All or nothing - as easy as 167[1]

Tax administration occurs across a continuum dotted by artificial time constraints (income years), lodgment dates, issue dates for Notices of Assessment, notice periods (objections, review, appeal), review periods (objections, remissions), various assessment amendment periods and the dates tax debts fall due for payment.

In this discussion paper I refer to unscheduled, spontaneously arising and consequential taxation administration events which occur along the continuum as "random taxation administration events". These include the exercise by the Commissioner of her[2] information gathering powers; reviewing the income tax affairs of taxpayers for particular income years (whether returns have been lodged, assessments have issued, or not); engaging – although not always transparently – with a taxpayer selected for review; the delivery of position papers, further reply to taxpayer's submissions in response, and the delivery of Reasons for Decision usually, but not always at the time a Notice of Amended Assessment is issued.

The focus of this discussion paper is on random taxation administration events which lead to the exercise of the Commissioner's assessing power under *Income Tax Assessment Act 1936* (Cth) (**the 1936 Act**)[3] s 167. These assessments are colloquially referred to as "default assessments". By proper engagement with the randomly occurring taxation administration events, can the effect of s 167 be countered – or dare one hope – neutralised by taxpayers?

Section 167 provides for default assessments in three situations. Only one situation – where the Commissioner is not satisfied with the return furnished by any person[4] - will be considered in any detail in this discussion paper. While there is no textual restriction on the operation of s 167 to

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1 The following labels are used for convenience in this discussion paper: "**s 167 assessment**" means an assessment, assumed validly made, using s 167; "**s 167 dispute**" means the issue of an assessment, challenged by the taxpayer on objection, which matures into Part IVC proceedings; "**ATO**" refers to all engaged in the tax assessment processes, those engaged in collection of the tax assessed, from the Commissioner to the employees occupying the lowest public service classification; "**private clients**" refers to individuals, small business entities, relationships associated with private clients and family offices; "**taxing statutes**" refers to the Income Tax Assessments Acts, the Taxation Administration Act, the International Agreements Act (even though this Act does not assess or levy tax); and the pot pourri of Acts which describe the rates at which income tax is levied.

2 *In Her Name* was published in April 2023 on the website of 3Wentworth. Amongst other things it explains why the Commissioner always looks so tired. Consistent with that piece, this paper assumes that our Commissioner of Taxation is a woman.

3 All statutory references will be to the 1936 Act unless otherwise mentioned

4 Section 167(b)

particular taxpayers, my experience has been that default assessments are more commonly issued to private clients.

Given the exercise required to discharge the burden of proof when the Commissioner engages her assessing power under s 167, many private clients perceive that the burden of proof is unreasonably onerous – and the client's conclusion is reached well before factoring in advisory costs.

Private clients understand that the exercise of the assessing power by the Commissioner of Taxation under s 167, in conjunction with the primary assessing power provided in s 166, leads to the assessment of an amount[5] as taxable income, determined by the Commissioner of Taxation in *her judgment* as the amount on which tax *ought to be levied*, rather than a determination of integers in the calculation of a taxpayer's taxable income as prescribed in *Income Tax Assessment Act 1997 (*Cth) (**the 1997 Act**) s 4-15

All taxpayers have the right to challenge the quantum of the taxable income assessed, whether the assessment meets the description of default assessment, or otherwise. Absent the occurrence of an event or course of conduct by the Commissioner or her officers which the Courts have recognised vitiate the assessing process[6], the *processes* conducted by the Australian Taxation Office (**ATO**) cannot be challenged[7].

Amendments made in 2013 to the statutory expression of the burden of proof have, in the view of some, lengthened the already long odds of a taxpayer successfully challenging a 167 assessment.

This discussion paper purports to address the exercise of the Commissioner's assessing powers and her instructions to her staff about making default assessments[8]; the content of the burden of proof; the function and powers of the Administrative Appeals Tribunal (the **Tribunal**) in reviewing an unfavourable objection decision made in relation to a s 167 assessment; and whether the Tribunal's powers may be exercised to confine a challenged assessment to an exercise of the assessing power under s 166.

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5 *Federal Commissioner of Taxation v Australia & New Zealand Savings Bank Ltd* (1994) 181 CLR 466, 483 (McHugh J)

6 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 158 [25], 164-5 [55] (Gummow, Hayne, Heydon and Crennan JJ)

7 Section 175

8 Law Administration Practice Statement PS LA 2007/24 *Making default assessments; section 167 of the Income Tax Assessment Act 1936*

Where to begin?

More than three-quarters of a career ago, the High Court addressed issues raised by assessments issued under s 167 to one Jeffrey Thomas Dalco[9].

During the income years for which he challenged his assessments Mr Dalco conducted activities through private companies with, amongst others, Brian Maher and John Walker Wynyard. Mr Maher and Mr Wynyard were drawn to public attention as active participants in widespread tax avoidance activities.

At issue was the content of the burden of proof borne by the taxpayer under former s 190(b)[10] where the Commissioner, as an incident of her assessing powers, assessed Mr Dalco using s 167. This was not a new issue. The High Court's adjudication of the appeal from a divided full Federal Court[11] was keenly anticipated, particularly in light of the context of a s 167 dispute.

The Court comprised seven justices. Brennan J and Toohey J delivered separate, lengthy reasons with which all of their colleagues agreed. Deane J wrote short concurring reasons encapsulating in very concise form the principal propositions found in the leading judgments.

At that time, the burden of proof was described in former s 190(b):

> Upon every reference or appeal –
>
> (b) the burden of proving that the assessment is excessive shall lie upon the taxpayer

Sheppard and Gummow JJ in the Federal Court had found that the assessments were excessive, drawing on reasoning of Taylor J in *McAndrew*[12] that an assessment made in purported but not justified exercise of power by the Commissioner, may be described as excessive[13]. Wilcox J, in robust dissent, concluded that the majority had cast the onus upon the Commissioner of proving that the assessments were correct[14], a proposition at odds with the position settled since the dissenting judgment of Mason J in *Gauci*[15].

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9 *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614; 20 ATR 1370
10 Now expressed in *Taxation Administration Act 1953* (Cth) (**TA**) ss 14ZZK(1)(b)(i) and 14ZZO(1)(
11 *Dalco v Federal Commissioner of Taxation* (1988) 19 ATR 1601
12 *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263; 6 AITR 359
13 *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263, 282; 6 AITR 359, 371
14 *Dalco v Federal Commissioner of Taxation* (1988) 19 ATR 1601, 1635 (Wilcox J)
15 *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81, 89; 5 ATR 672

Both Brennan J and Toohey J agreed with Wilcox J. in the Federal Court[16] who had said:

> "the task for the taxpayer, upon an appeal or a review under Pt V of the Act, is to show that the amount of money for which tax is levied by a particular notice of assessment exceeds the **actual substantive liability** of the taxpayer". (emphasis added)

This task requires the taxpayer to satisfy "the court or tribunal that his or her true taxable income is less than that appearing in the assessment"[17]

From this passage it is plain that a taxpayer has the burden of proving ***precisely*** his or her taxable income[18], which is less than the amount ascertained in the assessment under challenge. A failure to prove the precise amount of the true income will result in the affirmation of the objection decision.

It is not entirely clear whether the reasoning in the High Court was intended to be universally applicable or confined to disputed assessments made in exercise of s 167.

Proving the true taxable income involves more than a purely numerical exercise. Much will depend on the complexity of the affairs of the taxpayer. The character of receipts, whether on capital or revenue account; the existence, terms and legal character of contracts from which receipts and payments flow; who in joint ownership scenarios has entitlement to income; the timing of derivation of different types of income; engaging the correct assessing provisions (and avoiding deemed derivation); the correct measurement of market values and the evidence to support such values), nexus between outgoings and income; discounted gains; concessions and disregarded events, may inform the true taxable income of the taxpayer. The lot of a s 167 taxpayer may not be a happy one – the task ahead includes, in many cases, proving the non-existence of things and sources, grounded in assertion by the ATO, for which no proof is required from the ATO. The taxpayer is asked to provide the proof of the integers of 1997 Act s 4-15 which the Commissioner, by resort to s 167, says she does not have.

When *Dalco* was decided ss 175 and (now former) 177(1)[19], read together, shielded from review the work performed by the ATO during the assessment process – subject to few, quite limited

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16 *Dalco v Federal Commissioner of Taxation* (1988) 19 ATR 1601,1630 (Wilcox J)

17 *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, 631; 20 ATR 1370, 1379 (Toohey J)

18 What Nettle J later described in *Bosanac* (2019) 374 ALR 425, 437[30] as "the true amount of the taxpayer's assessable income"

19 Now *TA* Sch 1 s 350-10(1) Item 2

exceptions[20]. In combination with ss 166 and 167 these provisions also inform the taxpayer's burden of proof.

Post *Dalco*

After *Dalco* former s 190(b) was repealed. *Taxation Administration Act 1953* (Cth) (**TA**) Part IVC was enacted[21] and the burden of proving that an assessment was excessive was restated in ss 14ZZK(1)(b) and 14ZZO(1)(b).

Each of these provisions casts a burden on the taxpayer to prove, in Tribunal or Court proceedings, that the assessment was excessive, where the excess relates to the "substantive liability" of the taxpayer[22]. The additional element of the burden imposed by the reasons in *Dalco* in relation to cases where s 167 was used as an assessing power – demonstrating "the true amount of the taxpayer's assessable income"[23] – was not part of the statutory expression of the burden of proof.

Sections 14ZZK(1)(b) and 14ZZO(1)(b) were amended with effect from 1 July 2013[24]. The burden of proof of the taxpayer is now described similarly for Tribunal applications and Court appeals respectively:

> the [applicant/appellant] has the burden of proving:
>
> (i) if the taxation decision concerned is an assessment – that the assessment is excessive or otherwise incorrect and what the assessment should have been;

The Explanatory Memorandum published with the amending legislation, the *Tax and Superannuation Laws Amendment (2013 Measures No 1) Act 2013* (Cth), notes, perhaps in ignorance of the role of s 167 in *Dalco*, that:

> As a result of the High Court's decision in … Dalco…the taxpayer must prove, not just that the assessment is too high, but what the correct amount of the assessment is[25].

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20 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 158[25], 164-5 [55] (Gummow, Hayne, Heydon and Crennan JJ)

21 Act No 216 of 1991 *Taxation Laws Amendment Act (No 3) 1991* (Cth)

22 *McAndrew v Federal Commissioner of Taxation* (1956) 98 CLR 263, 271 (Dixon CJ, McTiernan and Webb JJ)

23 *Bosanac* (2019) 374 ALR 425, 437[30] Nettle J

24 Act No 88 of 2013 *Tax and Superannuation Laws Amendment (2013 Measures No 1) Act 2013* (Cth) s 3 (item 10), Sch 5, items 25 and 26

25 Explanatory Memorandum to the *Tax and Superannuation Laws Amendment (2013 Measures No 1) Act 2013* (Cth) [7.36]

The burden of proof, as expressed applies equally to all taxpayers irrespective of legal character, residence, commercial footprint or economic heft. Yet a review of judicial reasons for disputes arising in respect of income years commencing on or after 1 July 2013 does not demonstrate uniform insistence on each element of the burden of proof (excessive assessment; true taxable income), with the preponderance of adjudications demonstrating the full weight of the burden of proof falling on private clients (as I have labelled them).

The burden of proof which the taxpayer must discharge in a particular adjudication is a function of the scope of the dispute remaining between the taxpayer and the Commissioner upon review. As Brennan J explained in *Dalco* that

> The manner in which a taxpayer can discharge that burden varies with the circumstances. If the Commissioner and a taxpayer agree to confine an appeal to a specific point of law or fact on which the amount of the assessment depends, it will suffice for the taxpayer to show that he is entitled to succeed on that point. Absent such a confining of the issues for determination, the Commissioner is entitled to rely upon any deficiency in proof of the excessiveness of the amount assessed to uphold the assessment, though the taxpayer is limited to the grounds of his objection[26]

Unsurprisingly this judicial explanation can provide no insight into: how the Commissioner chooses cases to be wholly pursued without limitation or concession; the Commissioner's willingness to narrow any dispute to specific issues; the opportunities afforded to taxpayers by the Commissioner to narrow the dispute in exercise of her general power of administration; and how the Commissioner views her putative obligation to treat a taxpayer fairly and not to discriminate between one taxpayer and another[27].

How each of these matters may be addressed by the Commissioner in light of the bedrock proposition from *Wade*[28] that:

> No conduct on the part of the commissioner could operate as an estoppel against the operation of the Act[29]

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26 *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614; 628; 20 ATR 1370, 1375; see also *Le v Commissioner of Taxation* [2021] FCA 303 [33] (Logan J); *Sibai v Commissioner of Taxation* [2021] FCA 1353 [72] – [73] (Jagot J)

27 See, generally, *Bellinz Pty Ltd v Federal Commissioner of Taxation* (1998) 39 ATR 198, 208 ff

28 *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105

29 *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105, 117 (Kitto J)

is unknown.

None of these matters appears obviously capable of sculpting the Commissioner's duty to act as a Model Litigant.

The Commissioner's Assessing Powers

Making assessments is critical to the Commissioner performing her primary function of collecting the correct amount of income tax from persons correctly identified as taxpayers.

Ensuring the correctness of the assessment of a tax liability in relation to each taxpayer's annual income tax affairs enhances rates of success in collection and minimises the cost of collection. Once assessed the tax liability is a debt due to the Commonwealth. The principal category of debts are those owed by taxpayers in receipt of Notices of Assessment which describe an amount payable to the Commissioner[30].

Notices of Assessment are formal records which are the product of a process[31] undertaken by the Commissioner in exercise of her assessing powers following the acceptance and review of "returns, and from other information in the Commissioner's possession, or from any one or more of these sources"[32].

Assessments are generally made following the lodgment of an annual income tax return in response to the annual invitation of the Commissioner of Taxation to do so[33]. Assessments may also issue in response to further returns contemplated by s 162, or special returns by s 163. Relevantly, "every amended assessment shall be an assessment for the purposes of this Act" except as otherwise provided[34]. It follows that in issuing amended assessments, the Commissioner is also exercising her assessing powers presumably under ss 166 or 167.

Section 168 empowers the Commissioner to make assessments at any time in relation to all or part of an income year. Section 169AA, relocated and rewritten in 2010[35] from its former position as s 219,

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30 This paper does not address the other retention, withholding, collection and remittance regimes which the Commissioner administers within the Income Tax statutes

31 *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243, 253 (Kitto J)

32 s 166

33 s 161, although the Commissioner can require a taxpayer to lodge a further and fuller return (s 162(a)), provide any statement or information about the taxpayer's financial affairs (s 162(b)) or file a special return for all or part of an income year (s 163)

34 s 173

35 Act No 79 of 2010

allows the Commissioner to assess the recipient of income or gains for or on behalf of non-residents of Australia or persons absent from Australia.

By s 169A(1) the Commissioner may accept some or all of the statements made by a taxpayer in a return furnished by the taxpayer, or statements otherwise made by or on behalf of the taxpayer. Section 169A does not address the standard of proof which the Commissioner must accept. It may be thought that consistently with standard established in Court and Tribunal proceedings the standard of proof is the balance of probabilities

Whether the Commissioner's officers are properly calibrated when addressing the standard of proof as being the balance of probabilities, and not – as some appear to have it – beyond reasonable doubt, is a topic for another day. All that need to be said here is that oral evidence of undocumented, otherwise unrecorded arrangements, is not routinely rejected by Courts[36] but often is a matter of credit: rights, obligations and the character of transactional cash flows can be elucidated from oral evidence, and, as a result of *Corporations Act 2001* (Cth) s 1305, from the books and records kept by corporate taxpayers.

Assessments were described in *Hoffnung*[37] as a definite ascertainment of a tax liability which is definite and certain:

> The "assessment" and the notice of assessment required by the Act to fix the taxpayer with liability for a Crown debt carrying interest and penalties must be definite and certain, or, as it has been described throughout the argument, "definitive," as opposed to "provisional."[38]

More recently, when addressing a procedural application, Gyles J, reinforcing the certainty attending assessments once issued, said[39]:

> … an applicant should be left in no doubt as to the basis for the assessment. It does not necessarily follow that an applicant needs to know the details of the processes by which an assessment came to be made, provided that the basis for the assessment is clear. The nature of the case to be made should also be made clear.

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36 See *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1, 10-11 (Hunt J)
37 *Federal Commissioner of Taxation v S Hoffnung & Co Pty Ltd* (1928) 42 CLR 39
38 *Federal Commissioner of Taxation v S Hoffnung & Co Pty Ltd* (1928) 42 CLR 39, 55 – 6 (Isaacs J)
39 *Syngenta Crop Protection Pty Ltd v Federal Commissioner of Taxation* (2005) 61 ATR 186, 188 (Gyles J)

To preserve the s 175 protection the assessment process must relate to the taxpayer's circumstances, rather than be unrelated to them[40]. Errors made in the process do not prevent the amounts determined at the conclusion of the process from being an assessment[41], provided those errors do not "encompass deliberate failures to administer the law according to its terms"[42] or amount to "conscious maladministration" of the assessment process[43]. Put another way, the assessment process will not be vitiated, even if the Commissioner knows the amounts fixed are incorrect, provided that the process involves an exercise of judgment not conducted mala fides.

The Commissioner is armed with a general assessing power (s 166) and at least three other provisions (ss 167, 168 and 169AA) which can be used only where the preconditions for their engagement are present. As noted earlier, these provisions engage in the same manner and to the same degree when the assessment is the initial assessment, as they do for all amended assessments.

Without which, not

Section 166 provides that:

> From the returns and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:
>
> (a) the amount of the taxable income….
>
> (b) the amount of tax payable thereon
>
> (c) the total amount of the taxpayer's offset refunds…. ….

Section 167 provides:

> If
>
> (a) any person makes default in furnishing a return; or
>
> (b) the Commissioner is not satisfied with the return furnished by any person; or
>
> (c) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income
>
> the Commissioner may make an assessment of the amount upon which *in … her judgment* income tax *ought to be levied,* and that amount shall be the taxable income of that person…(emphasis added)

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40 *R v Deputy Commissioner of Taxation (WA); Ex Parte Briggs (No 2)* (1987) 14 FCR 249, 270 (Sheppard J)

41 Ibid

42 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 164-5 [55] (Gummow, Hayne, Heydon and Crennan JJ)

43 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 [25] (Gummow, Hayne, Heydon and Crennan JJ)

No attention is given in this discussion paper to s 167(a) or (c).

Without reference to *George* (see below) it has been accepted that the general assessing power is not subject to restriction, save for the operation of the assessment amendment powers in ss 170ff[44].

In *George*[45] the High Court described the relationship between ss 166 and 167:

> "**Section 167 and s 167 do not describe distinct duties or functions.** They combine to show what the commissioner may or must do in performing his single duty of arriving at an assessment. *Section 166 on its own terms covers cases where the commissioner depends exclusively on sources other than a return…. Clearly enough under s 166 the commissioner can make an assessment which does not adhere to the income returned and yet to do so must involve some want of satisfaction with the return.* **Section 167 is epexegetical to s 166. It is not an independent power.** What it does is to mention with particularity three situations which might arise in carrying out the duty imposed by s 166, and to direct how in those situations the Commissioner shall proceed for the purpose of s 166. **Just as under s 166 considered alone the Commissioner ascertains the amount of the taxable income and thus assesses it so does he under s 167, used in aid of s 166, ascertain the amount upon which, in his judgment, income tax ought to be levied and thus assesses it.** By definition, "assessment" means the ascertainment of the amount of the taxable income, and of the tax payable thereon."[46] (different emphases added)

Considered more closely, ss 166 and 167(b) address at least one common theme – a want of satisfaction with the return. When ss 166 and 167 were enacted, the approved form in which taxpayers furnished returns implicitly encouraged the taxpayer to make additional disclosures, beyond numerical disclosures, if there was the prospect of an amended assessment, which then hinged on the making of a full and true disclosure[47]. In *McEvoy*[48], Williams J said:

> A default assessment under section 167 would, in many, if not in most cases, be the form of assessment most appropriate to the case where a taxpayer has not made to the Commissioner a full and true disclosure of all material facts necessary for his assessment.

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44 *Federal Commissioner of Taxation v Ryan* (2000) 43 ATR 694; 201 CLR 109; 43 ATR 694 (Gleeson CJ, Gummow and Hayne JJ; Callinan J agreeing)

45 *George v Federal Commissioner of Taxation (*1952) 86 CLR 183, 203-4; 5 AITR 360; 10 ATD 65, 68 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ)

46 *George v Federal Commissioner of Taxation (*1952) 86 CLR 183, 203-4; 5 AITR 360; 10 ATD 65, 68 (Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ)

47 A concept once at the centre of analysing the operation of the amendment power (see for example *Federal Commissioner of Taxation v Broken Hill Pty Co Ltd* (2000) 2000 ATC 4659) and now relevant only in the context of fringe benefits assessments (*Fringe Benefits Tax Assessment Act* s 74(3))

48 *McEvoy v Federal Commissioner of Taxation* (1950) 5 AITR at 5 – 6 (Williams J)

Making a full and true disclosure is no longer an element of the power to amend assessments.

In more recent times admitted deficiencies in an income tax return furnished by the taxpayer have been regarded as sufficient to engage s 167(b): it has been held that the Commissioner could not be satisfied with a return which the taxpayer admitted was wrong in one or more particular[49].

The information in the possession of the Commissioner is an express source of information shaping the assessment process envisaged by s 166. In contrast, the information in the possession of the Commissioner is not mentioned in s 167, which, from its text, has as an overall theme - making assessments *in the absence of* (sufficient) information.

As to the judgment the Commissioner exercises in s 167, the Courts have recognised that, on the sensible assumption that a taxpayer has complete and detailed knowledge of their own affairs which hitherto have not been disclosed, and in the absence of records, the Commissioner's judgment "would necessarily be a guess to some extent…."[50]. Guesses by the Commissioner may pass muster: simply plucking a number from the air does not.

The Commissioner has provided instructions to her staff about default assessments in Law and Practice Statement PS LA 2007/24 *Making Default Assessments* (**the Statement**).

I consider that the Statement, as an attempt at stating general principles, achieves its goal. However, as with many ATO publications, including so called Public Rulings, it tends to lack specificity and for that reason provides little assistance to taxpayer and ATO alike, other than in routine situations.

Where the Statement is useful is in identifying examples of situations in which default assessments might be expected to be made.

The Statement may perplex some – and reasonable minds may differ on this – because it appears to present s 167 as an independent assessing power (cf *George*). If this reading were correct the instruction may encourage an overzealous use of s 167(b), without regard to the recognition in s 166 that an assessment may be made based on *information* (rather than evidence, or evidence considered to have sufficient probative value) in the Commissioner's possession. Some may think this unlikely because the ATO is impelled by reasoned analysis of unknown or hitherto unknown information. Others may

49 *Frangieh v Deputy Commissioner of Taxation* (2018) 367 557; [2018] NSWCA 557 [99], [101], [107] (White JA)
50 *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63, 87; 4 ATD 92 (Latham CJ)

be less sanguine. Read literally – and without the benefit of *George* – a dissatisfaction with the return is all that is required and the ATO officer may make a "direct judgment of taxable income."[51]

Before leaving the Statement, it is appropriate to remark on some of the general principles listed under heading 2 in the Statement. The decision to issue a default assessment must be based on sufficient information and reasonable grounds. Experience suggests that inferences drawn by the ATO may replace information, and not all ATO inferences have been soundly drawn. Experience also suggests that reasonable grounds relied upon by the ATO contain ambiguities and inconsistencies, which, if acted upon by the ATO in the assessing process, deliver the burden of proof to the taxpayer. Fortitude and financial resources may be needed to resolve ambiguities and inconsistencies.

Moving away from the Statement, a brief perusal of s 167(b) raises several basic questions, only some of which have been touched upon above:

(1) what is meant by the Commissioner not being satisfied with a return furnished, particularly in the era of self-assessment?
(2) when must the Commissioner fail to be satisfied with the return furnished?
(3) what procedure, if any, must the Commissioner follow to demonstrate that absence of satisfaction with the return furnished?
(4) what standard of proof of the existence of a fact going to that absent satisfaction does the Commissioner seek? (see above)
(5) can the Commissioner's state of satisfaction change, and what, if anything, may be presented to cure the Commissioner's absence of satisfaction with the return furnished?

The Commissioner's satisfaction referred to in question (2) above poses further questions. The primary question is whether the Commissioner's dissatisfaction with a return is immutable or can be salved by the reception of further information from the taxpayer, whether sought by the Commissioner or volunteered by the taxpayer?

The legislation provides no guidance on these matters.

Shouldn't these questions be addressed in the conscious administration of the taxing statutes? The non-translucent quality of the assessment processes, buttressed by s 175 and *TA* Sch 1 s 350-10(1) Item 2, denies the taxpayer access to the actual work done by the ATO, whether such questions were addressed and the answers reached by the assigned ATO officer(s). Assurances and oral reasoning

[51] PS LA 2007/24 heading 5

from the assigned officers cannot be relied upon, being shielded, if in error, in the process which is the assessment.

Considered in isolation it is most unlikely that these questions will be fully addressed before the exercise of the assessing powers. Outlying examples exist of a fulsome discussion of these and similar questions. However, if **a** function of position papers and Reasons for Decision is to engage with these questions, empirical evidence tends to disappoint.

Before leaving this topic, I note that an entire discussion paper could be devoted to default assessments using the asset betterment method and the difficulties a taxpayer faces when attempting to discharge the burden of proof as described in *Dalco* and now a feature of Part IVC. Engagement in ongoing disputes involving the method is reason enough not to provide detailed observations here.

However, for tax enthusiasts attracted to this area:

(1) resolution of the perceived controversy concerning the content of the burden of proof, said to flow from the somewhat difficult case of *Haritos*[52] may be found in the reasoning of Derington J in *Ross*[53];

(2) the otherwise rational approach of conceding the correctness of a perceived integer in the asset betterment method paradoxically may lead to a failure to discharge the burden of proof because the acceptance of the correctness of the Commissioner's measurement of the (conceded) integer does not contribute to the proof the taxpayer must deliver, and impermissibly casts the burden of proof onto the Commissioner. (To avoid this possibility express, preferably written, agreement of the agreed position should be formalised before the commencement of proceedings, and this agreement should be tendered in the proceedings.); and

(3) an absence of satisfaction by the Commissioner with a return apparently relates to an omission of income by the taxpayer from that return – even through such a return, at least for individuals, provides no means of disclosing the relevant integers of the asset betterment assessment, namely assets, liabilities, private expenditure and non-assessable receipts.

Recap

Section 167 permits the issue of default assessments. Even prior to the legislative changes in 2013 the taxpayer in receipt of a s 167 assessment was required to show that the assessment made was excessive,

52 *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 391-2 [233] – [236]

53 *Commissioner of Taxation v Ross* [2021] FCA 766 [53], [54] and [57] (Derrington J))

being greater than the actual tax liability for the income year, which actual tax liability the taxpayer was also required to prove.

The assessment process will produce an assessment which shall be conclusive evidence of the liability of the taxpayer (except in Part IVC proceedings). The validity of the assessment cannot be challenged in the absence of conscious maladministration, mala fides, or deliberate failures to administer the law according to its terms, or if there is evidence to suggest that the process is incomplete and the documented assessment is tentative or provisional. (Each of these limited exceptions are exceptional events.)

Detailed review of the work conducted by the ATO is unavailable to the taxpayer.

Administration across the continuum

Part IVC proceedings are usually conducted in relation to Notices of Amended Assessments which, as noted above, are issued in exercise of the Commissioner's assessing powers. If the Commissioner relies on s 167 the Commissioner must advise the taxpayer of her reliance.

Routinely taxpayers in Part IVC proceedings seeking a clearer exposition of the Commissioner's case, whether by unsuccessful applications for particulars or otherwise, are invited to engage with their statutory rights, which are grounded in discharge of the burden of proof.

Amended assessments usually issue following the conduct of a review by the ATO, an event or circumstance I have described in the opening paragraphs of this paper as a random taxation administration event.

A usual review step taken by the ATO is gathering further information. Information gathering by the Commissioner by her officers is always by courteous enquiry. Wherever that enquiry lies on the spectrum spanning informal enquiry, formal enquiry or enquiry reinforced by statutory sanction for failing to comply, providing a complete and unambiguous answer, if possible, will be important. The qualification is necessary to acknowledge that there may be some ATO requests which are attended by imprecision.

The visceral reaction of taxpayers (and I suspect of some advisers) is to provide limited information, often expressed in conclusory form, attended (in more cases than is seemly) with unrationed disparagement. Such an approach – it may be thought – impedes (but does not obstruct) the ATO

and, in a triumph for procrastination over delivery, is seen by its proponents to improve the taxpayer's lot.

With one eye on the terms of s 166, providing patient, accurate responses is of more benefit than limbering up for a street fight. With gratitude to Alastair Campbell and Rory Stewart[54], "disagreeing agreeably" is preferred – it allows for the recognition of common ground; it provides the Commissioner with information in addition to the return; and it narrows the issues to the real issues.

ATO position papers which follow which do not accept, incorporate, or give insufficient prominence to, material facts provide an early warning of the likelihood of dispute, the scope of dispute and whether the amended assessment is likely to be issues based or a default assessment.

If it is apparent that a default assessment is likely, seek confirmation of the statutory basis which engages s 167. Consider asking, respectfully, the five questions posed above. Assuming the prevailing courtesy of the ATO continues, request consideration of the additional information now in the Commissioner's possession, and if the ATO believes the information to be insufficient proof of the position advanced on behalf of the taxpayer, courteously ask for an explanation of the perceived deficiency.

If the measured and courteous correspondence and submissions does not persuade the ATO then it is time to seek vindication of the taxpayer through Part IVC proceedings.

Part IVC and s 167

Part IVC proceedings may be initiated where the taxpayer, dissatisfied with an assessment, has objected to it; the Commissioner has disallowed the objection in whole or part; the objection decision is reviewable; and the taxpayer has applied to the Tribunal for a review of the decision.

Recently four members of the High Court in *Frugtniet*[55] observed of the function and powers of the Tribunal:

> … except where altered by some other statute, which has not occurred here, the jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, is **to stand in the shoes of the decision-maker** whose decision is under review so as **to determine for itself** on the material before it the decision which can, and

54 A recurring theme of the Podcast: The Rest is Politics

55 *Frugniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, 263 [51] (Bell, Gageler, Gordon and Edelman JJ); see also Kiefel, Keane and Nettle JJ) at 256-7 [14]

> which it considers should, be made **in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision** under review (*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 299 [40], 315 [100], 324-325 [134]). The AAT exercises the same power or powers as the primary decision-maker, **subject to the same constraints**. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision (*Shi v Migration Agents Registration Authority*; (2008) 235 CLR 286, 327 [142]). **A consideration which the primary decision-maker must take into account in the exercise of statutory power to make the decision under review must be taken into account by the AAT.** Conversely, a consideration which the primary decision-maker must not take into account must not be taken into account by the AAT. (emphasis added)

Some years earlier, Hill J[56] highlighted as the principal constraint upon the Tribunal when hearing an application for review of a taxation objection decision, that the review sought should be within the limits of the taxpayer's objection. His Honour also observed that whilst the Tribunal has power to extend the grounds of the objection to which the objection decision relates, it has no obligation to do so; or, upon its own motion, extend the grounds of the objection without hearing from the Commissioner and the taxpayer[57].

The High Court has recently confirmed that, absent an appeal from the Tribunal on a question of law, the decision of the Tribunal is final and not subject to any further exercise by the Commissioner. In *Makasa*[58] the High Court said:

> Looking to the generic operation of the AAT Act an intention not to allow further re-exercise of a power by a primary decision-maker after re-exercise of that power by the AAT under s 43(1)(b) or (c)(i) of the AAT Act on review of an earlier exercise of power by the primary decision-maker is inherent in the nature of the merits review function for which it is the design of s 43 of the AAT Act to make provision. The merits review function of the AAT is "to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself

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56 *Liedig v Federal Commissioner of Taxation* (1994) 50 FCR 461; 464; 28 ATR 141, 145; 94 ATC 4269, 4272; see also *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475, 502

57 *Liedig v Federal Commissioner of Taxation* (1994) 50 FCR 461; 465; 28 ATR 141, 28 ATR 141, 145; 94 ATC 4269, 4272

58 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 [50]

on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review". The function of the AAT, in other words, is "to do over again" that which was done by the primary decision-maker. The function would be reduced to a mockery were the subject-matter of the decision made by the AAT on review able to be revisited by the primary decision-maker in the unqualified re-exercise of the same statutory power already re-exercised by the AAT in the conduct of the review.

Whilst it is plain that the taxpayer will have the burden of proof in Part IVC proceedings before the Tribunal, and may not cast that burden on the Commissioner, the function and powers of the Tribunal provide a taxpayer who has provided sufficient information to the Commissioner, supplemented now, if necessary, by additional evidence, with a means of blunting a s 167 assessment. The decision now will wholly be in the hands of the Tribunal.

The proceedings before the Tribunal are informed by two propositions:

(1) the Tribunal has, and may exercise, all of the same powers as the Commissioner; and
(2) the Tribunal's powers are confined to the grounds of the objection prepared by the taxpayer.

From these propositions it follows that:

(a) the Tribunal, properly informed as to the incidental nature of the assessing power in s 167, if persuaded on the materials before it, can decide whether there are grounds supporting the exercise of that power, or on the return and information within the Commissioner's possession – evident from the materials supplied by the Commissioner under obligation of *Administrative Appeals Tribunal Act* (Cth) s 37 – to exercise the power solely under s 166 - the Commissioner has no further decision making role to play; and
(b) the taxpayer must, as a ground in its objection, object to exercise by the Commissioner of the assessing power under s 167 and the taxpayer must calculate its true taxable income as the net result of assessable income and allowable deductions.

It may – but does necessarily – follow that the Tribunal may adopt a slightly less restrictive approach to the standard of proof required to determine the actual tax liability of the taxpayer.

For such an approach to succeed it will be necessary, well in advance, to determine the strength of the taxpayer's case – recognising how deficiencies in proof might be addressed – and to provide the ATO

with sufficient information. What is sufficient information will be determined by the nature of the dispute.

Statements from the taxpayer and central participants in the reviewed acts, transactions or events should be provided, notwithstanding the marked reluctance of the ATO to accept oral evidence unless the ATO has sought such statements in compliance with a s 353-10 notice. For at the very least they provide the Commissioner with information within her possession, engaging s 166; and, by being in the Commissioner's hands, must be shared with the Tribunal by the Commissioner as a matter of course when it review proceedings commence.

I J Stanley

31 July 2023