiawei Han, Micheline Kamber and Jian Pei, *Data Mining Concepts and Techniques* (Morgan Kaufmann, 3rd ed, 2012).

[36] See Kuo-Wei Hsu, Nishith Pathak, Jaideep Srivastava, Greg Tschida and Eric Bjorklund, 'Data Mining Based Tax Audit Selection: A Case Study of a Pilot Project at the Minnesota Department of Revenue' in Mahmoud Abou-Nasr, Stefan Lessmann, Robert Stahlbock and Gary M Weiss (eds), *Real World Data Mining Applications*, Annals of Information Systems Vol 17 (Springer International, 2015) 221.
For further examples, see Pieter W G Bots and Fred A B Lohman, 'Estimating the Added Value of Data Mining: A Study for the Dutch Internal Revenue Service' (2003) 3(3/4) *International Journal of Technology, Policy and Management* 380; Manish Gupta and Vishnuprasad Nagadevara, 'Audit Selection Strategy for Improving Tax Compliance – Application of Data Mining Techniques' in Ashok Agarwal and Venkata Ramana (eds), *Foundations of E-government* (Computer Society of India, 2007) 378 and the numerous further studies referred to therein (the Gupta and Nagadevara study is also cited in Inspector-General of Taxation, *Review into Aspects of the Australian Taxation Office's Use of Compliance Risk Assessment Tools: A Report to the Assistant Treasurer* (October 2013) 145).

[37] For examples see Justin Rohrlich, 'The Taxman Browseth: The IRS Wants to Use Social Media to Catch Tax Cheats', *Quartz* (27 December 2018), https://qz.com/1507962/the-irs-wants-to-use-facebook-and-instagram-to-catch-tax-evaders/; Monique Claiborne, '2 Ways the IRS May Be Stalking You on Social Media and How to Avoid Being Singled Out', *Inc.* (10 December 2019), https://www.inc.com/monique-claiborne/2-ways-the-irs-may-be-stalking-you-on-social-media.html; Dara Kerr, 'Tax Dodgers Beware: IRS Could Be Watching Your Social Media', *Cnet* (15 April 2014), http://www.cnet.com/news/taxdodgers-beware-irs-could-be-watching-your-social-media/.

[38] Milner and Berg, above n 14, 11.

3.   TAX AUTHORITY SUSCEPTIBILITY TO TAXPAYER SUIT IN AN 'ANALOGUE' TAX ADMINISTRATION WORLD

All taxing nations to some degree are concerned to protect the Revenue from exposure to liability which would have an undue economic impact on the public purse. The reason for this concern is simple and compelling. As one author has put it, '[t]here is obviously a strong public interest in keeping the government solvent so that it may continue to defend and improve our society'.[39] This reasoning is particularly potent in the tax administration context given that unfettered claims against the tax authorities have potentially harmful societal ripple effects extending well beyond tax authority bottom lines by directly impacting the solvency of all government functions and services which rely on tax revenue collected by those agencies.[40]

This fundamental concern has led to development of a range of statutory and judicial restrictions on taxpayer abilities to challenge tax authority decisions. The concern is most directly evident in statutory restrictions on permitted challenges to tax assessment decisions. The first half of this section of the article is dedicated to overviewing those restrictions and isolating the public policy concerns underpinning them. The balance of this section focuses on restrictions on taxpayer challenges to tax authority decisions and actions outside of the tax assessment context. Again, the aim is to provide an overview of the public policy concerns underpinning the judicial approaches to determining when such challenges will be permitted.

3.1   Tax assessments

In each of the jurisdictions examined in this article there are broad statutory restrictions on taxpayer rights to challenge tax assessment and calculation decisions. Prime examples of these types of restrictions include numerous 'privative' or 'no challenge' clauses.[41] Many of these establish a statutory presumption of the correctness of tax assessments. Others limit the availability of judicial review by restricting appeals against assessment decisions to specialist tax tribunals or strictly proscribed tax-specific avenues of complaint.[42]

In Australia, the primary privative clause protections of the Revenue are in section 175 of the *Income Tax Assessment Act 1936* (Cth) and Division 350 of Schedule 1 of the *Taxation Administration Act 1953* (Cth). These provisions effectively make production of a notice of assessment by the ATO conclusive evidence of the due making of the

---

[39] Osborne M Reynolds, Jr, 'The Discretionary Function Exception of the Federal Torts Claims Act' (1968) 57(1) *Georgetown Law Journal* 81, 122-123.

[40] In particular, this concern is a central consideration in cases involving claims for pure economic loss. As Cohen has noted in a Canadian context, '[t]he cost may be borne by another department, a bureaucracy independent from the one whose actions are most directly associated with the injury': David Cohen, 'Suing the State' (1990) 40(3) *University of Toronto Law Journal* 630, 647.

[41] Also, depending on the context and jurisdiction, sometimes referred to as 'ouster' or 'finality' clauses.

[42] For a good academic commentary of the merits of these provisions see Luke Sizer, 'Privative Clauses: Parliamentary Intent, Legislative Limits and Other Works of Fiction' (2014) 20 *Auckland University Law Review* 148, especially at 163.

assessment. In Canada, sub-section 152(8) of the *Income Tax Act 1985*[43] (ITA) has a similar effect.[44]

In the United States, sub-section 7421(a) of the United States *Internal Revenue Code*[45] (IRC) provides that, subject to a number of narrow exceptions '…no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed'.[46] In addition, the *Federal Tort Claims Act 1946*[47] (FTCA), which permits tort claims against public officials, contains a specific carve-out preserving immunity from suit in claims 'arising in respect of the assessment or collection of any tax or customs duty...'.[48]

In Australia, decisions concerning making or amending tax assessments or tax calculations and determining tax objections to those assessments or calculations are also expressly excluded from judicial review pursuant to Schedule 1(e) of the *Administrative Decisions (Judicial Review) Act 1997* (Cth).[49]

In Canada, the right to appeal an assessment is typically restricted to appealing to Canada's specialist Tax Court pursuant to section 169(1) of the ITA and section 12(1) of the *Tax Court of Canada Act 1985*.[50] Judicial review appeals to the Federal Court in cases involving assessments are also restricted under the *Federal Courts Act 1985*.[51] In addition, in Canada a doctrine known as the 'collateral attack' doctrine has also been developed to strike out taxpayer private law actions which are effectively disguised attacks on CRA assessment decisions.[52] The reasoning is that allowing such collateral

---

[43] *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.).

[44] Sub-section 152(8) provides: 'An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto'.

[45] Internal Revenue Code 26 USC (1986).

[46] These are set out in §§ 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436 of the Internal Revenue Code.

[47] 28 USC §§ 1346(b), 2671-80.

[48] 28 USC § 2680(c) provides that, aside from four specified exceptions, the FTCA does not authorise such actions. The exceptions relate to customs or excise seizures of goods, merchandise or other property which satisfy the specific conditions set out in § 2280(c)(1)-(4). The presumptive correctness of IRS tax assessments was also judicially affirmed in *Welch v Helvering* (1933) 290 US 111, 115.

[49] For a good discussion of the scope and purpose of the Australian restrictions of judicial review of tax assessments, see Vince Morabito and Stephen Barkoczy, 'Restricting the Judicial Review of Income Tax Assessments: The Scope and Purpose of Schedule 1(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)' (1999) 21(1) *Sydney Law Review* 36.

[50] Section 169(1) relevantly provides: '(1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied…'. Section 12(1) of the *Tax Court of Canada Act*, RSC, 1985, c. T-2, endows the Tax Court with exclusive original jurisdiction in matters concerning tax assessments.

[51] The jurisdiction of the Federal Court of Canada to judicially review decisions of the Tax Court is restricted under section 18.5 of the *Federal Courts Act*, RSC, 1985, c. F-7. This extends to challenges to the correctness of tax assessments: see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.* 2013 FCA 250.

[52] For an example of application of this principle in a taxpayer negligence case, see *Canus v Canada Customs* 2005 NSSC 283. See also *Canada v Roitman* 2006 FCA 266, a case in which the appellants raised a range of tortious claims arising out of a reassessment of their tax liabilities in accordance with terms of settlement struck with the CRA. The Federal Court of Appeal dealt summarily with these allegations, characterising the appellants' claim as, in reality, a challenge to tax assessments, and held that such challenges must be dealt with utilising the mechanisms contained in Canadian tax legislation.

attacks would undermine the public policy principles underpinning the restricted capacity to judicially challenge tax assessment decisions.

In addition to such restrictions on the ability to challenge tax assessments, there are a range of additional statutory protections of tax assessments. These often take the form of procedural disincentives for taxpayers contemplating challenging tax authority decisions. For example, sections 14ZZM and 14ZZR of the Australian *Taxation Administration Act 1953* (Cth) ensure no stay on collection actions while tax appeals are on foot.[53] In Australia, the onus of proof is also reversed in cases of taxpayers wishing to judicially challenge a tax assessment. Specifically, the taxpayer bears the burden of proving that the assessment is excessive and what the assessment should have been.[54]

Similarly, the Supreme Court of Canada has held that the taxpayer bears the burden of proof in challenging a tax assessment. In *Johnston v Minister of National Revenue*[55] the Court held that the initial onus is on the taxpayer to 'demolish the basic fact on which the taxation rested'.[56] This was affirmed by the Supreme Court in *Hickman Motors Ltd v The Queen*.[57] In the United States, section 7249(2) of the IRC similarly imposes the burden of proof of demonstrating the reasonableness of an assessment on the taxpayer.[58]

A further policy underpinning some of the statutory limits on challenges to assessments is based on relative institutional competency of courts to adjudicate technical tax calculation and assessment cases. These concerns are most evident in the various statutory requirements that taxpayer appeals are in the first instance dealt with internally by the tax authority or by specialist review courts or tribunals. The logic and justification is that if these claims are left to non-specialist courts without technical expertise, there is a high risk of inefficiency and error. Hence, the risk of injustice to taxpayers through the relatively restricted availability of relief through the courts is not as great as might

---

[53] Section 14ZZM provides: 'The fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending'. Section 14ZZR similarly provides: 'The fact that an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending'. See also *Deputy Federal Commissioner of Taxation v Niblett* [1965] NSWR 1552; and *Hoare Bros Pty Ltd v DFC of T* (1996) 62 FCR 302.

[54] This requirement is set out in ss 14ZZK (for appeals to the Administrative Appeals Tribunal) and 14ZZO (for appeals to the Federal Court) of the *Taxation Administration Act 1953* (Cth). For further discussion see Robin Woellner and Julie Zetler, 'Satisfying the Taxpayer's Burden of Proof in Challenging a Default Assessment – The Modern Labours of Sisyphus?' (2014) 7 *Journal of the Australasian Law Teachers Association* 119.

[55] [1948] SCR 486.

[56] *Johnston v Minister of National Revenue* [1948] SCR 486, 490.

[57] [1997] 2 SCR 336. It was also affirmed in this case *that once the assessment assumptions have been 'demolished', the onus then shifts to the CRA to rebut the case made out by the taxpayer and prove the assumptions informing the assessment.*

[58] The enactment of §7491 of the IRC in 1998 allows for the shifting of the burden of proof to the IRS in civil tax matters where the taxpayer can provide 'credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed…'. See IRC §7491(a)(1). However, to shift the burden, the taxpayer must have met all obligations to substantiate reporting of tax items, maintain records as required under the IRC, and cooperate with IRS requests for information witnesses, documents, meetings and records. See IRC §7491(a)(2).

first appear. In practical terms, the specialist alternatives will usually suffice, and judicial attention is rarely warranted.[59]

Perceived need for certainty and finality, and associated efficiencies are also significant justifications for restricting available avenues for judicially challenging tax authority decisions and setting procedural restrictions in favour of tax authorities. For example, the Australian Law Reform Commission has posited that 'Part IVC of the *Australian Taxation Administration Act 1953* (Cth) … was adopted to facilitate "a quick and efficient mechanism for review of numerous decisions". Additionally, the separate regime allows an affected person to seek review of a decision, while preserving the Commissioner of Taxation's ability to seek recovery of debts relating to the decision'.[60]

Nevertheless, the statutory restrictions leave few viable judicial avenues for challenging tax authority assessment decisions except in cases involving the most grievous abuses of power, extending to infringements of basic civil or constitutional rights or misfeasance or malfeasance in public office. Such claims, when brought, are rarely successful even when available. In Australia, for example, the High Court in *Commissioner of Taxation v Futuris Corporation Limited*[61] affirmed that a deliberate failure to administer the tax law according to its terms would result in the validity of a tax assessment being challengeable in judicial review proceedings. Examples would include situations amounting to a misfeasance in public office.[62] However, no taxpayer misfeasance case has ever succeeded in Australia.[63]

In the United States, the challenges facing taxpayers – even in cases of alleged infringements of basic Constitutional rights – have been highlighted in the very limited success taxpayers have had in claiming compensation via 'Bivens' damages actions claims. *Bivens* claims allow citizens whose constitutional rights have been infringed by a public official to sue that public officer personally for damages even where there is no

---

[59] This reasoning brings to mind the oft-cited judicial observation by United Kingdom judge Lord Brown that: 'The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff'. *Regina (Cart) v Upper Tribunal* [2011] UKSC 28, [100].

[60] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Interim Report* (July 2015) 480-481, https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_127_interim_report.pdf.

[61] (2008) 237 CLR 146.

[62] *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146, 164, the High Court majority expressly make this point.

[63] There was first instance success in *Donoghue v Federal Commissioner of Taxation* (2015) 323 ALR 337. However, the case was overturned by the Full Federal Court in *Federal Commissioner of Taxation v Donoghue* (2015) 237 FCR 316. Notable failed attempts include *Henderson v Deputy Commissioner of Taxation* (2005) 61 ATR 317; *Engler v Commissioner of Taxation (No 3)* (2003) 54 ATR 61; *Gates v Commissioner of Taxation* (2006) 63 ATR 56; *Madden v Madden & Ors* (1996) 65 FCR 354; and *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412.

statutory right to claim damages.[64] Most *Bivens* tax cases fail[65] on the grounds that the IRC provides adequate mechanisms for relief, thus precluding the availability of *Bivens* relief. This principle holds even where the available remedies might be ineffective or inadequate for remedying the plaintiff's injury,[66] and even in cases in which the behaviour of the tax officials involved has been judicially described as 'outrageous'.[67]

Again, this state of affairs affirms the primacy in most cases of the concern to protect the solvency of government from undue attack via challenges to exercises of tax authority tax assessment powers.

3.2   Tax authority susceptibility to taxpayer suit outside of the assessment context

Outside of the tax assessment context, rights to sue tax authorities are, *prima facie*, generally consistent with the rights to take action against other statutory authorities and public officers. These are set out in various Acts setting out the limits of Crown or governmental immunity from private law suit. For example, in Australia, Crown immunity from suit was abolished by section 64 of the *Judiciary Act 1903* (Cth).[68] In Canada, section 3 of the *Crown Liability and Proceedings Act*[69] serves a similar purpose. In the United States, claims against public officials have been permitted for decades under the FTCA.[70]

Further, with respect to tax collection activities, in response to numerous horror stories of taxpayer treatment at the hands of the IRS in the 1980s and 1990s the United States Congress enacted successive rounds of Taxpayer Bill of Rights (TBOR) legislation incorporating statutory avenues of compensatory relief for negligent or reckless tax

---

[64] So named after *Bivens v Six Unknown Named Federal Agents of Federal Bureau of Narcotics* 403 US 388 (1971), the case in which the United States Supreme Court created a constitutional damages action allowing citizens whose constitutional rights have been infringed by a public official to sue that public officer personally for damages, even where there was no statutory avenue of relief. A good example of a case in which a Bivens action was allowed in a tax case is *Rutherford v United States* 702 F.2d 580 (5th Cir. 1983). In this case, the Fifth Circuit Court of Appeals allowed a Bivens action for a breach by the IRS of the taxpayer's Fifth Amendment right to liberty which it characterised, at 585, as an 'abuse in tax collection'.

[65] Ridgeley A Scott, 'Suing the IRS and its Employees for Damages: David and Goliath' (1996) 20(3) *Southern Illinois University Law Journal* 507, 561, cites statistics that from 1980 to 1986 indicating that over 1,000 Bivens actions were launched against IRS officers and in not a single case did the taxpayer succeed. 'During the 1987 hearings on the Taxpayers' Bill of Rights, the Commissioner bragged that none of over 1,000 *Bivens* actions had been successful.'

[66] For detailed discussion see ibid, especially the discussion of cases such as *Wages v IRS*, 915 F.2d 1230 (9th Cir. 1990); *McMillan v United States*, 960 F.2d 187 (1st Cir. 1991); and *Cameron v IRS*, 773 F.2d 126 (7th Cir. 1985).

[67] In *Vennes v An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448 (8th Cir. 1994), the court rejected the plaintiff's *Bivens* claim, despite broadly accepting the plaintiff's factual account which clearly revealed behaviours including threats of physical violence and extortion attempts by IRS agents which Heaney J in his dissenting judgment characterised as 'outrageous'.

[68] Section 64 provides: 'In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject'. Australian States and Territories have similarly abrogated Crown immunity from suit in their jurisdictions.

[69] *Crown Liability and Proceedings Act*, RSC, 1985, c. C-50.

[70] However, as noted in the preceding discussion of statutory protections of assessment powers, the FTCA contains a specific carve-out preserving immunity from suit in cases involving tax collection or assessment functions. See further the discussion above at n 48.

collection activities.[71] Prime among these is section 7433, which provides taxpayers with strictly proscribed rights to bring civil actions for damages against the IRS for negligent, reckless or intentional disregard of provisions of the IRC by an IRS employee in connection with tax collection activities.[72]

As such, across each of the jurisdictions there is a notional right to bring private law claims against tax authorities stemming from a common approach to Crown or governmental immunity from suit which as far as possible seeks to create parity between the legal treatment of public officials and private citizens.[73]

Nevertheless, taxpayer success in suits against tax officials outside the tax assessment context is rare. Claims are regularly cursorily dismissed or struck out for lack of reasonable prospects of success. Here again, there are jurisdictional commonalities in terms of the public policy underpinnings of the various measures and approaches applied by the courts to delineate the boundary of susceptibility of tax authorities to taxpayer suit.

In particular, justiciability concerns in their many guises are apparent across all three jurisdictions.[74] The cases also reveal underlying concerns about the solvency of the Revenue expressed via concerns to obviate the risk of opening the floodgates to potentially large and indeterminate liability through recognising taxpayer rights to bring action against tax authorities, particularly in private law actions involving compensation claims. There is also evidence of concern to avoid triggering a potentially over-defensive response among tax officials which might have a chilling effect on the proper fulfilment of their duties. Each of these three underpinning policy concerns is discussed in turn below.

3.2.1   *Justiciability*

In Australia there has been no reported superior court successful taxpayer suit against a tax official for negligence, for breach of statutory duty or misfeasance in public office. In the context of negligence claims, there have been few reported cases and in all but one recent Australian case,[75] which is yet to proceed to a full hearing, the claims have

---

[71] The original *Taxpayer Bill of Rights* legislation was contained in *The Technical and Miscellaneous Revenue Act of 1988*, Pub L No 100-647, 102 Stat 3342 (1988) enacted on 10 November 1988. Sub-chapter J of Title VI is sub-titled the Omnibus Taxpayer Bill of Rights. The second tranche of the TBOR legislation was enacted in 1996 – *Taxpayer Bill of Rights 2 of 1996*, Pub L No 104-168, 110 Stat 1452 (1996). A third round of TBOR legislation was introduced in *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub L No 105-206, 112 Stat 685 (1998).

[72] Sub-section 7433(a). Claims are limited to USD 1,000,000 including costs, except in the case of negligence where the maximum of any single claim is USD 100,000 (§7433(b)). Taxpayers must also exhaust alternative avenues of relief before bringing a §7433 claim, mitigate their losses, and comply with a two-year statute of limitations for bringing a claim. These limitations are contained in §§7433(d)(1)-(3) respectively.

[73] At its core, this parity stems from Diceyan conceptions of the principle of the Rule of Law encompassing the idea that '…every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen'. See Albert Venn Dicey, *The Law of the Constitution* (1885) 178.

[74] Justiciability is a fluid and multifaceted concept which has been described as 'a complex phenomenon that weaves together a number of strands to create a whole that is perhaps greater than the sum of its parts': Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30(2) *Federal Law Review* 239, 241.

[75] *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076.

been summarily dismissed. The reasoning in *Harris v Deputy Commissioner of Taxation*[76] (*Harris*), accurately encapsulates the Australian judicial approach:

> There is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.[77]

A key underpinning of the Australian common law cases is the view that private law duties to taxpayers cannot co-exist with the public duties of tax authorities and tax officials. This concern was overtly stated by the Australian Federal Court in *Lucas v O'Reilly*,[78] a case involving allegations of tortious breach of statutory duty by the Australian Commissioner. In striking out the taxpayer's claim, the Court stated that 'the defendant owes the plaintiff no such duty. The duty of the Commissioner is owed to the Crown'.[79]

This reasoning indicates an underlying concern with the justiciability of actions asserting private law actions against public officials. If a tax authority's duties are owed exclusively to the Crown, imposing private law duties alongside those responsibilities could be viewed as the courts effectively restricting or modifying the Commissioner's legislatively sanctioned role. This would pose a direct judicial challenge to the legislative authority of Parliament.

The issue was most recently raised in *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)*[80] (*Farah*). In *Farah*, the Commissioner of Taxation was unsuccessful in having the taxpayer's negligence claim struck out with the court concluding that imposing a common law duty of care would not necessarily be '…inconsistent or incompatible with the statutory scheme...'.[81]

The reasoning in *Farah* is uncommon in Australian cases. Even outside of the negligence context, the traditional hard line of rejecting the possibility of co-existing public and private duties of tax officials continues to apply. This is most evident in judicial consideration of equitable estoppel claims against the Revenue. For example, in *AGC (Investments) Ltd v FCT*[82] the Federal Court dismissed the taxpayer's estoppel action, reasoning that '[t]he *Income Tax Assessment Act* imposes obligations on the

---

[76] [2001] NSWSC 550.
[77] *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550, [12].
[78] (1979) 79 ATC 4081.
[79] *Lucas v O'Reilly* (1979) 79 ATC 4081, 4085.
[80] *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076. The facts of the *Farah* case are relatively straightforward. Essentially, Farah was the victim of the fraudulent actions of its former tax agent (Strathfield Tax) and the principal of Strathfield Tax, Mr Kennedy. Kennedy prepared and lodged Business Activity Statements, purportedly on behalf of Farah, which generated substantial tax refunds due to Farah. However, unknown to Farah, Kennedy nominated a bank account held by a company Kennedy controlled (Viaus) into which the refunds due to Farah were paid, effectively fraudulently misappropriating the tax refunds. The genesis of the specific allegations of misconduct and negligence against the Commissioner stemmed from the fact the Commissioner's tax officers had been auditing both Strathfield Tax and the plaintiff during much of the period in which the refunds were continuing to be erroneously paid into the Viaus bank account (2012-2014). The plaintiff asserted these payments continued notwithstanding knowledge acquired by the tax officers in the process of carrying out the audit of Strathfield Tax, putting them on notice of the misuse or possible misuse of that account.
[81] *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [89].
[82] (1991) 91 ATC 4180. Reversed on other grounds in *AGC (Investments) Ltd v FCT* 92 ATC 4239.

Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart'.[83] Kitto J in *FCT v Wade*[84] was similarly forthright in concluding: 'No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act'.[85]

In the United States, the leading negligence case is *Johnson v Sawyer*.[86] In this case, the plaintiff was awarded more than USD 10 million in damages for harm caused through the publication of harmful factually inaccurate information about the taxpayer's tax return in press releases. Again, as with the Australian experience, much of the Court's judgment is dedicated to considering the justiciability of the taxpayer's claim, albeit in the context of whether the claim fell outside of the exceptions to the waiver of government immunity contained in the FTCA.[87]

Canadian courts have been more receptive to taxpayer private law claims against tax officials. For example, there have been a number of cases in which courts have recognised tax officials owe taxpayers a duty of care in tort.[88] However, again, taxpayer claims typically fail and taxpayer claims are still considered novel.[89] Pertinently, this is due to similar underpinning justiciability concerns to those raised in Australian and United States courts.

On the question of whether and in what circumstances private law duties to taxpayers are capable of coexisting with public duties of tax officials, Canadian courts have generally applied the reasoning of Hood J in *Canus v Canada Customs*[90] – which echoes the approach of Australian judges:

> [A]ny duty owed by [the CRA auditor] was to the Minister of National Revenue whose duty is owed in turn to Parliament and to all taxpayers generally. Therefore, there is no duty of care owed to an individual taxpayer under the *Income Tax Act*.[91]

There have been some exceptions. For example, a more accommodating approach was taken by the Alberta Court of Appeal in *783783 Alberta Ltd v Canada (Attorney General)*.[92] The Court was prepared to concede '[t]he relationship between the tax assessors and any taxpayer is primarily to ensure that the taxpayer is fairly assessed.

---

[83] *AGC (Investments) Ltd v FCT* (1991) 91 ATC 4180, 4195.

[84] (1951) 84 CLR 105.

[85] *FCT v Wade* (1951) 84 CLR 105, 117, per Kitto J. There have been very few successful Australian taxpayer equitable estoppel claims against the Revenue and these cases have involve unequivocal quasi-contractual commitments. For examples, see *Cox v Deputy Federal Commissioner of Land Tax (Tas)* (1914) 17 CLR 450; *Precision Polls Pty Ltd v FCT* (1992) 92 ATC 4549; and *Queensland Trustees v Fowles* (1910) 12 CLR 111. For a detailed exposition of these cases, see Cameron Rider, 'Estoppel of the Revenue: A Review of Recent Developments' (1994) 23(3) *Australian Tax Review* 135.

[86] 980 F.2d 1490 (5th Cir. 1992).

[87] Specifically, the discretionary exception in 28 USC § 2680(a) and the exception pertaining to tax assessment and collection in 28 USC § 2680(c), as discussed in section 3.1 above.

[88] See *Leroux v Canada* 2014 BCSC 720; *Neumann v Canada (Attorney General)* 2011 BCCA 313; *Canada Revenue Agency v Tele-Mobile Company Partnership* 2011 FCA 89; and *Gordon v Canada* 2019 FC 853.

[89] An argument that taxpayer negligence claims should no longer be considered as raising a novel duty of care was comprehensively rejected in *Grenon v Canada Revenue Agency* 2017 ABCA 96. The Alberta Court of Appeal, at [10], described this submission as an 'overreach' of the existing jurisprudence.

[90] *Canus v Canada Customs* 2005 NSSC 283.

[91] *Canus v Canada Customs* 2005 NSSC 283, [87]. Similar comments were made by Fisher J in *Leighton v Canada (Attorney General)* 2012 BCSC 961, [54].

[92] *783783 Alberta Ltd v Canada (Attorney General)* (2010) 237 NSR (2d) 166.

The tax assessors also have a general duty to the government they work for, and indirectly to the general public'.[93] In *Leroux v Canada Revenue Agency*[94] (*Leroux*), the British Columbia Supreme Court concluded CRA employees must conduct themselves as reasonably careful professionals and '[t]here is nothing in the statutory scheme of the Income Tax Act that would suggest otherwise'.[95]

However, Canadian courts have also developed and applied a number of additional approaches to limit tax authority susceptibility to common law suit. These approaches have been based on determining whether tax administration functions are 'regulatory' activities.[96] Separation of powers justiciability concerns are also at the heart of this delineation.

The reasoning is that where regulatory functions are concerned, the legislative scheme precludes the possibility of judicial intervention to impose private law duties alongside the regulator's public duties. Functions such as CRA tax audits have been considered non-regulatory and thus capable of being subject to common law suit if carried out negligently. For example, in *Leroux*[97] the Court concluded that '…the individual employees of CRA are not regulators. Their duties are operational'.[98]

In Australia, similar approaches to delineating the boundary of susceptibility to common law suit underpin the 'salient features' approach to development of novel tortious claims against public officials including tax officials.[99] One accepted salient feature is whether a statutory function is best described as merely operational or a 'core policy-making' or 'quasi-legislative' function.[100] The salient features approach was recently applied by the Australian Federal Court in refusing to strike out a taxpayer negligence claim in *Farah*.[101]

Perhaps one of the reasons for the similarities between Australia and Canada is that most of the common law tests for delineating the limits of tax authority susceptibility to private law suit stem from a traditional distinction known as the 'policy/operational'

---

[93] *783783 Alberta Ltd v Canada (Attorney General)* (2010) 237 NSR (2d) 166, [45].

[94] *Leroux v Canada* 2014 BCSC 720.

[95] *Leroux v Canada* 2014 BCSC 720, [303].

[96] This is an application of the approach to delineating the boundary of statutory authority immunity from suit set down by the Supreme Court of Canada in *Cooper v Hobart* 2001 SCC 79.

[97] *Leroux v Canada* 2014 BCSC 720.

[98] *Leroux v Canada* 2014 BCSC 720, [280]. This classification of CRA statutory duties as 'operational' rather than 'regulatory' has received mixed support in subsequent Canadian cases. For example, in *Ludmer v Attorney-General (Canada)* 2018 QCCS 3381, the Quebec Superior Court broadly followed *Leroux*, characterising CRA audit functions as not constituting 'true core policy acts'. This terminology echoes the Canadian Supreme Court characterisation of the limits of Crown immunity from suit in *R v Imperial Tobacco Canada Ltd* 2011 SCC 42, [87-90].

[99] The 'salient features' approach to determining whether to impose a duty of care in novel cases involving statutory authorities has a long history in Australia. See *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529, 576. However, the significance of this 'salient features' approach was more recently affirmed by the High Court in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, and *Sullivan v Moody* (2001) 207 CLR 562.

[100] This terminology reflects stage five of the six-stage test for determining whether to impose a duty of care on a statutory authority applied by McHugh J in the leading judgment in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1. His Honour described stage five of his six stage test, at [93], in the following terms: 'Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? If yes, then there is no duty'.

[101] *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076.

dichotomy.[102] Applying the policy/operational dichotomy, an activity which is fundamentally operational in nature will be capable of being considered justiciable. Conversely, a matter which is fundamentally of a policy-making or discretionary nature will not be considered justiciable.[103] The dichotomy has gradually lost favour as a singular measure for setting the boundary of statutory authority susceptibility to private law suit. This is largely due to the difficulty in delineating between discretionary and operational acts.

However, as one of a number of tools for determining the limits of exposure of tax officials to common law suit, delineations such as the regulatory/operational distinction in Canada and the operational/'core policy-making' or 'quasi-legislative' Australian salient features distinction reveal continuing obvious parallels with the policy/operational dichotomy.[104] In the United States, the policy/operational dichotomy retains an especial significance because 'discretionary' functions are a key exception to the waiver of government immunity from suit in the FTCA. Specifically, 28 US Code § 2680(a) provides that the lifting of immunity from suit does not extend to discretionary functions or duties of government employees.[105]

---

[102] The policy/operational dichotomy was first expressly enunciated in Commonwealth courts by the UK House of Lords in *Anns v London Borough of Merton* [1977] 2 All ER 492, although the distinction also has earlier foundational roots in the United States. The original source of the dichotomy is usually credited as the case law concerning the 'discretionary' exception to the waiver of Governmental tort law immunity in the United States *Federal Tort Claims Act 1946* (US). Notable early cases include *Dalehite v United States* 346 US 15 (1953); and *Indian Towing Co v United States* 350 US 61 (1955). For more recent judicial discussion see *United States v Gaubert* 499 US 315 (1991). For a comprehensive discussion of the basis for the distinction in American law, see Heinz R Hink and David C Schutter, 'Some Thoughts on the American Law of Governmental Tort Liability' (1966) 20(4) *Rutgers Law Review* 710, 721-724. For a good commentary on the application of the policy/operational distinction in Canada see Paul Daly, 'The Policy/Operational Distinction in Canadian Tort Law: R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42, [2011] 3 S.C.R. 45', http://canliiconnects.org/en/commentaries/30413. For detailed discussion in the Australian context, see John Bevacqua, 'A Detailed Assessment of the Potential for a Successful Negligence Claim Against the Commissioner of Taxation' (2008) 37(4) *Australian Tax Review* 241.

[103] The justiciability foundation of the policy/operational dichotomy has been highlighted both academically and judicially. For example, in the United Kingdom, in *Rowling v Takaro Properties Ltd* [1988] AC 473, 501, Lord Keith of Kinkel noted that the policy/operational distinction was developed to address 'the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution'. For academic discussion see R A Buckley, 'Negligence in the Public Sphere: Is Clarity Possible?' (2000) 51(1) *Northern Ireland Legal Quarterly* 25, 41; J J Doyle, 'The Liability of Public Authorities' (1994) 2(3) *Tort Law Review* 189, 197.

[104] In Canada, the policy-operational distinction has also been applied to distinguish whether the collateral attack doctrine should be used to deny the availability of relief to taxpayers. For example, in *Gardner v Canada (Attorney General)* 2005 FCA 284, the Ontario Superior Court of Justice drew a distinction between tortious actions challenging CRA processes as distinct from assessments of tax – the latter of which are prohibited from common law challenge according to the collateral attack doctrine. The taxpayer's claim was characterised as the former and permitted.

[105] 28 US Code § 2680(a) states that the waiver of Government immunity from suit does not extend to '[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused'. For detailed discussion of the discretionary function exception in the FTCA, see Barry R Goldman, 'Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act' (1992) 26(3) *Georgia Law Review* 837; Donald N Zillman, 'Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act' [1989] (3)

This further reinforces the significance of justiciability as a key policy concern underpinning the boundaries of susceptibility of tax authority activities to taxpayer suit.

3.2.2   Chill factor concerns

A second policy concern commonly raised in assessing taxpayer claims against tax authorities is the 'chill factor' effect.[106] The concern is essentially that imposing legal liability to taxpayers on tax authorities might manifest in a range of over-defensive behaviours. These behaviours might include reluctance to provide advice or information to taxpayers for fear of being sued if the advice or information is incorrect.[107]

Similarly, services to taxpayers might only be provided after expensive, inefficient, and time-consuming cross-checking procedures to identify potential legal exposures. Perceived high risk tax investigation or collection activities such as efforts to investigate and collect underpaid revenue from well-resourced and potentially litigious taxpayers might also be avoided for fear of being sued.[108] In an environment in which tax officials are exposed to significant risk of successful taxpayer suit, chilling effects might also manifest in difficulties recruiting otherwise qualified and willing individuals to be tax officers.[109]

In the United States, chill factor arguments have been prominent in recent years in cases considering taxpayer *Bivens* constitutional damages claims against tax officials.[110] Specifically, courts have struggled with potential chill factor effects of allowing such claims to proceed against IRS officers.[111] For example, in *Vennes v An Unknown Number of Unidentified Agents of the United States*[112] the majority rejected the taxpayer's claim for compensation, observing that:

> Expanding *Bivens* in this fashion would have a chilling effect on law enforcement officers and would flood the federal courts with constitutional

---

Utah Law Review 687; and D Scott Barash, 'The Discretionary Function Exception and Mandatory Regulations' (1987) 54(4) *University of Chicago Law Review* 1300.

[106] Chill factor effects have a long judicial history. In the United States the issue was first recorded in 1788 in *Respublica v Sparhawk* 1 US 357 (1788).

[107] Such arguments have been used to defend powers to revoke or modify Revenue Rulings retrospectively. See, for example, Edward A Morse, 'Reflections on the Rule of Law and "Clear Reflection of Income": What Constrains Discretion?' (1999) 8(3) *Cornell Journal of Law and Public Policy* 445, 490.

[108] Reduced tax collection actions by the United States Internal Revenue Service in the 1990s have been attributed to the threat of personal actions for damages against tax officials. See Christopher M Pietruszkiewicz, 'A Constitutional Cause of Action and the Internal Revenue Code: Can You Shoot (Sue) the Messenger?' (2004) 54(1) *Syracuse Law Review* 1, 5. See also Seth Kaufman, 'IRS Restructuring and Reform Act of 1998: Monopoly of Force, Administrative Accountability, and Due Process' (1998) 50(4) *Administrative Law Review* 819, 827.

[109] This risk has been acknowledged by the United States Supreme Court in general terms. In *Harlow v Fitzgerald* 457 US 800, 816 (1982), the Court expressed concern about 'the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service'. These comments were cited with approval in *Mitchell v Forsyth* 472 US 511, 526 (1985).

[110] In the context of assessing the merits of United States Bivens actions in tax cases, one author has compared the threat of a Bivens claim to a Damocles Sword which '…does little more than deter Internal Revenue employees from carrying out their duties': Pietruszkiewicz, above n 108, 67-68.

[111] Leave to bring action is typically denied. See, for example, *Capozzoli v Tracey* 663 F.2d 654 (5th Cir. 1981); and *Morris v United States* 521 F.2d 872 (9th Cir. 1975).

[112] 26 F.3d 1448 (8th Cir. 1994).

damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly.[113]

Chill factor concerns also weigh heavily on the minds of United States judges in cases involving potential personal liability of tax officials generally. For example, Biggers J in *Baddour Inc. v United States*[114] in dismissing the taxpayer's claim for damages observed that 'creation of a damages remedy ... resulting in the personal liability of Internal Revenue Service employees would serve to hamper the ability of such employees to perform a function that is a difficult one and one that is vital to our nation'.[115]

Generally speaking, Canadian courts have been more sceptical in their approach to chill factor concerns than their United States counterparts, with the Canadian Supreme Court describing the concerns as 'largely speculative'.[116] In the tax context, in *Sherman v Canada (Minister of National Revenue)*[117] Layden-Stevenson J agreed with the taxpayer's contention that 'the chilling effect on future investigations is not a valid reason to refuse disclosure'.[118] Chill factor concerns were similarly dismissed in *Leroux*, with the Court concluding that holding tax officials to a standard of care which makes them more careful '…is not such a bad thing'.[119]

Australian judges have generally been far less considered in their treatment of chill factor concerns than their Canadian or United States counterparts. For example, in the tax context, the Australian High Court directly, but briefly, discussed the issue in *Pape v Federal Commissioner of Taxation*[120] (*Pape*). In that case, the Court considered the ATO argument that placing limits on the Parliament's Constitutional appropriation powers 'would cause Parliament constantly to be "looking over its shoulder and being fearful of the long term consequences" if it made an appropriation outside power'.[121] The Court rejected the argument, observing, without elaboration, that '[t]he occasional

---

[113] *Vennes v An Unknown Number of Unidentified Agents of the United States* 26 F.3d 1448 (8th Cir. 1994) [13]. Similar reasoning was applied in *National Commodity and Barter Association, National Commodity Exchange v Gibbs* 886 F.2d 1240 (10th Cir. 1989). Chill factor concerns prevailed in *Vennes* notwithstanding the extreme behaviours of the tax officials in that case, as described above at n 67.

[114] 802 F.2d 801 (5th Cir. 1986).

[115] Ibid 807-808.

[116] *Nelles v Ontario* [1989] 2 SCR 170, 197. Similarly, in *Rubin v Canada Minister of Transport* [1998] 2 FC 430, the chill factor argument raised to resist release of government information was repeatedly described by the Federal Court as 'nebulous'.

[117] (2004) 236 DLR (4th) 546.

[118] *Sherman v Canada (Minister of National Revenue)* (2004) 236 DLR (4th) 546, [16]. *Sherman* involved a claim for access to statistics about tax collection assistance activity between the CRA and the United States IRS which the CRA had refused to release to the taxpayer.

[119] *Leroux v Canada* 2014 BCSC 720, [287]. There have been some tax cases in which courts have been more receptive to chill factor arguments. For example, in *783783 Alberta Ltd v Canada (Attorney-General)* (2010) 237 NSR (2d) 166, the Alberta Court of Appeal, at [48], relied in part on chill-factor concerns to deny taxpayer relief, concluding that allowing the claim might produce the result that '[s]ignificant resources would have to be diverted to dealing with inquiries and complaints about the application of particular rules of taxation ...'.

[120] (2009) 238 CLR 1.

[121] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [589], relying on *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 418, per Murphy J, who asserted that a narrow construction of the provision would have a 'chilling effect…on governmental and parliamentary initiatives'.

declaration that federal legislation is invalid does not cause the progress of government to be unduly chilled or stultified'.[122]

In the United States, in *Gregoire v Biddle*,[123] a case involving a challenge to governmental officers exercising judicial functions, the Court concluded: 'it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation'.[124] This is consistent with the reasoning in the earlier case of *Yaselli v Goff*[125] that '[t]he public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions'.[126] This line of reasoning has been used to support affording immunity from suit in cases alleging wrongful prosecution by IRS officers exercising prosecutorial powers.[127]

3.2.3 Solvency, floodgates and indeterminacy concerns

As the discussion in section 3.1 above demonstrates, concerns to protect the solvency of government through restricting the ability of taxpayers to challenge tax authority decisions are especially prominent policy underpinnings justifying statutory protections of tax assessments. Outside of the tax assessment context, similar concerns manifest as concerns to prevent judicial determination that would open the 'floodgates'[128] to court action or, alternatively expressed, generate 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[129]

In most cases, while these concerns might underlie judicial pronouncements, they are not necessarily explicitly stated. Hence, the influence of such concerns in tax cases is likely to be far greater than the number of explicit references might suggest.[130] When they are explicit in their consideration of floodgates arguments, judges are not always

---

[122] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [596].

[123] 177 F.2d 579 (1949).

[124] *Gregoire v Biddle* 177 F.2d 579, 581 (1949).

[125] 12 F.2d 396 (1926).

[126] *Yaselli v Goff* 12 F.2d 396, 406 (1926).

[127] See, for example, *Stankevitz v IRS* 640 F.2d 205 (1981), applying the precedent set in *Butz v Economou* 438 US 478, 508-517 (1979).

[128] It has been correctly observed with respect to the term 'floodgates' that '[j]udges and scholars tend to use the phrase as if it had a single, stable meaning. But in fact, these arguments vary considerably depending upon the government institution – and the dynamic between the judiciary and that institution – that would be affected by a flood of new cases': Marin K Levy, 'Judging the Flood of Litigation' (2013) 80(3) *University of Chicago Law Review* 1007, 1016.

[129] This is the oft-cited characterisation of the floodgates concern by Cardozo CJ, in *Ultramares Corporation v Touche* 174 NE 441, 444 (1931).

[130] For example, Australian High Court judges, Gaudron and Gummow JJ, (dissenting judgment) have suggested that in Australia 'an apprehension as to the cost to the Revenue' has 'intruded' in cases involving determinations of tax-deductibility of certain work-related expenses. See *Commissioner of Taxation v Payne* (2001) 202 CLR 93, [44]. This case concerned the question of deductibility of travel expenses between two unrelated places of employment. For a good discussion of the weight that should be afforded to costs to the revenue in determining cases such as *Payne*, see Miranda Stewart, '*Commissioner of Taxation v Payn*e – Deductibility of Travel Expenses: Is Australia Moving from Global to a Schedular Income Tax?' (2001) 25(2) *Melbourne University Law Review* 495, 521.

receptive.[131] For example, in Canada, in *Leroux*, the Court expressly discounted such concerns noting:

> As for the spectre of widespread litigation, the battle for any plaintiff in this situation is a steep uphill one … Any suit will be rigorously defended with unlimited resources … It is difficult to envision a glut of lawsuits overcoming these onerous burdens.[132]

In the United States, floodgates concerns have been directly raised in Bivens damages claims. In *Bivens* itself, the matter was the subject of judicial disagreement, with the majority considering the argument 'self-defeating' due to the 'truly *de minimis*' statistical chances of success by plaintiffs. Further, the majority rejected the possibility raised by Black J in his dissenting judgment of courts being flooded with 'frivolous' claims, considering that this possibility did not warrant 'closing the courthouse doors to people in Bivens' situation'.[133]

However, floodgates arguments were accepted by the majority in *Vennes v An Unknown Number of Unidentified Agents of the United States*.[134] In rejecting the taxpayer's claim for Bivens compensation, the majority expressed concerns that doing otherwise 'would flood the federal courts with constitutional damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly'.[135]

Beyond the overt discussions of floodgates and indeterminacy concerns, one scenario in which these concerns have been raised across a number of jurisdictions in a less overt manner is in cases in which it is alleged that tax officials owe a general duty to warn taxpayers of potential harm. These cases are typically unsuccessful and floodgates concerns feature heavily in the judicial reasoning informing these outcomes. For example, in *Canada v Scheuer*[136] the taxpayers claimed the CRA was negligent in failing to warn them of risks involved in their investment in a tax shelter donation program which was ultimately found to be a sham. The Federal Court of Appeal rejected the taxpayers' claim on the basis that to impose a duty of care in this case would 'effectively create an insurance scheme for investors at great cost to the taxpaying public'.[137]

In Australia, the issue was recently raised in *Farah*, with the Federal Court concluding that '… as a general proposition … it is unlikely to be the case that, when tax officers are undertaking investigations into the tax liabilities of a particular taxpayer, they owe a general duty to all other taxpayers, or other third parties in respect of the conduct of the investigation'.[138] Implicit in comments such as these is a consciousness of the

---

[131] There have also been significant academic criticisms of the validity of such concerns. For examples see a recent consideration in Levy, above n 128; and Tim Kaye, 'Risk and Predictability in English Common Law', in Gordon R Woodman and Diethelm Klippel (eds), *Risk and the Law* (Routledge-Cavendish, 2008) 95.
[132] *Leroux v Canada* 2014 BCSC 720, [307].
[133] *Bivens v Six Unknown Named Federal Agents of Federal Bureau of Narcotics* 403 US 388, 411 (1971).
[134] *Vennes v An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448 (8th Cir. 1994).
[135] *Vennes v An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448 (8th Cir. 1994), [13].
[136] *Canada v Scheuer*, 2016 FCA 7.
[137] *Canada v Scheuer*, 2016 FCA 7, [43], citing *Cooper v Hobart* 2001 SCC 79, [55].
[138] *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [92].

difficulty or impossibility of tax officials warning taxpayers of all conceivable risks. These fears are afforded even more weight in situations which involve suggestions of tax officials effectively being required either to fetter or go beyond their powers so as to warn of possible risks to taxpayers.

There are two recent Canadian examples of this type of duty to warn case – *Easton v Canada Revenue Agency*[139] and *Herrington v Canada (National Revenue)*.[140] In *Easton*, the Canadian Federal Court held CRA officials are under no duty to detect obvious mistakes taxpayers have made in their tax returns. Similarly, in *Herrington* the Federal Court determined that CRA officials are not obliged to inform taxpayers of income statement documentation missing from income tax returns or to warn taxpayers prior to levying penalties.

4.   JUSTICIABILITY IN A DIGITAL TAX ADMINISTRATION WORLD

As evidenced in the discussion above, courts have developed a range of tools and tests for setting the limits of justiciability of taxpayer claims against tax officials. These tests and tools will need to be re-examined in the face of the wholesale adoption of digital technologies by tax authorities. They will include reconsidering the relevance and application of traditional dichotomies such as the policy/operational dichotomy and similar tests based on a distinction between discretionary and administrative activities. More fundamentally, it will also require reconsidering the compatibility of private law duties to taxpayers with the public duties of tax officials.

4.1   The policy/operational dichotomy

Applications of the policy/operational dichotomy and related tests, such as the 'core policy-making' or 'quasi-legislative'/operational distinction which is part of the salient features test in Australia, will need to be reconsidered in a digital by default tax administration world. Equally, applications of the 'discretionary' exception to the waiver of immunity of government suit in the FTCA in the United States will also need to account for the involvement of AI in tax administration.

First, artificial intelligence raises a series of opportunities and challenges for judges in applying such tests. These stem from the ways in which AI technologies are used in a digital by default tax administration environment. To date, these technologies have been used to deal with distinctly operational activities. For example, the ATO has confirmed its focus on applying new technologies to 'realise process efficiencies'.[141] Similarly one of the four 'modernization pillars' of the IRS centres on the improving 'operational efficiencies'.[142]

Arguably, therefore, tax authorities are effectively carrying out the difficult task underpinning applications of the policy/operational dichotomy which have historically troubled judges. Thus, it may be possible that in a digital tax administration environment judges could determine a challenged tax administration activity is justiciable merely because it has been carried out by an AI actor. Conversely, tax administration activities

---

[139] 2017 FC 113.
[140] 2016 FC 953.
[141] Australian Taxation Office, *ATO Corporate Plan 2019-20*, above n 25, 10, as also discussed in section 2 above.
[142] Internal Revenue Service, *IRS Integrated Modernization Business Plan*, above n 4, 12.

remaining in the domain of human actors could, *prima facie*, be considered worthy of immunity from suit as presumably having been adjudged by the tax authority as non-justiciable 'discretionary' activities requiring human involvement.

The confinement of AI to non-discretionary tasks may be based on good administrative law practices. In its report to the Australian Attorney-General the Australian Administrative Review Council took the view that 'the automation of discretion is not in accordance with the administrative law values of lawfulness and fairness because it could fetter the decision maker in the exercise of their discretionary power'.[143] As such, the Council recommended adopting a principle that '[e]xpert systems that make a decision – as opposed to helping a decision maker make a decision – would generally be suitable only for decisions involving nondiscretionary elements'.[144] If this is the case, justiciability of claims based on discretionary/operational distinctions may become more straightforward and more relevant in a digital tax administration environment.

Unfortunately, while this is an interesting and viable proposition at present, it is unlikely to hold in the longer term. Technological development and its application in a tax administration context will not likely pause for long to allow for such a neat delineation. The ambitious nature of the tax authority strategic aspirations highlight this fact. Further, there are already warnings about the need to totally re-examine legal systems in the very near future to accommodate emerging higher level 'deep' applications of artificial intelligence:

> In the near future (approximately 10-15 years), the pace of development of systems and devices with AI will lead to the need for a total revision of all branches of law. In particular, the institutions of intellectual property, *the tax regime*, etc. will require deep processing, which will ultimately lead to the need to resolve the conceptual problem of endowing an autonomous AI with certain 'rights' and 'duties'.[145]

On this near-future state world view, the implications of digitisation for future applications of judicial tools such as the policy/operational dichotomy become more complex. Fundamentally, if the application of artificial intelligence extends to tax administration activities which are clearly discretionary, there will be a need to reconsider whether and how immunity from suit based on the discretionary nature of those activities should be applied.

The consequences of not doing so, and applying such distinctions incorrectly or inappropriately, have been described in the following terms by a writer discussing the issue in the context of UK public law: 'Characterising as discretionary decisions which should not in fact be afforded such deference can lead the courts to fail to interrogate

---

[143] Administrative Review Council, *Automated Assistance in Administrative Decision Making – Report No 46*, above n 34, 15. There have also been efforts in Canada to design principles for AI in administrative decision-making. See Government of Canada, *Directive on Automated Decision-Making* (2 February 2019), https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592.

[144] Administrative Review Council, *Automated Assistance in Administrative Decision Making – Report No 46*, above n 34, 16. See also Andrew Greinke, 'Legal Expert Systems: A Humanistic Critique of Mechanical Legal Inference' (1994) 1(4) *ELaw: Murdoch University Electronic Journal of Law* 43.

[145] Igor Bikeev, Pavel Kabanov, Ildar Begishev and Zarina I Khisamova, 'Criminological Risks and Legal Aspects of Artificial Intelligence Implementation' (Paper presented at the 2nd International Conference on Artificial Intelligence, Information Processing and Cloud Computing, Sanya, China, 19-21 December 2019) 6 (emphasis added).

sufficiently the propriety of HMRC actions'.[146] These consequences are accentuated in a digital environment because, due to their touted speed and efficiency, artificial actors can cause exponentially more damage if loss-causing behaviours are incorrectly classified as immune from suit and remain unremedied.

One factor which will determine whether these risks are realised is the relative degree of transparency of the decision-making process of an intelligent machine compared to a human. It has been argued that 'computer algorithms are transparent, and their detailed function can be understood'.[147] Further, except in the case of technological failure, machines, unlike humans, do not suffer from lapses of memory or leave gaps in the records they keep. Arguably, therefore, there is a much clearer and more transparent path to understanding the factors and processes underpinning the exercise of discretion when machines are involved.[148] This augers well for reducing the prospects of mistakes in determining justiciability of intelligent machine decisions.

It may also mean that in a digital tax administration environment litigants and judges will be able to more easily identify distinctly operational failures in processes underpinning discretionary decision-making. This may make it possible to add nuance to determinations of justiciability based on whether or not a challenge is to an exercise of discretionary powers. Conceivably it might also open the door to reconsidering the scope of privative clauses protecting assessment and collection powers from judicial attack if legislators are prepared to allow the various steps in the decision-making process to be considered independently.

This prospect is enhanced if the recommendations of the European Union Committee on Legal Affairs, 'that advanced robots should be equipped with a "black box" which records data on every transaction carried out by the machine, including the logic that contributed to its decisions',[149] are adopted. This recommendation is based on concerns that '[w]hile algorithmic decision making can offer benefits in terms of speed, efficiency, and even fairness, there is a common misconception that algorithms automatically result in unbiased decisions. In reality, inscrutable algorithms can also unfairly limit opportunities, restrict services, and even improperly curtail liberty'.[150]

However, these concerns may not carry much weight in justifying transparency of algorithms used to carry out some important high-level tax administration functions. In particular, where algorithms relating to audit target selections are concerned, there is a strong imperative for instructions and assumptions underpinning these algorithms to remain confidential. The reasoning is that if these are broadcast to the taxpaying public,

---

[146] Stephen Daly, 'Tax Exceptionalism: A UK Perspective' (2017) 3(1) *Journal of Tax Administration* 95.
[147] Milner and Berg, above n 14, 6.
[148] Guidelines have been suggested for ensuring algorithmic transparency. For example, see Simson Garfinkel, Jeanna Matthews, Stuart S Shapiro and Jonathan M Smith, 'Toward Algorithmic Transparency and Accountability' (letter from members of the Association for Computing Machinery US Public Policy Council) (September 2017) 60(9) *Communications of the ACM* 5. In a Canadian context see Standing Committee on Access to Information, Privacy and Ethics, *Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act* (February 2018), http://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9690701/ethirp12/ethirp12-e.pdf, archived at https://perma.cc/WVL5-5TPT.
[149] European Union, Committee on Legal Affairs, *Report with Recommendations to the Commission on Civil Law Rules on Robotics* (27 January 2017) 10, https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.pdf.
[150] Garfinkel et al, above n 148.

the direct and indirect deterrent taxpayer compliance effects flowing from the risk of being audited might be eroded.[151]

This issue of algorithmic secrecy in deciding whom to audit has already been raised in the United States as a matter of concern.[152] If tax authorities such as the IRS continue to retain secrecy over these algorithms, it is also unlikely that the transparency benefits of AI will be able to be fully realised in the context of determining questions of justiciability of tax administration decisions.

Further practical complexities arise in cases where there is a failure by an AI actor which is deemed clearly justiciable according to an application of the discretionary/operational distinction. When imposing liability by applying such distinctions, judges have frequently taken comfort that doing so was desirable because it would encourage improvements in administrative standards.[153] Can judges be so confident that their rulings will have such an effect in a digital by default tax administration environment? Much has already been written concerning the difficulty in 're-educating' criminal AI actors.[154] As one writer has noted:

> …[I]f the ultimate goal of a legal remedy is to encourage good behavior or discourage bad behavior, punishing owners or designers for the behavior of their robots may not always make sense – if only for the simple reason that their owners didn't act wrongfully in any meaningful way.[155]

To have any re-educative effect would require judges to order algorithms to be re-written or amended to avoid future harm so that the artificially intelligent machine can 'relearn how to behave'.[156]

If the potential educative effects of deeming a matter to be justiciable are reduced, judges may be more inclined to consider a matter as falling on the non-justiciable discretionary side of the ledger in borderline difficult cases. This is because benefits of finding otherwise in terms of improvements in public administration in such cases might no longer be considered as outweighing the potential risks of fettering tax authority discretion.

---

[151] It is well established in tax compliance literature that '[a]udits are thought to have a *direct* deterrent effect on those individuals actually audited; perhaps of more importance, audits are also thought to have an *indirect* deterrent effect on individuals not actually audited': James Alm, Betty R Jackson and Michael McKee, 'Getting the Word Out: Enforcement Information Dissemination and Compliance Behavior' (2009) 93(3-4) *Journal of Public Economics* 392, 392. See also Helen V Tauchen, Ann Dryden Witte and Kurt J Beron, 'Tax Compliance: An Investigation Using Individual Taxpayer Compliance Measurement Program (TCMP) Data' (1993) 9(2) *Journal of Quantitative Criminology* 177; Jeffrey A Dubin, Michael J Graetz and Louis L Wilde, 'The Effect of Audit Rates on the Federal Individual Income Tax, 1977-1986' (1990) 43(4) *National Tax Journal* 395; and Ann D Witte and Diane F Woodbury, 'The Effect of Tax Laws and Tax Administration in Tax Compliance: The Case of the US Individual Income Tax' (1983) 38(1) *National Tax Journal* 1.

[152] See Houser and Sanders, above n 6, 820.

[153] For example, see comments of the British Columbia Court of Appeal in *Leroux v Canada* 2014 BCSC 720, cited above at n 119.

[154] For example, see Janus Kopfstein, 'Should Robots Be Punished for Committing Crimes?', *Vocativ* (3 April 2017), https://www.vocativ.com/417732/robots - punished -committing -crimes/.

[155] Lemley and Casey, above n 14, 1311.

[156] Christina Mulligan, 'Revenge against Robots' (2018) 69(3) *South Carolina Law Review* 579, 595.

A final further potential issue stems from the capacity of low level, artificially intelligent actors to work at a pace and volume impossible for human actors. The question is whether this fact erodes the traditional guideposts available to judges to determine how to apply justiciability tests based on distinctions between discretionary and operational matters. Two of the more reliable historical, albeit not 'controlling',[157] factors for determining whether a matter is deemed to be discretionary or operational have been the volume of the activity and the level of authority of the person responsible for carrying out the activity. High volume, repetitive mechanical tasks carried out by low level employees would typically be expected to be operational in nature.[158] In contrast, discretionary matters have traditionally been considered the domain of high level officials engaged in relatively complex, low volume policy-setting tasks.

However, these features are less reliable predictors in a digital by default tax administration environment. Even intelligent machines will be on the lowest rungs of the hierarchical ladder in a tax authority organisational structure – or may not feature on that ladder at all. However, these low-level artificial actors are potentially capable of dealing with high level discretionary decision-making tasks and processing large volumes of those tasks in a mechanical and repetitive manner. Hence, if judges are to continue to rely on policy/operational distinctions for delineating the justiciability of taxpayer claims, they will need to look to other (potentially new) indicators to adjudicate the true nature of impugned tax administration tasks.

In the final analysis it is difficult to reach a clear conclusion as to whether the policy/operational distinctions for determining justiciability of taxpayer claims will retain or increase their significance in a digital by default environment. Similarly, it is unclear whether their application will become simpler or more complex. However, clearly there are a range of real and potentially significant legal implications that deserve attention.

4.2   Compatibility of public and private duties

In legal proceedings tax authorities have sought to maintain a distinction between the nature of their activities and the activities of the private sector. Asserting such a distinction is a particularly common submission made to oppose taxpayer claims that private sector duties and standards should be applied to tax officials in carrying out their statutory functions. Historically, one of the main justifications for distinguishing between tax administration functions and private sector functions (and, by extension, justifying the inappropriateness of imposing private sector legal duties on public sector tax authorities) has been the differences in the relative scale of the activities of tax administrators compared to even the largest private sector actors carrying out otherwise broadly analogous functions.

The argument is that the size and scale of the public tax administration activities makes it difficult if not impossible to carry out the sorts of checks and balances to ensure accuracy and correctness of each and every transaction which are feasible in the private sector. As such, it is incompatible with the statutory intent of the relevant tax

---

[157] United States commentators have also made the point that the status of the relevant officer should not be a 'controlling factor' in the application of the test. See Reynolds, above n 39, 130-131.
[158] For example, it has been observed that the word 'operational' itself '…seems to imply something that is mechanical in nature ... rather than discretionary'. See D Baker, 'Maladministration and the Law of Torts' (1986) 10(2) *Adelaide Law Review* 207, 219.

administration provisions to apply the same standards to tax officials as to private sector actors carrying out otherwise broadly comparable functions.

A very good recent example of this manifestation of what is essentially an 'exceptionalism'[159] argument arose in Australia in *Farah*, in which the taxpayer argued that standards similar to those applied to private sector bankers should be applied to determine whether the tax officials involved had been negligent in not detecting and advising the taxpayer of fraudulent activity concerning the taxpayer's nominated bank account into which tax refunds were being paid by the ATO. In response, the Commissioner of Taxation submitted that:

> …it would be impractical, if not impossible, for the Commissioner to verify, monitor and check the bank account details nominated by all tax agents … That submission was supported by evidence concerning the size and scale of the Australian tax system.[160]

In a digital tax administration environment, such submissions are likely to be increasingly difficult for tax authorities to sustain. This is because AI technology enables large masses of information to be processed in a fraction of the time presently taken by human actors. For instance, it has been estimated that a minute of work for a robot is equal to about 15 minutes of work for a human.[161] That comparison does not account for the fact that, in addition, unlike a human, a robot can work around the clock without rest, holidays or sick leave. Hence in an AI-enhanced tax administration environment, although the scale and volume of tasks facing tax administrators is not reduced, the dramatically increased capacity to deal with that scale and volume should largely negate any justification for special protection of tax authorities from exposure to suit on that basis.

A further challenge posed by digitisation to the characterisation of tax administration functions as inherently public, and thus immune from taxpayer suit, is the fact that a great deal of the work being carried out to automate and introduce new technologies is being outsourced.[162] One possible interpretation of the outsourcing trend, and the digital

---

[159] This reference to exceptionalism is not intended to reference 'tax exceptionalism'. Tax exceptionalism in the usual legal sense refers to differential treatment afforded to tax authorities compared to other public administrative agencies, especially in the context of the application of rules pertaining to judicial review. For discussion see Daly, above n 146; Kristin Hickman, 'The Need for *Mead*: Rejecting Tax Exceptionalism in Judicial Deference' (2006) 90(6) *Minnesota Law Review* 1537.

[160] *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [74].

[161] Nicole Norfleet, 'Robotic Software Sweeping Large Accounting Firms and Clients', *Australian Financial Review* (18 April 2017), https://www.afr.com/companies/professional-services/robotic-software-sweeping-large-accounting-firms-and-clients-20170418-gvmkap, citing recent survey data. The Deloitte Center for Government Insights has provided detailed estimates of projected time and money savings for government instrumentalities in adopting AI. They estimate high level AI adoption could lead to workforce time savings of up to 30 per cent. See Peter Viechnicki and William D Eggers, *How Much Time and Money Can AI Save Government?* (Deloitte Center for Government Insights, 2017), https://www2.deloitte.com/content/dam/insights/us/articles/3834_How-much-time-and-money-can-AI-save-government/DUP_How-much-time-and-money-can-AI-save-government.pdf.

[162] A recent Australian Senate enquiry into the digital delivery of government services recommended bringing such work 'in-house' noting that '[d]igital work should be considered part of the "core responsibility" of the public service': Australian Parliament, Senate Finance and Public Administration References Committee, *Digital Delivery of Government Services* (June 2018) [1.57], https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administratio n/digitaldelivery/Report.

tax administration transformation more broadly, is that tax authorities have taken a significant and conscious step to actively transition themselves fully (in an operational sense) into a private sector equivalent organisation.

This characterisation is supported by the fact that, as noted in section 2 above, significant drivers of the shift to digitisation across each of the jurisdictions have included nakedly commercial imperatives such as cost efficiency and service delivery improvement. It is unclear whether tax authorities have grasped the fact that these private sector equivalent commercial imperatives may also potentially unwittingly increase their exposure to taxpayer suit by further eroding private/public sector distinctions.

A further relevant legal implication of digitisation relates to the future applicability of private law avenues of relief which impose direct personal liability on individual tax officials. Imposing direct civil liability on tax officials is rare, except in cases involving particularly heinous abuses of power capable of being subjected to 'personal' torts such as the tort of misfeasance in public office[163] or *Bivens* constitutional damages actions. These avenues of relief are specifically aimed at public officials – they have no application in private sector contexts.[164] Hence, in the future application of these avenues of relief, a threshold issue will be whether artificially intelligent tax officers can be considered 'public officials'.

The task to which AI is applied may be one of the factors which is relevant to answering this question. For example, in Australia it has been contended that the term would not cover public servants who carry out manual tasks.[165] In a digital tax administration context it could be that a court considers that artificial intelligence engaged in low level operational tasks (such as tax data entry and processing) are not holding 'public office'. Hence (even setting aside any general fundamental questions concerning whether artificial actors have a legal capacity or status per se[166]), it may be that artificially intelligent actors in these contexts could not be subjected to personal actions. Conversely, artificial actors engaged in higher level discretionary activities are more prone to such claims. This raises the whole gamut of policy/operational distinction challenges discussed in section 4.1 above.

---

[163] The history of the tort of misfeasance in public office is briefly described by Lord Steyn in the leading English case of *Three Rivers District Council v Bank of England* [2003] 2 AC 1. See also R C Evans, 'Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office' (1982) 31(4) *International and Comparative Law Quarterly* 640.

[164] Sadler elaborates on this unique characteristic of the tort of misfeasance in public office, pointing out that the tort of misfeasance '…is the only tort having its roots and applications within public law alone. It cannot apply in private law; the defendant must be a public officer and the misfeasance complained of must occur whilst the public officer is purporting to exercise the powers of his or her office': Robert J Sadler, 'Liability for Misfeasance in a Public Office' (1992) 14(2) *Sydney Law Review* 137, 138-139.

[165] See Evans, above n 163, 646.

[166] The European Union Committee on Legal Affairs has acknowledged that the issue of legal capacity and legal status of artificially intelligent machines remains an important unresolved issue, acknowledging that 'clarification of responsibility for the actions of robots and eventually of the legal capacity and/or status of robots and AI is needed in order to ensure transparency and legal certainty…': European Union, Committee on Legal Affairs, *Report with Recommendations to the Commission on Civil Law Rules on Robotics*, above n 149, 29.

Alternatively, these causes of action may need to be modified to extend liability vicariously to some human actor.[167] Obviously this raises issues about to whom responsibility for wrongs of AI actors can be attributed.[168] More fundamentally, in the present context however, AI may challenge judges to alter the personal nature of these torts in a manner not previously considered, effectively creating new avenues of relief.

Further challenges in the application of these public torts are raised by AI because these torts typically require the plaintiff to prove the offending official acted deliberately or maliciously toward the plaintiff.[169] These difficult to prove subjective states of mind are a key reason why such claims rarely succeed.[170] It has been noted in the Australian context that '[t]he courts have traditionally operated on the assumption that ATO staff will act honestly in their work and hence the hurdle for proving that the ATO has acted improperly is generally fairly high'.[171]

An obvious question is whether a similar presumption of honesty can be applied to artificially intelligent tax administrators. Certainly, artificially intelligent actors are not necessarily objective and impartial. As one author has surmised:

> People have long assumed that robots are inherently 'neutral' and 'objective', given that robots simply intake data and systematically output results. But they are actually neither. Robots are only as 'neutral' as the data they are fed and only as 'objective' as the design choices of those who create them.[172]

This has led to one writer describing software programming models as 'opinions embedded in mathematics'.[173]

---

[167] In Australia, common law imposes liability on the individual; however, in past cases, the Commissioner of Taxation has undertaken to indemnify the official against whom misfeasance allegations have been raised. For example, see *Re Young v Commissioner of Taxation* [2008] AATA 115. In contrast, in Canada, section 3(b)(i) of the *Crown Liability and Proceedings Act*, RSC, 1985, c. C-50 imposes vicarious liability on the Crown 'in respect of a tort committed by a servant of the Crown'. The United States position is more complex. The *Federal Tort Claims Act* provides an exception to the waiver of governmental immunity from suit where intentional torts are involved (28 USC § 2680(h)). However, this exception does not extend to 'investigative or law enforcement officers'. Hence the question of vicarious liability for deliberate torts depends on whether the offending official is an investigative or law enforcement officer.

[168] These challenges are significant and are discussed in section 5 below.

[169] The requirement of 'malice' has been the subject of significant judicial attention across the common law world, particularly as to whether states of mind such as recklessness suffice to satisfy the requirement of malicious intent. For judicial discussion, in the context of the tort of misfeasance in public office, see *Three Rivers District Council v Bank of England* [2003] 2 AC 1. The Supreme Court of Canada adopted the *Three Rivers* approach in the leading Canadian case considering the tort - *Odhavji Estate v Woodhouse* (2003) 3 SCR 263.

[170] For example, as noted above, n 63, no such claim against a tax official has ever succeeded in Australia.

[171] Peter Haggstrom, 'A Critical Review of Tax Administration in Australia From an Ombudsman's Office Perspective' in Abe Greenbaum and Chris Evans (eds), *Tax Administration - Facing the Challenges of the Future* (Prospect Publishing, 1998) 263, 267. This operating judicial assumption has been confirmed in comments such as those of Hill, Dowsett, and Hely JJ, in *Kordan Pty Ltd v Federal Commissioner of Taxation* (2000) 46 ATR 191, 193: 'The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith … is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that allegations … on the basis of absence of good faith have generally been unsuccessful'. The Australian High Court recently discussed these comments favourably in *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146.

[172] Lemley and Casey, above n 14, 1338.

[173] Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown Publishers, 2016).

Most pertinently, however, it appears that machines are capable of being programmed to act dishonestly. Work has been carried out to test conceptual frameworks that will allow robots 'to both understand a person's reasons for being dishonest and to reason about if and when it should be dishonest'.[174] While this work is in its infancy, it indicates that it will be entirely conceivable in a future digital by default world that there may be artificially intelligent programs or machines capable of acting with dishonest intent.[175]

As such, attributing a presumption of honesty to artificial actors is not only technically incorrect, it is also dangerous. It is dangerous in the sense of presenting an opportunity for tax officials with malicious intent to shield themselves from potential personal liability by involving an artificial actor in the carrying out a malicious or abusive attack on a taxpayer. These are not necessarily tax-specific challenges. However, if judges do not appreciate the potential of artificial actors to be used in this way, avenues of relief which require demonstrating lack of good faith may become little more than illusory taxpayer rights in a digital tax administration environment.

Setting aside questions of objectivity of robot tax administrators, digitisation could also bring about changes in judicial treatment of taxpayer claims involving allegations that tax officials had a duty to warn the taxpayers of particular risks and breached that duty. As noted in section 3.2.3 above, taxpayers have rarely found success in such cases. There is a real prospect, however that cases like these may have improved prospects of success in a digitised tax administration environment.

The reason for this stems from the ability of robot actors to process more accurately huge amounts of information and transactions with increased speed and efficiency compared to humans. This reduces the force of arguments that it would be impossible for tax officials to identify and report all the types of risks that might cause harm to taxpayers. This argument is frequently raised by tax authorities to resist imposition of duties to warn. For example, the argument was raised in Australia in *Farah*, and accepted by the Federal Court as being of 'some force'.[176] Such arguments are unlikely to be as persuasive in a future digital state in which immense volumes of work scanning for potential taxpayer risks could be carried out in a fraction of the time and for a fraction of the resources presently possible. In this sense, '…the great efficiency of automated systems could also be their biggest downfall'.[177]

5.   CHILLING EFFECTS IN A DIGITAL BY DEFAULT TAX ADMINISTRATION WORLD

The digitisation of tax administration activities also potentially changes the nature of the judicial debate and consideration of potential chilling effects in taxpayer claims against tax authorities. While it has been difficult enough to consider the potential chilling effect of exposure to suit from taxpayers on human tax officials in the past, it is even harder to divine how those concerns translate to artificial intelligence actors

---

[174] Alan R Wagner, 'Lies and Deception: Robots that Use Falsehood as a Social Strategy' in Judith A Markowitz (ed), *Robots that Talk and Listen: Technology and Social Impact* (Walter de Gruyter, 2015) 203, 204.

[175] For a detailed report on the potential malicious applications of AI envisaged in the five years from 2018 – 2023 see Brundage et al, above n 18.

[176] *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [75].

[177] Dominique Hogan-Doran SC, 'Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making' (2017) 13(3) *The Judicial Review* 1, 15.

subjected to the same risks. Specifically, is an artificially intelligent 'tax official' subject to the same over-defensive response risk as a human actor?

Considered superficially, AI actors are unlikely to have direct awareness that there has been an adverse judicial outcome to which they would be capable of responding over-defensively. In fact, this superficial view precludes the possibility of *any* response to adverse judicial outcomes – over-defensive or otherwise. Extrapolating from this simplistic proposition, public policy concerns about imposing liability on tax officials due to potential chilling effects should be significantly reduced in a digital tax administration environment.

Of course, this ignores the obvious fact that human associates of the liable AI actor impacted by any adverse judicial outcome may respond overly-defensively to adverse judicial determinations. Over-defensive responses of these individuals might manifest in ways that have more far-reaching implications than might be the case in a non-digitised tax administration environment. This is because over-defensiveness might become entrenched in over-defensive revisions to AI algorithms. This may affect a far greater volume of transactions than changes in the behaviours of small groups of individuals or even a whole department. Further, these effects might not be appreciated for some time – perhaps only after significant Revenue losses have accrued. Hence, judges may be well-advised to be especially vigilant in guarding against potential chilling effects of imposing liability on tax officials in a digital by default tax administration setting.

To the extent that chilling effects continue to be considered and applied in a digitised tax administration environment, the other side of the behavioural consequences coin also needs to be considered. This will involve considering the potential attitudinal and behavioural consequences of the wholesale adoption of these technologies on taxpayers. The issue is relevant because inherent in any proper application of the chill factor argument is a weighing up of the risk against competing effects of not permitting a taxpayer claim to proceed.[178]

Recently released research commissioned by the United States National Taxpayer Advocate (NTA) Service gives significant cause for considering these countervailing effects.[179] Specifically, the NTA research found that perceived fairness of audits was higher for face-to-face audits than for 'correspondence audits' involving no human interaction and that, accordingly, '…face-to-face audits might be better suited to deter

---

[178] This is evident in a number of judicial comments cited in section 3.3.2 above. See for example the comments of the British Columbia Supreme Court in *Leroux v Canada* 2014 BCSC 720, cited above at n 119, and the Australian High Court in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1. One of the best illustrations of a Superior Court conducting such a weighing up process is the judgment of the Supreme Court of Canada considering the competing factors influencing potential chilling effects on police officers in *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129. At [43] the Court reasoned: 'Requiring police officers to take reasonable care toward suspects in the investigation of crimes may have positive policy ramifications. Reasonable care will reduce the risk of wrongful convictions and increase the probability that the guilty will be charged and convicted. By contrast, the potential for negative repercussions is dubious. Acting with reasonable care to suspects has not been shown to inhibit police investigation, as discussed more fully in connection with the argument on chilling effect'.

[179] Brian Erard, Matthias Kasper, Erich Kirchler and Jerome Olsen, 'What Influence do IRS Audits Have on Taxpayer Attitudes and Perceptions? Evidence from a National Survey' in *National Taxpayer Advocate, Annual Report to Congress 2018 – Volume II* (2019) 77, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume2.pdf.

evasion and establish high levels of compliance'.[180] This finding has obvious implications for any digitisation business case assumptions that digitisation will significantly increase Revenue collections and close the 'tax gap'.[181] However, it also lends weight to potential countervailing harmful results of yielding to chill factor concerns by feeding potentially pre-existing taxpayer perceptions of unfairness of automated tax administration decisions.

Another major factor judges have considered in determining the weight to be afforded to potential chilling effects involves the potential countervailing benefits of imposing liability in the form of consequent improvements in public administration. These have already been discussed in the context of justiciability in section 4 above. However, the issues are also relevant here. In this context, compensation awards have historically played an important role in a public administration context in re-educating poor public administrators and providing a price[182] for defective administration. For example, it has been observed that, applied in a public administration context, compensation can 'ensure that standards of administration are improved, since to reach a valid and unimpeachable decision, a more cautious approach will be adopted'.[183]

There is a prospect that such effects will be dulled in a world of digital tax administration actors. Compensation orders against machines are ineffectual. In addition, determining whether to impose liability on a human actor, such as a programmer for the loss caused by an intelligent machine, may not be possible or appropriate in many cases. This is because it will be recalled from the discussion in section 2 above that artificially intelligent machines are, by definition, capable of autonomous 'learning' beyond simply implementing pre-programmed instructions.

A recent report by the European Union Committee on Legal Affairs sheds light on the nub of the complexity:

> …[T]he more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc.)…[184]

---

[180] Ibid 108.

[181] The Australian Taxation Office defines the tax gap as the difference between the amount of tax collected and the amount that would be collected if all taxpayers were fully compliant with their tax obligations. See Australian Taxation Office, 'Australian Tax Gaps Overview' (2019), https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Australian-tax-gaps-overview/?anchor=Whywemeasurethetaxgap#Whywemeasurethetaxgap. In the United States, the IRS estimates that the tax gap has in recent years fluctuated between 15-18 per cent of total tax liability. See Internal Revenue Service, 'IRS Releases New Tax Gap Estimates; Compliance Rates Remain Substantially Unchanged from Prior Study', *News Release* (26 September 2019), https://www.irs.gov/newsroom/irs-releases-new-tax-gap-estimates-compliance-rates-remain-substantially-unchanged-from-prior-study. For further discussion of the tax gap in the United States context see Mark J Mazur and Alan H Plumley, 'Understanding the Tax Gap' (2007) 60(3) *National Tax Journal* 569.

[182] For a good discussion of the 'pricing' argument – as part of the case for damages awards in administrative law cases in the United Kingdom – see Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2003) 8(2) *Judicial Review* 104, 107.

[183] Lachlan Roots, 'A Tort of Maladministration: Government Stuff-Ups' (1993) 18(2) *Alternative Law Journal* 67, 69. Roots raises this argument in the context of arguing for a tort of maladministration.

[184] European Union, Committee on Legal Affairs, Report with Recommendations to the Commission on Civil Law Rules on Robotics, above n 149, 6-7.

As such the Committee recommends that although at present responsibility must be sheeted back to a human actor, in future '…liability should be proportional to the actual level of instructions given to the robot and of its degree of autonomy, so that the greater a robot's learning capability or autonomy, and the longer a robot's training, the greater the responsibility of its trainer should be…'.[185]

In terms of future assessments of whether chill factor concerns should prevail in assessing taxpayer claims, this suggests that the countervailing positive trade-offs presently relied upon by judges to help them make this assessment will need to be re-examined – perhaps multiple times – as intelligent technologies continue to evolve.

6. GOVERNMENT SOLVENCY, FLOODGATES AND INDETERMINACY IN A DIGITAL BY DEFAULT WORLD

As noted in section 3, public solvency and concerns about potentially exposing the Revenue to indeterminate liability – both in terms of the number of claims and the potential quantum of claims potentially triggered by a successful taxpayer claim – are an important public policy concern in cases involving taxpayer claims against tax authorities. This extends to cases involving tax assessments and other cases alike. A wholesale transition to artificially intelligent and automated tax administration will also raise challenges to the future relevance and applicability of these concerns.

Recent legislative efforts to address the validity of automated tax notices in the United Kingdom strongly suggest that legislators are broadly cognisant of the potential floodgates and Revenue solvency implications of digitisation. For example, the parliamentary statement announcing the introduction of the United Kingdom legislation to validate automated notices and decision-making processes confirmed those amendments were 'necessary to protect the Exchequer…'.[186] The significance of the underlying solvency concern is also evident in the fact that the legislation was endowed with retrospective effect. This was explained as necessary 'to close off the Exchequer and operational risks presented by judicial challenges' and to 'protect very substantial sums of tax and penalties already legitimately paid'.[187]

However, the potential floodgates, solvency and indeterminacy implications of the move to digital by default tax administration extend beyond the relatively simply resolved challenges to the validity of automated notices and other automated tax administration tasks. Exactly how these concerns will manifest in future will, in part, depend on the accuracy of future digital technologies and the frequency and nature of any failures of that technology.

Making predictions about these matters based on current knowledge, however, is not simple. There is a general presumption that artificial intelligence will improve the accuracy of tax functions. In the private sector for instance, major tax advisory firms

---

[185] Ibid 17. The United States Government has called for caution, observing that 'artificial intelligence carries some risk and presents complex policy challenges along several dimensions, from jobs and the economy to safety and regulatory questions': Ed Felten, 'Preparing for the Future of Artificial Intelligence' White House blog (3 May 2016), https://obamawhitehouse.archives.gov/blog/2016/05/03/preparing-future-artificial-intelligence.

[186] Financial Secretary to the Treasury, United Kingdom (Jesse Norman), 'HMRC: Automation of Tax Notices', above n 7.

[187] Ibid.

have adopted 'virtual bots' in their own offices, claiming they are more accurate in completing repetitive tasks formerly carried out by humans.[188] Similarly, a recent trial of artificial intelligence to determine customer insurance claims in an Australian insurance company returned a 90 per cent accuracy rate.[189] In the tax administration context, there are also claims that technology utilised by taxpayers is resulting in more accurate data being provided to tax authorities.[190] This is important, as the accuracy and reliability of machine learning depends a great deal on the accuracy and completeness of data sets.

> Missing or insufficient data are other sources that may complicate a learning task and hinder accurate performance of the trained machine. These insufficiencies of the data limit the performance of any learning machine or other statistical tool constructed from and applied to the data collection – no matter how complex the machine or how much data is used to train it.[191]

Bentley has also observed:

> One of the greatest challenges to data reporting, integration and general use is accurate identification, and tax data overcomes this. While supervised machine learning can develop more effective labels, the greater the degree of accurate, systematic, organisation of the information within a dataset the more easily it can be shaped for improved and different uses, taking advantage of fine-grained patterns.[192]

If technology is increasing the accuracy of information reaching tax authorities, this indirectly suggests a reduced potential for mistakes to be made by AI actors in dealing with that information, in turn reducing the risk of sustainable taxpayer claims against tax officials. OECD surveys of SMEs and tax administrators appear to confirm this presumption. Survey respondents expressed a view that big data/advanced analytics will result in 'improved decision-making'[193] and that increased use of online bookkeeping and cloud computing will reduce mistakes and facilitate the work of tax administrations.[194]

However, tax authority claims about improvements in accuracy brought about by digitisation are yet to fully materialise and there is evidence of an apparent lack of appreciation of the real error rate associated with the implementation of AI in some tax contexts. For example, in the United States, the NTA reportedly found that, as tax officials become more accustomed to relying on computer programs to make decisions,

---

[188] See for example, Norfleet, above n 161.

[189] See: Suncorp, *AI Technology Helps Customers Get Back On The Road Sooner* (1 November 2017), https://www.suncorpgroup.com.au/uploads/pdf/news/Media%20Release_Suncorp%20IBM%20Watson%20FINAL_0.pdf.

[190] One simple example is the widespread use of online cash register records. See OECD, *Rethinking Tax Services: The Changing Role of Tax Service Providers in SME Tax Compliance* (OECD Publishing, 2016) 37.

[191] Corinna Cortes, L D Jackel and Wan-Ping Chiang, 'Limits on Learning Machine Accuracy Imposed by Data Quality' in Usama M Fayyad and Ramasamy Uthurusamy (eds), *KDD'95: Proceedings of the First International Conference on Knowledge Discovery and Data Mining* (Association for the Advancement of Artificial Intelligence Press, August 1995) 57, 57.

[192] Bentley, above n 8, 303.

[193] OECD, *Rethinking Tax Services*, above n 190, 119.

[194] Ibid 121.

they become less capable of detecting errors in those programs. Specifically, it has been reported the NTA found that 'as IRS employees rely more heavily on computer programs to flag returns for audit or to waive penalties for reasonable cause, they are losing the ability to discern when the programs have made a mistake'.[195]

This means that tax authorities may not be taking adequate steps to mitigate against potential floodgates consequences of errors arising from the adoption of various AI methods and tools. They simply may not appreciate that the errors potentially triggering those floodgate consequences even exist until they manifest in potentially significant harm to taxpayers.

However, arguably the best indicator of potential floodgates effects of AI errors is the knowledge and understanding of the error rate by taxpayers rather than tax officials. Consider the scenario that digitisation realises the touted improvements in accuracy. If these improvements are known and understood by taxpayers, the result is likely be a significant additional disincentive for taxpayers to sue, and a correspondingly reduced number of successful taxpayer claims. In fact, the mere perception by taxpayers that digitisation is bringing about improvements in accuracy might suffice in having this effect.

This is borne out by recent tax compliance research which has revealed that taxpayers in industries and with income sources subject to electronic data matching by tax authorities are more willing to comply with their tax reporting obligations.[196] A digitised tax environment perceived by taxpayers as having a similar accuracy rate to data matching may result in significant positive effects in terms of generating trust and confidence in tax authorities and fostering similar improvements in voluntary compliance. On this world view, solvency and indeterminacy concern fears should be significantly allayed.

Of course, the converse is also true. If the technologies applied by tax authorities prove to be more prone to mistakes than human tax official actors, increased potential exposure to suit from taxpayers aggrieved by those mistakes might ensue. In this eventuality, protections traditionally afforded to the Revenue by public policy concerns about indeterminate liability would be expected to gain increasing prominence in a digital tax administration environment.

So which world view is likely to prevail based on recent experiences? The answer is uncertain, but there have certainly been numerous significant technology failures which suggest the real possibility of future instances of courts being flooded with large numbers of taxpayer claims. Recent experiences from Australia aptly illustrate the point.[197]

---

[195] Reported in Inspector-General of Taxation, *The Future of the Tax Profession* (November 2018) [3.111].
[196] See Henrik Jacobsen Kleven, Martin B Knudsen, Claus Thustrup Kreiner, Søren Pedersen and Emmanuel Saez, 'Unwilling or Unable to Cheat? Evidence from a Tax Audit Experiment in Denmark' (2011) 79(3) *Econometrica* 651, 689-691: the authors of this study found 'the key distinction in the taxpayer's reporting decision is whether income is subject to third-party reporting or if it is solely self-reported… For third-party reported income, tax evasion is extremely modest and does not respond to the perceived probability of detection, because this probability is already very high...'.
[197] The CRA and IRS have also experienced major technological failures. For example, in the United States, the IRS had a major data breach in 2016 resulting in a loss of hundreds of thousands of social security numbers. For a media account of this incident see CBS News, 'Massive IRS Data Breach Much Bigger

In Australia, the issue was recently brought into sharp focus in what has become known as the 'robodebt' (Online Compliance Intervention Program) scandal. This was a program of automated issue of debt recovery notices issued by the Department of Social Services to government welfare assistance recipients based on data matching and data averaging. The ATO was involved by virtue of using its garnishee powers to recoup the debts from tax refunds due to the debtors. The legal validity of the program was challenged and, in *Amato v Commonwealth of Australia*,[198] the Federal Court declared the robodebt notice issued to the plaintiff was not a validly issued notice for the purpose of section 1229 of the *Social Security Act 1991* (Cth).[199]

The Federal Court formed the view that the decision-maker could not have been satisfied that a debt was owed in the amount of the alleged debt. On 29 May 2020, the Minister for Government Services announced the scrapping of the program and the decision to repay debts assessed as owing under the robodebt scheme, waiving approximately 470,000 debts.[200]

The Australian Taxation Office has also been criticised in a recent parliamentary enquiry for a series of serious 'unplanned systems outages' it experienced in December 2016 and throughout 2017.[201] The failures were due to computer hardware faults in its storage network. According to the Senate Finance and Public Administration Committee, these outages had 'a significant effect on the ability of the public and tax professionals to engage with the ATO'.[202] The Committee ultimately characterised 'the sheer volume of outages suffered by the ATO' as 'largely unprecedented and entirely unacceptable'.[203]

Despite these previous failures, the ATO involvement in administering initiatives providing financial support to individuals affected by the COVID-19 pandemic has also

---

than First Thought' (29 February 2016), https://www.cbsnews.com/news/irs-identity-theft-online-hackers-social-security-number-get-transcript/. In Canada, according to recent media reports in the two years to 10 December 2019, the CRA experienced 3,005 separate data security incidents affecting approximately 60,000 Canadians. See Catharine Tunney, 'Personal Information Belonging to 144,000 Canadians Breached by Federal Departments and Agencies', *CBC News Canada* (14 February 2020), https://www.cbc.ca/news/politics/privacy-breach-canada-1.5457502.

[198] No VID611/2019. The Court Order was delivered by Davies J on 27 November 2019. A copy of the Order can be found at:
https://www.comcourts.gov.au/file/Federal/P/VID611/2019/3859485/event/30114114/document/1513665
.

[199] Section 1229 of the *Social Security Act 1991* (Cth) provides that notices issued to persons owing a debt under social security law must contain a range of particulars including the reason the debt was incurred and a brief explanation of the circumstances that led to the debt being incurred (sub-section (1)(b)) and the outstanding amount of the debt (sub-section (1)(d)).

[200] See Hon Stuart Robert (Minister for the National Disability Insurance Scheme and Minister for Government Services), 'Changes to the Income Compliance Program', *Media Release* (29 May 2020), https://minister.servicesaustralia.gov.au/media-releases/2020-05-29-changes-income-compliance-program.

[201] For the ATO statement on what happened, see Australian Taxation Office, 'ATO Systems Report', https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/ATO-systems-report/. For a good example of the media reports into the 2017 system failures, see Stephanie Borys, 'ATO launches investigation into website failure, says "situation could have been worse"', *ABC News online* (6 July 2017), http://www.abc.net.au/news/2017-07-06/ato-launches-investigatiion-into-website-failureduring-tax-time/8682612.

[202] Australian Parliament, Senate Finance and Public Administration References Committee, *Digital Delivery of Government Services*, above n 161, 81.

[203] Ibid 90.

been hindered by technological problems. For example, in administering a government initiative allowing affected individuals to access early release of their superannuation, it has been reported that '[a] series of technical hiccups have stifled some of Australia's biggest superannuation funds from making early release payments to savers, after the Australian Taxation Office program failed to deliver data on time or sent incomplete requests'.[204] There have also been some reports of fraudulent transactions as part of the superannuation early access scheme going undetected by ATO systems.[205]

The CRA and IRS have also experienced major technological failures. For example, in the United States, the IRS had a major data breach in 2016 resulting in a loss of hundreds of thousands of social security numbers.[206] The COVID-19 pandemic has exposed further frailties in IRS systems; the United States National Taxpayer Advocate recently described the IRS technological response as follows:

> The IRS's current arcane computer systems and infrastructure could not handle tax administration remotely, and it has not established across-the-board electronic communication procedures between the taxpayer and the IRS. The IRS needs to improve its infrastructure, hardware, and software to continue its mission-critical operations if another situation arises so that taxpayers do not have to put their lives on hold while the IRS recovers from the effect of the next crisis.[207]

In Canada, although the CRA appears to have coped relatively well with COVID-19 driven pressures on its systems, according to recent media reports in the two years to 10 December 2019 the CRA experienced 3,005 separate data security incidents affecting approximately 60,000 Canadians.[208] The outages related to security concerns have continued into 2020, with reports of a shutdown of online services for over 48 hours in early March 2020 to deal with identified 'internet vulnerabilities'.[209]

These recent technological failures provide good examples of the nature and scale of potential claims which might arise if things do go wrong in the digital world. The risk may be amplified by the fact that technology is already allowing for tax administration functions to extend beyond physical limits previously possible and, conceivably in the near future, extending to more complex and potentially high liability matters. If things go wrong, the potential consequences both in terms of sheer numbers of potential claims and aggregate loss caused, are likely to be significant. In this event, tax authorities may

---

[204] Michael Roddan, 'Glitches Delay ATO Early Access Super Scheme', *Australian Financial Review* (24 April 2020), https://www.afr.com/companies/financial-services/glitches-delay-ato-early-access-super-scheme-20200423-p54mlv.

[205] This was recently rejected by the government, with officials attributing the fraudulent transactions to 'intrusion into a third party'. See Mr Reece Kershaw (Commissioner, Australian Federal Police), Evidence to Senate Select Committee on COVID-19, Inquiry into the Australian Government's Response to the COVID-19 Pandemic, Official Committee Hansard (Thursday 7 May 2020) 5, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F0c5c7e36-6300-484b-b9c3-ed5847b7ce91%2F0000%22.

[206] For a media account of this incident see CBS News, above n 197.

[207] Taxpayer Advocate Service, *Objectives Report to Congress, Fiscal Year 2021* (29 June 2020) 11, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2021-JRC/JRC21_SAO_02.pdf.

[208] See Tunney, above n 197.

[209] See Laura Howells and Ramna Shahzad, 'Canada Revenue Agency Shuts Down Online Services After Discovering 'Internet Vulnerability'', *CBC News Canada* (11 March 2020), https://www.cbc.ca/news/canada/cra-online-1.4021131.

increasingly need to rely upon floodgates policy concerns to insulate the Revenue from attack.

7.   CONCLUSION

We stand on the cusp of an artificially intelligent tax administration world. The transformation of tax authorities to this near-future state appears inevitable and unstoppable. The ATO, CRA, and IRS are all well advanced down this digitisation and automation path, driven by the dual motivators of the potential for technology to raise revenue collection rates, and efficiently and effectively meet the 24/7 instantaneous service demands of taxpayers.

These advances have been a deliberate and well-considered exercise, accompanied by significant strategic thought and, increasingly, consideration and development of appropriate guidelines and standards to regulate the transition and to prepare and protect the taxpaying public. Mistakes have been made, and in some cases they have caused significant harm to both the taxpaying public and to tax authority reputations. In a sense, these mistakes serve to highlight the ambitions and speed of the changes to tax administration practices and interactions with taxpayers that have already occurred. They also hint at the possible similarly monumental effects of the further changes on the near horizon.

It seems incongruous, therefore, that despite all of these efforts and events, little conscious thought appears to have been given to the broader potential impact the transition to a digital by default world might have on the delicate balance between taxpayer rights to take action for tax administration failures and legal protections of the Revenue from unjustified and unsustainable exposure to taxpayer claims. The analysis in this article strongly suggests the issues run deep, challenging the fundamental public policy bases underpinning the current tax authority legal immunity settings in each of the examined jurisdictions.

In some cases, the challenges can be alleviated by tax authorities taking relatively simple actions such as ensuring that functions with potential criminal ramifications allocated to intelligent machines are kept separate from other tax administration functions. In other cases, it is unlikely that it will be appealing for tax administrators to take the steps necessary to address potential issues, such as adopting a policy of complete algorithmic transparency extending to algorithms used in audit target selection.

However, the analysis reveals that the vast majority of implications of the digital by default tax administration transformation are presently difficult to accurately predict – either in their nature or potential impact. This extends to assessments of the future impacts of the application of important tests for delineating justiciability of taxpayer claims against tax officials, potential chilling effects of adverse judicial determinations on artificially intelligent tax officials, and predictions of whether or not the transition will generate a 'flood' of claims.

Perhaps the only certainty is that judges will be unable to sort through these issues without some legislative guidance. Even if such a task was attempted, judicial development will simply not be able to keep pace with the current rate of technological progress and the associated challenges new technologies might pose. As such, tax administrators should urgently commit to working with the judiciary, policy-makers and other experts to address the various potential challenges to the current rules governing

the limits of tax authority susceptibility to taxpayer suit posed by their digital transformations.