

## MEDIATING TAX DISPUTES IN SINGAPORE

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Mediation has become a “buzzword” in Singapore ever since the United Nations decided to name its convention on mediation the “Singapore Convention on Mediation”. However, the Inland Revenue Authority of Singapore (“IRAS”) remains impervious to the allure of mediation to date. This article seeks to explore the challenges which IRAS may face in embracing mediation for the resolution of domestic tax disputes and suggests a way forward.

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1 On 7 August 2019, in a ringing endorsement of Singapore’s contributions, the United Nations made the historical decision of naming its Convention on International Settlement Agreements Resulting from Mediation<sup>1</sup> as the “Singapore Convention on Mediation” (“Convention”). Since then, 52 countries have signed the Convention.<sup>2</sup> The Singapore authorities have expressed hope that the Convention will put Singapore on the world map for mediation.

2 However, there remains a significant category of disputes that has yet to embrace mediation: disputes with the government. The Inland Revenue Authority of Singapore (“IRAS”), for example, has yet to embrace mediation to resolve domestic tax disputes. This author is of the view that it is an appropriate time for IRAS to re-evaluate its apparent reticence towards mediation.

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1 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

2 Dominic Low, “Singapore Convention on Mediation to Come into Force on Sept 12” *The Straits Times* (13 March 2020).

3 This article will set out the current process of determining tax disputes in Singapore, examine the benefits and challenges of mediating tax disputes, and propose a way forward for the out-of-court resolution of tax disputes in Singapore.

## **I. Determination of tax disputes in Singapore**

4 The process for the judicial determination of income tax, Good and Services Tax (“GST”) and stamp duty disputes in Singapore is set out in the Income Tax Act,<sup>3</sup> Goods and Services Tax Act<sup>4</sup> and Stamp Duties Act<sup>5</sup> (collectively, the “Acts”), respectively.

5 For all three tax types, the formal dispute resolution process starts when the taxpayer files a notice of objection and IRAS issues its notice of refusal to amend. By a historical quirk, income tax and GST disputes are determined differently from stamp duty disputes under the Acts.

6 Income tax and GST disputes are remitted to a tribunal known as the Board of Review. The Board of Review acts as a first-tier quasi-judicial body to decide upon the dispute. If the parties are dissatisfied with the Board of Review’s decision, they can appeal the matter to the High Court and then to the Court of Appeal.

7 In contrast, stamp duty disputes go directly to the High Court through a process known as the “case stated” process. This process requires the Commissioner of Stamp Duties to literally “state” a case for the High Court’s determination.

8 The Acts do not contain any statutory provisions for out-of-court settlements or for negotiations to be conducted between IRAS and the disputing taxpayer.

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3 Cap 134, 2014 Rev Ed. See ss 78–84.

4 Cap 117A, 2005 Rev Ed. See ss 49–57.

5 Cap 312, 2006 Rev Ed. See ss 39A–41.

## II. Settlement of tax disputes in Singapore

9 As with any other type of commercial dispute, tax disputes can be amicably resolved between the parties at any time. This can occur before IRAS issues the notice of refusal to amend or at any time after the conclusion of the hearing of the matter.

10 Either party can make the first move to make a settlement offer. Typically, it is the taxpayer who does so as it is potentially a costly and lengthy endeavour to engage IRAS in litigation. If IRAS considers the case suitable for settlement, the tax officer in charge of the taxpayer's matter may accept the offer on IRAS' behalf or counter-propose an alternative settlement offer. To this author's knowledge, IRAS' acceptance of a taxpayer's offer is not effected by a settlement agreement but is simply reflected in an amended Notice of Assessment which IRAS issues to the taxpayer after the fact.

11 If the parties are not able to agree, they will continue negotiating via written correspondence. On appropriate occasions, parties may resort to telephone calls or face-to-face meetings to speed up the process. However, the negotiation process is rarely concluded in a day. Instead, it can stretch for weeks or months as, among other reasons, the tax officer seeks internal clearance on the settlement offers on the table.

12 As far as this author is aware, IRAS does not resort to formal mediation (*ie*, engaging a neutral third-party mediator) to assist parties in their attempts to settle the tax dispute amicably. This is unfortunate given the largely positive sentiments arising from the use of mediation in resolving tax disputes overseas.

13 For example, the tax authority in the UK, Her Majesty's Revenue and Customs ("HMRC"), saw a 62% rise in disputed tax collected through mediation and a 23% increase of successful HMRC tax dispute settlements for financial year 2018.<sup>6</sup> The average time involved in resolving tax disputes was also reduced

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6 Robbie Lawther, "HMRC Logs 62% Rise in Disputed Tax Collected Through Mediation" *International Adviser* (19 November 2018).

from 23 months to 61 days.<sup>7</sup> In New Zealand, 55% of all facilitated conferences achieved resolution of the dispute.<sup>8</sup> In Australia, it has been estimated that taxpayers save at least A\$50,000 by resolving a dispute via a facilitative process with the Australian Tax Office as compared to if the dispute proceeded to litigation.<sup>9</sup>

14 Comparative studies have also shown that mediation in tax disputes enhances the mutual relationship between disputants and stimulates voluntary compliance.<sup>10</sup> Mediation works particularly well in countries that try to build a relationship between taxpayers and tax authorities that is based on trust and co-operation. In the Netherlands, mediation also functions as a good filter for disputes that arise from the attitudes of the disputants, or are related to miscommunication or emotions and do not belong in court. Further, in complex cases where there are additional issues involved in the tax dispute such as potential investment decisions, legal certainty, interests of shareholders, subsidiaries or parent companies, mediation offers potentially better outcomes as it can take into account multiple factors in the course of settlement.

15 As such, there are obvious time, cost and outcome benefits for IRAS to consider the use of mediation for the resolution of tax disputes going forward.

### III. Challenges in mediating tax disputes

16 This author is not aware of the policy reasons for why IRAS may not be willing to engage in formal mediation. However, there have been some overseas academic studies done which explain why tax authorities may not be inclined to the use of mediation.

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7 Sriram Govind & Samira Varanasi, “Dispute Resolution in Tax Matters: an India-UK Comparative Perspective” (2013) 9 *International Taxation* 313 at 319.

8 Melinda Jone & Andrew Maples, “Small Tax Dispute Resolution in New Zealand – Making Taxpayers ‘Winners’ not ‘Losers’” at p 7.

9 Melinda Jone & Andrew Maples, “Small Tax Dispute Resolution in New Zealand – Making Taxpayers ‘Winners’ not ‘Losers’” at p 11.

10 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 82.

17 First, tax law differs from most other areas of law in that resolution of the dispute has to be in accordance with the principle of legality and the principle of equal treatment.

18 The legality principle provides that all disputes between taxpayers and tax authorities fall within a statutory framework. This principle limits the power of tax authorities and protects the taxpayers from arbitrariness. It also reduces “the discretion of tax authorities to enter into an agreement with an individual taxpayer, because it would imply that tax is imposed otherwise than under the general rule of law”.<sup>11</sup>

19 The principle of equal treatment requires taxpayers to be treated equally. A failure to do so can undermine the whole system of levying tax. In tax law, every outcome of a dispute has a certain precedent in that taxpayers in the same position should be treated similarly and should feel that they are being treated similarly. This stands in contrast to contract law or family law where equal treatment is less important because the matter in dispute involves only individuals. For example, if a taxpayer discovers that he has closed a poor deal with the tax authority as compared to other taxpayers, he will feel misled. Similarly, if a taxpayer discovers that another taxpayer in the same position reached a favourable compromise, the former will feel deceived. Unequal treatment therefore “jeopardizes the relationship with tax authorities in the long term and will negatively influence the level of compliance of taxpayers”.<sup>12</sup>

20 Second, tax authorities and taxpayers are in an asymmetrical power relationship that is much more significant than in other types of disputes.<sup>13</sup>

21 This is largely because tax authorities have considerable unilateral powers to determine the tax liability of taxpayers. Tax

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11 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 66.

12 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 67.

13 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 68.

authorities have further advantages because they have more tax expertise available, more experience in tax disputes, more information sources and more budget. Such a power imbalance can have a negative impact on the principle of self-determination of the parties, which is an important feature in consensual mediation. Such a power differential can also be used by the tax authorities to compensate for the lack of substantive legal arguments in order to “force” the taxpayer into the tax authorities’ desired agreement.

22 Third, the average taxpayer may not regard a substantively “just” outcome as an acceptable outcome.<sup>14</sup> Taxpayers who do not have sufficient working knowledge of tax law are rarely in a position to judge the outcome based on objective factors. Instead, taxpayers may consider procedural justice to be paramount. Such procedural justice may include whether the tax officer was friendly, listened to the taxpayer’s story, understood the taxpayer’s position, among other things. In other words, the taxpayer will base his opinion on the way he had been treated by, and the quality of interaction with, the tax authorities.

23 Fourth, there is concern that tax authorities will use mediation as a “fishing exercise” to obtain information that they cannot obtain through their statutory powers.<sup>15</sup> In certain jurisdictions such as the UK and Singapore, there are provisions enabling tax authorities to serve information notices on taxpayers or third parties seeking facts and information about a taxpayer’s tax affairs. However, the tax authorities may have insufficient information to accurately draft such notices as is required to make the notices legally effective. Therefore, while mediation may be confidential, knowledge cannot be “undone”. There is the legitimate concern that tax authorities may use information acquired during mediation to serve information notices on the taxpayer if the dispute failed to settle at mediation.

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14 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 69–70.

15 Peter Nias & Nigel Popplewell, “The Use of Mediation in Tax Disputes – UK Position” (2014) 18(3) *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 47 at 51.

24 Fifth, tax officers are not always well informed about the advantages of mediation and will look at the case from a strict legal perspective. Over time, parties are likely to add various legal arguments to reinforce their position, which means that it becomes more and more difficult to detach parties from their legal position in order to convince them that an amicable settlement is possible.<sup>16</sup> Further, tax officers may not be sufficiently trained in mediation advocacy and may not be in a position to develop options or consider alternatives.

25 Sixth, tax officers may not have the discretionary authority to settle the dispute on the day of the mediation.<sup>17</sup> There are internal clearance processes that need to be adhered to, and it may be difficult to get pre-cleared positions on the range of outcomes that may arise from settlement negotiations.

26 Finally – and this is a reason that could be peculiar to Singapore – IRAS may not see the cost benefits of mediation as it is already extremely efficient in collecting its taxes. In the fiscal year of 2018/19, IRAS collected \$52.4bn in tax revenue, spending 0.80 cents to collect every dollar of tax. Tax arrears stood at a paltry 0.87%. It audited and investigated 10,301 cases and recovered about \$389m in taxes and penalties.<sup>18</sup> There may therefore be significant inertia to change the status quo.

27 In the light of the issues raised above, it is unsurprising that IRAS may be hesitant in adopting mediation as a means to resolve tax disputes.

#### **IV. The way forward**

28 Despite the challenges raised above, this author believes that the said challenges can be overcome by the appropriate use of mediation.

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16 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 74–75.

17 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 75.

18 Inland Revenue Authority of Singapore, *IRAS Annual Report FY 2018/19* at p 13.

29 First, it may not be necessary to put every tax dispute through mediation. There are certain tax disputes which are not suitable for mediation. Examples include situations where the resolution of the dispute could only be achieved by departing from an established internal position on a technical issue; where there is doubt over the strength of the evidence and the tax authority wishes to test it by cross-examination; where an issue needs to be clarified judicially so that the precedent gained can be applied to other cases; and where the taxpayer does not appear to be working collaboratively with the tax authority.<sup>19</sup>

30 Second, experienced mediators are well equipped to deal with power imbalances between parties.<sup>20</sup> By way of analogy, in divorce cases, one party may have more power than the other based on financial resources or parental authority over the children. However, this does not stand in the way of a mediated settlement. Therefore, mediation is not *per se* an inappropriate dispute resolution procedure simply because of power imbalances.

31 Third, suitably experienced mediators can function as a “bridge” between the disputing parties. Tax issues are usually complex and technical. Tax officers who work on tax matters on a daily basis often see the world from a narrow tax perspective and may find it difficult to “dumb down” their concerns to a layman taxpayer. Mediators therefore can help tax officers relate their concerns to the taxpayer, and *vice versa*, which may facilitate a more constructive and meaningful discussion between the parties. After all, taxpayers usually consider it their civic duty to contribute their fair share of taxes (with the emphasis on “fair”) and have no difficulty in paying what ought to be paid, subject to certain indulgences in granting additional time to pay.

32 Fourth, there is a wealth of training and educational resources available in Singapore to equip tax officers with the tools to negotiate and mediate effectively. The growth of mediation in the

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19 Peter Nias & Nigel Popplewell, “The Use of Mediation in Tax Disputes – UK Position” (2014) 18(3) *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 47 at 51.

20 Diana van Hout, “Is Mediation the Panacea to the Profusion of Tax Disputes?” (2018) 10(1) *World Tax Journal* 43 at 69.

commercial sphere has been accelerated by training programmes conducted by the Singapore Mediation Centre and Singapore International Mediation Institute. It is not difficult for the training providers to adapt their training courses to suit the settlement of tax disputes (or any other dispute between the individual or organisation and the government).

33 Fifth, it should not be too difficult for tax officers to obtain pre-clearance on settlement positions prior to mediation. In contrast to other types of disputes, tax disputes are relatively simple as they are binary: to pay or not to pay. If the taxpayer has to pay tax, then the only follow-up questions are: how much, and for how long, does the taxpayer have to make payment. If the tax officer is faced with a potential settlement offer that is below what has been pre-authorized, but is not far away from the pre-cleared amount, then perhaps the tax officer's superior could be on standby at the telephone to provide the necessary authorisation to extend the scope of settlement.

## **V. Conclusion**

34 In conclusion, this author believes that IRAS should seriously consider the appropriate use of mediation to resolve tax disputes. After all, it would be in line with the rest of Singapore when the Convention comes into force on 12 September 2020.