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SESSION 10/3:

## Fraud and Evasion

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34<sup>th</sup> National Convention, 13-15 March 2019, Grand Chancellor Hotel Hobart



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## Section 170(1) item 5

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- Commissioner may amend an assessment:

*“at any time if he or she is of the opinion there has been fraud or evasion”*

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## Road-map

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- Policy in favour of a time limit?
  - Certainty
  - Closure
- 2 or 4 years to close off tax assessments
  - Some specific exceptions; and
  - Commissioner may amend an assessment at any time if ... of **opinion** there has been **fraud** or **evasion**

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## Origin

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- Other taxes used “fraud” & “evasion” for different reasons:
  - Customs
  - Stamp, gift and death duties
- Federal income tax:
  - ITAA 1915 – unlimited amendment period
  - ITAA 1922 – introduced 3 year amendment period, except in case of fraud or evasion

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## The current issues

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- All centres on the fact it is an OPINION that matters
- Perception of overuse of F/E findings
- Changes to processes for F/E findings
- Practical limits to stopping F/E findings before made
- Transparency of internal review process
- Effectiveness of appeal and review

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## What is “fraud”?

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- Concept is less used, as “evasion” is lower threshold
- Requires a false statement or representation, with:
  - Knowledge that it is false; or
  - Without genuine belief in its truth; or
  - Recklessly careless whether true or not.

:*Bui v FCT* 2008 ATC ¶10-038, [18]

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## What is “evasion”?

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- Dictionary definitions have shades of meaning
  - Careful with old cases, non-income tax cases, dictionaries
  - Eg the confusion about “evasion” of customs duty after *Wilson v Chambers & Co P/L* (1926)
- Context of specific income tax laws over the years
  - have favoured one view, and
  - there is a classic expression of that view ...

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## Denver Chemicals: Evasion (Dixon J)

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- Unwise to define, but ... means more than:
  - “avoid”
  - mere withholding information
  - mere furnishing misleading information
- Some blameworthy act or omission by:
  - t/p, or
  - Someone for whom t/p answerable
- Eg - intention to withhold info, lest Commissioner impose more tax

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## The real problem

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- Depends on Commissioner's opinion
- Difficult to review in AAT or FCA
- Care with old cases about reviewing opinion
- Covert audit - amended assessments before taxpayer aware
- ATO response – including FE panel (PSLA 2008/6)

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## Reviewing FE opinion in court

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- Cannot judicially review – except *Futuris* exceptions:  
*Chhua* [2018] FCAFC 86
- So Part IVC appeal is needed
- Then can only attack on administrative law grounds
- Cannot simply go into the facts without showing error of law

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## Reviewing FE opinion in AAT

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- See Hanger QC in *Hourigan* [2018] AATA 3369, [10]-[11]:
  - Onus of proving the opinion was objectively wrong
  - Must disprove F/E --- \*AAT does not itself re-form opinion (*Binnerter*)
  - Not enough to show one or 2 items in an assets betterment assessment are wrong
- Can't get particulars of F/E: *Binnerter* (2016) 249 FCR 534, [84]
- Can't challenge validity of assessment: *Nguyen* 2016 ATC ¶10-442

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## So – try to avoid litigating F/E

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- Practical problems:
  - Convert audit – taxpayer's voice not heard
  - Whether externals on FE panel
  - Whether any way to have taxpayer's voice heard on FE panel
  - Once opinion formed – a government department has decided the client is a fraudster – how to engage
  - Changes to Tribunal function - harder for taxpayers to have an effective voice

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## Practical examples – no FE

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- Little-known TBR decisions – examples where no FE
  - From a different era
  - Some ATO and social changes
  - But human beings remain fallible in a million different ways ...

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## 8 CTBR Case 1

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- The unsuccessful land developer (?)
- Took advice from accountant, accountant referred it to his principal
- Accountant considered mode of accounting for land sales of subdivision was conventional
  - Differed from ATO internal policy
  - Didn't ask ATO

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## 8 CTBR Case 1 (cont'd)

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- No F/E
- No evasion as t/p acting in accordance with advice
- Not unreasonable to follow competent a/cnting advice
- No obligation to seek ATO advice
- Accounting method arguably supportable, and in the long correct here as made loss overall

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## 8 CTBR Case 2

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- Sold land within 2 months of purchase
- Made a profit
- Before CGT – did not return profit
- ATO said the t/ps–
  - knew of the under-bidder (in a loose sense, as no auction) and
  - intended to sell to the under-bidder – therefore profit making scheme of undertaking

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## 8 CTBR Case 2 (Cont'd)

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- No F/E
- No history of property speculation – in fact quite the opposite
- Bit rich to think they would have acted on a speculation of trying to on-sell the the under-bidder

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## 8 CTBR Case 3

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- The local store-keeper/baker in the country
  - Few records
  - Kept balances with customers by posting updated balance on the monthly invoice – no other record (ie could not date sales except by receipts)
  - Returned as best could on cash basis
  - Disclosed limited records to ATO on lodgement by accountant
  - Self-consumption figures under ATO scale

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## 8 CTBR Case 3 (Cont'd)

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- No F/E
  - Disclosed problems with records on accountant's lodgement of returns
  - ATO accepted the returns made on that basis (full assessment environment)
  - Cash basis was arguable at time of transactions – case law developed later though
  - Self-consumption in that locale was proved to be the correct allowance

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## 8 CTBR Cases 4 & 5

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- Son and mother respectively of deceased, dishonest farmer
  - Non-disclosures of amounts from entities in which they didn't know they had a profit
  - Son was a young man
  - Returns prepared by accountants simply left blanks for amounts from partnerships
- No F/E

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## 9 CTBR Case 1

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- Omitted interest from a mortgage
- Mere inadvertence is not F/E

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## 10 CTBR Case 1

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- Horse trainer
- Omitted winning bets
- Omitted share in an arrangement involving a horse related sweep
- Whilst betting was systematic and probably a business – no F/E, room for difference of views, no apparent attempt to evade

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## What to do?

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- If possible – avoid a finding of F/E by any means possible
- If possible – get your client's views before FE panel somehow
- If F/E found by Commissioner –
  - Try to resolve before court or AAT
  - Be aware of the stress this places on client
  - Be aware of the sensitivity within ATO to such findings
- Only if there is no other reasonable alternative - litigate

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# Thank you

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