

SCENARIOS

ETHICS IN TAX PRACTICE

Table of Contents

1	How does a model litigant behave?.....	1
1.1	Losing an appeal when the other side doesn't turn up.....	1
1.2	Losing an appeal when the other side does turn up	2
2	The unlooked-for gift.....	3
2.1	Harman obligation – direct use	3
2.2	Trying to overcome Harman obligation – issue of notice.....	4
2.3	Dob-in lion	4
3	Ms Actor v ATO.....	5
3.1	Ms Actor's counsel	5
3.2	Commissioner's counsel	6

1. These scenarios are to be read before the seminar, as you will be asked to contribute to the discussion. Footnoted references need not be read. In each case, the last footnoted hyperlink is to a free resource.
2. All scenarios are a work of fiction. It is not suggested that anyone would act improperly. Facts are deliberately exaggerated, to generate discussion and hone instincts.

1 How does a model litigant behave?

1.1 *Losing an appeal when the other side doesn't turn up*

3. You are instructed to defend the taxpayer's appeal to the Federal Court from the AAT.
4. In looking over the submissions already filed, you see the appellant taxpayer has a good point.
5. The point below was about depreciation. Farm equipment, on which depreciation had been claimed for several years, had been accidentally destroyed (but had admittedly immediately been replaced in order to continue business).
6. The taxpayer represented himself below, as his tax agent had since died. The taxpayer argued that the equipment was destroyed, and it was absurd that he should be taxed because of that.

7. Neither side drew the Tribunal's attention to a rollover.¹
8. In looking at the tax return in the appeal book, you consider the deceased tax agent relied on the rollover (given the way she made up the tax return).² The rollover would have been a complete answer to the amended assessment, in the Tribunal.
9. The appellant bears the onus of demonstrating error.³ The Court can act on a point of law not argued below.⁴
10. Leading up to the trial, the taxpayer sends the registry and your solicitor a note, stating that he has decided not to appear on the hearing.
11. Do you seek instructions to concede the appeal?
12. Is your position different from counsel instructed by a private party?⁵
13. Now, what if you were left in doubt, from the tax return, as to whether the necessary "choice" under s 40-365 had been made?

1.2 Losing an appeal when the other side does turn up

14. Same as above, as to the taxable facts, the return, and the conduct of the matter before the Tribunal.
15. But before the Federal Court the taxpayer is competently represented by counsel, and is determined to run the matter to trial.

¹ [Section 40-365](#) *Income Tax Assessment Act 1997* (Cth).
(Typically, the economic effect of a rollover is to defer recognition of an amount, either by deeming an event not to have occurred, or ignoring the occurrence of the event.)

² The "choice" required by this provision can be made by making up the tax return accordingly. See Woellner *et al.*, *Australian Taxation Law*, 28th ed. (OUP, Melbourne, 2018), ¶30-165.

³ *Finn v Commissioner of Taxation* (1960) [103 CLR 165](#); [\[1960\] HCA 69](#)

⁴ *Carpentaria Transport Pty Ltd v Commissioner of Taxation* (1990) [21 ATR 513](#), 516; [90 ATC 4590](#), 4593-4594

⁵ [Legal Services Directions 2017](#) (Cth), at [App.B](#)

16. The taxpayer's counsel has identified, albeit very belatedly, the winning point mentioned at paragraph 8. Submissions have been filed, and it is the day before hearing, when a proposed amended notice of appeal is sent to your instructing solicitors.
17. You had already identified the point as a winner for the taxpayer, but had been instructed, if asked, to run the line that the tax agent (being dead) had been unavailable in the AAT to confirm that was indeed the intent in the way she had drawn the tax return.
18. Do you oppose leave to amend the notice of appeal, citing Part VB of the *Federal Court of Australia Act*?⁶

2 The unlooked-for gift

2.1 Harman obligation – direct use

19. The Commissioner of Taxation sought to recover a tax debt from LittleCo, in the Queensland Supreme Court.
20. In prosecuting its defence, LittleCo filed an affidavit (with one exhibit, a tax invoice), and gave proper disclosure of a document (a “note of meeting”).
21. The proceedings were settled confidentially, and there was no substantive hearing.
22. No affidavit was read, nor any disclosed document tendered in evidence.
23. The Commissioner's in-house legal team have looked at the exhibit (tax invoice), and the disclosed document (note of meeting). They consider that each points cogently to an unrelated company, BigCo, having not returned assessable income on a profitable deal mentioned in those documents.
24. The Commissioner's in-house legal team ask your advice as to how to proceed.
25. They are aware of *FCT v Donoghue*.⁷

⁶ See [s 37M](#) *et seq.*

⁷ (2015) [237 FCR 316](#); [329 ALR 400](#); [\[2015\] FCAFC 183](#)

26. They are concerned by the recent ACT Tribunal Decision in *Canberra Cleaners Pty Ltd v Commissioner for ACT Revenue*:⁸

102. If the Commissioner seeks to use any affidavit material in subsequent decision-making processes that does not form part of the public record, the Commissioner may need to seek the consent of the parties involved and/or seek leave as appropriate.

2.2 Trying to overcome Harman obligation – issue of notice

27. Can you overcome all problems (of implied obligations to the Queensland Supreme Court) by issuing notices to LittleCo, requiring production of their copy of the material mentioned under heading 2.1.
28. Your interlocutor has read a recent Full Federal Court decision. The Full Federal Court considered that the *Harman* obligation was overcome by such a notice. You are aware of this case.⁹
29. The Full Court’s reasons discuss less positive decisions of the Full Family Court and NSW Court of Appeal. The Commissioner’s obligation is owed to the Queensland Supreme Court, here.

2.3 Dob-in lion

30. A disaffected lawyer arranges to meet a senior ATO officer near the “more Westerly lion” in King George Square.
31. She offers to hand the ATO officer a packet, containing what she assures him are confidential legal advices about the transfer pricing position of a multi-national company, GiantCo.

⁸ [\[2018\] ACTSC 208](#), [102]

⁹ *DCT v Rennie Produce (Aust) Pty Ltd (in liq)* [2018 ATC ¶20-650](#); [\[2018\] FCAFC 38](#), [36]

32. The ATO officer rings you from King George Square, asking whether to accept the parcel.¹⁰
33. Alternatively, he rings you moments after he has got back to the office, and having skimmed the contents of the parcel.

3 Ms Actor v ATO

3.1 Ms Actor's counsel

34. Ms Actor presents, with her solicitor, for advice in conference.
35. Last week she received 10 years of amended assessments.
36. Most were made outside the 4 year limit because of her alleged fraud in not reporting foreign income whilst she was allegedly resident.
37. She had already given ATO statutory declarations from independent witnesses, showing she has no connection with Australia. She and her family moved overseas 20 years ago, to further her acting career.
38. But she files, is assessed on, and pays, an Australian tax return every year, as she has some Australian royalty income.
39. The amended assessments issued whilst Ms Actor was in Australia to fulfil an engagement at an awards night.
40. A departure prohibition order¹¹ (*DPO*) prevented her leaving yesterday.
41. An officer handed the DPO to her at the departure gate.
42. Channel 6 was there to film her screaming at him and then being refused boarding by airline staff. (The words “Don’t you know who I am?” are distinct, doing her diction coach much credit.)

¹⁰ Does a recent HCA case bear on this, AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [\[2018\] HCA 58?](#)

¹¹ Under [Part IVA](#) *Taxation Administration Act 1953* (Cth)

43. There has been a deal of bad blood between Ms Actor and the audit team. The correspondence (briefed) has been fraught, each side accusing the other of unseemly actions.
44. The ATO's allegation of fraud is the last straw for her.
45. Ms Actor has consulted "Dr Google", and insists you apply for lifting of the DPO based on misfeasance in public office.
46. You are very concerned.
47. The assessments will not be valid if raised as an action of conscious maladministration.
48. But evidence of that would be at a premium, as the Commissioner's office is generally bullet-proof on that issue.¹² You are very concerned about making such an allegation in light of *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd*.¹³
49. Advise.

3.2 Commissioner's counsel

50. By the time the matter comes to you, Ms Actor has filed her appeal against the DPO, incorporating an application for review under s 39B in relation to the amended assessments.¹⁴
51. The paperwork appears professionally drawn, but Ms Actor's details appear as the address for service.
52. The initiating process attacks the amended assessments and DPO on the basis that they are invalid, and alleges "conscious maladministration" in public office in relation to the creation of the assessments and DPO. It points to the amended assessments for older years

¹² *Commissioner of Taxation v Donoghue* (2015) [237 FCR 316](#); [329 ALR 400](#); [\[2015\] FCAFC 183](#); *Anglo American Investments Pty Ltd v DCT* (2017) [347 ALR 134](#); [105 ATR 35](#); [\[2017\] NSWCA 17](#), [15]-[19], [53]-[54]; *Chhua v FCT* [\[2018\] FCAFC 86](#), esp. [29]

¹³ (2017) [261 CLR 509](#), [341 ALR 46](#), [\[2017\] HCA 6](#), at [80]

¹⁴ [Section 14V](#) *Taxation Administration Act 1953* (Cth) permits this.

as being out of time. The paperwork is a cluster of administrative law attacks. But the evidence is thin, simply reciting the bare facts at paragraphs 35-43.

53. How do you tackle the hearing in the Federal Court tomorrow?
- (a) Ms Actor, ostensibly self-represented, is plainly getting legally qualified assistance.
 - (b) The Commissioner is incensed at the allegation of conscious maladministration. He claims he has an informant against Ms Actor.
 - (c) The informant cannot be produced.
 - (d) Instead, you are considering simply tendering the assessments for their evidentiary value.¹⁵
 - (e) This is proving an expensive appeal to defend. Can you seek costs against the true drafter of the notice of appeal and affidavits?¹⁶

David W. Marks QC

Chambers

10 December 2018

¹⁵ Under *Taxation Administration Act 1953*, schedule 1 [s 155-85](#), “The validity of any assessment of an *assessable amount is not affected by non-compliance with the provisions of this Act or of any other *taxation law.” [Section 350-10\(1\), item 2](#) is the evidentiary provision.

¹⁶ *Levick v Commissioner of Taxation* (2000) 102 FCR 155; [2000] FCA 674, [44]-[45]