Forming an opinion of "fraud or evasion" — is this the Commissioner's unchallengeable right to an unlimited amendment period?

Murray Shume *COOPER GRACE WARD LAWYERS*

> The rules governing the amendment of income tax assessments attempt to balance two competing objectives, namely that:
>
> - A taxpayer should pay the correct amount of tax according to law.
> - Whether or not a taxpayer has paid the correct amount, eventually their tax affairs for a particular year should become final, unless they have deliberately sought to evade their responsibilities.
>
> — The Treasury, *Report on Aspects of Income Tax Self Assessment*[1]

Recent cases suggest that in relation to assessments amended because of fraud or evasion that this policy objective is not being met. A taxpayer no longer has certainty that their tax affairs for any particular year are final.

In this article, I will briefly examine these cases and comment on the potential implications of the current regime.

Period of review

An important aspect of the current self-assessment regime is to provide certainty for a taxpayer in relation to their yearly income tax assessments. Section 170(1) of the Income Tax Assessment Act 1936 (Cth) (ITAA 1936) does this by limiting the time in which the Commissioner may amend an assessment. To broadly summarise s 170(1):

- most individuals and small businesses have a two year period of review;[2]
- larger businesses, more complex circumstances and cases where anti-avoidance provisions have been applied have a 4 year period of review; and
- where the Commissioner has "formed an opinion of fraud or evasion", there is an unlimited period of review.

There is no question that where a taxpayer has deliberately sought to evade their responsibilities in relation to an assessment that they should not be protected by limited periods of review.

The issue however is that the right to amend is predicated on the Commissioner "forming an opinion" and not on whether there is actual fraud or evasion. This may be fine if there is scope for a taxpayer to have the Commissioner's opinion externally reviewed in some meaningful way.

The judgment of Perram and Davies JJ in *Binetter v Cmr of Taxation* (*Binetter*)[3] found that the operation of s 14ZZK of the Taxation Administration Act 1953 (Cth) (TAA), which requires a taxpayer to establish that the Commissioner's assessment was excessive, has cast doubt on the ability of some taxpayers to effectively have the Commissioner's opinion of fraud or evasion reviewed.

This effectively opens up an unlimited period of review for the Commissioner.

O'Loughlin SM aptly described the issue recently in *Nguyen v Federal Commissioner of Taxation* (*Nguyen*):

> Provided the Commissioner has formed the requisite opinion, in an income case, the effect of the *Binneter* decision, and those on which it is based, may well be to make a fraud or evasion finding *unchallengeable independently of the challenge to the assessability of the relevant amount*. If that is so that is not a matter that the Tribunal can alter.[4] [Emphasis added.]

Binetter

Mrs Binetter had lodged her income tax returns for the 2002 to 2007 income years (relevant years) and was assessed by the Commissioner based on these returns.

In 2010, the Commissioner, as part of a broad audit into her family's tax affairs, concluded that Mrs Binetter's assessments for the relevant years ought to be amended to include 50% (ie her half) of the amounts deposited into a joint bank account during these years.

The issue for the Commissioner was that by the time he decided that he wanted to amend these assessments, he was outside of Mrs Binetter's period of review and was therefore required to form an opinion of fraud or evasion in order to amend these assessments — which he did.

Mrs Binetter's objections to these assessments were disallowed and she sought a review of this decision by the Administrative Appeals Tribunal (AAT) under s 14ZZ of the TAA. The AAT confirmed the Commissioner's assessments.

Mrs Binetter argued that the AAT, in reviewing the Commissioner's decision, should act in the shoes of the Commissioner and reform the opinion of fraud or evasion on the basis of the evidence before it. This should be before considering whether the taxpayer had established that the Commissioner's amended assessments were excessive.

The AAT disagreed with this analysis and upheld the Commissioner's amended assessments.

Mrs Binetter appealed this decision to the Full Federal Court. That appeal was heard along with an appeal on similar issues for Mrs Bai.

The parties' arguments were summarised in the judgment as follows.

For the Commissioner:

> The Commissioner's position before the Tribunal, and in this Court, was that the effect of s 14ZZK(b)(i) was to cast upon Mrs Binetter the onus of satisfying the Tribunal that she had not engaged in fraud or evasion in each of the relevant years.
> The reasoning underpinning this was that s 14ZZK(b)(i) required the taxpayer to prove that the relevant assessment was excessive. In a case where the issue of an amended notice of assessment which would otherwise be out of time was authorised only if the Commissioner had formed the requisite opinion that there had been fraud or evasion, the burden was on the taxpayer to prove that the condition for the exercise of the amendment power was not met, either by proving that the Commissioner had amended the assessments without forming such an opinion or by proving that there had been no fraud or evasion.[5]

This is easier said than done: how does a taxpayer prove an absence of the intention that underlies a correct opinion of fraud or evasion?

For Mrs Binetter it was argued:

> Mrs Binetter's argument that the Tribunal erred by affirming the amended assessments without itself forming the opinion that there was fraud or evasion in relation to each relevant year relied on two propositions.
> The first proposition was that as the relevant jurisdictional fact under s 170 of the ITAA 1936 to enliven the amendment power was the formation by the Commissioner of the opinion that there was fraud or evasion, the onus imposed on Mrs Binetter by s 14ZZK of the TA Act required her only to prove that the Commissioner had not formed the requisite opinion.
> The second proposition was that the s 14ZZK onus to prove the absence of the fact of an opinion formed by the Commissioner 'has nothing to do with a full merits review of the opinion of the existence of the fact' (paragraph 30 of Mrs Binetter's submissions). Mrs Binetter argued that the Tribunal, on review, 'standing in the shoes of the Commissioner', must itself form the opinion there was fraud or evasion to enliven the amendment power and that that opinion becomes, by operation of s 43(6) of the AAT Act and s 169A(3) of the ITAA 1936, the authority under s 170 of the ITAA 1936 for making the amended assessment. If the Tribunal did not form an opinion (or if on appeal the Court holds that the Tribunal did not properly form its opinion), the argument went, then the jurisdictional fact necessary to authorise the amendment of the assessment under s 170 'has disappeared and not been replaced' and the amended assessment 'must be set aside as excessive under s 14ZZK' (paragraph 39 of Mrs Binetter's submissions). As in this case the Tribunal did not form its own opinion that there was fraud or evasion and the Tribunal's own opinion was required as a precondition to the authority to amend, the Tribunal could not lawfully affirm the amended assessments.[6]

The majority of the Full Federal Court accepted the Commissioner's position and affirmed the AAT's decision, concluding that: "The Tribunal was correct to hold that Mrs Binetter bore the onus of proving that the conditions for the exercise of the amendment power did not exist."[7]

Self-fulling power to amend

O'Loughlin SM's analysis of the decision in *Binetter* and in *Nguyen* led him to make the following comments relating to the evidentiary burden in proving no fraud or evasion:

> … the issue for this Tribunal is whether the taxpayer has discharged the onus of showing that the fraud or evasion opinion should not have been formed. If a taxpayer does not do that, the amended assessments stand.
> The manner in which a taxpayer would achieve such a goal in an income case depends on the particular circumstances. A taxpayer could demonstrate there was no omission of income and therefore no avoidance of tax. Alternatively a taxpayer could demonstrate that the amounts, while assessable, were not included in assessable income returned for a reason that shows that while there was a shortcoming, it was a shortcoming that fell short of a blameworthy act in the *Denver Chemical* sense.
> Provided the Commissioner has formed the requisite opinion, in an income case, the effect of the *Binneter* decision, and those on which it is based, *may well be to make a fraud or evasion finding unchallengeable independently of the challenge to the assessability of the relevant amount*. If that is so that is not a matter that the Tribunal can alter.[8] [Emphasis added.]

There will be circumstances where a taxpayer will not have any real or substantive right to have the Commissioner's fraud or evasion finding externally reviewed in practice.

For example, consider circumstances where the Commissioner includes deposits into bank accounts as assessable income. These deposits may have been received many years ago, and to amend these assessments, the Commissioner would need to form an opinion of fraud or evasion.

To establish that there was no fraud or evasion, a taxpayer would need to establish that these deposits were not income. In other words, the taxpayer would need to establish that the deposits were not assessable in order to establish that there was no fraud or evasion and therefore no basis to amend in the first place.

The earlier the income year, the more difficult it is for a taxpayer to discharge this evidentiary burden. Ironically, it becomes harder to challenge a fraud or evasion opinion as time passes, removing the certainty the ROSA amendments were legislated to provide. At some point, it becomes extremely difficult if not impossible to challenge the opinion of fraud or evasion.

This is an important issue. If there is effectively no right of external review of the opinion, taxpayers are then reliant on the Commissioner being correct in forming his opinion and not whether in fact there was fraud or evasion.[9]

Where to from here?

Mrs Bai has lodged an application for special leave to appeal this decision to the High Court.

In my view, there are a number of sound bases for this application.

First, there is judicial support for the requirement for the AAT to form its own opinion of fraud or evasion. For example:

In *Barripp v Cmr of Taxation*, Bavin J stated:

> I find it hard to reconcile the exclusion of a power to review the correctness of the opinion of the Board, with the plain words of the Act. I strongly concur with the expression of the opinion of the learned Chief Justice — that when liability of the subject to taxation is made to depend upon the volition or the opinion of an official, or a bureaucratic tribunal — 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 that some general class of rulings should be sheltered from appeal. The reasoning seems to me to apply with especial force where, as in this case, the subject matter involved in the appeal is one like fraud or evasion which is peculiarly appropriate for decision by a judicial tribunal.[10]

In *Denver Chemical Manufacturing Co v Cmr of Taxation (NSW)*, Dixon J stated in relation to the similar former s 210 of the ITAA 1936:

> In my opinion s 210 intends to repose in the commissioner a discretionary power to say whether there has been, in his opinion, an avoidance due to fraud or evasion, and the sections of the Acts of 1936 or 1941 dealing with objections and appeals intend to repose only in *the Board of Appeal the authority to re-examine that discretion on the merits. The provisions of the Act substitute the Board of Appeal for the commissioner, once there has been a reference to the Board of Appeal as a result of an objection by the taxpayer to the exercise of the discretion, the objection having been overruled by the commissioner.*[11] [Emphasis added.]

Second, there is judicial authority to suggest that in allegation of serious misconduct (such as a finding of fraud or evasion), the burden of establishing these allegations is on the party making them.[12]

For example, in *Danmark Pty Ltd v Federal Cmr of Taxation,*[13] Williams J said:

> If the Commissioner charges that a secret or covinous arrangement between [the relevant persons] exists behind the cloak of the apparent facts, the onus is on him to prove the charge.[14]

While s 170(1) of the TAA only requires the Commissioner to form an opinion on whether there was fraud or evasion, it is arguable that while s 14ZZK presumes that an assessment is correct, the Commissioner has the onus to prove to the court or AAT any serious allegations that support that assessment.

Finally, the Full Federal Court's decision in *Binetter* also raises questions as to sufficiency of s 44 of the Administrative Appeals Tribunal Act 1975 (AAT Act), in relation to a taxpayer's constitutional right under s 75(v) of the Constitution.

It is argued that the judgment in *Binetter* relegates the Commissioner's finding of fraud or evasion to a finding of fact on appeal from the decision of the AAT. As there is no right to appeal a question of fact under s 44 of the AAT Act, there is no review of the imposition of tax by the Commissioner.

The right to appeal would be available however, if the AAT were required to reform an opinion of fraud or evasion prior to considering the substantive issues. In this case, the AAT opinion would be a jurisdictional fact and therefore a question of law and reviewable by the Federal Court.

The balance between paying the correct amount of tax and taxpayer certainty

If, based on an effectively unchallengeable opinion of fraud and evasion, the Commissioner may amend an assessment to include unexplained deposits where there is no likelihood that a taxpayer will be able to establish these deposit's true character, then in my opinion the current legislation has got the policy balance wrong.

The taxpayer no longer has any certainty as to their tax position. The issue is that taxpayer's tax position is only certain if there is confidence that the Commissioner's opinion that there was fraud or evasion is correct. This can only be achieved if the Commissioner's opinion is reviewable on the merits of the decision.

Murray Shume
Associate
Cooper Grace Ward Lawyers
murray.shume@cgw.com.au
www.cgw.com.au

Footnotes

1. The Treasury (Cth) *Report on Aspects of Income Tax Self Assessment* (August 2004) 27.
2. It is arguable however that the vast majority of taxpayers have a 4 year amendment period as they are "beneficiaries of a trust": see *Yazbek v Cmr of Taxation* (2013) 88 ATR 792; [2013] FCA 39; BC201300304.
3. *Binetter v Cmr of Taxation* [2016] FCAFC 163; BC201610338.
4. *Nguyen v Federal Cmr of Taxation* [2016] AATA 1041 at [34].
5. Above n 3, at [80]–[81] (Perram and Davies JJ).
6. Above n 3, at [87]–[89] (Perram and Davies JJ).
7. Above n 3, at [95] (Perram and Davies JJ).
8. Above n 4, at [32]–[34].
9. This is concerning as current documents used by the Commissioner's representatives in forming this opinion incorrectly state the test for evasion as "a blameworthy act or omission", whereas the test as provided by Dixon J in *Denver Chemical Manufacturing Co v Cmr of Taxation (NSW) (Denver Chemical)* (1949) 79 CLR 296 at 313 is described as "some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible is *contemplated*" (emphasis added).
10. *Barripp v Cmr of Taxation (NSW)* (1940) 6 ATD 59 at 22.
11. *Denver Chemical*, above n 9, at 311. See also *Mobil Oil Australia Pty Ltd v Federal Cmr of Taxation* (1963) 113 CLR 475; (1963) 37 ALJR 182; BC6300650.
12. For a more detailed analysis of the Briginshaw standard in tax litigation, see M Leighton-Daly "The Briginshaw standard in tax litigation: a substantive law taxpayer protection?" (2010) 44(9) *Taxation in Australia*.
13. *Danmark Pty Ltd & Forestwood Pty Ltd v Federal Cmr of Taxation* (1944) 2 AITR 517; (1944) 7 ATD 333.
14. See also comments by Logan J in *Pacific Exchange Corp Pty Ltd v Cmr of Taxation* (2009) 180 FCR 300; [2009] FCA 1155; BC200909295.