Fraud and evasion

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Abstract: Income tax affairs are closed after two or four years. There are many exceptions, but a general exception for "fraud or evasion" causes angst. This exception originated in measures introduced to benefit taxpayers. The beneficial origin is easy to forget when a client is dismayed at being accused by a government agency of "fraud" or "evasion". The article explains the meaning and origin of these expressions, and examples of conduct held to fall on one or other side of the line are given. The facts, not just some oft-quoted paragraphs about the law, need to be understood in the old cases. The article revisits classic High Court cases, and explains forgotten Board of Review decisions, providing illustrations. A difficult legal issue presently is how to challenge the Commissioner's "opinion" that there is fraud or evasion. The article suggests making it an objective test, not depending on an "opinion", and recommends how to handle these problems pending law reform.

Introduction

The policy of the law is that taxpayers with simple tax affairs should be able to treat their tax affairs as closed after two years, and four years otherwise. Outside of those limitation periods, the Commissioner may only amend an assessment if he has formed the opinion that there was "fraud or evasion".[1]

That is a simplistic explanation. There are numerous examples of extended and unlimited amendment periods related to the operation of *particular* provisions. Sometimes those particular exceptions to the above rule about limited time for amendment reflect the particular problems raised by special provisions. I put those to one side.

Fraud or evasion in terms of s 170 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) opens the door to an unlimited time for amendment, regardless of the taxing provisions concerned. Item 5 at s 170(1) simply provides:

> "The Commissioner may amend an assessment at any time if he or she is of the opinion there has been fraud or evasion."

The words "fraud" and "evasion" have a long heritage. The first use in Australasia was in a New Zealand stamp duties law of 1867.[2] However, the present context, relating to opening up periods of review, appears only to have emerged later.

When it emerged in federal income tax, in 1922, it was part of a *beneficial reform* introducing a limited period of amendment. There was no time limit previously.

Recently, there has been chatter that the Commissioner is becoming more inclined to form the opinion that there was fraud or evasion, allowing him to amend taxpayers' assessments outside the review period. The hard statistics about that may not bear that out.

Anecdotally, it seems there are only about 50 actual determinations per year. (This does not count the number of times an amendment for fraud or evasion is mentioned during reviews and audits.) Regardless, the Commissioner has recently provided some visible process and rigour to making formal determinations.

A decision that there has been fraud or evasion raises the stakes for taxpayers under audit. Anyone who has acted for a taxpayer accused of fraud or evasion knows that the accusation stings.

On the other side is a revenue authority suddenly less willing to compromise or discuss matters with someone they regard as having not been straightforward.

The accusation makes the relationship between the parties fraught. Advisers' full skills of persuasion and communication come to the fore, in having both sides look beyond these natural, human reactions.

With the allegation of fraud or evasion incidentally goes a higher level of penalty. This is because behaviour is relevant to penalty; and most likely there is some uplift to the penalty.

With multiple past years of tax assessments, together with a high level of penalty, and interest going back possibly more than a decade, you have an insoluble, monetary problem.

Though perhaps justified, or even required, by the legislation, such assessments and liabilities can themselves be an impediment to progressing the relationship between taxpayer and the ATO. That notwithstanding, experience shows that patient negotiating skills can bring parties closer together. In such difficult negotiations, an allegation of fraud or evasion does not assist.

In my view, modern problems centre on the requirement that the Commissioner form an opinion. The 1922 beneficial amendment, to limit amendment periods, has by steps become practically more difficult to review or appeal. Further, the courts decline to define the word "evasion", which makes it unsuitable as a standard for something with draconian consequences.

The first High Court decision

Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia[3] in 1914 was about the validity of an evasion rule in the former Commonwealth land tax.

Substantial land was transferred for £13,000 by husband to wife, for which she paid £8,000 cash with the £5,000 left outstanding bearing interest at 4%. The facts on which the High Court of Australia proceeded included that:

- the wife had begun to pay down the outstanding balance, having already paid £600 off the £5,000 debt;

- the transfer from husband to wife was intended to pass the property in the land, and property did pass; and
- importantly, one object of the parties was to reduce the amount of tax to which the transferor's land as a whole was liable.

The land tax legislation said that transfers between husband and wife were effectively nullified by deeming husband and wife to be joint owners of all the land owned by either of them, "unless the Commissioner is satisfied that the transfer was not for the *purpose of evading land tax*".

The deeming provision was struck down as unconstitutional, but for a surprising reason. A Commonwealth law (except customs or excise) may only deal with one subject of taxation. A land tax could not be imposed on someone who did not own the taxed land.

However, Barton J deals with the consequence of the Commissioner being judge of whether an impost fell on someone who had not persuaded the Commissioner of an *absence of evasion*:[4]

> "It is true that the Commissioner has power to exempt them from the consequences if he is satisfied that the purpose was not to evade the tax, but this is not to say that the clause means to make the parties immune from the tax if the transaction is an innocent one. *Innocence is no safeguard*, and the liability automatically ensues unless the Commissioner intervenes, and in the absence of such intervention … [the deeming follows] …
>
> Attributing to Parliament, then, a knowledge of the course of … [legal decisions in the Privy Council], *it intended to tax the parties to an innocent transaction unless the Commissioner intervened* …" (emphasis added)

But the power of the Commissioner to determine whether he was satisfied as to an absence of evasion was not the invalidating factor. It was only in 1953, in *Australasian Jam Co*, that an aspect of documenting a fraud or evasion opinion was struck down as invalid (see below).

A customs duty decision

The High Court of Australia next considered the word "evade", in *Wilson v Chambers and Co Pty Ltd*,[5] concerning alleged evasion of customs duty. This 1926 case is a helpful example of facts found *not* to amount to evasion.

The Australian consignee of paint was charged with an offence of evading payment of customs duty.

The paint was shipped on board a steamer from England consigned to Sydney. The ship instead arrived at Port Kembla, omitting to call at Sydney. She arrived at Port Kembla and only remained there 13 hours for the purpose of bunkering, before leaving for Melbourne.

The consignee's representative, and an employee of the ship owners, went to Port Kembla to meet her. The consignee told the ship owner that there was paint on board the ship for the consignee, and the consignee was going to land it there. Port Kembla was an appropriate port under the Customs Act and there was a customs officer in attendance.

The consignee had also been engaged by the ship owner to clear the ship on its behalf for customs.

> *"… it involves something more than a mere omission or neglect to pay the duty."*

While the ship was at Port Kembla, the consignee arranged with the ship that they should buy the paint on terms that it should remain on the ship to be used as required (for painting the ship) and to be paid for as used by the ship. The ship left Port Kembla with the paint, some of which was then used in Melbourne in painting the ship.

The paint was dutiable under the customs tariff. No duty was paid. No entry was made for customs duty purposes. The consignee was charged, relevantly, with evading payment of duty. The magistrate dismissed the charge.

Knox CJ found no evasion:[6]

> "The distinction in meaning between the words 'evade' and 'avoid' in well established, and a charge of evading payment is not made out by evidence which proves no more than that the person charged failed or omitted to pay an amount payable by him. There was nothing to suggest that the agreement to sell the paint to the ship was other than a genuine agreement, nor did the evidence tend to show that the respondents did not honestly believe that in the circumstances it was not necessary to enter the goods or to pay duty in respect of them, or that their intention in selling the goods was to escape payment of duty. In fact the evidence proved no more than an omission to pay duty which was legally payable."

Isaacs J introduces a controversial test of absence of "reasonable grounds" for evasion:[7]

> "If, legally owing the duty, the importer has not merely omitted to pay, but has omitted without any reasonable grounds for withholding payment, he has 'evaded' payment. If, however, he can show any reasonable excuse for omitting to pay, he does not evade payment. He may genuinely and without negligence be unaware of the facts constituting liability; he may have misunderstood a regulation or a law; he may, though perfectly cognizant of all necessary facts, be strongly advised that either on construction or constitutionally the law does not reach him. Such a man does not, in my opinion, 'evade' payment. On the other hand, if his ignorance of facts arises through his own unbusinesslike conduct, so as to be unreasonable in his case want of knowledge is no reasonable excuse."

Higgin J also said something about "evade":[8]

> "To say the least, 'evade' would seem to connote the exercise of will in avoiding; whereas a mere failure to pay may be by accident or mistake."

His Honour rejected the gloss proposed by Isaacs J, being the use of the words "without reasonable excuse". He thought it dangerous to attempt to frame a definition, or to interpose a formula, given that the facts might vary in each case.

Rich J agreed that there had been no evasion, but thought it inexpedient to attempt an exhaustive definition.[9]

Starke J doubted the need for "underhand dealing":[10]

> "Clearly, in my opinion, the word 'evade' in the Act does not necessarily involve any device or underhand dealing for the purpose of escaping duty; but on the other hand it involves something more than a mere omission or neglect to pay the duty. It involves, in my opinion, the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation to pay duty. The circumstances may consist of knowledge, or neglect of available means of knowledge, that the omission to pay is or may be in contravention of the Customs law."

The result was that the paint was found to have been imported. The consignee had failed to enter the imported goods as required by the Act and had failed to pay duty required. But the consignee had not "evaded" payment of duty.

This is an early instance of a definite desire by the courts not to define "evasion". The lack of definition has always been repeated. It is not a useful legal standard for so serious a charge.

The idea of a "reasonable" ground or excuse has not survived. But we will see, in looking at some examples later, that a good excuse or ground often helps.

Evolution of income tax statutes

The *Income Tax Assessment Act 1915* (Cth) did not, by s 33, impose a time limit for amendment to assessments.

The court could only exercise moral suasion, on the Revenue, to discourage amendment at a very distant date after the first assessment. This judge-made guideline to the Revenue was subject to there being "concealment or any other kind of fraud" (*Re The Commonwealth Portland Cement Co Ltd*[11]).

That changed.

The explanatory memorandum to the Income Tax Assessment Bill 1922[12] shows that:[13]

> "This section now places a limit of three years upon the Department within which it may alter assessments, unless the Commissioner has reason to believe the existence of fraud or attempted evasion.
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> It is obvious that any other limitation on the Department to recover tax which has been evaded would seriously prejudice the revenue. Any express of limitation on the Department, except in cases where fraud or attempted evasion exists, would not assist the Department owing to the difficulty in demonstrating fraud to the satisfaction of a court."

Thus, as enacted, s 37(1) contained a second proviso as follows:

> "Provided further an alteration or addition shall not be made in or to an assessment after the expiration of three years from the date when the tax payable on the assessment was originally due and payable, unless the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion."

Moreau v FCT was the first opportunity for the provision to be tested.[14]

It came before Isaacs J, sitting at trial in the High Court of Australia. The question was whether "the Commissioner had power to make the increasing alterations absolutely notwithstanding the expiration of the three years mentioned, or whether he had that power only if he had 'reason to believe' that there had been an avoidance of tax owing to fraud or an attempted evasion".[15]

Isaacs J was satisfied that the Commissioner "had reason to believe" there was an avoidance of tax owing to an attempted evasion. Thus, power plainly existed.

Isaacs J decided that the task of deciding if the Commissioner had reason to believe there had been fraud or an attempted evasion lay with the Commissioner.[16]

The Commissioner's conclusion is not a judicial decision, but an administrative decision. The decision "is not to be preceded by any judicial or quasi-judicial inquiry; it is not, and could not be, subject to any appeal".

The Commissioner's "reason to believe" could be "the result of official information, or his own investigation, or may come from any source he considers reliable".

The Commissioner could, if he thought right, ask the taxpayer for explanation. He might on the other hand think it unnecessary, inadvisable or useless. Crucially, Isaacs J said:[17]

> "Fair play would, of course, usually induce him to give the taxpayer the fullest opportunity to explain, but that is not legally inexorable."

In *Moreau*, the taxpayer was not given an opportunity to explain.

The Commissioner was called to give evidence in his case. He asserted that he had "reason to believe", and "did believe", the necessary fact. He gave particulars of the circumstances inducing the belief.

Isaacs J considered that the Commissioner was open to cross-examination on this evidence. But the cross-examination had to be directed to "ascertaining whether the alleged reason really existed, and, if it did, whether it was so irrational as to be outside the limits of administrative discretion … and as to be really in disregard of the statutory condition".[18]

This is the first expression by the High Court of what has become conventional — that, in the court, you must attack formation of the state of mind.

This large and inconvenient conclusion would have been revisited by the majority in *Barripp*, in the NSW Full Court. But they felt bound by *Moreau.*

So, a strong Full Court of NSW has been silenced by a single High Court judge sitting at trial. In turn, the NSW Full Court's judgment in *Barripp* is cited as concluding the scope of review, in *Denver Chemical*. These are two of the small steps I say have led to the present state of affairs.

Moreau is also instructive because it is an actual, positive finding of *lack of evasion*. The facts can be best gleaned from another report of the case, in *Income tax decisions (Australasia)*:[19]

> "The appellant carried on business as an importer, dealing in goods produced in France. He also sold goods on commission for French principals. The purchases of goods on the taxpayer's own account were always made at a price agreed upon in francs, and such price was accordingly payable in francs, irrespective of the rate of exchange.
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> The taxpayer's books were kept on a sterling basis. When the goods arrived, the actual cost price in francs was entered in one column, and alongside it a price was entered in sterling. This latter price was estimated on the basis of 25 francs to the pound. It happened that before the price became payable the value of the franc fell so that fewer pounds were required to provide for the necessary number of francs. As a result, at the end of one year, there were surpluses in various purchases accounts which were transferred to the credit of a foreign exchange account. The taxpayer treated the amount at the credit of this account as income arising from a source outside Australia, and omitted it from his return … He contended that the price at which the purchases were entered, viz, 25 francs to the pound, being the rate ruling at the date of purchase was correct. The Commissioner ignored the foreign exchange account, and reduced the amount charged for purchases to the amount of sterling eventually and actually used to pay for the goods.
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> As regards commissions, the amounts due to the taxpayer were credited to him half-yearly, and in the ordinary course were available to him within two months of the end of each half-year. The taxpayer however, allowed the commissions to which he was entitled for the two half-years … to remain at his credit until [a later date], when they were used for the purchase of goods. At this date the franc had depreciated to 36 francs to the pound, whereas the rate ruling [earlier], at which date the taxpayer was entitled to draw the commissions … was 26.50. Practically the whole of the commissions for the year … were earned in the first half-year, but in making up the return, all the commissions were converted on the basis of 36 francs to the pound, thus disclosing a lower income.
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> … [The] business was converted into a company. The taxpayer became the governing director, and

> was the controlling shareholder. … [The] whole of the amount … at the credit of the company's foreign exchange account, was by resolution at a general meeting of the company appropriated as a bonus to the taxpayer who contended that it was non-taxable."

Isaacs J found for the Commissioner in terms of date of conversion of the foreign exchange. His Honour also found against the taxpayer in terms of taxability of the distribution by the company of the alleged bonus.

Isaacs J found that the taxpayer and his representative were honest men.[15] This did not, however, deal with whether the Commissioner could not have formed the view that the avoidance of tax was due to fraud or evasion.

The case is thus remarkable in result. An honest trader nevertheless had his income tax assessments upset outside the usual (then) three-year period, on the basis that the Commissioner had not been shown to have improperly formed the view that the avoidance of tax was due to fraud or evasion.

This early case highlights how honest people may nevertheless be branded as frauds, with no effective remedy in the court.

Further early developments

A peculiar case came before the Victorian Supreme Court (Mann J) and then on appeal to the High Court of Australia, called *FCT v Clarke*.[20]

Without descending into the facts, I am unsurprised that the Commissioner formed a view that there had been an avoidance of tax due to fraud or evasion. The interesting point in issue was whether the "attempted evasion" had to occur during the then three years allowed for amendment, or not. Isaacs ACJ said:[21]

> "The attempted evasion might take place at any during the three years, thus misleading the Commissioner during any part of the period open to him to assess unconditionally."

Rich J also considered, though not conclusively, that the wording and structure of the then s 37 of the 1922 Act directed attention to a fraud or attempted evasion during some particular period. His Honour's reasoning depended on the construction of the then provisions. However, his Honour would have required the fraud or attempted evasion to have occurred during the period leading up to assessment, or perhaps during the then period of three years after that assessment was payable.[22]

The other remarkable thing, looking back on *Clarke*, was that the Commissioner again got in the witness box and stated that he held the relevant belief, giving some elaboration on that. Rich J commented:[23]

> "The process of calling the Commissioner as a witness as to his secret beliefs and reasons unexpressed and not communicated to the taxpayer seems a curious proceeding; and *I cannot help thinking that the Legislature intended that the assessment itself should state what reason the Commissioner had for his belief*, leaving the taxpayer to attack its sufficiency if he thought he could do so." (emphasis added)

Considering current authority, that would be a useful suggestion. It is not the current law.

Walters – what usually happens in a fraud trial

In 1936, *Walters v Commissioner of Taxation (NSW)*[24] states that the onus of establishing that there had been avoidance of tax due to fraud or evasion was on the Crown. I do not suggest that is good law today in tax appeals.

It is interesting, since it accords with the normal requirements of other civil litigation. A person alleging fraud should prove it. Further, that person must give adequate notice of why it is said there is fraud.[25]

Instead, nowadays, it would seem invariably the case that the Commissioner will tender the assessment in evidence. Once tendered, it is evidence under s 350-10 of Sch 1 of the *Taxation Administration Act 1953* (Cth) as to the following:

- conclusive evidence that the assessment was properly made; and
- except in appeal proceedings, conclusive evidence that the amounts and particulars of the assessment are correct.

The predecessor provision in the ITAA36 was s 177. Section 175 remains in the ITAA36, and provides that the validity of an assessment is not affected by reason that a provision of that Act had not been complied with.

As we shall see, even in the Administrative Appeals Tribunal (AAT) nowadays, the taxpayer bears the onus of showing that such opinion was not justified. And it has been held that the taxpayer is not entitled to particulars of the opinion.

Walters represented a respectable view in its day, though it has not prevailed in tax appeals today. *Walters* still accords with what occurs more generally in litigation. In light of developments, it may have been preferable for that view to prevail, but it did not.

Barripp

First, I note the involvement of Sir Frederick Jordan in this case. He was one of the strongest judges never appointed to the High Court. His views are accorded respect.

This case is about the then New South Wales income tax. New South Wales had adopted the federal initiative of permitting amendment outside a time limit in case of fraud or attempted evasion, after the decision of the High Court of Australia in *Moreau*.

In the NSW Full Court,[26] Jordan CJ expressed strong doubt about the result in *Moreau*, above. If the matter had been free of authority, Jordan CJ may well have found differently. Particularly strong are the following passages:

> "When liability of the subject to taxation is made to depend upon the volition or the opinion of an official, or of a bureaucratic tribunal, I am of opinion that if the Legislature, in express terms, gives a right of appeal to a Court of Justice in unrestricted terms, the Court should not be astute to find reasons for holding that the Legislature, notwithstanding the generality of its language, intended that same general class of rulings should be sheltered from appeal.
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> …
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> If the matter were free from authority, I should find considerable difficulty in discovering any implication of intention to exclude from the general provision for appeal a provision that the Commissioner may amend an assessment, whatever the lapse of time, if he is of opinion that there has been an avoidance of tax and that the avoidance is due to fraud or evasion. Fraud and evasion are matters which constantly arise for adjudication in Courts of Justice; and the subject matter is not specially and peculiarly administrative, nor is it necessarily involved with matters that are highly technical."

Nevertheless, considering *Moreau*, and what had followed, Jordan CJ felt constrained to follow the High Court of Australia, albeit in the context of NSW income tax. The adoption of the Commonwealth drafting of provisions by NSW pointed strongly to that conclusion.

As with Isaacs J in *Moreau*, Jordan CJ in *Barripp* would not, himself, have found fraud or evasion proved. But the Full Court,

on appeal from a decision of the NSW Board of Review, was not at liberty simply to substitute its own view. Jordan CJ said:[27]

> "I have examined and considered the findings and reasons of the Board, and am of opinion that they contain nothing which indicates or suggests that, in arriving at their decision, they acted capriciously or fancifully or upon legally irrelevant or inadmissible grounds. In these circumstances, the fact that I personally should have arrived at a different conclusion is immaterial …"

The other two members of the Full Court gave their own reasons.

Bavin J would, if it were for himself to decide, have found fraud or evasion.[28] His Honour nevertheless concurred with the Chief Justice's opinion that the court should not be "astute to find reasons for holding that the Legislature, notwithstanding the generality of the language in which it has granted a right of appeal, intended some general class of ruling should be sheltered from appeal".[28] His Honour did not find it necessary to reach a conclusion.

Roper J followed what we would now regard as the conventional approach, finding that the court was restricted to the question of whether the Commissioner was "actually of the opinion". Thus, the "facts on which he formed his opinion, or the grounds on which he holds it" were only material "for the purpose of showing that he could not have formed the opinion at all, or that it is 'so irrational as not to be worthy of being called an opinion by an honest man'".[29]

On appeal to the High Court of Australia,[30] all four High Court judges concluded that the board had correctly concluded that the avoidance of tax was due to fraud or evasion, making it unnecessary to express a view about the limits of any appeal to a court. However, usefully for the purposes of illustration, we do get some details of the evidence which justified the board coming to the view that there had been fraud or evasion. Starke J says:[31]

> "It is conceded in the present case that the appellant was assessable to tax in respect of the sum of £3,924 for the year of income which ended on 30 June 1927. The sum was shown in the revenue account in his books for the six months ended 30 June 1927, as a profit on sale. It was never returned as income, and tax was avoided. The excuse put forward was that the sum represented a balance of purchase money which had not been paid or received by the appellant but had been secured by mortgage. The Commissioner may not have heard, but the Board heard the *confused account of the appellant and his accountant* in relation to the matter, but did not accept the view that the appellant omitted the sum from his return for the reason assigned. The Commissioner and the Board had no doubt, I think, nor have I, that *the sum was knowingly omitted from the appellant's return and was concealed from the tax authorities for many years* … Moreover, the evidence establishes that *in other years the appellant had not made the mistake* now suggested but had returned his profits on the sale of land when he ascertained them." (emphasis added)

Denver Chemical

High Court

The *Denver Chemical* decision is best remembered for a passage in Dixon J's reasons:[32]

> "I think it is unwise to attempt to define the word 'evasion'. The context … 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."

The decision is again about New South Wales income tax law. The NSW Full Court's decision of *Barripp*, above, had not quelled dispute concerning the powers of a court, on appeal from the NSW Board of Appeal.

Thus, *Denver Chemical* is significant in confirming Jordan CJ's view of the limited role of a court on appeal from the NSW Board of Appeal.

The case is unsatisfactory, in a federal context. Jordan CJ in *Barripp* had pointed out that the NSW Board of Appeal had judicial features. This contrasted with the Commonwealth's Board of Review.

It had already been established, in 1925, that the former Commonwealth Board of Appeal was problematic. The Commonwealth had conferred judicial powers on the old Board of Appeal, something that could only be conferred on a court under the Commonwealth's Constitution.[33] Commonwealth tribunals have ever since been given no judicial powers, or have been held invalid. Nevertheless, and despite these distinctions, *Denver Chemical* has been influential. Dixon J said that:[34]

- the amendment provision gave to the Commissioner a discretionary power to say whether there had been, in his opinion, an avoidance due to fraud or evasion;
- the provisions concerning objections and appeals gave to only the Board of Appeal the authority to re-examine that discretion on the merits;
- the New South Wales legislation was based on federal legislation. While another view of the scope of appeal might be possible, authority lay the other way; and
- "long experience of the matter in which discretionary decisions of the Federal Commissioner and Board of Review are dealt with in this Court would be quite enough to convince one that [the contrary argument] … was doomed to failure".

Thus, Dixon J said:[35]

> "If the Board has stated that there has been an avoidance due to evasion it is for the Supreme Court to examine processes by which the Board arrived at that conclusion in order to see whether there has been any error in law or misconception of the Board's duty or any such miscarriage as will show that it cannot stand."

NSW Full Court – Denver Chemical

The High Court in *Denver Chemical* was hearing an appeal from the NSW Full Court. Recall that this was the era when the states also imposed their income taxes.

I will refer briefly to the Full Court's reasons, only to mention what was found by the Board of Appeal to constitute fraud or evasion.

The commodity in question is apparently still made.[36] It is a proprietary medicine still popular in Canada for treatment of muscle and other pains.

The taxpayer was incorporated in New York. It carried on business selling this commodity. It appointed Mr Woodward as its branch manager in NSW and sold the commodity in Australia from that base.

When he arrived in Australia in 1906, he found that NSW income tax was being assessed and paid on a particular basis. A return was made to the NSW Commissioner on the gross amount received each year in respect of sales made in Australia, and the NSW income tax was assessed on the basis of a certain percentage of this gross amount.

An expert, Mr Molesworth, whose advice Mr Woodward obtained on arrival, made returns on this basis on the company's behalf and continued to do so until 1913 when Mr Woodward (or his staff) continued the process of making estimates to save the expert's fee.

There was a change in 1917. Until that point, the product was made up in the United States and sent out to Australia in finished form for sale. In 1917, the company started sending to NSW only part of the ingredients of the commodity. The rest was obtained in NSW. The finished article was manufactured in NSW and sold in NSW and other states.

Mr Duncan, then Mr Woodward's employee who was making up income tax returns, and acting under Mr Woodward's instructions, had an interview with an officer of the NSW Income Tax Department. He explained that Mr Woodward, on the company's behalf, was no longer simply selling the commodity in NSW. It was first manufacturing it here, and then selling it here. He was told by the officer that, until the department instructed otherwise, the return should be made up on the same basis as previously.

That continued until 1923. In 1923, Mr Woodward had a conversation with his neighbour. The neighbour was employed by a company that sold chemicals. The neighbour told Mr Woodward that, in his opinion, the appellant company was liable for NSW income tax only on the gross amount of sales made to NSW customers, not of sales made to persons residing in other states.

Relying on his neighbour's opinion, Mr Woodward, in the returns for NSW income tax from 1923 to 1934 inclusive, omitted from total gross sales all sales made to customers outside NSW.

In his Commonwealth income tax returns, he included all sales made to persons anywhere in Australia. The NSW Commissioner continued to assess the company for NSW income tax on the basis of a percentage on gross sales.

In 1938, Mr Woodward sent to the NSW Commissioner a return intended for the Federal Commissioner.

This return showed gross sales for the whole of Australia. This aroused the NSW Commissioner's suspicions. An investigation led to amended assessments made in 1941, for the years ended 1923 to 1934 inclusive. These amended assessments were made not on the basis of a percentage of the gross sales in Australia, but on the basis of the tax payable according to the results of an ordinary profit and loss account.

The question for the Commissioner, and then for the Board of Appeal, was whether there had been an avoidance of tax due to fraud or evasion.[37]

> *"… seeking to prevent the Commissioner from applying his mind to some debatable question …"*

Again, notice that Jordan CJ sat on the NSW Full Court. Jordan CJ[38] dealt with what might amount to evasion. His Honour approved the Board of Appeal's statement that:

> "Without attempting any definition of evasion, we think it undoubtedly connotes underhand dealing and is usually associated with acts or omissions which are designed to obtain an unwarranted advantage. Even where a taxpayer is firmly of the opinion that his view is the correct one, he may be guilty of evasion by seeking to prevent the Commissioner from applying his mind to some debatable question, eg, whether a particular item of income should be assessed: the evasion in such a case consists in the attempt to preclude the presentation of any opposing view or to exclude its application."

Relevance in a self-assessment era

The facts recited show that the practical system of administration in those days was quite different from the present. There were interviews between the NSW manager and the revenue authority. That led to practical and comfortable arrangements being reached between them. The Board of Appeal assumed that there was some way of seeking the Commissioner's opinion in the context of a return.

Presently, with self-assessment (either full or de facto), there is no practical way for many taxpayers to access the view of the Commissioner on a disputable item. A suggestion that a taxpayer should apply for a private ruling is problematic, considering the Commissioner's difficulties in that regard.[39] For small business and tax agents, the idea of dealing with someone who is a non-specialist at the other end of a telephone line in a call centre is unattractive.

There is no practical or economic way of personally engaging with the Commissioner's officers by walking into the ATO and meeting someone. You may end up dealing with a specialist located in another state, potentially on the other side of the country. Theoretical possibilities about getting the Commissioner's view on a disputable item abound. The opportunity, in a practical sense, to have a discussion with the Commissioner, in the way that Denver Chemical did in the 1900s, is now a thing of the past, except for the economically significant and the well resourced. Nevertheless, we have this law from that bygone era. It prevails into the current era, despite its facts having a sepia tinge.

Australasian Jam Co

The 1953 matter in *Australasian Jam Co Pty Ltd v FCT* concerned problems with disclosed amounts for trading stock.

The cost of jam, fruit and tin

From 1914, the company adopted a practice in its accounts and for income tax returns of valuing stocks of jams, canned fruits and tinplate at "standard" values. These values had originally been based on cost. However, the standard values remained unchanged from 1914 to 1947. There had been wide fluctuations in stock on hand from year to year, also. Thus, I expect trading stock would be material to income tax calculations.

Until the end of the 1938 year, no basis of valuation of stock was stated in the company's accounts or in its income tax returns. In later periods, the company, in its accounts and income tax returns, stated the valuation of its stocks as having been made "at cost or under".

An investigation led to amended assessments for each of 11 income years, in 1950. Eight of the 11 years showed a taxable income higher than returned.

Fullagar J decides

Fullagar J, first, distinguishes the concept of an avoidance of tax from evasion. The former does not "involve any notion of active or passive fault on the part of the taxpayer".[40]

Fullagar J found that the burden of proving that the Commissioner held the relevant opinion at the relevant time was borne by the Commissioner.[41] The Commissioner initially tried to discharge that burden by tender of a certificate under the then reg 43 of the *Income Tax and Social Services Contribution Regulations 1936* (Cth). This regulation purportedly made tender of such a certificate conclusive evidence that the Commissioner had formed the opinion that the avoidance of tax was due to fraud or evasion. I will come back to that.

Fullagar J found that that certificate was not evidence, for reasons discussed below. Thus, a Second Commissioner was called as a witness. That witness said that he had, before the amended assessments were made, formed the relevant opinion. He was cross-examined on that.

Fullagar J held[42] that it was not for the court to decide whether there had been fraud or evasion. Rather, it was a question of whether the opinion was not in fact entertained, or whether it was based on a misconception of the word "evasion", or whether it was arrived at "capriciously, or fancifully, or on irrelevant or inadmissible grounds".

Fullagar J rejected a passage from *Moreau* in which Isaacs J had said that it would be necessary to show that the Commissioner's belief was "found to be so irrational as not to be worthy of being called a reason by any honest man". This was said to be putting the position "somewhat too strongly".[42]

Finally, the court held that the taxpayer could obtain an actual review of an opinion or discretion of the Commissioner by the Board of Review, though not by the court. (We shall see below that this may not practically be the case nowadays.)

What was the evasion?

The evidence of the Second Commissioner exposes the reasons why the opinion was formed.[43]

- the company, over a period, began to bring stock to account at a unit value which proved to be considerably below cost, and only a minor proportion was at cost price. Over a period, this led to "a very substantial hidden reserve of £160,000 odd";
- as a result, the total tax escaped was in the vicinity of £56,000;
- it was a big company and well advised. The Second Commissioner considered that the company officers were supposed to know the law, and they would have known that under the then s 31 ITAA36, the company was required to select one of three valuations;
- the company made no effort to deny that the unit value used was not "cost". But they claimed that it may have been "market selling value". That was rejected and was not later pursued in the investigation;[44] and
- the unit value did not in any way answer any of the required descriptions.

The problems can be characterised as follows:

- a large, concealed, financial item;
- a large amount of avoided tax;
- prevarication even in the investigation; and
- non-compliance with a basic rule by a big company that could be expected to know better.

The Commissioner formed the view that there was no deliberate attempt to deceive, and thus it was said not to be a case of fraud. It was only pursued as evasion.

Fullagar J considered that, had it been for him to decide, his Honour would also have concluded that there had been an evasion. His Honour found that the Commissioner did entertain a view that there had been an avoidance of tax due to evasion, and it was not an unreasonable view. It was certainly not a view which was capricious, fanciful or arrived at on irrelevant or inadmissible grounds.

The following was regarded by the Commissioner as relevant:

- the size of the company and the fact that it would have been well advised;
- the fact that it can be assumed that this company's officials would have known the three methods permissible under the trading stock rules for valuation;
- the failure to come up with better information during the audit, despite opportunity;
- the size of the "hidden reserve" and the amount of the tax evaded; and
- an initial representation that the unit price actually was closest to "market selling" value, a contention not then pursued during the audit.

Certificate tendered by Commissioner

I now return to the certificate under the then reg 43. That regulation purportedly provided that such a certificate was conclusive evidence that the relevant opinion was held. But the purported effect of the certificate was to preclude the court from deciding questions which, by the provisions of the Act, related to objections and appeals, and were committed to the court for decision. Thus, the certificate was not authorised by the regulation-making power, as it then stood in the ITAA36.[45]

The regulation was remade, and the new regulation simply made the certificate prima facie evidence. That overcame the problem. There is no such regulation nowadays, however. Perhaps the modern view is that tender of the amended assessment carries with it evidence of formation of the opinion.

Modern controversies

There are real and practical problems about contesting findings of fraud or of evasion made under s 170. One matter where there was an appeal to the Full Federal Court (since discontinued) is of particular interest. This case is *Nguyen v FCT*,[46] an appeal from the AAT.[47]

A difficulty in contesting the Commissioner's decision that there has been an avoidance of tax owing to fraud or evasion, in a court, is that the review can only be on administrative law grounds. It is not the court's function to substitute its own decision for that of the Commissioner.[48] So the logical thing to do might seem to be to go to the AAT, which is suggested by one of the authorities dealt with above.

The difficulty there is that *Nguyen*, and before it *Binetter v FCT; FCT v Bai*,[49] state that the taxpayer bears the onus of proving that the conditions for the exercise of the amendment power did not exist.[50] It was said in *Binetter* that the former Taxation Board of Review did not perform a different task, of forming its own view as to whether there had been fraud or evasion.[51] That is difficult to follow, in the face of *Krew*.[52] But the debate is almost academic now.

Worse, the Commissioner had refused to provide particulars of the basis on which he

had concluded that there had been fraud or evasion in *Binetter*. He had refused to do so on the basis that if he had done so, it would be contrary to the function of the tribunal.[53] In effect, since the Commissioner did not have the onus of proof on the point, the provision of particulars indicating how he would go about proving it was a "redundant exercise".[54]

Thus, we now have a situation where, in the forum which should give merits review of exercises of discretion, the Commissioner's opinion is practically unexaminable. The taxpayer is expected to go to trial without particulars of how an opinion was formed. You may learn in addresses, after evidence, why your evidence has been misdirected or insufficient. Apparently, that is now the law.

We see amended assessments issued as assets betterment assessments often. A taxpayer cannot discharge its onus simply by chipping away at parts of an asset betterment basis or by showing only that *some* moneys treated as income are not in fact income.[55]

It is little wonder that Ms Nguyen appealed to the Full Court. While it appears that her appeal was discontinued on about 18 February 2019,[56] the grounds of appeal may indicate further controversy in this area. In short, issues raised by that notice of appeal include:

- whether the AAT in fact is purportedly required to exercise judicial power in review of an objection decision in such a case, contrary to the Constitution. The path to that conclusion lies in the purported change in the AAT's role, as against that of the old Board of Review which stood in the shoes of the Commissioner and was merely to do over again what the Commissioner did in making the assessment within the limits of the taxpayer's objection. If the AAT, as opposed to the Board of Review, had a more limited role, this was said to lead to purported conferral on the AAT of judicial power;
- it was also said that the construction favoured by *Binetter* meant that the AAT was required to start with a statutory presumption of wrongdoing, and that instead the AAT should have been found to be required to ignore the Commissioner's assertions and opinions of fact that underlay his assessments of the liability of the taxpayer;
- there was also a ground to do with whether, because you could not judicially review a finding of fraud or evasion, the appeal to the Federal Court from the AAT should be construed as permitting effective review instead. This ground questions the decision of the court in *Chhua v FCT*;[57] and
- there was also said to be a constructive failure to exercise jurisdiction to review the question of fraud or evasion.

Since Ms Nguyen has discontinued her appeal, it will be for others to appraise and possibly advance such points.

The practical difficulties being thrown up for taxpayers, particularly those who might have expected to get reasonable access to merits review in the tribunal (including notice of the Commissioner's basis of the formation of his opinion) will, I think, lead to continued litigation in this area.

Something must give.

What can be done?

After I presented an earlier version of this article, at The Tax Institute's National Convention in Hobart in 2019, Mr F John Morgan of Counsel suggested I consider what appeared to be modest law reform to overcome the problems that beset attempts either in the court or in the tribunal to contest a finding of fraud or evasion.

The simple suggestion was the omission of the requirement for the Commissioner to form an opinion. Then the criterion for making such an amended assessment would simply and factually be fraud or evasion. Mr Morgan put that suggestion to the then Assistant Minister, Mr Stuart Roberts, the next day at the National Convention. As requested by Mr Roberts, I sent him papers showing how that amendment could be effected. An election has overtaken this, and the matter will now be followed up with the incoming assistant minister.

Commissioner's processes

The Commissioner has publications dealing with fraud or evasion. There are fraud and evasion guidelines, and also PS LA 2008/6 on fraud or evasion. The latter is more detailed.

Further, the Commissioner is said to be referring questions of determination of fraud or evasion to the National Fraud or Evasion Advisory Panel.[58] This panel is also known as the "FE panel".

The panel will comprise "at least three senior ATO staff" at EL2 level or above.

Some discussion has focused on the lack of any outside member on the panel. There has also been discussion about the fact that the taxpayer or its representative will not be in attendance at meetings.

As an assurance mechanism, such a formalised procedure seems worthwhile.

On the other hand, the lack of outside representation on the panel, and the lack of representation by or for the taxpayer at meetings of the panel may send the wrong message in terms of transparency of the process.

A practical issue arises where there has been a covert audit. In such cases, the Commissioner may fear dissipation of assets. I am not unrealistic. In such cases, the Commissioner may consider it necessary to issue assessments, to facilitate further steps such as garnishee notices or an ex parte freezing order in a court.[59]

But not every case referred to the FE panel will have those concerns. As Isaacs J said in *Moreau*, above:[17]

> "Fair play would, of course, usually induce [the Commissioner] to give the taxpayer the fullest opportunity to explain."

One of the reasons I have given an expansive historical perspective in this article is that those early cases seem to have been forgotten in modern administrative design.

More broadly, Jordan CJ's concern, in *Moreau*, about the courts giving up merits review of the formation of an opinion was a lost opportunity. Later characterisation of Jordan CJ's decision in *Moreau*, as *supporting* an inability to have merits review in a court,[60] is a caricature of Sir Frederick's expressed view, and another lost opportunity.

Denver Chemical is a curiosity, because the NSW and Commonwealth constitutional positions were different, and that case was an appeal from a tribunal which had been held to have some judicial characteristics.

In short, by small steps, we have reached a position where it is difficult to shift the formation of an opinion by the Commissioner as to fraud or evasion. The consequences of such an opinion are drastic, including for the relationship between the taxpayer and the Commissioner.

Absent legislative change, it would be helpful to have more openness in the original decision-making process, such

as outside representation on the panel and an ability (where possible) for the taxpayer's representative to make submissions. This is said, acknowledging that some cases do not lend themselves to such open processes.

Taxpayer's options

My simple prescription, in light of the above, is:

- engage early. Since a decision that there has been fraud or evasion will be hard to shift, act to prevent that conclusion being formed;
- use the process recently introduced, if at all possible, by getting your client's views before the FE panel;
- be aware of the distress your client will be suffering in being accused of fraud or evasion. You are the cool, rational voice in the room. Use that position;
- seek freedom of information of documents outlining the Commissioner's case on fraud or evasion. Address this in preparation of objections and beyond; and
- if left with no other reasonable option, litigate. But the foregoing recognises that practical remedy is hard to find there. The AAT seems only little better than the court on this point, if recent cases are correct.

Examples from the cases

I have taken a historical perspective throughout this article. In outlining the cases above, I have already provided examples where fraud or evasion has been found, or where the court would have differed from the Commissioner (by not finding evasion) but was powerless to alter the result.[61]

It can be hard to find cases which assist in making the argument against fraud or evasion. To attempt to redress the balance, I will now give some notes about actual decisions of the former Taxation Board of Review, where it was found positively that there had been no fraud or evasion.[62]

Because the cases are more likely to turn up where merits review is available, the cases tend to have less authority. And it can always be said against you that all cases in the area are "facts cases". Be that as it may, it is something.[63]

8 CTBR Case 1

This was a case about an unsuccessful land developer. Their ultimate lack of success as a land developer actually assisted them before the Taxation Board of Review, as we shall see.

They took advice from an accountant at a firm. That accountant referred the question about how they should account for proceeds of sales to his principal at that firm. The accountant considered that the proposed mode of accounting for land sales on a subdivision was conventional. However, that mode of accounting differed from ATO internal policy, and the accountant did not ask the ATO. Nevertheless, it was found that there had been no fraud or evasion.

The taxpayer was acting in accordance with advice. It was not unreasonable to follow competent accounting advice.

There was no obligation to seek ATO advice.

The accounting method used was arguably supportable.

In fact, in the long run over the course of the subdivision, a loss had been made. This meant that a mode of accounting, that did not reflect profits as the subdivision proceeded, was correct in ultimate result.

The case is notable for two points:

(1) the lack of any obligation to seek ATO advice; and

(2) the fact that the taxpayer was not evasive in acting on competent accounting advice leading to an arguable basis for reporting.

8 CTBR Case 3

Admittedly, some aspects of this case reflect practice prior to effective self-assessment. Nevertheless, some parallels can still be drawn, in appropriate cases.

The taxpayer was the local storekeeper and baker in a country town. Unfortunately, he kept few records. The way that he kept track of what his customers owed him on account was by posting an updated balance on the monthly invoice. Regrettably, this left him with no record, after that, of the date on which actual sales were made.

He did not file returns for some years. He engaged an accountant to get returns up to date.

Returns were prepared on a cash basis. This was the best that the accountant could do, because the accountant could at least look at the bank accounts.

The accountant had disclosed the problem to the ATO when he lodged, and disclosed that there were limited records.

The board considered that there had been no fraud or evasion. The accountant disclosed the problem of lack of records when he lodged returns. The Commissioner accepted the returns made on that basis, albeit that, in those days, it would have been a full assessment environment.

It was also said by the board, in light of case law at the time, that a cash basis was an arguable basis for accounting, at the time of the transactions.

The case encourages openness with the ATO about the problems an accountant has in making up returns, for example, where there are few records.

8 CTBR Cases 4 and 5

These two cases concern a son and a mother, respectively, of a deceased farmer. The deceased left a mess, in short.

It appears that both the son and the mother had been placed in difficulty, in part by the way they had been inserted in entities such as partnerships and trusts, with little disclosure or consultation.

The real problem was non-disclosure of amounts from those entities in their respective returns, and where they did not know they had made a profit.

Again, the administrative processes used in those days differ from the present. The practical way that the tax agent had dealt with his uncertainty about what amounts should be inserted as derived from various entities was to leave blanks for amounts from partnerships in the returns.

It was not as if the taxpayers were saying that they did not derive profit from entities, but rather that they did not know what to insert.

It was held there was no fraud or evasion on their part. Neither was there fraud or evasion on the part of the accountant, it would seem.

Again, translated to the modern environment, this does encourage engagement with the ATO where there are practical problems in making up a return for some reason.

9 CTBR Case 1

The facts are quite complicated in this case, but it comes down to the omission of interest from a return.

A young woman's affairs were being managed by her solicitor, but also by a registered trustee company (which must have been a tax agent as well).

Due to a mix up, interest on a substantial loan secured by a mortgage was not included in her returns.

A further complication was that she went to England for several years, and the returns kept on being filed with this error in her absence. She returned to Australia, and would have had a better opportunity to examine matters, on her return. Nevertheless, the board was satisfied that, had she looked at the returns, she would not have detected the error.

The case is useful as an example where mere inadvertence, even over a large sum, was found not to amount to fraud or evasion.

10 CTBR Case 1

I only mention this case for the reassuring detail that a horse trainer can be found not guilty of fraud or evasion. So often we see cases about fraud or evasion where the reader sighs at mention of gambling winnings or connections with equestrian activities.

This horse trainer omitted winning bets. He omitted proceeds of a share in an arrangement somehow related to a winning ticket in a sweep. It was found in relation to the betting, at least, that it was systematic and probably a business.

Nevertheless, the board found that there had been no fraud or evasion, since there was room for difference of views as to whether such wins should be included. There was no apparent attempt to evade.

Conclusion

I thought it about time to give some historical perspective to this topic. We have reached an unsatisfactory position. Opinions as to fraud or evasion verge on unexaminable. And we have reached that position by little missteps.

Starting with a statutory amendment, in a suite of measures intended to be beneficial to taxpayers, we somehow failed to take the opportunity in *Moreau* (or perhaps later) to re-examine the role of the courts in examining such opinions.

This was despite the warning bell sounded by Jordan CJ in that case. Instead, we find Sir Frederick's views in *Moreau* being cited in favour of a restricted view about the mode of review in *Denver Chemical*.

Worse, the law about the AAT has evolved to the point where there are real, practical difficulties in reviewing an assessment by attacking the finding of fraud or evasion.

While the ATO has attempted to mitigate concerns, by the formation of a panel to assist in making fraud or evasion determinations, aspects of that panel lack openness.

The courts repeatedly refuse to define "evasion", which is nevertheless the standard applied with draconian results.

The result is that, for the time being, in a small but noisy group of cases each year, we see taxpayers accused of fraud or evasion, without in many cases having been heard from.[64] That causes the gravest offence, in my experience.

Perhaps the taxpayers might have engaged at an earlier point in time, and in that are at fault. But it does not reduce the human reaction to being accused of being a fraudster.

On the other hand, the odds are raised for the ATO, and other government agencies, since someone in government has found a citizen to be a fraudster, which naturally leads to the conclusion that they are unreliable and should not readily be dealt with.

For the time being, the tax profession — and here I include the ATO — is left with a system generating high emotions and distrust. Every ounce of our professional ability must then be directed to overcome those natural reactions, to avert litigation, and to restore relationships.

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Inns of Court

An earlier version of this article was presented at The Tax Institute's 34th National Convention held in Hobart on 13 to 15 March 2019.

References

1 In this article, I concentrate on "evasion". For the definition of "fraud", see *Bui v FCT* 2008 ATC ¶10-038 at [18]. Fraud requires a false statement or representation: (1) with knowledge that it is false; or (2) without genuine belief in its truth; or (3) recklessly careless as to whether true or not. Since fraud is a harder standard, the Commissioner charges evasion generally.

2 S 27 of the *Stamp Duties Act Amendment Act 1867* (NZ).

3 (1914) 17 CLR 665.

4 (1914) 17 CLR 665 at 673-674.

5 (1926) 38 CLR 131.

6 (1926) 38 CLR 131 at 136.

7 (1926) 38 CLR 131 at 144.

8 (1926) 38 CLR 131 at 148.

9 (1926) 38 CLR 131 at 149.

10 (1926) 38 CLR 131 at 151.

11 (1905) 1 Tas LR 141 at 143.

12 1 TLA 110.

13 Cl 37.

14 (1926) 39 CLR 65.

15 (1926) 39 CLR 65 at 67.

16 (1926) 39 CLR 65 at 67-68.

17 (1926) 39 CLR 65 at 68.

18 (1926) 39 CLR 65 at 69.

19 J Ratcliffe and J McGrath, *Income tax decisions (Australasia)*, Law Book Co of Australasia, Sydney, 1928, from p F84.

20 Mann J's decision is in J Ratcliffe and J McGrath, *Income tax decisions (Australasia)*, Law Book Co of Australasia, Sydney, 1928, p F115. The High Court's decision is at (1927) 40 CLR 246.

21 (1927) 40 CLR 246 at 276.

22 (1927) 40 CLR 246 at 304.

23 (1927) 40 CLR 246 at 306

24 (1936) 3 ATD 337. This is a decision of the Court of Review in NSW, concerning NSW tax. That court was constituted by a District Court judge.

25 For example, r 150(1)(f) of the *Uniform Civil Procedure Rules 1999* (Qld).

26 *Barripp v Commissioner of Taxation (NSW)* (1940) 41 SR (NSW) 16 at 19-20.

27 (1940) 41 SR (NSW) 16 at 21.

28 (1940) 41 SR (NSW) 16 at 22.

29 (1940) 41 SR (NSW) 16 at 24.

30 (1941) 6 ATD 69. It is not in the authorised reports except as a note at 65 CLR 661 and 41 SR (NSW) 325.

31 (1941) 6 ATD 69 at 70-71.

32 *Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)* (1949) 79 CLR 296 at 313. The decision below, again of a strong NSW Full Court, is at (1949) 49 SR (NSW) 195.

33 *British Imperial Oil Co Ltd v FCT* (1925) 35 CLR 422.

34 (1949) 79 CLR 296 at 311-312.

35 (1949) 79 CLR 296 at 312. McTiernan J and Webb J concurred. Williams J agreed, giving substantial reasons to the same end.

36 Wikipedia, "RUB A535". Available at https://en.wikipedia.org/wiki/RUB_A535. Accessed 5 April 2019.

37 S 210(2)(a) of the *Income Tax (Management) Act 1936* (NSW).

38 (1949) 49 SR (NSW) 195 at 199.

39 D Marks, "Proceeding in certainty: tax rulings", (2017) 89 *AIAL Forum* 91-101.

40 (1953) 88 CLR 23 at 34.

41 (1953) 88 CLR 23 at 34.

42 (1953) 88 CLR 23 at 37.

43 (1953) 88 CLR 23 at 38-40.

44 The company was given an opportunity to identify units which were "below cost" and to submit a market selling value. They did not do so.

45 (1953) 88 CLR 23 at 35-36.

46 2018 ATC ¶20-667.

47 2016 ATC ¶10-442.

48 If the finding were against the Commissioner on that limited basis, query if the court could then proceed to decide the matter on the merits. See *Harding v FCT* 2019 ATC ¶20-685 at [4]. The other members of the Full Court in *Harding* do not appear to have dealt with this issue.

49 2016 ATC ¶20-593.

50 2018 ATC ¶20-667 at [114].

51 2016 ATC ¶20-593 at [94]. But see *Krew v FCT* (1971) 45 ALJR 324 at 327 col. IIE per Walsh J.

52 *Krew v FCT* (1971) 45 ALJR 324 at 327 col. IIE per Walsh J.

53 See the summary in *Nguyen*, above, 2018 ATC ¶20-667 at [104].

54 It is understood that a Deputy President has since required particulars to be delivered, in another matter, under the Commissioner's duty to assist the AAT: s 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth).

55 *Hourigan and FCT* [2018] AATA 3369 at [11] per Hanger QC, DP, summarising the law usefully.

56 See the Federal Court's record for proceeding number VID1299/2018.

57 [2018] FCAFC 86. Some caution is required before questioning the conclusions in *Chhua*. The Full Court was asked to make an order for indemnity costs, but declined to do so since this was the first appellate court decision on a point otherwise said to be untenable. *Chhua*, having been published, stands as a warning in future.

58 Para 7 of revised PS LA 2008/6.

59 Those cases exist. I appeared for the Queensland Commissioner of State Revenue in such a case about garnishee notices.

60 *Denver Chemical*, discussed above.

61 There are few cases of reversal, by a court. However, see *Fitzroy Services Pty Ltd v FCT* (2013) 93 ATR 855.

62 All of these cases are from the *old* series of the "CTBR".

63 A fuller list of example cases is: 8 CTBR *Case* 1; 8 CTBR *Case* 3; 8 CTBR *Case* 4; 8 CTBR *Case* 5; 9 CTBR *Case* 1; 10 CTBR *Case* 1; 11 CTBR *Case* 1; 12 CTBR (NS) *Case* 99; and compare *SRBBB v FCT* 2001 ATC 2194; *Parry v FCT* (2004) 57 ATR 1343; *Lam v FCT* (2005) 58 ATR 1317; *Case* 4/2006, 2006 ATC 133.

64 For example, covert audits.