



Australian Government
Australian Taxation Office

Fraud or evasion guideline (period of review)

These guidelines support the policy and principles set out in Law Administration Practice Statement PS LA 2008/6 Fraud or evasion.

This is an operational document used by ATO staff. We have made it publicly available in line with requirements of the [Information Publication Scheme](#) under the *Freedom of Information Act 1982*, and also in line with our broader commitment under the [ATO charter](#) for transparency in dealing with taxpayers.

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Purpose

1. This guideline supports the policy and principles set out in [Law Administration Practice Statement PS LA 2008/6 Fraud or evasion](#) (PS LA 2008/6).
2. The primary audience of this guideline is ATO staff recommending, or forming, an opinion of fraud or evasion in order to amend assessments (or to seek payment of indirect tax which has been underpaid) outside the statutory time limits (also called 'period of review').
3. This guideline:
 - a. sets procedures for obtaining advice from the National Fraud or Evasion Advisory Panel
 - b. provides guidance to authorised opinion-makers on forming an opinion of fraud or evasion
 - c. draws attention to particular topics of interest and related practice and procedure, and
 - d. includes examples to illustrate key considerations when deciding whether a taxpayer's behaviour would constitute fraud or evasion.

Technical advisory arrangements

4. When preparing a fraud or evasion submission, you must seek assistance from technical advisers within your business line. For example, all Public Groups and International (PGI) cases in which fraud or evasion is being considered as an issue require engagement with PGI Law Advice and Resolution. You may also seek advice from Tax Counsel in accordance with Practice Statement PS LA 2012/1 and, in rare cases, from an external legal services provider.
5. As the submission reaches a developed state you must seek advice from the National Fraud or Evasion Advisory Panel (the FE Panel).
6. A case officer seeking to have an opinion of fraud or evasion formed by an authorised officer (opinion maker), or the opinion-maker themselves, must seek advice from the FE Panel prior to any opinion being formed.
7. The opinion-maker must have regard to advice provided by technical specialists and the FE Panel. The act of forming the fraud or evasion opinion remains, however, with the properly authorised officer.

National Fraud or Evasion Advisory Panel

8. The primary purpose of the FE Panel is to provide advice and guidance to ATO staff that are considering seeking, or forming, an opinion of fraud or evasion. Its role is purely advisory. The FE Panel does not form the opinion. Instead, it provides advice and guidance that the opinion-maker must consider. The ultimate authority to form an opinion of fraud or evasion remains with the opinion-maker.

Composition of the FE Panel

9. The FE Panel will comprise at least 3 senior ATO staff at the Executive Level 2 or above.
10. One member must be from the referring business line (but not a member of the case team) and one member must be from the Office of the Chief Tax Counsel.
11. Where the referring business line is Objections and Review, the panel members will only be drawn from Objections and Review and/or the Office of the Chief Tax Counsel who have not previously been involved in the case.
12. Further information on the membership and governance of the FE Panel is available in the Panel's governing documents.

Attendance at FE Panel meetings

13. The following ATO staff must attend the FE Panel.
 - a. The opinion-maker (if known). It is highly desired that opinion-makers be identified and attend the FE Panel as they have the ultimate responsibility of forming the opinion of fraud or evasion.
 - b. Case officer or objection officer presenting the submission.
 - c. Case officer's team leader/manager and/or director.

Timing of referrals to the FE Panel

14. At a minimum, you should approach the FE Panel for advice:
 - a. after you have made sufficient enquiries and gathered relevant information and evidence such that an opinion-maker could form a preliminary view on fraud or evasion
 - b. before forming an opinion of fraud or evasion or issuing the ATO's statement of audit position, reasons for decision or objection decision to the taxpayer in which the finding of fraud or evasion is communicated, as the case may require.
15. You may, however, refer matters to the FE Panel for preliminary advice or guidance at an earlier time. For example, you can approach the FE Panel prior to issuing the ATO's position paper with a preliminary view on the issue of fraud or evasion and again after you have considered the taxpayer's response and any other information, before finally forming an opinion of evasion or fraud. You may also seek advice from the FE Panel on otherwise important, sensitive, novel, or otherwise complex cases.

Material to be included in referrals to the FE Panel

Audit case

16. If your case is at the audit stage, your submission to the FE Panel should include the following.
 - a. A one-page executive summary.
 - b. Draft position paper, draft reasons for decision or draft audit report.
 - c. A fraud or evasion submission including statements about the following:

- i. whether the advice sought relates to an evasion opinion, a fraud opinion or both
 - ii. the relevant legislative provision pursuant to which the opinion is sought
 - iii. the tax periods and income years for which the opinion is sought, including expiration dates of those periods.
- d. A draft evasion opinion or fraud opinion (in the case of an opinion maker approaching the FE Panel for advice).

Objection case

17. If your case is at the objection stage, include the following in your approach to the FE Panel.
- a. A one-page executive summary.
 - b. Taxpayer's objection.
 - c. Draft Legal Reasoning document.
 - d. Any relevant position paper or audit report.
 - e. Fraud or evasion submission (using the template form) including statements about the following:
 - i. whether the advice sought relates to an evasion opinion, a fraud opinion or both
 - ii. the relevant legislative provision pursuant to which the opinion is sought
 - iii. the tax periods and income years for which the opinion is sought, including expiration dates of those periods.
 - iv. A draft evasion opinion or fraud opinion if at that stage of development.

Forming an opinion

Each opinion relates to one year of tax

18. Where fraud or evasion is being considered for multiple years or tax periods, the opinion-maker is required to consider each year or period and form an opinion in respect of each.

Evasion – avoidance of tax (a shortfall) and a blameworthy act or omission

19. The circumstances in which the Commissioner would consider forming an opinion of evasion would involve:
 - a. an avoidance of tax¹ in the sense that less tax has been paid than ought to have been paid (ie there is an identified tax shortfall)²; and
 - b. a blameworthy act or omission on the part of the taxpayer or their agent/trustee³ which has resulted in the tax shortfall.
20. Evasion falls between an innocent mistake and fraud and involves some blameworthy act or omission. Whether a taxpayer's acts (including omissions) can be said to be blameworthy is an objective test based on what a reasonable person would do in any given situation. A person is usually presumed to intend the natural consequences of his or her own acts:⁴

... There is no suggestion that the taxpayer detected the omissions from the returns and wilfully withheld the information from her agents. Upon the evidence it seems to be that the taxpayer simply approached the task of signing her returns with a lack of care that amounted virtually to indifference to their correctness. If they were understated (as indeed they proved to be), I do not think that the taxpayer can reasonably raise her own carelessness as an excuse. Such neglect must surely be blameworthy, and sufficient to justify the opinion that the avoidance of tax was due to evasion...⁵
21. A straightforward example of evasion is where a taxpayer has omitted income from their tax return and not provided any credible explanation: eg a taxpayer who consistently understates his business income.⁶
22. Un-businesslike behaviour that results in a tax shortfall (such as a failure to keep proper records), or indifference to the accuracy of a return before signing and lodging, may also be blameworthy in the sense required to form an opinion.

¹ Item 5 of the table in Subsection 170(1) of the ITAA 1936 does not make reference to the phrase 'an avoidance of tax'. Former paragraph 170 (2)(a) stated that the Commissioner could amend an assessment at any time where the 'avoidance of tax' was due to fraud or evasion. The Explanatory Memorandum which accompanied the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 that introduced subsection 170(1) states that "the omission of the phrase referring to 'an avoidance of tax' from the old paragraph 170(2)(a) is not expected to have practical significance". For the 2004-05 and later years of income, subsection 170(1) also applies to assessments where no tax is payable. Both the former paragraph 170(2)(a) and current subsection 170(1) of the ITAA 1936 apply to amended assessments. Subsection 170(3) of the ITAA 1936 states: 'Except as otherwise provided every amended assessment shall be an assessment for all the purposes of this Act'. Perram and Davies JJ at [72] in *Binneter v FCT* [2016] FCAFC 163 explained that 'avoidance of tax' was removed because subsection 170(1) also applies to the recovery of fraudulently claimed tax credits.

² *Australasian Jam Company Pty Ltd v. FCT* (1953) 88 CLR 23.

³ *Australasian Jam Company Pty Ltd v. FCT* (1953) 88 CLR 23, *Kajewski v. FCT*, [2003] FCA 258, and *Hasmid Investments Pty Ltd v. FC of T* 2001 ATC 2150.

⁴ *Lloyds Bank Ltd v Marcan* [1973] 2 All ER 359.

⁵ F.E. Dubout (Chairman) - Board of Review in Case 61 (1969) 15 CTBR (NS), Case A79 69 ATC 424 at [10].

⁶ For example Case No H10 (1956) 8 TBRD 46.

23. The mere fact of a shortfall is not enough to establish evasion. If there is evidence of the taxpayer having acted reasonably and honestly such action could not be considered as blameworthy. Therefore, it is useful to ask the following questions.
- a. What would a person, standing in the taxpayer's shoes, be expected to have done if acting reasonably and honestly?
 - b. What reasons have been provided by the taxpayer for not doing what would be expected of such a person who acted reasonably and honestly?
 - c. To what extent are the taxpayer's acts or omissions still considered to be blameworthy in light of the reasons provided by the taxpayer?
24. Reasons provided by the taxpayer and/or adviser in connection with the acts or omissions that gave rise to the tax shortfalls are relevant but not determinative. The analysis in support of an opinion of evasion is an objective exercise. It is what a reasonable person would have done in the circumstances. It is therefore necessary to also take into account matters such as the following:
- a. The number of years over which the income was omitted or the deductions were over-claimed.
 - b. The steps involved that led to the tax shortfall, including the degree of any artifice involved (if any).
 - c. Whether the taxpayer has withheld any information requested by the Commissioner.
 - d. The manner in which the taxpayer kept the relevant records.
 - e. The attention given to the particular matter by the taxpayer.
 - f. How the taxpayer had attended to other taxation obligations.
 - g. The complexity of the relevant law.
 - h. What (if any) uncertainty is there around the legislative provision or legal issue.
 - i. The nature of any advice or guidance provided by the ATO in relation to the issue (rulings, ATO IDs, web content etc) and whether that information was ambiguous or capable of misleading.
 - j. The sophistication of the taxpayer and/or adviser (including their knowledge of the ATO procedures and systems).
 - k. The nature of any professional advice provided by an adviser and the questions asked of the adviser by the taxpayer in relation to the issue.
 - l. Other means available to the taxpayer and/or the adviser to clarify the law (including the rulings system).
 - m. Information or questions on the return form that might alert a taxpayer to the relevance of certain transactions.
 - n. Other information provided by the ATO that might alert a taxpayer to the relevance of certain transactions.
25. That is not an exhaustive list. Each case will need to be considered on its own particular facts which may point to other relevant matters not listed.

26. Blameworthy acts are not limited to the lodgment of the return. *Barripp* and *Denver Chemical Manufacturing*⁷ provide authority for considering behaviour both before and after the preparation of a return in determining whether evasion has occurred. [Appendix 1](#) contains an overview of how evasion has been considered by the High Court in these (and other) cases.

Fraud – avoidance of tax (a shortfall) and false representation or indifference

27. The circumstances in which the Commissioner would consider forming an opinion of fraud would involve:
- a. an avoidance of tax in the sense that less tax has been paid than ought to have been paid (ie there is an identified tax shortfall);⁸ and
 - b. false representations made to the Commissioner that resulted in the tax shortfall which the taxpayer:
 - i. knew were incorrect
 - ii. held no belief in their truth, or
 - iii. made recklessly or indifferently as to whether the representations were true and false.
28. The definition and standard of fraud we apply is the common law civil definition and standard of fraud, which is broader and a lower threshold than the criminal definition and standard of fraud. The civil definition of fraud will also include, for example, the culpable behaviour of reckless indifference.
29. The primary facts will need to establish that the taxpayer knowingly made false representations or held no genuine belief in the representations put to the Commissioner. This will mean that the primary facts and evidence will have to establish that the taxpayer either knew the correct position and chose not to follow it, or was so reckless or indifferent to the correct position that he or she could not be taken to hold any genuine belief in the correctness of those representations.
30. This will usually be inferred or imputed on an objective basis from a consideration of all the relevant circumstances. It will be necessary to consider the facts and draw a conclusion, from those facts, as to whether the taxpayer intended to make the false statement, held no belief in its truth or was reckless as to its veracity.
31. [Appendix 2](#) contains an overview of how fraud has been construed by the judiciary.

⁷ *Barripp v C of T (NSW)* (1941) 6 ATD 69 and *Denver Chemical Manufacturing Co v. Commissioner of Taxation (NSW)* 1949 79CLR 296.

⁸ *Australasian Jam Company Pty Ltd v. FCT* (1953) 88 CLR 23.

Recording an opinion

Submission document

32. There is a prescribed template for preparing submissions to an opinion maker recommending that he or she form an opinion of fraud or evasion.
33. If you observe culpable behaviour in more than one year, then a separate opinion must be formed for each of those years. For administrative convenience, you may record those facts and evidence in the one submission document, however you must clearly explain where there is different culpable behaviour exhibited in different income years or tax periods.

Opinion document

34. The forming of the Commissioner's opinion that there has been an avoidance of tax due to fraud or evasion is a condition precedent to the exercise of the power to amend outside the limits on period of review.
35. A taxpayer may put into issue, in tribunal or court proceedings, whether or not that condition was satisfied. See [Appendix 3](#) for the circumstances in which the Commissioner's opinion on fraud or evasion can be judicially reviewed.
36. It is therefore vital that the opinion:
 - a. is properly documented using the prescribed opinion template –;
 - b. is recorded contemporaneously in Siebel by the opinion-maker completing the authorisation activity upon forming the opinion;
 - c. sets out all the material facts;
 - d. articulates the blameworthy act
 - e. refers to the evidence from which the material facts were drawn, the reliability of the evidence and any conflicting material;
 - f. highlights any gaps in the evidence which remain to be investigated or explained and why that evidence has not been sought; and
 - g. explains the full administrative context in which the opinion of fraud or evasion was made.
37. The opinion should be recorded in writing and should set out concisely the basis for the opinion. It is not appropriate to say that the opinion has been formed because advice has been received that it could be formed. The fact of having received advice is itself irrelevant.
38. If the opinion-maker seeks advice and accepts it, the reasons adopted become his or her own reasons. For example, if an officer is advised that a certain statement may constitute a fraudulent misrepresentation, and accepts that advice, forming an opinion that there has been an avoidance of tax due to fraud, the officer should say, 'I formed the opinion that there has been fraud because in my opinion such and such a statement is a fraudulent misrepresentation.' That sufficiently explains the basis of the opinion.

39. However, the officer should not say, 'I formed the opinion that there was fraud because I was advised that such and such a statement was a fraudulent misrepresentation'. Also, if asked what was taken into account the officer should not say 'I took into account advice that there has been fraud or evasion'. The advice, as such, is irrelevant. What was taken into account, in this example, is the statement and its alleged fraudulent quality, not the advice.
40. If ATO officers state that they rely on legal advice obtained from the Australian Government Solicitor or counsel to form an opinion on fraud or evasion, there is a risk that legal professional privilege may be waived on both the advice and the brief.

Multiple years

41. We may, for convenience, record opinions of culpable behaviour covering multiple years in the one opinion document. When we do that we must, however, take special care to clearly identify the behaviour that applies to each respective year. We must do that even where it is the same behaviour repeated in each year or tax period.
42. Similarly, we must state that we have formed an opinion for each year or tax period. To avoid doubt you should say, for example, that for year 2011 you have considered the facts and evidence of <the blameworthy act> and <the shortfall> and you have formed an opinion of evasion; for year 2012 you have considered the facts and evidence of <the blameworthy act> and <the shortfall> and you have formed an opinion of evasion; and so on.

Topics of particular interest

Evasion and fraud to be considered separately

43. Item 5 of the table in subsection 170(1) of *the Income Tax Assessment Act 1936* (ITAA 1936) requires the Commissioner to form an opinion of evasion or an opinion of fraud. The usual case is evasion. In most cases it will be evident there was no fraud.
44. Where it appears there is a strong case for fraud then you should also separately consider the conduct under the indicators of fraud.
45. The submission provides for the separate marshalling of facts, evidence and argument under each of evasion and fraud.
46. If your case gives rise to both evasion and fraud opinions, then you have to use separate templates for those different opinions.

No requirement for an independent opinion-maker

47. It is entirely appropriate for an opinion-maker to have been involved in the audit or review that gave rise to the relevant facts and evidence. The officer forming the fraud or evasion opinion will need to have a good understanding of the facts and evidence in the case.

The 'per' signing convention

48. Clause 1.6.1 of the *ATO Taxation Authorisation Guidelines* states that only an Executive Level 2 officer or a Senior Executive Service officer can form an opinion of fraud or evasion. Such an opinion-maker will be forming the opinion in the name of a delegate. That is why the template for recording an opinion is signed by the delegate per the authorised opinion-maker.

Timing of enquiries and forming an opinion

49. PS LA 2008/6 states that 'the fraud or evasion exception to period of review is no basis for amending assessments that could and should have been made within the ordinary time limits but were not'. The opinion-maker must put on the case file an explanation of the circumstances that have given rise to the particular timing of the formation of the opinion.
50. Where new information comes to light, it may be reasonable to reopen a case and re-examine periods which would otherwise be outside the period of review.
51. Time can run out because of delay caused by the taxpayer in the course of the review or audit.
52. We can make enquiries about a taxpayer's affairs in relation to periods outside the general periods of review. We should reassure taxpayers that such enquiries do not imply that we are alleging fraud or evasion. We should reassure taxpayers that if we consider that fraud or evasion may apply, we will generally express these concerns in a position paper so that the taxpayer will have an opportunity to respond before we form an opinion.
53. We should consider fraud or evasion as soon as practicable during an audit or review. The method and timing of communicating our concerns that fraud or evasion may have taken place will depend on the circumstances of the case. This may be during the information gathering stages or through formal or informal interviews or other means of communication. However, in most cases, it will be practicable to first present any discussions of fraud or evasion through a position paper and provide an opportunity for the taxpayer to respond.
54. In serious cases involving disengagement, aggressive behaviour or where there are asset dissipation risks, we may not give the taxpayer an opportunity to respond before we form the opinion.

Gaps in facts and evidence

55. You have to base an opinion of evasion or of fraud on evidence of relevant purported facts. That is why the case team uses a facts and evidence worksheet approach to prepare its submission for an opinion.
56. You may make reasonable assumptions and inferences. When you do, you must make those explicit in your record of opinion-making. You will not be supported where you have not been able to properly consider and explain gaps in evidence.

Opinion requires evidence of specific conduct – not a ‘blanket’ opinion by reference to ‘general’ bad behaviour

57. The opinion has to relate to specific culpable behaviour that has an effect on assessment of the tax year in question.
58. You cannot seek to amend over a multi-year period where culpable behaviour affects only some of the years.
59. Similarly, you cannot seek to amend where the culpable behaviour exhibited over time would give the mere ‘impression’ of fraud or evasion.
60. The requisite culpable behaviour has to be specific and it has to relate to the shortfall.

Fraud or evasion opinion not required for penalty purpose

61. The legislative provisions that impose penalties and the provisions dealing with the amendment of assessment are distinct. The concepts involved may be similar. There is, however, no direct relationship between forming an opinion as to fraud or evasion for period of review purposes and the imposition of different levels of penalties.
62. You do **not** use the fraud or evasion submission and opinion templates for penalty purposes.

Voluntary disclosure

63. The expression ‘voluntary disclosure’ has a particular meaning for the purposes of applying the penalty provisions. The fact that the taxpayer has or has not made a voluntary disclosure does not impact upon the requirement for the Commissioner to form an opinion on fraud or evasion where he or she is seeking to amend beyond the permitted time period.

Acts of agents

64. Taxpayers are responsible for the acts of agents in common law.

To enliven the power to amend an assessment under [the former] s.170(2)(a), the Commissioner only has to be of the opinion that an avoidance of tax is due to fraud or evasion. There is no justification for implying a limitation on these clear words to restrict the Commissioner’s power under the provision to amend an assessment only where the avoidance of tax is due to fraud or evasion by the taxpayer personally. The wording of s.170(2)(a) is apt to empower the Commissioner to issue an amended assessment where an avoidance of tax is due to the fraud or evasion of the taxpayer’s agent engaged to prepare returns signed by the taxpayer and to lodge those returns on the taxpayer’s behalf, as Hart did here for Askena and the applicants.⁹

⁹ Kajewski & Ors v. FC of T (2003) ATC 4375 [114].

Acts of Trustee

65. Acts of a trustee may also give rise to the forming of a fraud or evasion opinion with respect to a beneficiary's assessment.¹⁰ Senior Member Pascoe stated:

...it is not necessary that the particular taxpayer is guilty of fraud or evasion provided the avoidance of tax was due to fraud or evasion and the taxpayer would have benefited from such avoidance of tax.

66. This approach is supported in the following way.

- a. The ordinary meaning of the words of subsection 170(1) and the former paragraph 170(2)(a): *Kajewski v. FCT*.
- b. The context of Division 6 of the ITAA 1936, where a trustee determines the income of the trust in such a manner so as to avoid payment of tax by it or the beneficiaries on the net income of the trust, the beneficiaries stand to benefit from the avoidance.
- c. Its consistency with legal principle. A trustee will be taken to know of its duties to adhere to the terms of the trust, and to keep and render proper accounts. At the time of the trustee's fraud or evasion a beneficiary may have limited access to information about the trust and the determination and distribution of the income of the trust. They may not have constructive knowledge of the trustee's fraud or evasion. But they do have a right against the trustee for the due administration of the trust, a right to disclaim for each exercise of the discretion, and a right to compensation in the event of a breach of trust.

67. The Commissioner's opinion as to the fraud or evasion of the trustee is therefore sufficient to enliven the Commissioner's power to amend the assessments of the beneficiaries who have benefited from the avoidance and so they have a tax shortfall.

Status of opinion following resolution of a dispute

68. Where reasons for decision accompany an assessment the taxpayer has recourse to the normal objection processes. If the taxpayer provides information at objection which causes the ATO to change its position on its fraud or evasion opinion, then the opinion is effectively withdrawn. In such a case the opinion ceases to exist as a subject of controversy.

69. Where a substantive tax issue is resolved by settlement or by a substituted decision, such resolution has no practical or legal effect on the fraud or evasion opinion. There would be no need to do anything about the opinion.

Failure to form an opinion

70. A failure by the Commissioner to have formed an opinion that there was fraud or evasion prior to, or at the time of, amending an assessment does not invalidate that assessment,¹¹ but does go to whether the amended assessment is excessive because the Commissioner did not have the authority to impose the increased/altered liability.

¹⁰ *Hasmid Investments Pty Ltd & Ors v. FC of T* 2001 ATC 2150; 2001 47 ATR 1020, [24].

¹¹ By operation of section 175 of the ITAA 1936 and section 350-10 of the Taxation Administration Act 1953.

71. However, given that the amended assessment is valid, the Commissioner can form an opinion on fraud or evasion at the objection stage. Subsection 169A(3) of the ITAA 1936 will apply to deem the opinion to have been made when the amended assessment was made. This results in the amended assessment being treated as appropriately authorised in terms of the requirement for the Commissioner to form an opinion on fraud or evasion (cf *FC of T v. BHP Billiton Finance Ltd* 2010 ATC 20-169, which confirmed the decision and detailed analysis on the operation of section 169A(3) by Gordon J in *BHP Billiton Finance v. FC of T* 2009 ATC 20-097).
72. Provided the amount under the objection decision remains the same as the amount under the amended assessment it will not be necessary to issue new amended assessments. An increase or decrease in the amount included in the amended assessment at objection stage would require an amended assessment.

Amendment not restricted to shortfall from the fraud or evasion

73. This topic is in addition to, and does not affect, the actual forming of an opinion.
74. If a taxpayer has omitted income or over-claimed deductions and the taxpayer's actions and/or omissions constitute fraud or evasion then all aspects of the taxpayer's affairs in that year may be reconsidered in determining their taxable income.
75. In *Denver Chemical Manufacturing* Dixon J held that the Commissioner 'was at liberty to reconsider the whole question of how he would ascertain the assessable income and taxable income of the taxpayer.'¹²
76. The Commissioner is obliged to consider all issues and all relevant circumstances so that a taxpayer's taxable income is correctly ascertained. The assessment process starts afresh beyond the normal time period permitted by the Act because the taxpayer has engaged in fraud or evasion. Once the assessment process starts the Commissioner is bound to correctly ascertain assessable income and is not restricted to the tax avoided by fraud or evasion in determining the taxpayer's correct liability to tax.
77. It is open for the Commissioner to review the entire assessment. Judgment and caution must be exercised in cases where proposed revisions become more distant from the fraud or evasion opinion either legislatively or temporally. **Case officers must refer such issues to the appropriate technical specialist area in their business line for advice on the amendment.**

Related material

78. ATO staff should also refer to:
 - a. CEI 2014/05/09 *Tax Crime and External Fraud*
 - b. [PS LA 2008/6 – Fraud or Evasion](#)
 - c. *Taxation Authorisation Guidelines*

¹² *Denver Chemical Manufacturing Co v. Commissioner of Taxation (NSW)* (1949) 79CLR 296 at 314.

Examples

79. These examples are intended to illustrate for ATO staff how to identify relevant issues when considering the fraud or evasion amendment exception. They are not intended to provide a full analysis of the facts, evidence and application of the law.

Example 1 – mischaracterisation and omission of income based upon incorrect advice

80. Simon runs a small business which is his primary source of income. He also owns a rented investment property, and holds shares in a small number of ASX listed companies.
81. Simon has a good tax compliance history. Over an extended period he has consistently lodged his tax returns and Business Activity Statements on time and declared the correct amount of taxable income.
82. For his 2015 income tax return, Simon correctly declared his business and rental income, bank account interest income and dividends received from his shares. His taxable income was approximately \$80,000.
83. The ATO, as a result of data matching, became aware that XYZ Pty Ltd had distributed substantial funds in addition to the ordinary dividend to its shareholders in 2015 as a 'return of capital'. Simon had included the dividend amount in his tax return but not the return of capital which totalled \$10,000. He did not include the \$10,000 because he understood (correctly) that a return of capital did not fall within the definition of a 'dividend' in subsection 6(1) of the ITAA 1936 and was not assessable income.
84. The Commissioner of Taxation formed the view after auditing XYZ Pty Ltd that the return of capital had not been undertaken in accordance with the strict legislative requirements. Accordingly section 45B of the ITAA 1936 applied to make the amounts paid in substitution for dividends to be unfranked dividends for income tax purposes. The Commissioner subsequently made a determination treating the XYZ Pty Ltd capital distributions as unfranked dividends.
85. The ATO notified Simon that he had incorrectly omitted the unfranked dividend amount from his 2015 income tax return. Simon responded to the ATO acknowledging his mistake, but explained that he had assumed the amount was non-taxable based upon XYZ Pty Ltd's advice.
86. As evidence, Simon provided the ATO with a letter from XYZ Pty Ltd advising its shareholders that the dividend was not taxable, although the letter did recommend that shareholders seek independent tax advice. Simon also provided the ATO with contemporaneous notes he'd kept from a conversation with his tax agent. The notes recorded that Simon and his tax agent agreed that the amount was non assessable.
87. The period of review for amending Simon's tax return has now expired pursuant to section 170 of the ITAA 1936. Simon has a tax shortfall arising from not paying tax on the unfranked dividend as he did not include the amount in his income tax return.

88. However, notwithstanding the avoidance of tax, the Commissioner will only be able to amend Simon's 2015 assessment if an opinion is formed that Simon has engaged in fraud or evasion.

Q) Should the Commissioner form an opinion that Simon has engaged in behaviour that would constitute fraud or evasion?

A) No.

89. A brief analysis of the key considerations in deciding whether fraud or evasion exists in the circumstances is presented below. ATO staff must refer to PS LA 2008/6 and these guidelines in approaching fraud or evasion issues in their case.
90. Address the issue of evasion first before considering fraud.

The elements of evasion

91. The elements to be established which prove evasion are:
- a. there must be an avoidance of tax resulting in a tax shortfall, and
 - b. there must be a blameworthy act or omission on the part of the taxpayer or their agent.

Has Simon avoided tax resulting in a tax shortfall?

92. The facts demonstrate that Simon has avoided tax by not declaring the unfranked dividend in his 2015 income tax return. This has resulted in a tax shortfall. Therefore the first element is satisfied and this discussion will focus on whether there has been a blameworthy act or omission by Simon or his agent.

Has Simon (or his agent) committed a blameworthy act or omission?

93. Not making known to the Commissioner something Simon knew (or ought to have known) which the Commissioner would have considered relevant when assessing Simon's tax liability, is arguably blameworthy.
94. It is important to distinguish Simon's actions from those of XYZ Pty Ltd. XYZ Pty Ltd is not considered to be Simon's 'agent' for taxation purposes; therefore Simon cannot be held responsible for the company's actions.
95. Simon has mistakenly characterised the payment to him as a return of capital and not included the amount in his tax return. This constitutes an omission. However, this fact alone would not be sufficient to conclude that it was a blameworthy omission.
96. Here are some examples of indicators and their application to the facts that assist in deciding whether Simon's omission was blameworthy:
- a. **Number of years involved:** only one income year and one transaction.
 - b. **Steps involved that led to the tax shortfall:** Simon had a passive role in receiving the return of capital from XYZ Pty Ltd. It can reasonably be concluded that much of the fault for the mischaracterisation lies with XYZ Pty Ltd.

- c. **Manner in which Simon kept the relevant records:** Simon kept relevant records and has been co-operative in providing them to the ATO. These records include documents which explain the reasons for his omission.
- d. **How Simon attended to his other taxation obligations:** Simon has a good compliance history and no other issues have arisen.
- e. **Complexity of the relevant law:** the law relating to return of capital and the Commissioner's discretion under section 45B can be considered as complex. Simon and his tax agent made reasonable attempts to apply the law to the facts as they understood them at the time.
- f. **Nature of any professional advice provided by an adviser and the questions asked of the adviser by Simon in relation to the issue:** Simon relied upon advice provided by XYZ Pty Ltd who were in a better position to explain the tax effects of its return of capital. Indeed, it would have been difficult for Simon or his tax agent to ascertain that the return of capital was not undertaken correctly in accordance with the law because much of the information was private to XYZ Pty Ltd.

97. These indicators are indicative and not exhaustive.

Conclusion

98. As the factors above indicate, Simon's omission should not be characterised as blameworthy. Simon has made an honest and reasonable mistake in omitting the amount from his tax return.

Example 2 – Failure to disclose – withholding of information from the Commissioner – failure to keep records

- 99. Taylor has a number of investments both in Australia and overseas. She is a director of numerous property development and building companies and travels regularly for business. Her investments primarily consist of shares and interests in residential property development. She has bought and sold numerous residential properties 'off the plan' over an extended period.
- 100. Taylor has a good tax compliance history having lodged her tax returns consistently on time and her average income as declared has been approximately \$150,000 per annum.
- 101. In early 2013 Taylor purchased two adjoining apartments off the plan which were to be constructed in late 2013 with an expected completion date in late 2014. In early 2014, during the construction phase, Taylor sold both apartments and made a significant profit due to the rise in property values. She did not declare the gain of approximately \$200,000 in her 2014 tax return.
- 102. The ATO sent Taylor a letter in 2016 requesting information on the purchase and sale of the two neighbouring apartments. Taylor responded by stating that she has very few records relating to the transactions and must have lost them or thrown them out. She was unable to explain why she failed to disclose the sale of the apartments in her tax return; which would have been necessary even on her view that the gains were capital gains.
- 103. Due to the lack of information provided by Taylor, the ATO conducted an audit. Taylor's previous tax returns in which she had declared numerous capital gains on residential

property sales were reviewed. Taylor had sold eight properties in the income years 2009–2013, all for a profit and most within 15 months of their respective purchase dates.

104. At the time of the audit Taylor had held another four properties which she had owned for a period of less than twelve months.
105. Taylor stated that she was aware of the difference between capital and income and that her purpose in purchasing the apartments was to live in one herself and have her parents live in the other. She had intended to hold onto the apartments long term, but had then decided to sell them because her circumstances changed.
106. Taylor stated that she received advice from a business associate who was an accountant that the sales would result in non-assessable capital gains. However, when asked, Taylor stated that she could not remember the accountant's name nor did she have anything in writing.
107. The auditor is concerned that Taylor's explanations do not accord with the facts and by the lack of evidence to support her statements. For example, Taylor's parents live overseas and there was no evidence to suggest they would move to Australia. Further, Taylor has previously disclosed CGT events and treated all of her off the plan sales as capital gains, even though repetitive investments of this kind would usually be classified as ordinary income. A check with her former tax agent revealed that the agent had argued with Taylor over her treatment of the profits as capital gains.
108. After further inquiries, the auditor concluded that Taylor has incorrectly failed to disclose gains from the sale of the apartments in her tax return. The auditor's findings were that Taylor should have included the gains as ordinary income.
109. The standard two year period of review for Taylor's 2014 income tax assessment has now expired. It can only be amended if the opinion is formed that Taylor has engaged in fraud or evasion.

Q) Should the Commissioner form an opinion that Taylor has engaged in behaviour that would constitute fraud or evasion?

A) Yes.

110. Provided below is a brief analysis of the key considerations in deciding whether fraud or evasion exists in the circumstances as presented. ATO staff must refer to PS LA 2008/6 and these guidelines in approaching fraud or evasion issues in their case.
111. Address the issue of evasion first before considering fraud.

The elements of evasion

112. The elements to be established which prove evasion are:
 - a. there must be an avoidance of tax resulting in a tax shortfall, and
 - b. there must be a blameworthy act or omission on the part of the taxpayer or their agent.

Has Taylor avoided tax resulting in a tax shortfall?

113. Yes. By failing to disclose the profits from sale of the apartments as ordinary income, Taylor has avoided tax because she has paid less tax than is properly payable.

Has Taylor (or her agent) committed a blameworthy act or omission?

114. Not making known to the Commissioner something Taylor knew (or ought to have known) which the Commissioner would have considered relevant in assessing Taylor's tax liability, is arguably blameworthy.
115. Taylor's relevant behaviour includes both her actions and omissions at the time of lodging her tax return (assessment behaviour) and her actions and omissions up until the conclusion of the audit undertaken by the ATO (post assessment behaviour). When analysing the factors that assist in identifying evasion, both assessment and post-assessment behaviour can be taken into account.
116. Here are some examples of indicators and their application to the facts that will assist in deciding whether Taylor's acts and/or omissions were blameworthy:
- a. **Number of years involved:** one income year and two transactions. However, the audit did discover the existence of previous profits that Taylor may also have mischaracterised as capital gains instead of ordinary income. As no findings were made on these transactions they cannot be considered material to a finding of evasion, although they may be relevant when considering the sophistication and experience of the taxpayer as noted below.
 - b. **Steps involved that led to the tax shortfall:** Taylor took an active role in structuring her tax affairs with respect to her property investments. It can be reasonably concluded that she has knowingly timed the sales of the apartments in order to try to take advantage of the capital gains tax discount provisions.
 - c. **Manner in which Taylor kept the relevant records:** Taylor has failed in her record keeping duties. She has lost or disposed of records, and has failed to provide evidence to support her explanations for not including the gains as ordinary income. Given the doubt that is attached to her explanations, the lack of evidence weighs heavily against Taylor.
 - d. **How Taylor attended to her other taxation obligations:** Other than these issues relating to her property investments, Taylor appears to have a good compliance history. However, her lack of co-operation in the audit and failure to keep records weighs against Taylor.
 - e. **Complexity of the relevant law:** although there could be fact patterns where distinguishing between income and capital can be quite difficult, on these facts, it appears to be fairly straightforward. As well, Taylor stated that she was aware of the difference; yet she failed to disclose the transactions in her tax return at all. Further, guidance on classifying these types of investments is readily available, but Taylor provided no evidence that she had made an effort to clarify her views of the law.
 - f. **Nature of any professional advice provided by an adviser and the questions asked of the adviser by Taylor in relation to the issue:** Taylor stated she could not remember the accountant's name from whom she received advice and didn't get anything in writing. Taylor's failure to provide this information weighs against her, and there is significant doubt about whether she did in fact obtain such advice, or, if she did, whether the accountant was apprised of all the relevant facts. Further her former tax

agent stated that he had argued with Taylor over the treatment of the profits from property sales.

- g. **Taylor's knowledge and sophistication:** Taylor has been involved in property investment for quite some time and there is an expectation that she would be aware of the relevant law and record keeping requirements. Her reckless behaviour in this regard is inconsistent with the knowledge and sophistication she has demonstrated in structuring her investments to achieve significant profits.

117. These indicators are indicative and not exhaustive.

Conclusion

118. The above analysis demonstrates how some factors may indicate evasion while other factors will not necessarily lead to such a conclusion. This is often the case in matters where the taxpayer's conduct falls into the grey area of the law.
119. In Taylor's case, it is considered that there are sufficient indicators of blameworthy conduct to support a finding of evasion. Her failure to disclose the transactions, to provide records and evidence to support her explanations, and the significant doubt as to the truth of these explanations, leads to the conclusion that her actions constitute blameworthy acts and/or omissions.
120. Therefore, based on Taylor's assessment and post-assessment behaviour as detailed above, the Commissioner would be justified in forming an opinion that Taylor's behaviour amounted to evasion.

Example 3 – Withholding information from an external valuer to obtain favourable tax outcomes

121. GlobalCorp is a multinational, carrying on a business through its Australian subsidiary AustCorp.
122. In 2010, GlobalCorp engaged AccountingCorp, an accounting advisory firm, to advise both GlobalCorp and AustCorp on restructuring the Australian business in order to move aspects of the business offshore.
123. AustCorp engages ValuationCorp, to value the Australian business prior to the restructure. ValuationCorp requests all relevant documentation, in order to undertake the valuation.
124. Rather than providing some key documents to ValuationCorp, AustCorp instructs ValuationCorp to value the business on various assumptions about the nature of the business.
125. As a result of these assumptions, the valuation provided by ValuationCorp is inflated. AustCorp relies on the valuation to complete its income tax returns and claims significant deductions.
126. AccountingCorp advises GlobalCorp and AustCorp that the assumptions upon which the valuation is based do not reflect the terms of the Group's legal agreements. AccountingCorp does not recommend that AustCorp amend its income tax return, instead

suggesting a reason to justify why AustCorp should have relied on the report. This argument is developed several years after they had relied on the valuation and lodged their income tax returns.

127. The ATO commences to audit the taxpayer. During the course of the audit, ValuationCorp confirms that had they been aware of the terms of the legal agreements, they would have valued the AustCorp business at a lesser value. As such, AustCorp's deductions would be reduced and its tax liability increased.

Q) Should the Commissioner form an opinion that AustCorp has engaged in behaviour that would constitute fraud or evasion?

A) Yes

The elements of evasion

128. The elements to be established which prove evasion are:

- a. there must be an avoidance of tax resulting in a tax shortfall, and
- b. there must be a blameworthy act or omission on the part of the taxpayer or their agent.

Has AustCorp avoided tax resulting in a tax shortfall?

129. The increased deductions claimed by AustCorp by relying on the valuation resulted in a reduced tax liability for AustCorp for the relevant years.

Has AustCorp committed a blameworthy act or omission?

130. AustCorp instructed ValuationCorp to prepare a valuation based on an arrangement that did not accurately reflect the terms of their legal agreements. AccountingCorp advised AustCorp that the valuation did not reflect its legal agreements. AustCorp did not correct these assumptions in any of the draft valuations ValuationCorp provided to AustCorp for fact checking.
131. AustCorp was aware that correcting the false assumptions would result in a lower valuation and therefore reduced deductions and increased tax liability, but took no action to amend its income tax returns for the relevant years.
132. AustCorp made a decision to follow the advice from AccountingCorp, justifying reliance on the valuation obtained on false assumptions intentionally made by AustCorp.
133. Here are some examples of indicators and their application to the facts that assist in deciding whether AustCorp's actions were blameworthy:
- a. **Prior knowledge:** AustCorp instructed ValuationCorp to value the business on false assumptions and withheld the relevant documents. AustCorp was informed by AccountingCorp that the valuation did not reflect the terms of the licence agreements.
 - b. **Number of Years involved:** Increased deductions were claimed over several years. At the time that AccountingCorp highlighted the false valuation, the period of review had not expired for the relevant years.
 - c. **Steps involved that led to the tax shortfall:** AustCorp played an active role in restructuring its business and obtaining the valuation on false assumptions and by

withholding the relevant documents from the valuer. AustCorp chose to follow the advice from AccountingCorp and omitted to take action to correct its income tax returns for the relevant years.

- d. **Complexity of the relevant law:** Whilst the relevant law is complex, involving interactions between accounting and tax concepts applicable to cross-border financing arrangements, AustCorp and GlobalCorp are sophisticated taxpayers and retained the services of leading advisers for the re-structure.
- e. **Nature of any professional advice provided by an adviser:** AccountingCorp raised the concern with both GlobalCorp and AustCorp that the valuation assumptions did not reflect the terms of their licence agreements. This highlighted that AustCorp had claimed deductions that it was unlikely to be entitled to. AccountingCorp further advised that this position could be justified. There is no documented evidence of AccountingCorp advising AustCorp to amend its income tax returns. The documented evidence shows that AustCorp was fully informed and properly considered the advice by AccountingCorp to arrive at the decision not to amend its income tax returns.
- f. **GlobalCorp's and AustCorp's knowledge and sophistication:** As a large, multinational group, there is an expectation that the company has the resources to ensure their structuring, financing and tax obligations are conducted with due diligence.

Conclusion

134. From these actions, it can be concluded that AustCorp committed a blameworthy act by withholding pertinent information from ValuationCorp, instructing ValuationCorp to value the business on intentionally false assumptions and being aware that these false assumptions resulted in decreased tax liabilities for the relevant years. AustCorp subsequently made a deliberate decision not to seek an amendment of its assessment despite knowing that it had claimed excessive deductions which resulted in reduced tax liabilities for the relevant years.

Example 4 – recklessly claiming deductions to which the taxpayer was not entitled

135. Susie works as an accountant in a large business. She has an expensive lifestyle and whilst she earns a good salary (approximately \$100,000 per annum) her deductions significantly reduce her taxable income, such that she has paid only minimal amounts of tax in the past 5 years.
136. Susie comes under audit by the ATO and the auditor focuses his inquiries on Susie's deductions in her income tax returns. In particular, Susie's 'work related car expenses' are large and have been increasing year by year. Over the past 5 years Susie has claimed over \$20,000 per year in car expenses.
137. The ATO contacts Susie informally to request information supporting these deductions, however Susie does not respond to the letter.
138. As a consequence, Susie is required to attend a formal interview pursuant to section 353-10 in Schedule 1 to the TAA. When Susie is asked to explain the basis for her work related car expenses she states that she merely estimated a figure which she then inserted into her tax return. She did not keep any records relating to her travel expenses.

139. When pressed it emerges that Susie only drives to and from the office – she is not required to travel from one office to another or on other business. The auditor explains to Susie that work related car expenses cannot be claimed for driving to and from a single place of work. She states she is surprised to learn this and that she was unaware of this principle and assumed that everyone claimed these types of expenses. She states that she had never bothered to look into the issue and had not read the relevant ATO instructional material when completing her tax return, nor consulted an adviser.
140. Susie is subject to the 2 year period of review limitations and therefore for 3 of the past 5 income years, Susie’s assessments can only be amended if there is a finding of fraud or evasion.

Q) Should the Commissioner form an opinion that Susie has engaged in behaviour that would constitute fraud or evasion?

A) Yes.

141. Provided below is a brief analysis of the key considerations in deciding whether fraud or evasion exists in the circumstances as presented. ATO staff must refer to PS LA 2008/6 and these guidelines in approaching fraud or evasion issues in their case.
142. For this example we begin by addressing the issue of fraud.

The elements of fraud

143. Fraud involves the making of a false statement to the Commissioner relevant to the taxpayer’s liability to tax which the person makes:
- a. knowing it to be false, or
 - b. without belief in its truth, or
 - c. recklessly, being careless or indifferent as to whether it is true or false.

Has Susie avoided tax resulting in a tax shortfall?

144. Susie has incorrectly claimed large amounts of deductions in her tax returns. She was not entitled to these deductions, and has avoided paying the correct amount of tax because her taxable income was incorrectly reduced. This has resulted in a tax shortfall.

Has Susie engaged in fraudulent behaviour?

145. There is no evidence that Susie actually knew her representations in her tax return to be false. Indeed, Susie’s sworn evidence is that she was unaware that she was not entitled to claim the car expenses as deductions. Therefore the evidence would not support a finding that Susie made the claims in her tax returns knowing them to be false.
146. However, as noted above, the concept of fraud in section 170 of the ITAA 1936 is broader than simply the making of representations knowing them to be false. If a taxpayer deliberately closes their eyes so that they might not ascertain the truth, this conduct may constitute fraud.¹³ Further, a representation may be fraudulently made without evil motive.¹⁴

¹³ Derry v Peek (1889) 14 App Cas 337.

¹⁴ Krakowski v Eurolynx Properties Ltd [1995] HCA 68.

147. Therefore Susie's behaviour should still be analysed to determine whether she has claimed the deductions recklessly, being careless or indifferent as to whether she was entitled to claim the deductions.
148. To assist in this analysis, the factors identified as relevant to proving evasion can also be used to identify whether sufficient evidence exists to prove fraud:
- a. **Number of years involved:** Susie has incorrectly claimed these deductions, for 5 consecutive years. This is a continuous pattern of behaviour and indicative of sustained recklessness or carelessness and indifference to the consequences of her actions.
 - b. **Steps involved that led to the tax shortfall, including the degree of any artifice involved:** Susie's behaviour does not exhibit a high degree of artifice, indeed her behaviour was quite blatant. However, behaviour like Susie's undermines the integrity of Australia's tax system self-assessment, which relies on taxpayers taking reasonable care and making an honest attempt to meet their tax obligations.
 - c. **Manner in which Susie kept the relevant records:** Susie has not kept any records relating to her car expenses, and, according to her explanations, such records would be unlikely to support the claiming of these deductions.
 - d. **Attention given to the particular matter by the taxpayer:** by her own admissions, Susie has given very little attention to the claiming of these deductions in her tax returns. Her behaviour was reckless in not making an effort to confirm her view of the law, yet persisting in claiming significant amounts of deductions.
 - e. **Complexity of the relevant law:** the law on this point is clearly settled, and not considered to be complex.
 - f. **Information or questions on the tax return that might alert a taxpayer:** the availability of clear guidance on work related car expenses (such as in ato.gov.au publications and myTax) further demonstrates Susie's recklessness in not bothering to seek guidance. The information contained in this guidance clearly explains why Susie was never entitled to claim these work related car expenses.

Conclusion

149. As the above factors indicate, Susie has been reckless in complying with her tax obligations. Her behaviour is sufficiently serious to justify a finding of fraud.
150. Behaviour that constitutes fraud will also constitute the blameworthy act or omission required for a finding of evasion. Therefore Susie's behaviour will also constitute evasion and the correct finding will be that Susie has committed fraud and evasion.
151. Where an ATO employee forms the opinion or has a strong suspicion that fraud may have been committed against the revenue system, the matter should be referred to the Tax Crime area of PGH in accordance with CEI 2014/05/09.

Appendix 1

Evasion case law

Barrripp

In *Barrripp v. Commissioner of Taxation (NSW)* (1940) 6 ATD 58 it was explained by the taxpayer, Mr Barrripp, that he did not return income from the sale of a property in the year ended 30 June 1927 because of advice received from his accountant. An amended assessment including the profit on the sale of property was issued to Mr Barrripp in 1938. Mr Barrripp claimed that his accountants¹⁵ 'explained to him that it was not assessable until the mortgages on the properties on which the profit was made, were paid off'.

The Full Court of the Supreme Court of NSW rejected this contention and held that the evidence justified the Board of Review's decision that tax had been avoided due to evasion.

Bavin J¹⁶ stated that Mr Barrripp 'was fully aware of his obligations to return this profit as income' and that he gave a 'false explanation of his failure'. Mr Barrripp had received sums in earlier years under the same conditions as the year under review, and he had correctly returned those amounts as income in the year of receipt. Roper J described the taxpayer's explanation for omitting income from his return as 'vague and unsatisfactory'.¹⁷ Mr Barrripp appealed against the decision of the Supreme Court to the full court of the High Court, which dismissed the appeal.

Starke J did not accept the taxpayer or the accountant's reasons for omitting income made from the sale of property. His Honour concluded¹⁸ that the profit on sale was 'knowingly omitted from the appellant's return and was concealed from tax authorities for many years'.

The judgment of McTiernan J took into account the deliberateness of the omission and the failure of the taxpayer to provide any credible explanation for his conduct:¹⁹

The facts proved come down to these. The taxpayer received the omitted income in that year. He knew that he received it in that year. He omitted it from his income. He knew or the knowledge ought to be imputed to him that it was omitted. He gave as an explanation that he believed that it was not taxable in that year. But the question whether the excuse offered could change the complexion of the facts proved is only an abstract one because the reality of the excuse was not established. The case therefore stands in this situation. The appellant intentionally omitted the income from the return and there is no credible explanation before the court why he did so. His conduct in my opinion answers to the description of an avoidance of taxation at any rate by evasion.

Denver Chemical Manufacturing

The leading case on evasion is *Denver Chemical Manufacturing Co. v. Commissioner of Taxation* 79 CLR 296 (Denver Chemical Manufacturing), which was decided by the Full High

¹⁵ 6 ATD 58 at 65.

¹⁶ 6 ATD 58 at 66.

¹⁷ 6 ATD 58 at 68.

¹⁸ 6 ATD 58 at 71.

¹⁹ 6 ATD 58 at 71.

Court. The case required the interpretation of evasion in the context of state income tax legislation.

Subsection 210(1) of the *New South Wales Income Tax (Management) Act 1936* provided the NSW Commissioner of Taxation with the power to amend any assessment 'where the Commissioner is of opinion that there has been an avoidance of tax and that the avoidance is due to fraud or evasion – at any time'. The wording of subsection 210(2) of the *New South Wales Income Tax (Management) Act 1936* is very similar to the wording that existed in paragraph 170(2)(a) of the ITAA 1936, which applied until 19 December 2005.

The manager of Denver Chemical Manufacturing Co (Denver), Mr Woodward, was advised in 1923 by Mr Wrigley, a neighbour and amateur expert in taxation, that sales of Denver's product antiphlogistine to people dwelling in other states outside of NSW might be excluded from returns. This advice was contrary to advice previously provided in 1917 to Denver, by an officer of the Income Tax Department, that returns be made on the basis of the whole of sales in Australia.

After the 1923 advice from Mr Wrigley, Denver began to omit sales outside of New South Wales in preparing returns for New South Wales income tax purposes.

In December 1928 the NSW Commissioner of Taxation sent Denver a letter requesting a detailed aggregate balance sheet for 30 June 1927 and 1928 and a detailed profit and loss statement showing the total income derived from all sources, both inside and outside New South Wales for both years.

Correspondence ensued between the company's head office in New York and Mr Woodward. In 1929 head office forwarded copies of the relevant balance sheet, accounts and other information to Mr Woodward. The detailed accounts forwarded by the company's head office were not submitted to the NSW Commissioner of Taxation. Mr Woodward adopted an approach of²⁰ 'we shall not file them unless we are compelled to do so'.

A subsequent hearing was held before the Income Tax Board. At the hearing Mr Woodward stated that as the company has no Australian shareholders it was not necessary to supply the requested information.

In May 1938 a return of income by the company for the year ended 30 June 1937 and an accompanying full set of accounts, intended for lodgment at the Federal Taxation Department, were lodged in error with the NSW Commissioner of Taxation. As a consequence the NSW Commissioner of Taxation undertook an audit of the taxpayer's affairs. In 1941 amended assessments were issued for the 1923 to 1934 tax years.

McTiernan J and Webb J of the High Court agreed with the judgment of Dixon J. Dixon J said:²¹

I think it is unwise to attempt to define the word 'evasion'. The context of s.210(2) 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 concede 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.

²⁰ Denver Chemical Manufacturing Co v. C of T (NSW) 79 CLR 296 at 301.

²¹ Denver Chemical Manufacturing Co v. C of T (NSW) 79 CLR 296 at 313.

Matters of a blameworthy nature before Dixon J included:

- the Commissioner had provided advice to Denver on how to calculate its liability for tax and Denver's Mr Woodward chose to ignore this advice after receiving different advice from his neighbour
- no clarification of the new method of returning sales income in 1923 or later years was sought by Denver from the Commissioner, and
- Denver withheld profit and loss and balance sheet information from the Commissioner for the 1927 and 1928 financial years, which would have revealed sales income from outside NSW.

The approach of the High Court to evasion in *Denver Chemical Manufacturing* has remained undisturbed for over fifty years. All subsequent court and tribunal decisions have followed the approach enunciated by Dixon J and this case remains the most recent High Court decision in which the meaning of 'evasion' is considered.

The other High Court case which considered evasion following *Denver Chemical Manufacturing* was *Australasian Jam*.

Australasian Jam

In *Australasian Jam* the taxpayer adopted incorrect valuations for closing stock. Closing stock had been valued on the basis of standard values which had been established before or in 1914. The company adhered to these figures, which had no bearing to the actual cost after the passage of many years, and the appeals concerned amended assessments for years during the period 1937 to 1947.

The taxpayer argued that its closing stock was valued at the market selling price, and that such a price could be determined by supposing a sale en bloc on the last day of the accounting period. Fullagar J described this argument as being 'based on a foundation that is not really tenable'.²² His Honour stated that the words 'market selling value' contemplated a sale 'in the ordinary course of the company's business'²³ and stated that the²⁴ 'supposition of a forced sale on one particular day seems to have no relation to business reality'.

His Honour held²⁵:

There has been, says the Commissioner, no deliberate attempt to deceive, and therefore the case is not one of fraud. On the other hand, it would be unreasonable to suppose, and it has not really been suggested, that those responsible for the company's income tax returns were ignorant of the requirements of s. 31. They continued to use in their accounts a figure which had once represented cost but which no longer represented cost. They returned, for income tax purposes, the accounts of the company as quite correctly and properly kept by it for its own purposes, but not adjusted so as to comply with s. 31. They would have supplied further true information, if they had been asked for it, but they hoped, says the Commissioner, that they would not be asked for it, and they allowed, if they did not actually invite, my assessors to make an assumption which they must have known was unfounded. I think, says the Commissioner, that there has been here more than a mere withholding of information which might or might not be relevant: I think that there has

²² *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 31.

²³ *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 31.

²⁴ *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 32.

²⁵ *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 39-40

been an intentional withholding of information lest I should hold the company liable to tax to a greater extent than it was prepared to concede, and I regard this as 'evasion'.

Fullagar J found that the taxpayer must have known that the closing stock values were not being correctly calculated. The taxpayer was prepared to lodge returns on this basis hoping that the Commissioner would not review the calculations and so hold the company liable to a greater amount of tax. This was evasion.

Appendix 2

Fraud case law

The nature of fraud at common law is described by *Lord Hershell in Derry v. Peek (1889)* 14 App. Cas 337 at 373:

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.

In *Derry v. Peek* the directors of a company issued a prospectus containing a statement that the company had the right to use steam power instead of horses. The plaintiff acquired shares on the basis of this statement. The Board of Trade subsequently refused to consent to steam power and the company was wound up. The plaintiff brought a common law action of deceit against the directors, founded upon a false statement.

A modern restatement of fraud can be found in the majority judgment of the High Court in *Krakowski and Anor v. Eurolynx Properties Ltd and Anor* (1995) 183 CLR 563 at 578:

In order to succeed in fraud, a representee must prove, inter alia, that the representor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood.

An illustration of fraud in a tax matter is contained in *Masterman v. FC of T; MacFarlane v. FC of T* 85 ATC 4015; 16 ATR 77. In this case, incorrect tax returns were lodged for the 1972 to 1979 years. Amounts had been claimed as tax deductions in respect of employees that did not exist. Enderby J in the Supreme Court concluded that the statements made in returns 'can only be described as frauds on the Commissioner of Taxation'.²⁶

Drummond J in *Kajewski & Ors v. FC of T* 2003 ATC 4375; 52 ATR 455 at ATC 4400; ATR 483 confirmed that the meaning of fraud for the purposes of paragraph 170(2)(a) of the ITAA 1936 is to be determined by reference to common law.²⁷

²⁶ 85 ATC 4015 at 4016; 16 ATR 77 at 79.

²⁷ Paragraph 170(2)(a) of the ITAA 1936 applied until 19 December 2005 to allow the Commissioner to amend a taxpayer's assessment at any time if the Commissioner formed the opinion that there has been an avoidance of tax due to fraud or evasion.

Fraud within s 170(2)(a) involves something in the nature of fraud at common law, ie, the making of a statement to the Commissioner relevant to the taxpayer's liability to tax which the maker believes to be false or is recklessly careless whether it be true or false.

Appendix 3

A decision to amend a taxpayer's assessment on the basis that there is fraud or evasion can be subject to judicial review.

Australasian Jam Co Pty Ltd v. Federal Commissioner of Taxation (1953) 88 CLR 23

(Australasian Jam) is a case in which a single judge of the High Court, Fullagar J, considered the issue of whether the Commissioner had properly formed an opinion on fraud or evasion.

His Honour stated²⁸ that the taxpayer's appeal would only succeed if the Commissioner had not 'entertained' an opinion on fraud or evasion or if the Commissioner's opinion on fraud or evasion was based upon a misconception or if the opinion 'was arrived at 'capriciously, or fancifully, or upon irrelevant or inadmissible grounds' (per Rich and Dixon JJ in *Australasian Scale Co Ltd. v. Commissioner of Taxes (Qld)*). Second Commissioner of Taxation, Mr Mair, was examined about the formation of his view that an avoidance of tax had been due to evasion. Fullagar J concluded that the Commissioner's opinion on fraud or evasion was not misconceived or unreasonable and held that the Commissioner's amended assessments were authorised by the ITAA 1936.

If a taxpayer appeals to the Federal Court the Court's role 'is limited to the ordinary grounds of judicial review' which Hill J described in *FCT v. Jackson* 21 ATR 1012; 90 ATC 4990 at ATR 1023; ATC 5000 in the following way:

Thus, in a case where the exercise of discretion by the Commissioner may have been involved, this court cannot stand in the shoes of the Commissioner and do again that which he has done, but is limited to the ordinary grounds of judicial review, namely to ensuring that the Commissioner has addressed himself to the right issue, that his decision is not affected by an error of law, that he has not taken some extraneous factor into consideration nor failed to take some relevant factor into consideration: *Avon Downs Pty Ltd v. FCT* (1949) 78 CLR 353 at 360. Thus, by way of example, it could not be doubted that, if a case involving the exercise of the discretion to make a determination under sec. 177F were to come before this court, the court's power to review the discretion would be limited as set out above. In particular, the court could not itself exercise the discretion.

In *Kajewski v. Federal Commissioner of Taxation* 2003 ATC 4375; 52 ATR 455 the taxpayer submitted that the appeal should be heard by way of a re-hearing de novo which would allow the Federal Court to stand in the shoes of the original decision maker, the Commissioner. Drummond J rejected this argument stating that paragraph 14ZZO(a) of the *Taxation Administration Act 1953* (TAA) does not allow the taxpayer to put all relevant material before the court:²⁹

But paragraph 14ZZO(a) shows that the taxpayer does not have an unqualified right to put before the appeal court all the material which it might contend is relevant to determining the correct amount of the assessment that should be made. Paragraph 14ZZO(b) is also inconsistent with the appeal by way of hearing de novo, for the reasons referred to in Poletti at 4644.

²⁸ *Australasian Jam Co Pty Ltd v. Federal Commissioner of Taxation* (1953) 88 CLR 23 at 37.

²⁹ *Kajewski v. Federal Commissioner of Taxation* 2003 ATC 4375 at 4378-4379; 52 ATR 455 at 459.

In *Weyers & Anor v. FC* of T 2006 ATC 4523; 63 ATR 268 Dowsett J considered the formation by the Commissioner of an opinion that there had been an avoidance of tax due to evasion under paragraph 170(2)(a) of the ITAA 1936. His Honour placed the onus of proof on the taxpayer in attempting to challenge the formation of the Commissioner's opinion that evasion had occurred:³⁰

It is for the taxpayer to identify grounds upon which the formation of the Commissioner's opinion may be impugned. The Commissioner need not justify the decision, save in response to an appropriate attack upon it.

³⁰ *Weyers & Anor v. FC* of T 2006 ATC 4523 at 4555; 63 ATR 268 at 304.