

Tax Dispute Insights

Counter Tax Litigators



Authors

Peter Aprile, Natalie Worsfold, James Roberts & Jennifer Mak are tax litigators specializing in overturning adverse CRA reassessments.

To speak with Peter, Natalie, James or Jennifer about this article, please visit countertax.ca/our-people



The Standards That Enable Settlement in Tax Disputes

The standards for lawful settlements that demonstrate judgment and discipline.

Sept 3, 2025

Counsel on both sides of tax disputes face the same challenge: how to resolve cases in ways that are fair, objective, and justifiable — settlements that withstand internal and external review.

Too often, one or both sides miscast the principled basis for settlement or misunderstand what defensibility requires. When both standards are applied together, settlement space expands and agreements are more likely to withstand review — protecting professional judgment, preserving credibility, and aligning with institutional goals.

The DoJ regularly articulates what an effective resolution should achieve. In *“Tax Dispute Result: The Crown Perspective”*, Deen Olsen, General Counsel of the DoJ’s Tax Law Services, states the Crown’s standard that every settlement should aim to:

1. reach certainty earlier,
2. focus on significant and material positions,
3. improve relationships, and
4. use resources efficiently.

These benchmarks reinforce that defensibility is not abstract — it is the mechanism by which the Crown achieves its goals. And, when both sides adopt this approach, they set the stage for productive settlement discussions and opportunities.



Tax Dispute Insights

Counter Tax Litigators



Principled settlements: the floor

Courts and DoJ leadership emphasize that all settlements must be principled. This means no tax dispute settlement can contravene the law. It is the floor that closes off certain possibilities. A principled settlement does not compromise legal principles.

That requirement is taken as a given. The practical challenge, and the focus of this discussion, is defensibility — the standard counsel must work within the principled boundary.

Defensible settlements: the working standard

Defensibility builds on principled settlement. When legality is assured, counsel must still resolve how agreements will withstand both legal and institutional review. Defensible settlements open and fill that space. They have two components:

- **Legally defensible:** rests on facts, and on characterizations or weightings of those facts, that a court **could** sanction — even if not the outcome the court **would** ultimately reach.
- Internally defensible: can be explained as fair, objective, and justifiable to
 - supervisors, managers, and program areas on the Crown side; and
 - executives, boards, or other governance bodies on the taxpayer side.

Both DoJ and the private bar recognize that defensibility, not perfection, is the operative standard for settlements. The DoJ counts such settlements as litigation wins in its performance metrics, and credible private bar counsel treat them similarly. Acceptable levels are sufficient; the standard is disciplined defensibility, not perfection.

Defensibility enables agreement within the principled floor. It gives counsel the opportunity to apply judgment, reframe, reweight, and evolve their positions while remaining connected to reality.





Exhibit 0. Principled vs. Defensible

Principled (Constraint)	Defensible (Space)
Cannot contravene the law.	Must be fair, objective, and justifiable.
Minister cannot trade on the law.	Counsel can reframe, re-weight, or exclude facts tethered to the record.
Sets the floor.	Expands the zone of agreement.
Ensures legality.	Enables practicality and closure.

Where settlements fall on the spectrum

The question is how defensibility operates in practice, and how it shapes the space in which agreements can be reached.

In practice, settlements fall along a spectrum. At one end are expedient trade-offs that collapse under review. At the other are agreements so tightly aligned with the record and law that they resemble court outcomes. Most defensible settlements sit in the middle of this spectrum.

[the remainder of this page has been left blank intentionally]



Exhibit 1. Spectrum of settlement defensibility

The spectrum shows that defensibility lowers the barrier to settlement rather than raising it. Level 3 (Acceptable) and Level 4 (Good) settlements are viable successes. They withstand review and demonstrate disciplined judgment.

Level	Characteristics	Survival Under Internal Review	Professional Impact
Level 1 (Very Poor)	Unthinking trade-offs; unsupported characterizations	Collapses immediately	Fails review
Level 2 (Poor)	Thin factual basis; invented or ignored facts	Rejected on review	Requires correction
Level 3 (Acceptable)	Grounded but fragile; tethered to record, but some facts contested	Survives review	Satisfies threshold
Level 4 (Good)	Clear facts, weighting and beliefs are flexible, aligned with the law	Strong support	Strengthens support
Level 5 (Beyond Requirement)	Facts, assumptions, and law tightly aligned	Survives any scrutiny	Expands negotiating latitude

CRA states openly that settlement is the preferred resolution of factual disputes. Its [Settlement Process guidance](#) notes that taking these cases to a Tax Court hearing “generally does not add much value to the subsequent administration or interpretation of the law by taxpayers or the CRA” and that they “should only be resolved in court where valid attempts to settle are not fruitful”.

The message is straightforward: CRA leadership expects DoJ counsel to find a defensible settlement in these cases before they reach a hearing. The court process remains critical — it provides the framework, oversight, and discipline that make principled and defensible settlements possible. But for factual disputes, the hearing itself should not be the destination. The expectation is that resolution occurs through defensible settlement in the pre-hearing stages.

Tax Dispute Insights

Counter Tax Litigators



Where settlements fall on the spectrum

The question is how defensibility operates in practice, and how it shapes the space in which agreements can be reached.

In practice, settlements fall along a spectrum. At one end are expedient trade-offs that collapse under review. At the other are agreements so tightly aligned with the record and law that they resemble court outcomes. Most defensible settlements sit in the middle of this spectrum.

How to achieve defensibility

The most effective settlement discussions begin when counsel align on the Crown's benchmarks. If fairness, objectivity, and justifiability are accepted as common ground, defensibility becomes the lens through which the facts and their characterizations are interpreted and shaped — a normal process of professional judgment that avoids spin or invention.

Three mechanics illustrate how defensibility opens space within the principled floor:

- **Reframing.** The same record can support different lawful characterizations. A recurring payment stream may be treated as cost-sharing, management fees, or dividends. Courts have accepted each, depending on context. DoJ confirms the frame is legally defensible for CRA, while private counsel confirms it for the taxpayer. On each side, CRA officials and taxpayer executives, boards, or governance bodies must be able to accept it as internally defensible.
- **Re-weighting.** Facts are rarely binary. Occasional personal use of corporate property, for instance, can be treated as decisive by one side or incidental by the other. The fact is undisputed; its weight is debated. Courts resolve cases this way. DoJ confirms the weighting is legally defensible for CRA, while private counsel confirms it for the taxpayer. On each side, CRA officials and taxpayer executives, boards, or governance bodies must be able to accept it as internally defensible.
- **Exclusion.** Weak or marginal facts can be dropped. Courts do this routinely by disregarding evidence. Excluding in a responsible way keeps settlements tethered to reality. DoJ ensures exclusions are legally sustainable for CRA, while private counsel ensures the same for the taxpayer. On each side, CRA officials and taxpayer executives, boards, or governance bodies must be able to accept the exclusion as internally defensible.



Tax Dispute Insights

Counter Tax Litigators



Defensibility accommodates evolution

Defensibility is something the parties explore, both individually and together. It is dynamic; it accommodates the natural evolution of a file as facts, assumptions, and beliefs are clarified, re-weighted, or set aside.

As stated, the Crown cannot compromise on the law but may compromise on facts — provided they have some “bearing on reality.” That does not mean certainty or full proof; it means plausibly tied to the record, even if incomplete, contested, or open to interpretation.

The courts themselves recognize this flexibility. In *CIBC World Markets Inc. v. R.*, the Tax Court observed that settlement negotiations often bring forward new facts, better characterizations, and richer appreciation of the law. Similarly, in *1390758 Ontario Corp. v. R.*, the court emphasized that the Crown may revise an initial view of the facts and law.

In *Principled Settlements: There’s More Room To Negotiate Than You Think*, Shubir (Shane) Aikat and Gregory B. King reinforced the point: settlements are not expected to mirror the CRA’s or DoJ’s preferred position, the taxpayer’s, or even the outcome counsel predict a court would reach. They need only represent a defensible permutation that a court could sanction.

This point is counter-intuitive because settlement is often treated as splitting the difference or predicting the court’s decision; in reality, defensibility allows broader outcomes, so long as they remain tethered to the record and law.

Avoiding an improperly high bar

When stakeholders handling a dispute shift the test from whether a court could sanction an agreement to whether it reflects their preferred position, or what a court would ultimately decide, the bar is improperly raised. Shifting the test beyond defensibility — to preferred positions or predicted outcomes — undermines the principled and defensible standards both sides are expected to apply.

Raising the bar in this way is not only inefficient; it exposes counsel, officers, and executives to risks at multiple levels: judgment, credibility, and institutional alignment.

Individually, raising the bar prolongs files unnecessarily. On the Crown side, DoJ counsel and CRA officers carry heavier caseloads, adding stress and exposing their judgment to reversal if a defensible settlement is later accepted. Similarly, on the taxpayer’s side, executives and advisors commit capital and management time longer than necessary, with boards left to question whether judgment was exercised effectively.

Tax Dispute Insights

Counter Tax Litigators



Socially, reputations suffer. On the Crown side, counsel risk being seen as rigid or overly adversarial within their own organizations, with professional counterparts across the bar, and before the Court. Similarly, on the taxpayer's side, executives risk appearing inflexible to boards, investors, and regulators.

Institutionally, the consequences are clear. On the Crown side, raising the bar undermines DoJ's success ratio and CRA Appeals' "good management" mandate, while consuming resources that leadership expects to be redeployed. On the taxpayer's side, it delays planning certainty, ties up liquidity, and undermines governance credibility.

Exhibit 2. Risks of raising the bar improperly

Insisting on "preferred" or "predicted" outcomes instead of defensible ones creates risks for the Crown and the taxpayer.

Dimension	Crown (CRA / DoJ)	Taxpayer (Executives / Boards)
Judgment	Counsel and officers carry heavier caseloads; risk their judgment if defensible settlements are later accepted by the Court or management.	Executives and advisors prolong capital exposure; boards may later conclude that an earlier, defensible settlement was missed.
Reputation	Reputation with colleagues, repeat counsel, and Tax Court judges suffers; seen as rigid or "win-maximizing."	Reputation suffers with boards, investors, and regulators, being perceived as rigid or unwilling to resolve issues strategically.
Institutional Alignment	Undermines DoJ's settlement success ratio and CRA Appeals' efficiency mandate; consumes resources and fosters misaligned culture.	Delays certainty required for governance and planning; ties up liquidity and distracts management from business priorities.

[the remainder of this page has been left blank intentionally]

Tax Dispute Insights

Counter Tax Litigators



Exhibit 3. Avoiding an improperly high bar

Common Drift	Correction	Why It Matters
Settlement must match a preferred position.	Focus on whether a court could sanction the agreement.	Keeps the defensibility standard intact for both parties.
Settlement must predict what a court would decide	Focus on plausible permutations the court could sanction.	Avoids overreach and unnecessary disputes.
Settlement must be airtight.	Defensible does not require airtight perfection.	Encourages settlement without creating artificial barriers.

Operating inside defensibility

Judgment and professional credibility are the assets that counsel trade on. Discipline protects these assets. Discipline in defensibility does not mean perfection. It means keeping agreements tethered to facts and lawful characterizations, while letting go of confirmation bias, rigid views, fragile assumptions, and personal stake.

[the remainder of this page has been left blank intentionally]

Tax Dispute Insights

Counter Tax Litigators



Exhibit 4. Trigger questions for defensibility

Simple prompts help counsel drop weak positions and keep settlements review-ready.

Common Drift	Correction	Why It Matters
Facts	Is this fact tied to the record? Would narrowing the record make the agreement stronger?	Rigour
Assumptions	Is this inference plausible given the record? Should it remain open to revision?	Flexibility
Beliefs	Could this belief shift as new facts or precedent emerge?	Adaptability
Defensibility	Could I explain this settlement in one clear sentence internally – to DoJ/CRA or to executives/boards?	Clarity
Balance	Have we applied the same standard of defensibility to both our own and the other side's positions?	Even-handedness

Exhibit 5. Best practices for settlements that survive internal review

Simple prompts help counsel drop weak positions and keep settlements review-ready.

Principle	Safe Application	Professional Payoff
Anchor in reality	Facts tied to the record	Agreement won't collapse
Reframe, not invent	Lawful characterizations of facts	Shows adaptability
Re-weight, not distort	Adjust emphasis, not existence	Demonstrates judgment
Keep law intact	Stay within precedent and statute	Avoids overreach
Frame for review	One-line basis: facts + law that CRA and taxpayer boards can accept	Passes internal review (both sides)
Preserve credibility	Drop positions that weaken the whole	Reinforces trust internally and across the table

Tax Dispute Insights

Counter Tax Litigators



Exhibit 6. Phrases that make defensibility explicit in internal review

Disciplined responses protect credibility and ease internal approval.

Internal challenge	Credible response	Signal Sent
“This fact feels weak.”	“We excluded other marginal facts, but this one is tied to the record.”	Discipline
“That’s just spin.”	“Courts have treated this record in multiple ways; this interpretation has precedent.”	Precedent-grounded
“You’re downplaying a fact.”	“The fact is acknowledged; the issue is weight. Courts have treated it as incidental.”	Judgment
“You’re compromising on principle.”	“This interpretation stays within statutory bounds and judicial application.”	Legal discipline
“This explanation isn’t clear.”	“The settlement rests on these agreed facts and this accepted interpretation of law.”	Clarity
“This looks like expedience.”	“The agreement resolves the file on terms a court could plausibly reach, and both the Crown and taxpayer can justify internally.”	Professional credibility

When counsel use these tools, defensibility is not just achieved but made visible. That visibility — internally, institutionally, and in court — is what creates confidence to settle.

[the remainder of this page has been left blank intentionally]

Tax Dispute Insights

Counter Tax Litigators



Closing thought

Principled is the floor: it constrains by ensuring no agreement contravenes the law. Defensible is the working standard: it opens, allowing settlements to be fair, objective, and tethered to the record — outcomes a court could sanction, even if not the outcome it would ultimately reach.

Defensibility, when treated as common ground, is where counsel exercise judgment with discipline and protect their credibility under review.

When both sides align on this frame, settlement becomes not only possible but expected — achieving earlier certainty, conserving resources, and strengthening trust. When they do not, costs are borne on both sides: DOJ counsel and CRA officers face heavier caseloads, reputational risk, and scrutiny from leadership; private bar counsel and executives face prolonged capital exposure, credibility risk with boards, and questions about judgment.

In both cases, oversight tests two things: the defensibility of the settlement and the judgment of counsel who advanced it. Failures on either measure do not withstand review. When DOJ or private counsel reject defensible settlements within the zone, the consequences are predictable: heavier caseloads, capital at risk, reputational strain, and institutional scrutiny.

Counter Tax Litigators

We win superior results and give our clients the clarity they need along the way.

Visit countertax.ca to learn more about us.



This bulletin is not intended to provide legal or other professional advice and readers should not act on the information contained in this review without seeking specific independent advice on the particular matters with which they are concerned. No solicitor-client relationship is created between the readers and Counter Tax Litigators.

