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1 Overview

It might be trite, but it is necessary to begin this paper by observing that the Commissioner of Taxation's power to amend assessments of tax is generally limited to specified periods, unless an exception applies.[1] One of the main exceptions to the relevant time limits on the Commissioner's power of amendment applies where the Commissioner forms the opinion that there has been fraud or evasion. In those circumstances, the Commissioner may amend at any time.[2]

The title of this paper juxtaposes the concepts of 'fraud' and 'evasion' because it is taken from the statutory provisions that relieve the Commissioner from the relevant time limits on amending assessments in circumstances in which he forms the opinion that there has been fraud or evasion. However, given how rarely the Commissioner relies on fraud as the basis for forming his opinion under these statutory provisions, the title of the paper could just have easily have asked 'avoidance or evasion?'. Arguably that is the more difficult and controversial issue. The first half of this paper therefore focuses principally on the question of what constitutes evasion, although it also provides a brief overview of the principles governing common law fraud.

The second half of this paper focuses how taxpayers may challenge the Commissioner's opinion that there has been fraud or evasion, with a particular focus on the difficulties faced by taxpayers in challenging the basis for and formation of that opinion in the context of taxation review proceedings brought under Part IVC of the TAA in light of recent decisions such as *Binetter v Commissioner of Taxation* (2016) 249 FCR 534 (Siopis, Perram and Davies JJ). This section of the paper will conclude with a review of some of the unsuccessful attempts by taxpayers to challenge the Commissioner's opinion that there has been fraud or evasion using legal processes outside Part IVC of the TAA, such as judicial review proceedings brought under s 39B of the *Judiciary Act 1903* (Cth).

The paper does not refer to the Commissioner's general administrative practice concerning his opinion on fraud or evasion, which is currently outlined in Law Administration Practice Statement PS LA 2008/6. That practice statement is currently being re-written, and the revised version has not been published at the date of this paper.

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[1] For example, in respect of income tax, see s 170 of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***). In respect of franking assessments, see s 214-95 of the *Income Tax Assessment Act 1997* (Cth) (***ITAA 1997***). In respect of indirect taxes, such as GST, see s 155-35 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (***TAA***). In respect of FBT, see s 74 of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (***FBTAA***).

[2] See, for example, item 5 of s 170(1) of the ITAA 1936, s 214-120 of Sch 1 to the ITAA 1997, s 155-60 of Sch 1 to the TAA and s 74(3) of the FBTAA.

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2 Understanding the Concepts

2.1 Fraud

The word 'fraud' is not defined in s 170 of the ITAA 1936. Nor is it defined in any of the other tax Acts that contain statutory provisions limiting the Commissioner's power to amend assessments. Nonetheless, for the purposes of s 170 of the ITAA 1936, 'fraud' has been held to involve something in the nature of fraud at common law, namely: 'the making of a statement to the Commissioner relevant to the taxpayer's liability to tax which the maker believes to be false or is recklessly careless whether it be true or false'.[3]

This understanding of what constitutes fraud for tax purposes appears to correspond with the definition given by Lord Herschell LC in *Derry v Peek* (1889) 14 AC 337 at 374:

> ... fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false ... if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

These observations were endorsed by the High Court of Australia in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 579-580 (Brennan, Deane, Gaudron and McHugh JJ) in so far as their Honours held that a representation may be made fraudulently without 'evil motive'. Thus, a false statement, made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud, but it does not necessarily amount to fraud. Rather, as Brennan, Deane, Gaudron and McHugh JJ stated in *Krakowski v Eurolynx Properties Ltd* at 378:[4]

> In order to succeed in fraud, a representee must prove, inter alia, that the representor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood.

The effect of this statement is that fraud will not be found where the taxpayer has formed a genuine, subjective belief in the truth of the representation made by them.

2.2 Evasion

From the reported cases dealing with the Commissioner's opinion as to fraud or evasion as a precondition to the Commissioner's power to amend at any time, it appears that the Commissioner relies principally on the 'evasion' limb of the relevant statutory provisions. Therefore, the question of what constitutes 'evasion' for the purposes of item 5 of s 170(1) of the ITAA 1936, and the corresponding provisions for other taxes, is of greater relevance for most tax practitioners and their clients.

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[3] *Kajewski v Commissioner of Taxation* [2003] FCA 258 at [111] (Drummond J).

[4] See also *Maye v Colonial Mutual Life Assurance Society Ltd* (1924) 35 CLR 14 at 30 (Isaacs ACJ) to the effect that a finding of negligence is inconsistent with a finding of fraud.

2.2.1 No Fixed Definition of Evasion

The difficulty is that there is no fixed definition of 'evasion' for the purposes of the statutory provisions dealing with the Commissioner's ability to amend at any time. Indeed, the judgment of Dixon J (with whom McTiernan, Wilson and Webb JJ agreed) in *Denver Chemical Manufacturing Company v Commission of Taxation (NSW)* (1949) 79 CLR 296 at 313 makes it clear that the absence of any fixed definition is deliberate:

> I think it is unwise to attempt to define the word 'evasion'. The context of s 210(2) [of the *Income Tax (Management) Act 1936* (NSW)] shows that it means more than avoid and also more than a mere withholding of information or the mere furnishing of misleading information. It is probably safe to say that some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible is contemplated. An intention to withhold information lest the commissioner should consider the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion.

Relevantly, in *Denver*, evasion was found in circumstances where the taxpayer had changed the basis on which it reported its sales for income tax purposes, so that it reported gross sales from New South Wales only rather than sales from all of Australia, notwithstanding that the method adopted was contrary to the oral advice given by the Commissioner. When the Commissioner subsequently requested copies of the taxpayer's financial statements, the taxpayer declined to provide them, with the evidence apparently being that the taxpayer had decided to withhold this information unless it was compelled to provide the financial statements. Justice Dixon was satisfied that there was no basis to impugn the Board's decision that the taxpayer's conduct, which the Board characterised as the deliberate omission of income without credible explanation, constituted evasion.

Justice Dixon noted in *Denver* that the language used by the Board in its decision had been adopted from *Barripp v Federal Commissioner of Taxation* (1941) 6 ATD 69. In *Barripp*, the taxpayer did not include a profit from the sale of land in his income tax return for the year in which the transaction was completed. His explanation was that his accountant had advised him that the profit was not assessable until a later year. The High Court did not accept the taxpayer's explanation and held that there had been evasion given the income had been intentionally omitted, and no satisfactory explanation for the omission had been given (at 71).

However, it would be unwise to assume that absence of a reasonable explanation is a necessary ingredient of evasion in all cases. After all, in the context of customs legislation designed to address evading payments, in *Wilson v Chambers and Co Pty Ltd* (1926) 38 CLR 131 Higgins J agreed that evasion requires an act of will by the taxpayer in avoiding payment, as opposed to a mere failure to pay due to accident or mistake, but (at 148):

> I cannot, however, accept the gloss on the section proposed by my brother Isaacs-that the words "without reasonable excuse" are implied. Indeed, for my part, I think it dangerous to attempt to frame a definition, or to interpose a formula between the section and the facts of each situation: facts vary so infinitely.

2.2.2 Relevance of the Conduct of Agents

Kajewski v Federal Commissioner of Taxation [2003] FCA 258 (Drummond J) dealt with the deductibility of certain amounts claimed by a trust in the year ended 30 June 1990 as a result of implementing an arrangement referred to as an 'employee retention plan'. Not only did the evidence

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establish that the deduction was a key element of the arrangement, but there was evidence that the amounts deducted had not been incurred by 30 June 1990 and there had been back-dating of documents to try to establish that the loans necessary to fund the deductible contributions had been made by the relevant date (at [51]-[71]). Further, the evidence established that but the arrangement itself was of a type that the accountant's firm had marketed to their clients (at [36]). However, the taxpayers, who were beneficiaries of the trust, claimed to have had limited knowledge of the arrangement, which had been recommended to them and implemented by their accountant, Mr Hart (at [75] and [112]).

Justice Drummond concluded that the beneficiaries' ignorance of their accountant's activities did not 'immunise' them from having their assessments being reopened by the Commissioner in reliance on former s 170(2)(a) of the ITAA 1936 (at [113]). His Honour elaborated on the role of agents at [114]:

> 114 To enliven the power to amend an assessment under s 170(2)(a), the Commissioner only has to be of the opinion that an avoidance of tax is due to fraud or evasion. There is no justification for implying a limitation on these clear words to restrict the Commissioner's power under the provision to amend an assessment only where the avoidance of tax is due to fraud or evasion by the taxpayer personally. The wording of s 170(2)(a) is apt to empower the Commissioner to issue an amended assessment where an avoidance of tax is due to the fraud or evasion of the taxpayer's agent engaged to prepare returns signed by the taxpayer and to lodge those returns on the taxpayer's behalf, as Hart did here for Askena and the applicants. Tax agents whose registration as such is controlled by Pt VIIA the ITAA 1936 are recognised by the Act as entitled to perform a range of functions on behalf of their taxpayer principals in respect of their tax affairs, including the preparation and lodging of taxpayers' returns. For example, by s 251L, a registered tax agent is entitled to charge fees for a wide range of services rendered to taxpayers in connection with their tax affairs. This legislative recognition of the role of tax agents is an additional reason for giving the words of s 170(2)(a) their ordinary meaning. Nor can it be said there is any absurdity involved in so construing the sub-section. The notion that a principal may be held responsible for the fraudulent conduct of an agent, even though ignorant of the agent's fraudulent behaviour is not a novel one: it is well established at common law. It is not necessary that the principal should authorise or even know of the fraudulent act of the agent to be liable for it. "It is enough that the agent has been put by the principal in a position to do the class of acts complained of": see *Colonial Mutual Life Assurance Society Limited v The Producers and Citizens Co-Operative Assurance Company of Australia Limited* [1931] HCA 53; (1931) 46 CLR 41 at 46. If this were a common law fraud case, it could be said that, as between the applicants and the Commissioner, the applicants put Mr Hart in a position to do the class of fraudulent acts complained of by accepting his advice about the employee retention plan arrangements, leaving it to him to implement those arrangements in circumstances where they expected the arrangements to generate a tax benefit and retaining Mr Hart as their tax agent.

2.2.3 Timing Considerations and Conduct During the Audit

Based on these cases, it is apparent that, at a high level, evasion involves the payment of less tax than is legally required as a result of deliberate acts or failures to act by and on behalf of taxpayers. The circumstances that give rise to the failure to pay sufficient tax must arise at the time the return is lodged. However, that is not to say that a finding of fraud or evasion need be based only on the facts and circumstances of the taxpayer at the time of the filing of the relevant tax return, without regard to subsequent events and conduct.[5] After all, it appears from *Denver* that the conduct of the taxpayer

[5] Contra *Re Mano and Federal Commissioner of Taxation* [2010] AATA 289 at [53] (SM Sweidan).

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during audit has always had some relevance to a finding of evasion,[6] even if it is simply by way of providing the factual basis to infer that the failure to return sufficient taxable amounts at the time of lodgement was intentional.

Since the introduction of self-assessment in 1992, arguably post-lodgement conduct has taken on even greater importance to the extent that it may supply evidence to support the inference that the original omission was evasion and not mere avoidance. That is, although the 'mere withholding of information or the mere furnishing of misleading information' would not be enough of itself to constitute evasion, the post-lodgement withholding of information or the furnishing of misleading information may support the inference that the statement made on lodging the return that resulted in the underpayment of tax was evasion. However, the relevance of self-assessment to how evasion is identified and characterised has not been expressly acknowledged in any of the cases. This is notwithstanding that frequently cited definition of what constitutes 'evasion' in *Denver Chemical Manufacturing* relates to the assessment regime that applied before self-assessment, when taxpayers were obliged to disclose in their income tax returns all the facts relevant to determining their assessable income.

The increasing relevance of post-audit conduct is perhaps most clearly illustrated by the case of *Weyers v Federal Commissioner of Taxation* [2006] FCA 818 (Dowsett J). In *Weyers*, the question was whether the Commissioner was entitled to amend the taxpayers' assessments to disallow their claim for deductions attributable to the taxpayers' use of tax losses from a trust. The Commissioner's reasons for forming the opinion that there had been evasion were extracted in the judgment at [142]:

> The Commissioner has formed this opinion because you paid $160,000 for a trust without any assets, save for (possibly) tax losses and with a Fund Deficiency of Capital of $2,655,292.
>
> The only documentation received when the trust was acquired in December 1994 was the Trust Deed. The evidence available to the Commissioner indicates that you did not obtain any financial records from the former trustee to verify that the tax losses exceeding $2.6 million were actually available. The Facilitation Agreement expressly provided for the provision of these documents.
>
> Moreover, the onus of proof that there had not been an avoidance of tax due to fraud or evasion rests with you. In this case, it has not been satisfied despite a specific request for a submission why the Commissioner should not, given the facts already available to him, be in a position to consider that tax has been avoided as a result of fraud or evasion."

Justice Dowsett considered that the Commissioner's approach to the question of whether the taxpayers had engaged in evasion was correct, and the Commissioner was entitled to take into account both the structure of the transaction itself, involving old tax losses in an apparently abandoned trust, as well as the taxpayers' failure to respond to requests for information (at [148]-[149]). Specifically, Dowsett J concluded:

> 149. The Commissioner was entitled to place significant weight upon the failure by the taxpayers to respond to his request for further information. There may have been a valid reason for acquiring a trust with accumulated losses for a relatively substantial amount of money. If so, one would expect the taxpayer to respond to such an inquiry. In the absence of such response, it was reasonable to infer that the Weyers did not wish to explain to the Commissioner the

[6] See also *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246 at 289 (Higgins J) and, to a lesser extent, Isaacs ACJ at 276.

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> purpose for which they had acquired the trust or their use of it. It would also be a reasonable inference that the trust was acquired for use in avoiding tax.

Also, although certainly not the only indicia of evasion in the case, it appears from the lengthy description of the facts in *Kajewski* that the finding of evasion based on the accountant's conduct was, at least to some small extent, influenced by events that occurred during the audit. These considerations included the evidence that the accountant had informed people associated with the employment retention plan that he was 'destroying evidence as quickly as is permissible' after the ATO had commenced its investigation into the scheme,[7] and also the allegation that various documents produced to the ATO during the investigation were 'concocted'.[8]

This focus on concealing facts from the Commissioner, including during the audit phase, arguably might also have led Edmonds J to adopt a definition of 'evasion' from a criminal law case as part of his reasoning in *Fitzroy Services Pty Ltd v Federal Commissioner of Taxation* [2013] FCA 471 at [53] – specifically, to emphasise the importance of the 'revenue authorities never finding out the true facts' as a key ingredient of evasion. Notwithstanding the different statutory and legal context, his Honour cited the following passage from *R v Meares* (1997) 37 ATR 321 at 323 (Gleeson CJ, with whom Sully and Bruce JJ agreed), a case which dealt with sentencing for a conspiracy to defraud conviction under the *Crimes Act 1914* (Cth), with approval:

> Although on occasion, it suits people for argumentative purposes, to blur the difference, or pretend that there is no difference, between tax avoidance and tax evasion, the difference between the two is simple and clear. Tax avoidance involves using, or attempting to use, lawful means to reduce tax obligations. Tax evasion involves using unlawful means to escape payment of tax. Tax avoidance is lawful and tax evasion is unlawful. Although some people may feel entitled to disregard that difference, no lawyer can treat it as unimportant or irrelevant. It is sometimes said that the difference may be difficult to recognise in practice. I would suggest that in most cases there is a simple practical test that can be applied . <u>If the parties to a scheme believe that its possibility of success is entirely dependent upon the revenue authorities never finding out the true facts, it is likely to be a scheme of tax evasion, not tax avoidance</u>. [Emphasis added.]

Evidence of the concealment of facts was not found in *Fitzroy Services* (as to which see the discussion under heading 3.1.6 below). However, it is safe to assume that, in other cases, evidence of the concealment of facts during the audit phase would support an inference that the success of a particular scheme for tax purposes was dependent on the revenue authorities never finding out the true facts. Indeed, the word 'conceal' was also used by Dowsett J in his Honour's decision on costs in the *Weyers* case to describe the taxpayers' conduct.[9] However, based on the frequently cited passage from *Denver*, it is also necessary to remember that the 'mere withholding of information or the mere furnishing of misleading information' would not ordinarily be enough to support a finding of evasion without other features.

I note for completeness the interesting question raised by Gzell J, writing extra-judicially, of whether a taxpayer could somehow 'cure' an earlier failure to pay sufficient tax by taking steps during the audit (by coming clean or amending his/her ways as it were) that could prevent the Commissioner from

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[7] *Kajewski v Commissioner of Taxation* [2003] FCA 258 at [34].
[8] *Kajewski v Commissioner of Taxation* [2003] FCA 258 at [72].
[9] *Weyers v Federal Commissioner of Taxation* [2006] FCA 1319 at [5].

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forming the opinion that there was fraud or evasion.[10] There are no cases dealing with this point, but I tend to agree with his Honour's conclusion that the Courts are unlikely to support this conclusion – particularly, in the context of a system that is based on self-assessment where the taxpayer must be encouraged to return the correct amount of income when they lodge their return and not after their failure to pay sufficient tax has been detected.

[10] Gzell I, *The Taxpayer's Duty of Disclosure* (Step Asia Conference, Hong Kong, 12 to 13 October 2006) at pp 5 to 6.

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3 Challenging the Commissioner's Opinion on Fraud or Evasion

3.1 Challenges to the Opinion under Part IVC

3.1.1 *McAndrew* and the Onus of the Taxpayer in Part IVC Proceedings

Until the High Court handed down *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263 dealing with the power to amend former s 170(2) of the ITAA 1936 in the context of the former onus provision in s 190(b), there was a line of authorities that the Commissioner had the burden of proving that the circumstances existed that empowered him to amend the assessment out of time. At that time, former s 170(2) of the ITAA 1936 only applied where the taxpayer had not made full and true disclosure of all material facts necessary to his or her assessment, and that there had been an avoidance of tax. These matters were posited as objective facts; at the relevant time, the requirement that the Commissioner had to form the opinion that there had been an avoidance of tax had been removed.[11]

Notwithstanding that former s 190(b) of the ITAA 1936 referred to the taxpayer bearing the onus of proving that the assessments were excessive,[12] the High Court held in *McAndrew* that it was for the taxpayer, and not the Commissioner, to prove that the conditions precedent to the power to amend under s 170(2) of the ITAA 1936 had not been satisfied. This conclusion necessarily followed from the operation of former s 190(b) of the ITAA 1936 once their Honours concluded that the conclusive assessment provision in former s 177 of the ITAA 1936 (now found in item 2 of s 350-10(1) of Sch 1 to the TAA) did not prevent the taxpayer from challenging whether the conditions in former s 170(2) had been satisfied.[13] As to the operation of former s 190(b) of the ITAA 1936, the plurality in *McAndrew* (Dixon CJ, McTiernan and Webb JJ) stated at 271 to 272:

> … But bearing in mind that the word "excessive" relates to the amount of the substantive liability It is not difficult to see that it will extend over the area in which the conditions mentioned in s 170(2) find a place. For the fulfilment of those conditions goes to the power of the commissioner to impose the liability by amendment. If he cannot amend consistently with s 170(2) and so increase the amount of the assessment then it must be excessive.

McAndrew was cited with approval by the High Court in *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614,[14] although it was distinguished. *Dalco*, like *George v Federal Commissioner of*

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[11] *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263 at 270 (Dixon CJ, McTiernan and Webb JJ) and 276 to 277 (Kitto J).

[12] It was suggested that the word 'excessive' was perhaps 'not a good choice': see *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263 at 271 (Dixon CJ, McTiernan and Webb JJ) and 282 (Taylor J). Arguably any difficulty presented by the potentially inapt language has now been addressed by the amendments made to ss 14ZZK and 14ZZO of the TAA from 1 July 2013. Those provisions now require the taxpayer to prove that the assessment is 'excessive or otherwise incorrect'.

[13]

[14] At 622 to 623 (Brennan J) and 631 to 632 (Toohey J). Chief Justice Mason and Dawson, Gaudron and McHugh JJ agreed with Brennan and Toohey JJ, and Deane J stated that he was in 'general agreement' (at 626).

Taxation (1952) 86 CLR 183, concerned the power to make a default assessment under s 167(b) of the ITAA 1936 – a power that was not considered to create a condition precedent to assessment or, if it did, was considered to be part of the due making of the assessment not going to substantive liability, so that former s 177 of the ITAA 1936 prevented it from being challenged in taxation appeal proceedings.

3.1.2 The Commissioner's Opinion as a Criterion for Liability

The Commissioner's power to amend assessments at any time in the event of fraud or evasion is now expressed in a way that requires the Commissioner to form an opinion. To the extent that the formation of that opinion is a criterion of liability, which may be relevant to whether the assessment is excessive or otherwise incorrect for the purposes of ss 14ZZK and 14ZZO of the TAA, it may be challenged through either taxation review proceedings before the Tribunal or taxation appeal proceedings before the Federal Court.

3.1.3 Tribunal or Federal Court?

Where a taxpayer applies under s 14ZZ of the TAA for review by the Tribunal of an objection decision, the Tribunal is able to exercise all the powers and discretions that are conferred by the tax law on the Commissioner as part of its review.[15] Therefore the Tribunal has the power to substitute its opinion for the opinion of the Commissioner in appropriate cases.

In contrast, where a taxpayer appeals under s 14ZZ of the TAA to the Federal Court against an objection decision, the Court is limited to judicial review. This means that the Court will only interfere with the Commissioner's exercise of the amendment power if the taxpayer can show that the Commissioner did not form the requisite opinion or if it was vitiated by some error of law. The types of errors that may make the Commissioner's opinion susceptible to challenge before the Court were described by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 in the context of considering the state of satisfaction required by former s 80(5) of the ITAA 1936 as follows:[16]

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true is not unexaminable. If he does not address himself to the question which the subsection formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be

[15] Section 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (***AAT Act***).

[16] Applied in the context of former s 170(2) of the ITAA 1936 in *Kajewski v Federal Commissioner of Taxation* [2003] FCA 258 at [10] (Drummond). See also *Binetter v Commissioner of Taxation* (2016) 249 FCR 534 at [93] (Perram and Davies JJ, with whom Siopis J agreed on this issue).

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> sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

Critically, the Commissioner is not required to justify his opinion absent 'an appropriate attack upon it' (*Weyers v Federal Commissioner of Taxation* [2006] FCA 818 at [146] (Dowsett J)).

3.1.4 *Binetter v Commissioner of Taxation*

It appears that the differences between merits review before the Tribunal and judicial review by the Courts may have led to a view that an application for review by the Tribunal might have provided an easier route to impugning the Commissioner's opinion. This view appears to have followed from the belief that the Tribunal could re-form (or decline to re-form) the opinion that there was fraud or evasion on the merits without regard to the Commissioner's original opinion. A view which, in turn, stems from some of the propositions established by the administrative law cases dealing with the function and powers of the Tribunal, such as:[17]

- the Tribunal's exercise of its review jurisdiction is a 'fresh exercise of administrative power';[18] and
- the Tribunal is required to determine whether the decision under review is the correct or preferable one on the material before the Tribunal at the date of its decision.[19]

However, the decision of the Full Federal Court in *Binetter v Commissioner of Taxation* (2016) 249 FCR 534 (Siopis, Perram and Davies JJ) makes it clear this view is not entirely correct – the evidentiary burden imposed on taxpayers by s 14ZZK of the TAA means that the Commissioner's original opinion is relevant to the Tribunal's review.

There were four appeals before the Court in *Binetter*: three involving decisions of the Tribunal in respect of members of the Binetter family and the final appeal being in respect of the orders made by Rares J in *Bai v Federal Commissioner of Taxation* [2015] FCA 973 on appeal against an earlier decision of the Tribunal. One issue that was common to each of the appeals by Mrs and Mr Binetter, and Mrs Bai, involved the question of whether the Tribunal was required to form its own opinion on the question of fraud or evasion, or whether it was for the taxpayer to prove that the condition for the exercise of the amendment power was not met, either by proving that the Commissioner had amended the assessments without forming such an opinion or by proving that there had been no fraud or evasion.

Justices Perram and Davies, with whom Siopis J agreed on this issue, concluded that the effect of s 14ZZK of the TAA was such that it was for the taxpayer to prove that there had been no fraud or evasion. Their Honours stated at [93]:

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[17] There was also judicial authority to support this view. See, for instance, *Federal Commissioner of Taxation v Swift* (1989) 20 ATR 1434 at 1446 per French J: 'It was, rather, bound to consider the relevant facts provided on the evidence before it and to decide on the basis of those facts what was the correct or preferable decision… In that process it was neither entitled nor required to place weight upon the fact that the Commissioner had exercised his discretion in a particular way…'.

[18] *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943-944.

[19] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 per Bowen CJ and Deane J; see also *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943 and *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 35 FCR 284, 297 per French J (as his Honour then was).

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> 93. … Although the Tribunal re-examines whether, on the evidence before it, there was an avoidance of tax due to fraud or evasion, and is able to substitute its opinion for that of the Commissioner, the issue for the Tribunal is whether the taxpayer has discharged the onus of showing that the opinion that there was fraud or evasion should not have been formed, and therefore, that the statutory condition for the power to amend is not satisfied. Unless the taxpayer discharges that onus, the assessments are not shown to be excessive and the effect of s 14ZZK is that the Tribunal must affirm the amended assessments, such assessments having been made by the Commissioner in compliance with statutory requirements: *McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284 at 303; *Millar v Commissioner of Taxation* (2015) 67 AAR 490. In *Millar* Griffiths J correctly held that on a merits review before the Tribunal, the onus of proof imposed by s 14ZZK places on the taxpayer the burden of disproving fraud or evasion.

Special leave to appeal was refused by the High Court in *Margaret Binetter for the Estate of Erwin Binetter v Commissioner of Taxation; Binetter v Commissioner of Taxation; Bai v Commissioner of Taxation* [2017] HCATrans 126 (16 June 2017).

3.1.5 Difficulties in Challenging the Commissioner's Opinion on Fraud or Evasion before the Tribunal

Some commentators have begun to ask whether *Binetter* has resulted in the Commissioner's opinion on fraud or evasion being unchallengeable.[20] On a more moderate note, Deputy President O'Loughlin of the Administrative Appeals Tribunal has outlined the difficulties in challenging the Commissioner's opinion on fraud or evasion before the Tribunal in light of *Binetter* twice – first, in *Re Nguyen and Commissioner of Taxation (Taxation)* [2016] AATA 1041 at [29]-[35] when the Deputy President was still a Senior Member and again in *Re LDGL and Commissioner of Taxation (Taxation)* [2017] AATA 2779 at [50]-[54].

In *Re LDGL and Commissioner of Taxation (Taxation)*, Deputy President O'Loughlin stated:

> 50. The Respondent says that the Applicant bears the onus of providing evidence that satisfies the Tribunal as to the cause of the tax shortfall, and that cause did not constitute fraud or evasion. Further, the Respondent contends that that has not been done.
>
> 51. The decision in *Bai* is relevant in these circumstances. That decision was the subject of the appeal decision in *Binneter & Ors* (sic). Perram and Davies JJ begin their decision to the effect that a taxpayer carries the onus of showing that there was no fraud or evasion or that the Respondent had not formed the requisite opinion, and explain that there is no onus on the Respondent to show that the assessment was correctly made; and that while this Tribunal can re-examine whether, on the evidence before it, there was fraud or evasion, and can substitute its opinion for the Respondent's, the issue for this Tribunal is whether the taxpayer has discharged the onus of showing that the fraud or evasion opinion should not have been formed. If a taxpayer does not do that, the amended assessments stand.
>
> 52. The manner in which a taxpayer would achieve such a goal in an income case depends on the particular circumstances. A taxpayer could demonstrate there was no omission of income and therefore no avoidance of tax. Alternatively, a taxpayer could demonstrate that the amounts, while assessable, were not included in assessable

[20] Murray Shume, 'Forming an opinion of "fraud or evasion" – is this the Commissioner's unchallengeable right to an unlimited amendment period?' (April 2017) *Australian Tax Law Bulletin* 3.

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> income returned for a reason that shows that while there was a shortcoming, it was a shortcoming that fell short of a blameworthy act in the *Denver Chemical* sense.
>
> 53. Provided the Respondent has formed the requisite opinion, in an income case, the effect of the *Binneter* decision, and those on which it is based, may well be to make a fraud or evasion finding unchallengeable independently of the challenge to the assessability of the relevant amount. If that is so, that is not a matter that the Tribunal can alter. Thus the Applicant's contentions at paragraph [48] above, in the present circumstances. cannot be accepted
>
> 54. Where the character of an amount remains unestablished and the taxpayer has not proven the amount is not assessable, it is difficult, if not impossible to:
>
> (xx) form any view as to the level of shortcoming, if there be one;
>
> (yy) form a view as to whether there has been an innocent mistake or a blameworthy act; and
>
> (zz) say that the taxpayer has demonstrated that there was not fraud or evasion.

What is clear from the Deputy President's comments is that it will be difficult to challenge the Commissioner's opinion on fraud or evasion before the Tribunal. However, the Deputy President does not go so far as suggesting that the opinion cannot be challenged separately from the substantive liability to tax. Rather, the Deputy President expressly leaves it open for a taxpayer to lead evidence that proves that, to the extent that there is a shortcoming in the payment of tax, it was a shortcoming that fell short of the type of blameworthy conduct necessary to constitute evasion. However, as noted by the Deputy President, that will be inherently difficult to do in what are, in effect, 'burden of proof' cases such as *Nguyen* and *LDGL*.

In cases such as *Nguyen* and *LDGL*, where the taxpayer is required to account for the character of certain amounts or deposits, the taxpayer will need to lead evidence as to the character of those amounts. Where the evidence is found to be unsatisfactory, as it was in both *Nguyen* and *LDGL*, it would make it difficult, if not impossible, for the taxpayer to then lead separate evidence suggesting that their failure to return the amounts as assessable income was innocent, due to inadvertence or mistake. Therefore, it is relevant to note that in *Nguyen* the principal evidence relied on by the taxpayer was described as 'an uncorroborated assertion of an improbable source of funds' (at [17]). In *LDGL*, the reconstructed financial accounts relied on by the taxpayer could not be accepted as accurate (at [18]-[20]), and the taxpayer struggled to explain the provenance of deposits during cross-examination (at [29]-[30]).

However, outside of simple burden of proof cases where the taxpayer fails to produce probative evidence, it seems reasonable to assume that it would be open to a taxpayer to prove that their underpayment of tax was not deliberate and blameworthy so as to constitute evasion. How that may be achieved will depend on the facts and circumstances of each case. However, it may be of interest to note that the case of *Re Mano and Federal Commissioner of Taxation* [2010] AATA 289 (SM Sweidan) suggests that, in some cases, character references could have a role to play (at [65]-[66]):[21]

> 65. In *Denver Chemical Manufacturing Co* Dixon J referred to conduct amounting to "evasion": "an intention to withhold information lest the Commissioner should consider the taxpayer liable to a greater extent than the taxpayer is prepared to concede". In other words, an intention to pay less tax than the taxpayer knows he or she would be liable

[21] Although this case was relevantly decided before *Binetter* and therefore should be read in that context.

> to pay, if full disclosure were made. There is no evidence that applicant had any such intention, or that she knew at any relevant time that additional tax, over and above UK tax already paid, would be payable in Australia. (In fact, in some years the UK tax credit exceeded the Australian tax). It was never put to her in cross-examination that she knew that additional Australian tax would be payable. Her evidence that she did not believe that any further tax, in addition to the UK tax, would be payable was unchallenged, uncontradicted, and in the view of the Tribunal inherently credible.
>
> 66. There are before the Tribunal three character references which attest to the applicant's integrity and honesty, and that it would be out of character for her to deliberately conceal income which she knew was subject to Australian tax, or do anything which might impugn her good name. Two High Court decisions *Attwood v R* (1960) 102 CLR 535 at 359 and *Simic v R* [1980] HCA 25; (1980) 144 CLR 319 at 333 make it clear such evidence has a twofold relevance and that it should not be "downgraded", or treated as having little weight. See also *Wedd v R* (2000) WASCA 273 at [14] - [25]. [Emphasis added.]

3.1.6 Examples of Judicial Review of the Commissioner's Opinion before the Federal Court

Despite the grounds for judicial review appearing to be reasonably limited (refer to the discussion of *Avon Downs* under heading 3.1.3 above), there are examples of where a taxpayer has successfully impugned the Commissioner's opinion with respect to fraud or evasion in taxation appeal proceedings brought under Part IVC of the TAA before the Federal Court. *Fitzroy Services Pty Ltd v Federal Commissioner of Taxation* [2013] FCA 471 (Edmonds J) is one such case. *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 (Hill J) is another.

Relevantly, neither Edmonds J in *Fitzroy Services* or Hill J in *Evans* found it necessary to analyse the Commissioner's opinion closely for errors of the kind described in *Avon Downs*. Rather, if anything, the judgments in those cases suggest that their Honours held that the respective opinions were infected with legal error because, as a matter of impression, the wrong test must have been applied for the Commissioner to have characterised the facts in those cases as evasion.

In *Fitzroy Services* at [52], Edmonds J reproduced an extract from the Commissioner's reason for decision, which set out the Commissioner's reasons for forming the opinion that there had been evasion:

> 33. You claimed deductions for interest and bank fees and charges paid to Hua Wang Bank Berhad and Hua Wang Finance Limited. These amounts were transferred through the bank accounts of these entities and then repatriated to you under the cover of drawdowns on a loan. This arrangement is considered to be a sham.
>
> 34. The arrangement was structured in such a way that it hid the true nature of the transactions. There is no evidence that loan funds were received for working capital purposes.
>
> 35. The facts indicate that your directors controlled and implemented the arrangement and understood their actions. It is considered that your directors understood that structuring the arrangement in this way and using offshore entities would disguise their activities and provide a veil of legitimacy to the accounts.
>
> 36. You have not provided any evidence to substantiate the deductions for management fees. Further information in relation to the management fees was requested on 31 January 2011. In your response dated 1 March 2011 you advised that you do not have any invoices, contracts or agreements for these services. You advised that the fees

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> were paid to associated companies in the Heasman Group and were calculated by reference to the actual Group costs incurred and related accounting costs. However, you have not provided any costing figures or worksheets to show how the management fees were determined.
>
> 37. During the audit it was determined that there was evidence of evasion based on the factors described in paragraphs 33 to 36 above. It is considered that there was sufficient basis for the Commissioner to form this opinion and the Commissioner was therefore able to amend your assessment for the 2004–05 financial year at any time.
>
> 38. In your objection you contend that you have not engaged in fraud or evasion. However, you have not provided any evidence or information in your objection to establish that evasion did not occur.

His Honour observed that '[in] the absence of further elaboration, I have no alternative but to assume that these matters alone found the basis of the Commissioner's opinion' (at [53]). In light of his Honour's conclusion that the loans between Hua Wang Bank Berhad and Heasman Sales were not shams, his Honour stated that the 'whole foundation of the Commissioner's opinion… falls away' (at [53]). This was sufficient for his Honour to conclude that the Commissioner's opinion that evasion had occurred in respect of the deductions claimed for management fees in the year of income ended 30 June 2005 was 'flawed and infected with error' (at [54]).

In *Evans*, the question arose whether the Commissioner was authorised to amend the taxpayer's assessment in respect of the 1977 year in circumstances where the taxpayer had appended a note to his return that indicated that he pursued an interest in horseracing and greyhound racing betting as a hobby and social activity, and that as a result of pursuing his hobby he had winnings exceeding losses of an amount 'not exceeding' $33,000 for that year. After Hill J observed that '[it] was not seriously contended' that the facts of the case constituted fraud, his Honour went on to cite *Denver Chemical Manufacturing* and observe in relation to evasion:[22]

> In the present case it was virtually conceded by counsel for the Commissioner that s.170 did not authorise the issue of an amended assessment in the 1977 year. The concession, if made, would, in my view, have been correct. The taxpayer in his return disclosed gambling wins "not exceeding" $33,000. In fact the asset betterment assessment in respect of that year was erroneous in any event because it had proceeded on the assumption that the applicant had no assets at all at the commencement of the 1977 year, when in fact the bank records disclosed something in excess of $15,000 in assets held at the commencement of the year.
>
> In my view whatever the meaning of "evasion" it cannot be said in the present circumstances that the avoidance of tax, if there was one, was a result of fraud or evasion on behalf of the applicant.
>
> It follows that the applicant is successful in his appeal in relation to the 1977 year.

3.1.7 Are There Any Obligations on the Commissioner with respect to his Opinion?

It is now settled that the Commissioner bears no onus under the tax law to prove that his opinion that there was fraud or evasion was justified as a matter of fact. However, there might be other considerations outside of the tax law that require the Commissioner to consider the basis for his opinion, and to disclose the basis for it, as part of tax litigation.

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[22] *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 at 938.

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In the ordinary course, the party that alleges fraud or other forms of serious misconduct must plead it specifically and with particularity.[23] Although an appeal statement might not strictly be 'pleadings',[24] it seems reasonable to assume that a Court would expect any allegations of serious misconduct, such as fraud, would be outlined in sufficient detail so as to give a proper understanding of the Commissioner's position – albeit without imposing any burden of proof on the Commissioner. The question is whether such an obligation would extend to the Commissioner's opinion regarding 'evasion'. After all, it is unclear to what extent these principles apply to making allegations of sham in light of the High Court's decision in *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 at [36] (Gleeson CJ, Gummow and Crennan JJ) that sham will sometimes, but not always, involve a suggestion of fraud.[25]

Similarly, any counsel acting for the Commissioner will need to be cognisant of their obligations under rule 65 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*:

> 65. A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
>
> (a) available material by which the allegation could be supported provides a proper basis for it; and
>
> (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

Finally, there might be circumstances in which a taxpayer will seek further particulars of the Commissioner's opinion on fraud or evasion[26] – although such a request might not always be granted.[27] A request of this type is more likely to succeed where the taxpayer is seeking to establish that the Commissioner's opinion is vitiated by legal error on the basis of traditional judicial review grounds given that challenge must be mounted based on the material before the Commissioner. The function of the Tribunal on review means that a request for particulars is less likely to succeed in proceedings before the Tribunal.[28]

3.2 Constitutional writs and ancillary relief under s 39B of the *Judiciary Act 1903* (Cth)

In the past few years, there have been a number of cases in which taxpayers have sought to challenge assessments that were made pursuant to the Commissioner's ability to amend out of time

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[23] *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [26] (French CJ, Gummow, Hayne and Kiefel JJ). See also rule 16.42 of the *Federal Court Rules 2011* (Cth).

[24] *BAE Systems Australia (NSW) Pty Ltd v Federal Commissioner of Taxation* [2008] FCA 48 at [18]-[19] (Stone J).

[25] Cf *Pacific Exchange Corporation Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 300 at [48] (Logan J) who stated that an allegation of sham is 'tantamount to fraud'.

[26] As to the Commissioner's obligation to provide particulars generally, see *Bailey v Federal Commissioner of Taxation* (1977) 136 CLR 214 at 217 (Barwick CJ), 219 (Gibbs J) and 221 (Mason J). See also *Jackson v Federal Commissioner of Taxation* (1989) 87 ALR 461 at 469-470 (Gummow J).

[27] *Vai v Forgie* [2003] FCA 87 (North J) in the context of a request for particulars made in an application for review by the Tribunal.

[28] As to which, see the comment regarding the Tribunal's refusal to order particulars in *Binetter v Commissioner of Taxation* [2016] FCAFC 163 at [84].

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by reason of forming the opinion that there had been fraud or evasion under s 39B of the *Judiciary Act 1903* (Cth). To date, all have been unsuccessful – and there is no reason to expect that pattern of lack of success will change any time soon.

The reason for this lack of success largely stems from the inability of the taxpayers to identify sufficiently egregious conduct or errors in the process of assessment that would bring their case within one of the two categories of jurisdictional error identified by the High Court in *Federal Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 that is capable of, in effect, nullifying the existence of any 'assessment'. Consistent with the judgment of the plurality in *Futuris* (2008) 237 CLR 146 at [25] and [49]-[61], it now appears to be settled that the categories of jurisdictional error that can be relied on to impugn an assessment in proceedings brought under s 39B of the *Judiciary Act 1903* (Cth) are limited to conscious maladministration,[29] and tentative and provisional assessments.[30] Where jurisdictional errors of this kind are established, the consequence is that the documents that purported to be assessments, but were not assessments, would not have its validity protected by s 175 of the ITAA 1936[31] and the conclusive evidence provision in s 350-10 of Sch 1 to the TAA would not apply.

However, taxpayers have struggled to show that the formation of the Commissioner's opinion as to fraud or evasion miscarried in a way that would constitute conscious maladministration:

- The claim by the taxpayer that the Commissioner had used material obtained for an improper purpose under an agreement for the exchange of information with another country in reaching the opinion that there had been fraud or evasion did not establish conscious maladministration that vitiated the assessments made in reliance on those opinions: see *Gould v Deputy Commissioner of Taxation* [2017] FCAFC 1 at [75]-[78] (Robertson J, with whom Gilmour J agreed).
- Conscious maladministration was not established where the Commissioner did not re-form an opinion as to fraud or evasion at the objection stage where that opinion was previously formed: *Hii v Federal Commissioner of Taxation* [2015] FCA 375 at [101]-[102] (Collier J).[32]

More recently, in *Chhua v Commissioner of Taxation* [2017] FCA 1127 (Davies J), a taxpayer brought proceedings under s 39B seeking orders quashing the Commissioner's fraud or evasion opinion, and quashing the amended assessment as being invalid for lacking the power to make them absent the valid opinion having been formed. The taxpayer did not in that case attempt to frame its pleadings by

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[29] Which is a serious allegation, which should not be made lightly: see *Futuris* at [60].

[30] See, for instance, *Roberts v Deputy Commissioner of Taxation* [2013] FCA 1108 at [42] (Besanko J) and *Commissioner of Taxation v Bosanac* [2016] FCA 448 at [31] (McKerracher J).

[31] Section 175 of the ITAA 1936 provides that: 'The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'. The equivalent provision for indirect taxes is at s 155-85 of Sch 1 to the TAA.

[32] This case concerned s 169A of the ITAA 1936, which provides: 'In determining whether an assessment is correct, any determination, opinion or judgment of the Commissioner made, held or formed in connection with the consideration of an objection against the assessment shall be deemed to have been made, held or formed when the assessment was made'. Although not the subject of any discussion in *Hii*, s 169A(3) would presumably enable the Commissioner to form an opinion as to fraud or evasion in the course of deciding an objection if the Commissioner had otherwise issued the assessment that was the subject of the objection out of time (*Federal Commissioner of Taxation v BHP Billiton Finance Ltd* (2010) 182 FCR 526 at [48]-[50] (Edmonds J, with whom Sundberg and Stone JJ agreed)). Arguably the Tribunal would also be able to form an opinion on review (by analogy, see *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 at 453-454 (Lockhart, Wilcox and Burchett JJ)).

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reference to the two categories of jurisdictional error outlined in *Futuris*, but rather proceeded on the 'misconception that the errors identified in forming the requisite opinion would have the effect of nullifying the assessment by reason that the power to issue the amendment assessments was conditioned upon the Commissioner forming the requisite opinion before amending the assessment' (at [12]). Her Honour concluded that s 175 of the ITAA 1936 provided a complete answer to the taxpayer's application, 'with the consequence that such errors do not found a complaint for jurisdictional error and do [not] render the amended assessment invalid'.

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