The Tax Institute

The Tax Summit

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Session 5.2: Tips and traps when a dispute emerges

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Contents

1. Overview

The Matrix is everywhere. It is all around us. Even now, in this room. You can see it when you look out the window or when you turn on your television. You can feel it when you go to work… when you go to church… when you pay your taxes. It is the world that has been pulled over your eyes…

Even more than usual, during a review or audit, the scrutiny of the ATO can feel as labyrinthine as the Matrix itself. Like Neo stepping into the Matrix, taxpayers and advisors alike must be ready to face a set of challenges that are as unpredictable as they are daunting. And advisors themselves need to take on the role of Morpheus, responsible for taking the lead against the metaphorical machines.

While this paper has, where possible, offered some tips and traps, "*[p]racitioners will be much better placed to develop their own engagement strategies and tactics*", as a different taxpayer, or different tax context, might led to a very different strategy when it comes to the inevitability of risk-based reviews or audits.[1]

This paper will take you through the "Matrix" of ATO reviews and audits, highlighting the common challenges encountered, and providing practical strategies to navigate the complexities.

[1] Martin Keating, *Facing the Dragon in his Lair*, Tax Institute, 28th National Convention, 3.

1. The stages of a tax review or audit: Order, Deviation, and the Illusion of Predictability

All reviews and audits tend to follow a predictable path:

a. Stage 1: Review and Information Gathering

b. Stage 2: Audit

c. Stage 3: Issue of a Position Paper (though not always)

d. Stage 4: Response to a Position Paper

e. Stage 5: Issue of assessments

f. Stage 6: Objection

g. Stage 7: ART or Court application

However, that illusion of predictability must be considered in the context that no two reviews or audits are the same. In some cases, information gathering can continue throughout all stages of the review or audit.

And at any stage during the review or audit, the taxpayer can make voluntary disclosures, or make settlement offers or engage in alternative dispute resolution. Whether, and at what stage, it is appropriate to do so will depend on all the facts and circumstances.

The illusion of predictability is taken further by the fact that a taxpayer will have to contend with multiple decision makers who have their own subjective understanding of the requirements of the law: an audit officer, a team leader and an objections officer. In addition, there is an increasing involvement of various panels. While some have been around for some time (for example, the GAAR panel) more recently there has been the advent of others – such as the fraud or evasion panel, the settlement panel – reflecting the ATO's increasing institutional reliance on specialist panels as part of its decision-making framework. With respect to the more recent panels, unlike the GAAR panel, none provide taxpayers an opportunity to make direct submissions to the panel and are entirely internal processes.

Taxpayers may be in furious agreement with case law on a particular issue – for example what the burden of proof requires or what constitutes a *present entitlement* – but that is of little use if the decision maker you are dealing with (or that decision maker is dealing with as the decision maker inside the ATO, including in some instances panels) has an opposing view. That means a taxpayer may have to think about at least three cases simultaneously:

a. materials and arguments that will convince the audit decision maker;

b. materials and arguments that will convince an objections officer;

c. evidence and arguments that will convince an Administrative Review Tribunal member or a judge.

Further complicating this, is the Commissioner will routinely abandon (or seek to abandon) all prior positions at any one of the three stages and the taxpayer will find themselves in a materially different dispute. That applies at all levels and size of tax dispute: from personal residency (*Abotomey*, discussed further below) to questions of statutory interpretation in complex cross-border private equity divestments (*RCF IV* causing four members of the Full Federal Court, in refusing to consider a lately identified

submission put by the Commissioner, to address what limitations may restrict this within Federal Court proceedings).[2]

The time it takes from Stage 1 to Stage 7 can vary considerably.

1.1 Stage 1: Review and Information Gathering

The beginning of a review usually commences through the issue of an initial letter and (sometimes after some initial introductions) a request for information. As the review progresses, so too does the information gathering. Information gathering can include requests for information and documents in writing, and requests for interviews with key individuals and, in some instances, of third parties. Requests for information, documents or interviews may be made informally, or in accordance with formal powers provided to the Commissioner under statute.

While some risk reviews occur as a matter of course because of the nature or type of a particular taxpayer (for, example the Top 500 and Next 5000 programs), others arise because of other information known to the ATO which may trigger a review. Where there is other information known it can arise because of profiling or data matching, media attention or the identification of key areas, issues, or risks which sparks a review. Either way, a working assumption should be that at the beginning the information gathering stage, the Commissioner already has significant information. They possibly even know the answer to the questions they are asking.

There will be times that simply answering the questions will be appropriate. However, other times, particularly if the audit team appears to be missing the wood for the trees, it may be appropriate to seek clarification on the precise question the ATO wants answered, or in other circumstances, proffer up more than what has been asked for. It is therein that the skill lies for the advisor – knowing which matter requires which response.

A similar statement can be made in circumstances where an advisor is present in interviews either of the taxpayer themselves or of third parties conducted pursuant to s 353-10 of the TAA. An individual does not have a right to have an advisor, including a legal advisor, present, though it is a rare circumstance where the Commissioner denies the individual the ability to have an advisor present. Where they are, an advisor is not able to answer questions on behalf of the individual. Indeed, the advisor can rarely speak up during the interview other than in circumstances where in answering the question, the individual is likely to waive legal professional privilege (or the accountant's concession in circumstances where the Commissioner adheres to the concession). However, there are circumstances where an advisor can, and should, challenge the lie of question. This might be particularly the case where, for example, the question is unclear, or the line of questioning becomes unreasonably repetitive, or otherwise becomes unfair. It is here that an advisor's skill is to be deployed and a detailed understanding of administrative law principles, the scope of the Commissioner's powers under s 353-10, and the limits imposed by procedural fairness is required.

Recent developments in 353-10 interviews

While not a "new" innovation, the Commissioner appears to be using external counsel (i.e. barristers) to conduct s 353-10 interviews even in the seemingly early stages of information gathering. While counsel bring different forensic skills, the utility of using counsel for "cross-examinations" in s 353-10 interviews early is dubious; even an effective forensic cross-examination is worthless if it does not advance the

[2] Federal Commissioner of Taxation v Resource Capital Fund IV LP (2019) 266 FCR 1 at [91] (Besanko, Middleton, Steward and Thawley JJ).

Commissioner's legal position. The Commissioner's reliance on barristers without specific relevant legal expertise for conducting s 353-10 interviews exacerbates that issue.

One thing to note is that if the Commissioner is briefing external counsel for s 353-10 interviews at a relatively early stage, it indicates the audit team has already formed a jaundiced view of the taxpayer. That should inform your strategic thinking into either:

a. rehabilitating their view of the taxpayer or the arrangement, including considering whether additional or different representatives (i.e. disconnected from the original transaction) would better manage the relationship and Commissioner's perception; or

b. working with a practical assumption that the matter will not disappear, at a minimum before the matter moves into a new team after lodging an objection.

1.2 Stage 2: Audit

If the Commissioner perceives there to be tax risks, he may escalate to an audit and undertake further information gathering. Again, such information gathering can be undertaken informally or pursuant to his formal powers.

1.3 Stage 3: Issue of a Position Paper (usually)

Where the Commissioner forms the view that a tax shortfall exists, he will ordinarily, though not invariably, and absent any statutory requirement, issue a position paper setting out his preliminary views. This typically includes the Commissioner's assessment of the relevant facts (and in some instances the evidence on which those facts are based), as well as the legal conclusions said to arise from them. While characterised as preliminary, a position paper is usually issued only after a substantial period of engagement and information gathering. Accordingly, it is often a carefully formulated statement of the Commissioner's position, intended to frame the issues in dispute and invite the taxpayer's formal response.

1.4 Stage 4: Response to a Position Paper

A taxpayer may respond to the position paper. This provides the taxpayer with an opportunity to correct any misapprehensions or misunderstandings of the facts, provide all necessary evidence, and set out any differences of opinion in respect of the operation of law.

Importantly, often for the first time, it enables the taxpayer to set out their position with a full and thorough narrative, which may have been lost in the earlier stages, either because the Commissioner was asking the wrong questions, or the key facts were not understood.

Either way, if it has not been done already, preparing the response to a position paper provides taxpayers with a good opportunity to evaluate the relative strengths and weaknesses of the evidence. The process warrants careful and considered engagement, approached with diligence and seriousness. It also enables the taxpayer to determine whether there is other evidence from third parties which may not have been available to the taxpayer at an earlier point in time or to prepare additional evidence in the form of statutory declarations.

Generally, a taxpayer is given 28 days to respond to a position paper. That is rarely a sufficient period to respond, and why the taxpayer should have already commencement the process of formulating their

response well before receiving the position paper. Requesting appropriate extensions, or providing information on a staged basis if absolutely necessary, may be appropriate.

Although the response to the position paper is addressed to the audit team, it is appropriate to start preparing for the possibility of the matter proceeding to Court or the ART. While the taxpayer is not bound by strict rules of evidence, those rules should be considered a guide in preparing a response. Further, if the matter is to go to review in the ART the Commissioner is obliged to provide the evidence and materials given to him to the ART. The earlier information and documents are provided, the less opportunity for the Commissioner to make adverse credibility submissions about particular documents in the ART or the Court.

1.5 Stage 5: Issue of assessments and debt management

If the Commissioner still considers there to be a tax shortfall, he may issue amended assessment/s and/or penalty assessment/s. This is a formal notice of a liability to pay tax.

The liability becomes due shortly after the issue of the assessment/s. Even if the taxpayer intends to object or issue proceedings in the Administrative Review Tribunal (ART) and/or Federal Court (Court), the Commissioner will expect that the taxpayer pays all or part of the debt or otherwise provide security for the debt. This gives rise to the full suite of the Commissioner's debt management powers, including the possibility of issuing garnishee notices, freezing orders, departure prohibition notices and the list continues. Taxpayers must engage with the ATO in respect to debt management if the taxpayer intends to object to the assessment.

1.6 Stage 6: Objection

The taxpayer can object to the assessment/s in accordance with Part IVC of the TAA. This gives another opportunity for the taxpayer to correct any misapprehension or misunderstanding of the facts or law. However, an objection is also a legal document which must set out all grounds of appeal that may be relied on if the taxpayer ultimately issues proceedings in the ART and/or Court.

The period to object to amended assessments and penalty assessments will ordinarily be 60 days.[3] However, in some instances, depending on the date of the original assessment, the taxpayer may have longer. Where the Commissioner issues an original assessment, the taxpayer will be entitled to object within their ordinary period of review.

While those dates are critical, a taxpayer can lodge an objection out of time and request the Commissioner treat it as being lodged within time.[4] The provisions that enable a taxpayer to lodge objections out of time and the Commissioner's discretion to treat the objection as being lodged within time do not "*set out the factors the Commissioner must consider when determining whether to accept a late objection as being in time.*"[5] Rather, they come from case law. Justice Hill provided relevant matters that must be taken into account, which have been approved by the Full Federal Court.[6] He stated:[7]

> In summary when a taxpayer seeks an extension of time in which to lodge an objection the following matters will require consideration:

[3] TAA, s 14ZW.
[4] TAA, s 14W(2), s 14ZX.
[5] *PTBS and FCT* [2025] ARTA 1262, [15].
[6] *COT v Primary Health Care Ltd* [2017] FCAFC 131, [15]; *Zizza* v *COT* [1999] FCA 848, [13].
[7] *Brown v Commissioner of Taxation* [1999] FCA 563, [58]-[59].

> 1. The taxpayer's explanation of the delay in lodging an objection against the assessment within the time stipulated by Parliament.
>
> 2. The circumstances attendant upon that delay.
>
> 3. Whether the objection is one which, on its face, is frivolous or which in law must fail, or, to the extent that this is indeed a different test, is one in which the taxpayer has no arguable case. This matter will be considered by reference to the objection itself and such other material as the taxpayer puts before the Commissioner. It will seldom, if ever, require the decision maker to consider matters such as credit or endeavour to reconcile the evidence which the taxpayer choses to rely upon with other factual material in the possession of the Commissioner. No doubt the stronger the case the more likely that the discretion would be exercised in favour of a taxpayer even where the explanation for delay was thought not to be strong. Whether the converse is also the case need not here be considered.
>
> 4. Such other matters as the circumstances of the particular case make relevant, including, if prejudice to the Commissioner is asserted, such prejudice as is shown to arise.
>
> What is required is the balancing of the delay; the explanation for it; the circumstances which gave rise to it and such prejudice if any as may be shown to exist to the Commissioner against the prejudice which may arise to a taxpayer who has by reason of the failure to object in time lost the right to a review of the assessment. In this balancing process the Commissioner or the Tribunal on a review will be guided by what the justice of the case requires. The balancing process should be approached on the basis that whilst Parliament has stipulated a time in which objections are required to be lodged it has entrusted to the Commissioner a power to extend that time in appropriate circumstances. The decision maker should not lose sight of the fact that s14ZW is an ameliorating provision designed to avoid injustice.

In the same decision, Hill J also stated (references omitted):[8]

> While, therefore, the explanation for delay in lodging the objection will be an important factor, it is necessary to bear in mind that the decision maker should take into account all the circumstances of the particular case against the background that Parliament has enacted a procedure to permit extensions of time being granted. An extension should be granted where the justice of the case requires... Neither the Commissioner nor the Tribunal on review should approach the question of determining whether an extension of time should be granted on the basis that it will only be in an exceptional case that an extension is granted.

In the recent decision of *PTBS and FCT* [2025] ARTA 1262, the ART concluded that an objection in relation to two BASs that was lodged 6 days late should be treated as having been lodged in time. The taxpayer comprised several individuals and entities (**participants**) who were involved in property development. The substantive issue was whether the participants' involvement was by way of joint venture, partnership or trust. The taxpayer contended there was a trust relationship. The taxpayer's explanation for the delay of 6 days was that the participants were unaware of their GST liability or that the taxpayer had been registered as a partnership for GST purposes when it ought to have been registered as a trust.

The Commissioner disagreed with the taxpayer on the GST status, submitting that the taxpayer had no genuinely arguable case, and described it as "*speculative and self-serving*" and determined that the objection would not be treated as having been lodged within time.

While the Commissioner determined that the objection could not be treated as having been lodged within time, the Tribunal concluded otherwise. In applying Hill J's factors, the Tribunal made the following comments:

[8] *Brown v Commissioner of Taxation* [1999] FCA 563, [47]

a. **Length of delay**: While the Tribunal acknowledges that (references omitted):[9]

> the effect that the length of the delay impacts the exercise of the discretion, and a very good reason is needed if there is a lengthy delay. The length of the delay is also relevant. If the delay is minimal that requires a less compelling explanation.

The taxpayer submitted that it was only when statutory demands were issued to the participants that they became aware that there was a GST issue and that the taxpayer may have been incorrectly registered. There was in the taxpayer's statement of facts, issues and contentions (**SFIC**) an impression that the participants were "*scrambling to determine what to do…".* While the Commissioner disagreed with that impression, and disputed the proposition that the taxpayer was unaware of the taxpayer's registered status, the Tribunal held that the delay of less than a week, which could be explained, was a factor in favour of the taxpayer.

b. **Circumstances attendant upon that delay**: The Tribunal held that this factor tended to be neutral. In particular it stated:[10]

> Because we are talking about a *6 day delay*, and taking into account the *argued apparent knowledge* of the participants which the Applicant says now impact its understanding of what it did, there is an argument in favour of the Applicant. There is a crossover with the first factor, and of course the explanation for lateness need not be compelling given the minimal delay.

That was notwithstanding the Commissioner argued that the apparent lack of knowledge, and prompt action, was inconsistent with the taxpayer having filed 9 years of BAS consistent with its position and that 9 years had passed.

c. **Assessing whether the objection is frivolous or whether it has arguable merits**: The Tribunal referred to the decided case law which held this hurdle for the taxpayer was low, being whether the objection is "*frivolous, must fail or is one in which the taxpayer has no arguable case*" and the Tribunal's role is not to determine the objection (thus, the reason for the neutral descriptor of participants).[11] Notwithstanding the Tribunal stating that the taxpayer's case "*does not seem particularly convincing*" facing "*significant hurdles both legally and evidentially"* which made its case "*difficult, even improbable*", and the Commissioner's arguments "*have strength"*, the Tribunal held that the taxpayer had met the threshold.[12] Despite its comments in respect of the parties particular positions, it still held that the taxpayer's case was arguable, and was not "*frivolous, fanciful and nor can it be said (per Brown) that it 'must fail'."*[13] Accordingly, this factor was narrowly in favour of the taxpayer.

d. Other factors – Prejudice: The Tribunal raised both the potential prejudice to the taxpayer and the Commissioner. In respect of the prejudice to the Commissioner, of particular concern was that the time frame which had allowed credits to the taxpayer could not be amended. The Tribunal made the following comments:[14]

> The Tribunal had an exchange with the Commissioner at the hearing about this rationale. The Tribunal specifically asked the Commissioner whether it was claiming that the Applicant manipulated the objection process to delay it in order to ensure that some periods were time barred before filing its objection. Mr McKillop did not take that position. Instead, he said the Commissioner's submission was that the time bar was, of itself,

[9] *PTBS and FCT* [2025] ARTA 1262, [22]
[10] *PTBS and FCT* [2025] ARTA 1262, [34]
[11] *PTBS and FCT* [2025] ARTA 1262, [36] and [42].
[12] *PTBS and FCT* [2025] ARTA 1262, [42]-[45]
[13] *PTBS and FCT* [2025] ARTA 1262, [45].
[14] *PTBS and FCT* [2025] ARTA 1262, [50]-[51].

> prejudice in this case. The Tribunal requested further submissions on this point. These were duly provided in the Commissioner's Closing Submissions, and the Applicant's Closing Submissions also touch on this issue.
>
> The Tribunal notes that the Commissioner's SFIC submissions cited above in paragraph 49 mirrors wording in PS LA 2003/7, and notes that:
>
> (a) In paragraph 4 of PS LA 2003/7 the Commissioner refers to a circumstance when the time bar will be a reason to decline an extension of time as including "whether the delay is explained, in whole or in part, by an intent to allow a period of review of the correct taxpayer and the correct tax period, as contended in the objection, to expire".
>
> (b) In terms of prejudice and the Commissioner's operations, paragraph 4 of PS LA 2003/7 says a factor to consider is "whether the Commissioner's consideration of the objection is prejudiced by reason of the delay, including - where material documents have been lost, destroyed or are no longer available; - where witnesses have disappeared or their recollections have faded, and - where avenues of useful enquiry have dried up or have become difficult to pursue". It does not mention the statutory time bar in that context.

However, the Tribunal held:

> I do not accept the Commissioner's submissions as to prejudice arising from the application of the time bar in this case. The delay of 6 days to the objection has not led to the result the Commissioner complains of. The operation of the law has. I also do not agree that the mere fact the time bar applies to other periods is sufficient to be prejudice to the Commissioner in the sense from Brown. This is simply the application of the statutory provisions. While it would be useful to the Commissioner to have an unlimited timeframe on every occasion to amend tax returns, that is not the law. The fact that is not the law is not prejudice. It is just what the law is. If a taxpayer manipulates the timing of the objection in circumstances that in some way puts the Commissioner in a time-barred position, that is prejudice, but Mr McKillop did not claim this occurred here. What the Commissioner is saying is that the law is prejudice to it as a general matter. I do not accept that.

The Tribunal also considered whether the Commissioner was prejudiced because a lack of evidence supports the view of the GST status in circumstances where there was no evidence from the tax agents or all the participants. The Tribunal did not accept that proposition in circumstances where the onus of proof is on the taxpayer.

The Tribunal found that the substantive prejudice was on the taxpayer and supported the objection being accepted out of time.

e. **Other – interests of justice**: while the Tribunal recognised the strength of the Commissioner's concerns about the taxpayer's case, it held:

> to take a case that a 6 day delay should result in the Applicant having no rights to pursue its argument (that argument being assessed at its highest) is, in my view, not a sensible balancing of the purpose of the statutory provisions which allow for extensions of time, nor of the factors in Brown. This factor is in favour of the Applicant.

Despite that decision being in favour of the taxpayer, it should also be a lesson as to why out of time objections should be avoided if possible and relied on as a last resort only.

1.7 Stage 7: ART or Court application

If the Commissioner disallows the taxpayer's objection (in full or part), the taxpayer can issue proceedings in the ART and/or Federal Court.

There are a number of underlying legal differences between proceedings under the TAA when conducted in the Administrative Review Tribunal or Federal Court of Australia. These have been canvassed in detail in various other papers presented at the TIA. In summary the key differences (ordered in the manner taxpayers tend to care about them) include:

a. The Tribunal can re-exercise discretions conferred on the Commissioner based on the 'correct or preferable result' based on all the material before it; the Federal Court cannot do so as of right but can consider whether the taxpayer has established a legal error in the exercise of the power. The most common discretionary power is the general power to remit penalties in s 298-20 of Schedule 1 to the TAA, but there are a range of taxation matters that involve the Commissioner's discretion or the forming of an opinion.

b. The non-lawyer costs of the ART are usually considerably lower (e.g. filing fees, etc). However, there is no ability for a successful taxpayer to receive a costs order in their favour in the ART. In the Federal Court, a successful taxpayer will usually receive a costs order and an unsuccessful taxpayer have to pay the Commissioner's costs. However if legal costs are likely to be material, and the taxpayer has a strong case, the Federal Court may be preferable for that reason alone provided the matter is suitable for it (see point a).

c. In the Federal Court, the rules of evidence apply strictly (e.g. the *Evidence Act 1995*) and in the ART they do not apply strictly and are applied as a guide to rational and probative evidence. Practically, a matter being conducted according to the rules of evidence is either neutral or favourable to taxpayers who are well represented. Most credible tax cases are largely based on contemporaneous, documentary evidence which tends to be admissible as proof of its contents if it is a business record or maintained by a company as part of complying with the *Corporations Act 2001* obligations.[15]

d. The Federal Court is a court of pleadings and the appeal statement filed at the outset of the matter is a pleading.[16] That means once a party has committed to the issues in their appeal statement, they usually require leave of the Court to go beyond those issues and contentions. Practically, this advantages taxpayers who usually know their case well before the litigation commences.

e. The ART is not a Court nor are the parties bound by their SFICs, absent a direction from the Tribunal. This means the Commissioner will frequently change his case, often significantly, over the course of a matter. There is no clear line of authority that SFICs act as pleadings in the ART, even though as a matter of a logic that would seem a useful default position.

f. For complex cases, particularly anti-avoidance cases, there is a recent trend of matters being appealed from the ART to the Federal Court and the result being the matter must be remitted to be heard again[17] because of errors in reasoning by the relevant Tribunal.

[15] See *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385 at [68-71].

[16] *Federal Commissioner of Taxation v Resource Capital Fund IV LP* (2019) 266 FCR 1

[17] *ACN 154 520 199 Pty Ltd (in liq) v Federal Commissioner of Taxation* (2020) 282 FCR 455; *Federal Commissioner of Taxation v Complete Success Solutions Pty Ltd* (2023) 116 ATR 9; *Commissioner of Taxation v Patrix Prestige Pty Ltd* [2024] FCAFC 148; (2024) 306 FCR 56.

1.8 A case study – *Abotomey v FCT*

The unpredictability and challenge of a tax audit was demonstrated in the decision of *Abotomey v FCT*,[18] particularly if the ATO continues to gather information or raise new issues years after the audit and objection process.

A timeline of the key dates of the relevant dispute can be summarised as follows:[19]

(a) in August 2016, the Commissioner commenced a review of the taxpayers 2012 to 2015 income years;
(b) in June 2017, the Commissioner escalated the matter to audit;
(c) in February 2018, the Commissioner expanded the audit to include the 2010 and 2011 income years;
(d) in December 2018, the Commissioner concluded the audit and issued a statement of audit position and Reasons for Decision for the period 1 July 2009 to 30 June 2015, which included issuing notices of amended assessment for the income years 2010 to 2015, coupled with a finding of evasion, and associated penalty assessments on the basis of recklessness;
(e) in February 2019, the taxpayer lodged an objection against the amended assessments, penalty assessments and evasion opinion;
(f) in October 2021, the Commissioner disallowed the objection;
(g) in November 2021, the taxpayer applied to the Tribunal for review of the objection decision;
(h) in September 2023, the taxpayer filed his statement of facts, issues and contentions;
(i) in February 2024, the Commissioner filed his statement of facts, issues and contentions which was "*markedly different in many respects to that set out in its objection decision*",[20] including:[21]

> (a) withdrawn the allegations of fraud or evasion on the part of the Applicant (such that only the 2014 Year and 2015 Year remained in contention before the Tribunal).
>
> (b) provided an alternative analysis as to why the Respondent was within time to amend the Applicant's assessments for the 2014 Year and 2015 Year.
>
> (c) raised a contention that the Applicant should also be assessed on a dividend paid by [an Australian company] to the Applicant in the 2014 Year.
>
> (d) raised a contention that loans from [from a foreign company] to the Applicant were deemed to be dividends and therefore assessable to the Applicant.
>
> …

(j) in March 2025, the Tribunal heard the matter;
(k) in June 2025, the Tribunal handed down its decision.

The primary issue, and only issue in dispute before Stage 7 related to whether the taxpayer was a resident of Australia during the relevant income years (as they then were), and associated flow on aspects (whether the Commissioner was within time to issue the relevant assessments (on the basis of an opinion of evasion) and penalties), although the relevant position paper issued (as did the reasons for decision) did state:[22]

[18] [2025] ARTA 719.
[19] *Abotomey v FCT* [2025] ARTA 719, [23]-[35]
[20] *Abotomey v FCT* [2025] ARTA 719, [29].
[21] *Abotomey v FCT* [2025] ARTA 719, [37].
[22] *Abotomey v FCT* [2025] ARTA 719, [35].

> We reserve the right to consider application of the controlled foreign company provisions in accordance with section 361 and section 47A of the ITAA 1936, should information come to light that indicates that they may be applicable.

Despite the reservation, it appears the Commissioner did not consider the issue of the controlled foreign income provisions until at or about the time it was finalising its Statement of Facts, Issues and Contentions, at which point the Commissioner requested additional time on the basis that "*upon internal review, there is an issue and contention that has arisen that requires additional time to be explored*".[23]

As was stated by the Tribunal, it was not clear "*what further information had come to light between December 2018 and December 2023 to prompt the Respondent to proceed at such a late stage on the basis of a CFC analysis."*[24] Despite finding in favour of the Commissioner that the relevant foreign company was a controlled foreign company in respect of one income year, which gave rise to the application of s 47A, the Tribunal stated that it was "*uncomfortable with aspects of the process taken*" and:

> concerned that the Respondent only articulated its CFC position at a time when the matter had been before the Tribunal for over 2 years. This is particularly so in circumstances where the underlying events and transactions occurred several years prior and the Applicant no longer had the financial resources to retain specialist taxation advisers. The CFC rules are arguably significantly more complex than the ordinary income and assessment provisions.

A challenge for taxpayers is while the Commissioner goes about his review or audit, the taxpayer's world does not stop turning. They must continue with their own life, business and personal, amidst significant life events and financial pressures, all while simultaneously managing a tax dispute which can take many years. In the case of Mr Abotomey, over 10 years before a decision for the Tribunal (no appeal has been lodged by either party).

It is a process not for the faint hearted. However, it may be better than the alternative.

[23] *Abotomey v FCT* [2025] ARTA 719, [34].
[24] *Abotomey v FCT* [2025] ARTA 719, [36].

2. Facts and evidence

A taxpayer always has the burden of proof in tax proceedings regardless of whether it is a review of objection[25] decision under Part IVC of the TAA, an application[26] for declaratory relief pursuant to s 39B of the *Judiciary Act* 1903 (Cth), or a review under the *Administration Decision (Judicial Review) Act* 1977 (Cth) (ADJR Act) processes (or their state[27] law counterparts).

In courts, the rules of evidence apply.[28] The rules of evidence serve not merely as procedural formalities, but as essential safeguards of fairness and reliability in the fact-finding process of a Court, and have been said to "*embody the wisdom of the courts which have carried on forensic processes over a long period*."[29] The ART is not bound by rules of evidence, and may inform itself of any matters in such matters as it thinks appropriate.[30] However, as was stated by Perry J in *COT v Rawson Finances Pty Ltd*:[31]

> while the Tribunal is not bound by the rules of evidence, that does not mean that the common law rules of evidence may not guide an administrative tribunal in making findings of fact based upon material which is logically probative, bearing in mind that the rules of evidence are generally founded upon principles of common sense and fairness: Sullivan at [82]-[97] (Flick and Perry JJ).

Accordingly, even in the ART, the rules of evidence are still a useful guide, and indeed they may be particularly instructive if the hearing before the ART is conducted in a court-like manner, but they are not ultimately determinative.[32]

Outside of those scenarios, the rules of evidence and the burden of proof do not, strictly speaking, apply. There is an obvious disjoint between the obligations on a taxpayer to discharge a burden of proof in review proceedings and the requirements on the Commissioner under s 166 of the 1936 Act. Section 166 obliges the Commissioner to:

> **166 Assessment**
>
> **From the returns, and from any other information in the Commissioner's possession**, or from any one or more of these sources, **the Commissioner must make an assessment of:**
>
> (a) the amount of the taxable income (or that there is no taxable income) of any taxpayer; and
>
> (b) the amount of the tax payable thereon (or that no tax is payable); and
>
> (c) the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).

Pointing that out to an ATO officer appears to be a good way to lose friends, and influence people.

[25] *Taxation Administration Act 1953* (Cth), Ss 14ZZK and 14ZZO.

[26] *Cassaniti* [2018] FCAFC 212, [5] per Logan J, citing s 80 of the *Judiciary Act 1903 (Cth)* and *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [132]; *Dickinson v Minister of Pensions* [1953] 1 QB 228 at 232; *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125.

[27] *Taxation Administration Act 1997* (Vic), s 98; *Taxation Administration Act 1996* (NSW), s 88; *Taxation Administration Act 2001* (Qld), s 66; *Taxation Administration Act 1996 (*SA), s 85; *Taxation Administration Act 2003* (WA), s 37; *Taxation Administration Act 1997* (Tas), s 81.

[28] *Evidence Act* 1995 (Cth), s 4.

[29] ACN 154 520 199 Pty Ltd (In Liq and Commissioner of Taxation (Taxation) [2019] AATA 5981, [177] (which on appeal was remitted back to the Tribunal, although not in respect of that point).

[30] *Administrative Review Tribunal Act* 2024, s 52.

[31] [2023] FCA617, [93].

[32] ACN 154 520 199 Pty Ltd (In Liq and Commissioner of Taxation (Taxation) [2019] AATA 5981, [177] (which on appeal was remitted back to the Tribunal, although not in respect of that point).

As a matter of practical reality, the taxpayer has a burden of convincing a decision maker that their perception of the world should be the reality.

The fact that during the review and audit, and up to the point of the objection, there are no legislated rules of engagement, does not prevent a taxpayer from using the rules of evidence and guidance from the Court as a guide for persuading the decision maker. Indeed, even at those earlier stages, one must have regard to those rules that apply both on objection and before a court or tribunal.

The rules of evidence, and the content of the burden of proof, can be a neutral way of convincing a decision maker that their current lens should not be preferred. The rules are critical signposts that shape how information should be gathered, assessed, and communicated. Although not legally binding during a review or audit, these principles guide the Commissioner's inquiries and the taxpayer's responses, foreshadowing the likely course of any subsequent dispute. By grounding their position in admissible, credible, and persuasive evidence from the outset, a taxpayer improves their chances of resolving matters early—or succeeding later, should the dispute proceed to objection or litigation.

But even outside the burden of proof and rules of evidence, what is critical is that there is meaningful engagement with the facts, and their application to the law.

2.1 Burden of proof

The taxpayer's burden of proof under ss 14ZZO and 14ZZK of the TAA really comprises two parts:

a. establishing, with evidence, the underlying facts on which the law is to operate (and in its regard, the standard of proof to which each fact must be proved is relevant);[33] and

b. that the operation of the law when applied to those facts establishes that the assessment is excessive.[34]

The distinction between the two stages was usefully set out by Gageler J in *Commissioner of Taxation v Thomas* [2018] HCA 31 in a brief concurring judgment:

> Tax lawyers often speak of "taxable facts" (73). They mean by that expression to refer to more than just facts. They mean by it to refer to the combination of events that have occurred and legal consequences of events that have occurred on which a taxing statute fixes to impose a taxation liability or to confer a taxation benefit.
>
> Most often, taxable facts are independent of and antecedent to their taxation consequences. That is because, most often, a taxing statute will operate upon "the result of a taxpayer's activities as it finds them" (74).

The separation of the burden of proof into discrete stages is a useful analytical tool, and one which can help build consensus, or at the very least, determine where the taxpayer and decision maker are not in agreement:

Actual Facts

a. the actual facts of what happened (e.g. when was money received into a taxpayer's bank account? Did a trustee make a resolution before 30 June? When did an entity dispose of an asset?);

Legal Facts

[33] *FCT v Thomas* (2018) 357 ALR 445; [2018] HCA 31 at [84] and [85] per Gageler J.
[34] *FCT v Thomas* (2018) 357 ALR 445; [2018] HCA 31 at [84] – [85] per Gageler J.

b. the legal facts of what happened (e.g. Was the money a gift? Did a trustee confer a right vested in interest and vested in possession to trust income? When did the contract come into existence?);

Application of the tax law

c. the tax law consequences of the actual and legal facts (e.g. was the amount assessable income? What was the Division 6E net income of the trust estate? In which tax year was the asset disposed of?);

The standard of proof is the ordinary civil standard of proof on the balance of probabilities. That requires the taxpayer must affirmatively prove that their version of events is ever so slightly more probable than the Commissioner's.[35] If you think of something being about as likely correct as incorrect – that is a standard of likelihood no greater and no less than 50%, or perhaps described as being your guess is as good as mine, that will not meet the requisite standard of proof. However, if we tip those scales, "*weighing [them]… ever so slightly in his favour"*[36] the taxpayer succeeds. That standard could be strong, it could be without hesitation, it could be very likely, in favour of the taxpayer. However, it can also be in the taxpayer's favour, notwithstanding elements of hesitation. This can cause a point of contention between advisors and the ATO where at times, particularly in during the early stages of the review and audit, including on objection, it can feel as though the administrator is applying the standard which exceeds the balance of probabilities, and often even exceeding the criminal standard of beyond reasonable doubt.

Satisfying the standard of proof does not, for example, require a taxpayer to call all material witnesses or produce all the material documents which support his evidence. Importantly:[37]

> Mathematical precision is not required in order to prove on the balance of probabilities what the correct assessment should have been. The Court is entitled to decide the appeal by reference to estimates upon inexact evidence: *Allard v Commissioner of Taxation* (1992) 24 ATR 493 at 499 *per* Hill J.

Further, the Commissioner must not, particularly in the earlier stages of a review or dispute, be too quick to unfairly judge the evidence:[38]

> … the making of estimates upon inexact evidence, which is so much a feature of both judicial and administrative decision-making, cannot be uniquely excluded from appeals against betterment assessments. To refuse to consider the credit, not only of the applicant, but also of his independent and unchallenged witnesses, simply because the effect of the evidence was to support his accountant's generalisations about double-counting rather than to hit upon a precise figure, was to fall into an error of law.

Although the onus on the taxpayer in proving the assessment is excessive, "*the evidentiary onus in a particular case may shift from time to time.*"[39]

[35] *FCT v Cassaniti [*2018] FCAFC 212.
[36] *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1.
[37] *Condon v COT* [2023] FCA 561, [60].
[38] *Ma v COT* (1992) 37 FCR 225, 233.
[39] *Richard Walter Pty Ltd v COT* (1996) 67 FCR 243.

2.2 Section 167

Section 167 of the ITAA 1936 provides:

> If:
> (a) any person makes default in furnishing a return; or
> (b) the Commissioner is not satisfied with the return furnished by any person; or
> (c) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income;
> the Commissioner may make an assessment of the amount upon which in his or her judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of section 166.

Even though when s 167 is relied on by the Commissioner, the resulting assessment is referred to as a "default assessment", it is not, in fact or law, a provision enabling the Commissioner to issue an assessment or amended assessment. The Commissioner must still rely on his power in s 166 to issue the assessment or amended assessment – "*the two sections together prescribe the scope of the duty of the Commissioner to make assessments and confer upon him the power to perform that duty*", and "*[s]ection 166 is to be read with s.167 (the latter is not an independent power but is 'epexegetical to' the former"*.[40] In truth, what s 167 does is calculate an amount of net income that can be assessed, without reference to any particular assessing provision in the *Income Tax Assessment Acts*. This is because "taxable income" is defined to mean "assessable income" minus "deductions".[41] But his power in s 167 is "*not constrained by a process of subtracting 'deductions' from 'assessable income'.*"[42] Instead, he is empowered to make a judgment, an estimate, or a guestimate of the amount that becomes taxable.[43]

The historical situations in which s 167 has been utilised by the Commissioner means that there is a long line of authority which provides that it will not be sufficient for a taxpayer to demonstrate that there has been an error in the process of calculating the amount of taxable income included by reason of s 167. While "*sec. 167 is not the gateway to fantasy and that it is not open to the Commissioner either to pluck a figure out of the air or to make an uninformed guess*", it necessarily enables an element of guesswork and imprecision.[44] As was stated by Latham CJ in *Trautwein v COT*:[45]

> The application of s 39 [the predecessor to s 167] is not, in my opinion, excluded as soon as it is shown that an element in the assessment is a guess, and that it is therefore very probably wrong. It is primá facie right, and remains right until the appellant shows that it is wrong. If it were necessary to decide the point I would, as at present advised, be prepared to hold that the taxpayer must, at least as a general rule, go further and show, not only negatively that the assessment is wrong, but also positively what correction should be made in order to make it right or more nearly right. I say "as a general rule" because conceivably there might be a case where it appeared that the assessment had been made upon no intelligible basis even as an approximation, and the court would then set aside the assessment and remit it to the Commissioner for further consideration.

Provided the evidence establishes that there was a genuine estimate, notwithstanding it is inexact and perhaps incorrect, the Commissioner's assessment will be valid unless the taxpayer can discharge the burden to prove the assessment is invalid (see also below as to what this necessarily requires).

Historically, the Commissioner relied on s 167 in circumstances where he had insufficient information to rely on a particular provision of the *Income Tax Assessment Acts*. This will include, for example:[46]

[40] *FCT v Dalco* (1990) 168 CLR 614, pp 618 and 630.
[41] ITAA 1997, s 4-15; ITAA 1936, s 6(1).
[42] *Gashi v COT* [2013] FCAFC 30, [53].
[43] *Trautwein* at 87, 99-100 and 105; *Gashi* [56].
[44] *Briggs v DFC* 87 ATC 4278, 4293 (per Sheppard J).
[45] (1936) 56 CLR 63, at 87 (per Latham CJ).
[46] PSLA 2007/24.

a. unexplained deposits;

b. asset betterment calculations;

c. extrapolation from prior years or third parties;

d. in circumstances where there are lost or destroyed records.

The Commissioner also has, for some time, provided guidance in respect of relying on s 167 in respect of amounts of attributable income.[47] Notwithstanding the legislative basis for including attributable income as statutory income, the necessary challenges that might flow to the Commissioner in respect of amounts derived offshore necessarily means these amounts are somewhat akin to the other cases in which the Commissioner has historically sought to rely on his power in s 67.

However, in the past 5 years or so, what we have seen is a trend where the Commissioner is beginning to rely on the power in s 167 where he need not do so.

Take, for example, where the Commissioner forms the view that the taxpayer has received a loan from a private company, giving rise to a deemed dividend under Division 7A of the ITAA 1936. Historically, the Commissioner would have included the amount in taxpayer's assessable income pursuant to s 6-10 as a result of the application of s 44 and Division 7A. However, what we have seen more recently is that the Commissioner instead in includes the amount pursuant to s 167 with the relevant amount being calculated by reference to the same amount that would otherwise be included pursuant to s 44 and s 6-10 – however, the amount is not, at law, assessed under s 44. The Commissioner then issues the assessment pursuant to s 166.

It is not precisely clear why the Commissioner has, with greater frequency, tended to rely on s 167 when issuing assessments in circumstances where he could simply rely on provisions of ordinary or statutory income, other than perhaps a perceived evidentiary advantage.

In *McPartland v COT* (in which the Commissioner arrived at the amount of default assessments by treating the amount of personal expenses in the taxpayers' bank accounts as taxable income), the Full Federal Court made the following statements:[48]

> A taxpayer's burden in challenging an assessment made pursuant to s 167 is to establish on the balance of probabilities their "actual taxable income" and, in so doing, show that the amount of money for which tax was levied exceeded their actual substantive liability: Gashi at [63], citing Cmr of Taxation v Dalco (1990) 168 CLR 614 at 621 , 623 –625 (Dalco).
>
> The taxpayer cannot discharge their burden only by showing that the Commissioner erred in the formation of his assessment for the purposes of s 167 of the ITAA: Dalco at 621; Gashi at [62]; Bosanac at [35], [47]–[48].
>
> The taxpayer bears the onus on all issues, save where the Commissioner and taxpayer agree to confine the issues to a particular point of law or fact, in which case the taxpayer bears the onus in respect of those: Dalco at 624. No particular method by which the taxpayer must discharge their burden is defined or specified. The method will vary according to the circumstances of the case: Gashi at [63], citing Dalco at 624.

Those statements stemmed from the decision of *COT v Ross*. In *Ross*, the parties differed in their view as to how the onus might be discharged in the context of an asset betterment calculation. Justice Derrington held that granular analysis of the authorities could be synthesised into the following 10 propositions:[49]

[47] PSLA 2007/7.
[48] [2025] FCAFC 23, [13]-[15].
[49] (2021) 174 ALD 77, [48].

(1) An assessment under s 166 is fundamentally different to an assessment under s 167 and, necessarily, the manner in which they can be challenged are also fundamentally different: Gashi [61]–[67]; Rigoli v Cmr of Taxation (2014) 141 ALD 529 (Rigoli) [12].

(2) The assessment by the "asset betterment method" is a legitimate form of assessment: Trautwein at 86–87, 99–100 and 105; even though it necessarily involves an amount of guesswork and, whilst almost certainly inaccurate to some extent, it is no part of the Commissioner's duty to establish what judgment he has formed in making a s 167 assessment: Gashi [55]; George v FCT (1952) 86 CLR 183 (George) at 204. Clearly enough, any inaccuracy follows from the circumstances which impel the Commissioner to make a default assessment, being that a process of calculating assessable income less deductions is not possible: Rigoli [12].

(3) It is not part of a review of an objection decision concerning an assessment under s 167 to seek to identify the facts the Commissioner adopted for the purpose of making the assessment and whether those facts disclose a taxable income: Gashi [55]; George at 204. The principal fact which the Commissioner is required to determine in making an assessment pursuant to s 167 is "the amount of income upon which … income tax ought to be levied": Gashi [56].

(4)It is insufficient to discharge the burden under s 14ZZK(b)(i) in relation to an assessment under s 167, whether based on the asset betterment method or otherwise, to merely demonstrate that the Commissioner formed a judgment about the taxpayer's taxable income on a wrong basis and that the amount assessed far exceeded the taxpayer's taxable income: Gashi [62]; Rigoli [12].

(5) In order to establish that an assessment under s 167 is excessive, a taxpayer must positively prove their "actual taxable income" and, in doing so, must demonstrate that the amount of tax levied by the assessment exceeds their actual substantive liability: Gashi [63]; Dalco at 623–625; Trautwein at 88; Ma v FCT (1992) 37 FCR 225 (Ma) at 230; by, in effect, furnishing a return of actual income which involves establishing both sides of the equation: Bosanac v Cmr of Taxation (2019) 267 FCR 169 (Bosanac (FC)) [57].

(6) In the context of a s 167 assessment based on the asset betterment method, the taxpayer must demonstrate that the identified unexplained accumulated wealth was derived from non-income sources and that may be achieved by an accepted denial of any undisclosed source of income, providing acceptable evidence of how the taxpayer spends their time, and demonstrating a reasonable explanation for any appearance of the possession of assets: Ma at 230; Gashi [64]–[65]. The taxpayer must account for the unexplained increase in assets by explaining the source of those assets and identifying that those sources are not taxable. "[I]f the disclosed "actual" taxable income does not explain the increase in assets, then the taxpayer is unlikely to have discharged the burden of establishing the assessment is excessive": Gashi [65].

(7) The converse is that it is insufficient for a taxpayer to prove that an item in their asset betterment statement was wrong or should not have been included: Gashi [63]–[67]; Rigoli [12]. If they do not also satisfactorily explain the source or sources for the other unexplained wealth, that is that they were derived from non-income sources, the onus under s 14ZZK(b)(i) will remain unsatisfied: Gashi [66]. A deficiency in proof of the excessiveness of the assessment results in the challenge failing: Dalco at 624–626. Necessarily, this prevents a successful challenge to an assessment being made by a process of "picking and choosing" part or parts of the increased wealth relied upon by the Commissioner and attacking them as being improperly included as part of the taxpayer's taxable income: Gashi [66]; Rigoli A process which involves attacking elements of the Commissioner's calculation and facts in respect of which the taxpayer chooses to lead evidence is not sufficient. The same is true for a default assessment not based on the asset betterment method: Rigoli [12].

(8) These principles can result in a situation where the default assessment can be assumed to be inaccurate in some respects but, in the absence of the taxpayer establishing what their actual taxable income was, it must nevertheless stand: Gashi [77]–[79]; Woellner and Zetle, "Satisfying The Taxpayer's Burden Of Proof In Challenging A Default Assessment — The Modern Labours Of Sisyphus?" [2014] JlALawTA 11.

> (9) The ultimate question in Part IVC proceedings relating to an assessment made under s 167 is whether the amount of the assessment is excessive. That places no burden on the Commissioner to show that the assessments were correctly made: Dalco at 623–624. The manner in which the taxpayer can discharge the burden may vary with the circumstances but "absent agreement with the Commissioner to confine the issues for determination in a Pt IVC proceeding, the Commissioner is entitled to rely upon any deficiency in the taxpayer's proof of the excessiveness of the amount assessed in seeking to uphold the assessment": Gashi [61]. See also Dalco at 624.
>
> (10) There may be cases where the amount of taxable income depends upon the legal complexion of known facts or upon specific factual questions. In such a case, a taxpayer may successfully discharge the onus by establishing that the Commissioner included in their taxable income amounts which ought not to have been included: Dalco at 624. However, such a situation would only arise where the Commissioner agrees to a process which is different to that described above by confining the scope of the dispute between him and the taxpayer to certain enumerated amounts. One might expect some clear expression of that agreement, involving as it does an abandonment of the advantages accorded to the Commissioner in s 167 in respect of defaulting taxpayers.

In some instances, the burden in s 167 cases has been referred to as a "dual onus" which requires:[50]

> …not just of showing that the Commissioner's assessment was excessive, but of filling in the "blank" that demonstrating excessiveness would create by showing what the assessment should have been, is that the facts relating to the correct taxable income are peculiarly within the taxpayer's knowledge…

Whether there is an evidentiary advantage where the Commissioner relies on his power pursuant to s 167, particularly in circumstances where the Commissioner need not do so, remains perhaps, for the time being, answered. In *Rigoli v COT*, the Full Federal Court stated:[51]

> While the Commissioner's assessment for Mr Rigoli under s 167 was not made on the basis of asset betterment, the primary judge noted (at R[8]) that the reasoning in Gashi was not confined to an assessment on asset betterment. Rather, it was on the basis that under s 167 the "process of calculating taxable income as assessable income minus deductions is not possible (in whole or in part)". Even if the process under which the Commissioner reached a figure under s 167 was similar to the process for the purpose of s 166 in circumstances where the taxpayer had actually furnished a return, an assessment under s 167 was fundamentally different from one under s 166. A taxpayer seeking to establish that an assessment under s 167 is excessive must establish not that some element in the assessment is wrong but that "the amount upon which [in the Commissioner's judgment] income tax ought to be levied" was the taxpayer's actual taxable income.

Rigoli also involved a more traditional application of s 167. The taxpayer had carried on a business partnership but failed to lodge personal or partnership income tax returns. The Commissioner issued original assessments to the taxpayer, relying on his power in s 167. The taxpayer did not keep any financial or accounting records in relation to the business and was unable to discharge the burden of proof where during the course of the proceedings he simply identified some errors in the Commissioner's approach.

However, the statutory onus of proof is "*no panacea for illogicality of reasoning*."[52] That proposition arose in the taxpayer's appeal in *Le v FCT* (which related to an asset betterment approach). In *Le*, the ATO calculated a component of the taxable income based on the annual change in the taxpayers' net assets, and a second component was calculated assuming amounts paid from bank accounts must have had a corresponding amount of income derived. In the Tribunal, the taxpayers submitted that they made loans, and many amounts deposited into their account represented a repayment of those loans, although they accepted some components were interest. The Tribunal largely upheld the assessments stating that the evidence "*often hinted at alternative explanations for the cash that tended to tantalise rather than persuade or clarify*."[53] The Tribunal

[50] *Buzadizic v COT*, [8].
[51] (2014) 141 ALRD 529, [12].
[52] *Le v FCT* [2021] FCA 303, [81].
[53] *NGFZ and COT* [2019] AATA 5410, [3].

also made adverse findings as to credit and some witnesses, and criticised that there was a lack of contemporaneous records and the loans were undocumented. The Tribunal also highlighted that the passage of time made the taxpayers' onus more difficult, with hazy memories and witnesses no longer available.[54]

Despite those findings, on appeal, Logan J remitted the matter back to the Tribunal on the basis that in the Tribunal's reasons:[55]

> There was an inherent and illogical inconsistency between accepting on the one hand the applicants' concession that they had derived but not declared in their income tax returns interest income on loans on the one hand and, on the other, not accepting that the transactions which yielded these interest payments were loans rather than income. The source in the material before it of the Tribunal's satisfaction as to the derivation of interest was Ms Le's evidence. She admitted that she had earned interest income and identified particular source transactions as the related loans upon which that interest had been earned. Yet in the Tribunal's analysis of the applicants' sources of funds in the income years in question, the Tribunal was not satisfied that the very same transactions were loans.

The precise manner in which a taxpayer can discharge the onus in respect of the more traditional s 167 matters will depend on all the facts and circumstances. However, it often requires significant care and precision to work through business records, and, in many instances, obtaining witness statements to corroborate contemporaneous evidence of the underlying transactions. That exercise can be time consuming and should be undertaken from a very early stage in the review process (if not before the relevant returns are lodged). Even in the traditional s 167 cases, particularly those involving undisclosed income, gifts or loans, careful consideration of the evidence early on in the review (indeed as early as Stage 1) may enable the taxpayer to convince the Commissioner that the ultimate amounts which he may include in taxable income pursuant to s 167 is significant less than what would have otherwise been included. This requires substantial review and consideration of the contemporaneous records (if any) and appropriate reliance on oral evidence both from the taxpayer and appropriate third parties. The benefit of undertaking that process at an early stage of the review, ensuring also that the taxpayer makes appropriate concessions or makes voluntary disclosures if mistakes were made when the returns were lodged, can be essential in minimising the damage.

There remains, at large, a question as to whether the same propositions can be made in the less traditional s 167 cases, that is, in circumstances where the Commissioner includes an amount in taxable income by reason of s 167, but that amount is referrable to some other provision in the *Income Tax Assessment Acts*. An alternative view might be that, in making the amount referrable to some other provision in the *income Tax Assessment Acts,* the Commissioner is narrowing the grounds in dispute and the basis on which the taxpayer needs to prove that the assessments are excessive.

From an advisor's perspective, it may be useful, at a minimum, to heed this advice:[56]

> Focusing on seeking to disprove the basis of the Commissioner's assessment is an all too common error that taxpayers make in seeking to challenge a section 167 assessment. A more productive course is to ignore the detail of how the Commissioner arrived at the section 167 assessment, and prove their actual taxable income for the year or years in issue.

Certainly, in setting out the grounds of objection, consideration must be given to all possible grounds of objection, and the basis of the assessment needs to be given careful consideration.

[54] *NGFZ and COT* [2019] AATA 5410, [6], [8].
[55] *Le v FCT* [2021] FCA 303, [76],
[56] *Dalby v COT* [2025] ARTA 1060, [26] (Deputy President Thompson SC)

2.3 Some key principles of the rules of evidence that are often applicable in tax matters

If it hasn't been made clear to this point, it is important to gather evidence as early as possible to support your case. That means gathering the evidence but also making assessments as to the probative value of each piece of evidence. Ideally this process should begin at the time of the underlying transaction or event, particularly in circumstances where a dispute is probable, or even possible. However, if not then, it certainly should begin well before proceedings before the ART or the Federal Court. Oftentimes when gathering evidence in early stages of a review or audit, there can be a difficult balance of demonstrating to clients the value involved in what can be costly, and setting them up for what may be the long game or the best possible outcome in the event of settlement negotiations.

In *FCT v Cassaniti* (which is not a s 167 case), the Full Federal Court provided, under both applications for declaratory relief and in Pt IVC reviews, five propositions of general relevance:[57]

a. the degree or standard of proof required by a taxpayer is that which applies in an ordinary civil proceeding. Referring to the description by Justice Hunt in Allied Pastoral,[58] that can be described as:

> …if the plaintiff succeeds… in weighing down those scales ever so slightly in his favour then he has discharged the burden he carries…

b. a taxpayer is not obliged to call all material witnesses and produce all material documents which support their proposition;

c. there is no requirement that direct evidence by testimony or affidavit can only be accepted if it is corroborated;

d. the first instance hearer of the case is free to accept the evidence of the taxpayer alone if they find it truthful; and

e. while it would usually be prudent to corroborate the evidence of a taxpayer and adduce contemporaneous objective evidence, "*prudence should not be confused with the requirements of the law*".

But there are no rules as to the weighing of evidence. It is herein that the skill of an advisor lies: knowing how best to discharge the burden of proof based on each facts and circumstances of a particular matter. Precisely what that entails will vary on a case-by-case basis. In some instances, it may take preparing evidence for a much longer period than that which the assessments relate to.

Take, for example, the decision of *Cheung v COT* [2024] FCA 1370, which related to the receipt of $33 million from bank accounts in Vanuatu between 2005 and 2015. The parties had agreed to confine the matter to particular points of law and fact, namely whether the $33 million was income under ordinary concepts and based on a concession by the taxpayer that he had no allowable deductions. The taxpayer led substantial evidence, spanning a period of 70 years (far longer than the assessments in question), which prove the origins of a supermarket business in Vanuatu which, by the time of the hearing, was owned and controlled by the taxpayer's nephew, but had its origins in a small grocery business which was originally started by the parents of the taxpayer's former brother-in-law (his sister's former husband). The evidence led was also in respect to life events of the key players which demonstrated a pattern of behaviour between the family members. There was evidence led from the taxpayer, his sister, his brother, and two of his nephews. The Court held the oral evidence was reliable and honest, notwithstanding there were some minor discrepancies in some of the

[57] [2018] FCAFC 21, [88].
[58] *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1 at 8.

testimony which could be explained by the period of time that elapsed in respect of the particular memory. Indeed, in respect of the taxpayer's sister, the Court held that she:

> was a most impressive witness. I accept her evidence without reservation. She is now elderly (born in Port Vila in 1942). However, an evident degree of physical frailty on her part was in no way indicative of any mental decline. She was, to my observation, polite, courteous, engaged, modest in relation to her considerable business achievements, possessed of a good sense of humour and, above all, possessed of a masterly knowledge of [her business] and her family. I am well-satisfied her evidence was honest.

The evidence led was sufficient at first instance to demonstrate that the receipts were voluntary payments made by the taxpayer's sister to a "*brother trusted to invest them widely and well for the wider … family as, if and when occasion required, according to his value judgement but without any formal legal obligation. They were gifts of capital."* Accordingly, at first instance, the Court held that the taxpayer had discharged his onus of proof that the amounts were not ordinary income. The Commissioner's appeal was due to be held in August 2025.

The specific attributes of the relevant parties may also be highly relevant, and this can be particularly the case where there are culture norms or familiar nuances that may need explaining.

But it is not the case that evidence is necessarily essential. The burden of proof can be discharged by drawing inferences from the evidence.[59]

2.3.1 Documentary v oral evidence

While documentary evidence may be best practice, the lack of formal documentation, particularly between related parties, does not itself preclude a fact being proved.[60] However, that will require that oral evidence given is detailed, precise and broadly consistent. It also requires careful consideration of all the facts and circumstances, including the conduct of parties involved:[61]

> In relation to whether, in circumstances of great informality, it can be concluded that a contract exists and, if so, what are its terms Kennett J stated in Chiodo v Silk Contract Logistics [2023] FCA 1047, at [8]-[9]:
>
> > 8 … where the contract is not written and its terms are to be inferred in whole or in part from the parties' conduct. The terms of an oral contract may not be limited to express terms; terms may be inferred from the circumstances, including a course of dealing between the parties, or implied where necessary for business efficacy: Realestate.com.au Pty Ltd v Hardingham [2022] HCA 39; 406 ALR 678 at [21]–[22] (Kiefel CJ and Gageler J).
> >
> > 9 Where there is no written contract and no evidence of a particular conversation in which a contract was formed orally, evidence of the parties' conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken (see Personnel Contracting at [177] (Gordon J, Steward J agreeing)).
> >
> > [footnote references omitted]

Again, preparing oral evidence (or rather writing down the oral evidence) early is essential. It requires careful consideration of the taxable facts, and the evidence necessary to support it, with appropriate regard to peripheral issues or ancillary factors which might need to be given consideration or explanation.

But a word of warning – it can be challenging convincing the ATO that their narrative, based on assumptions made where there is a lack of documentary evidence, is incorrect based on the narrative provided by the

[59] *McCormack v FCT* [1979] HCA 18.
[60] *SNA Group Pty Ltd v COT* [2025] FCA 240.
[61] *SNA Group Pty Ltd v COT* [2025] FCA 240, [101].

taxpayer alone. This can particularly be the case if the ATO perceives – rightly or wrongly – that there are inconsistencies or imperfection in the oral evidence. After all, confirmation bias is a natural tendency, especially where the absence of documentation appears to support the ATO's assumptions (just as the taxpayer can be critical of making self-serving statements, it can be perceived that sometimes the ATO fails to give proper regard to a version of events which results in less tax payable). If the taxpayer's version changes, or the ATO picks up inconsistencies that need later explanation, the hurdle can become insurmountable, and the only avenue may be independent review or appeal.

In respect of taxpayer's evidence at hearing, Steward J states at [88] of *Cassaniti* (Greenwood and Logan JJ relevantly agreeing that:

> Contending that evidence was "insufficient" in the face of three sworn affidavits of the respondent, together with the exhibits attached thereto, and her answers in cross-examination, may suggest that a taxpayer bears a special burden of proof. However, other than the necessity to scrutinise evidence given by the taxpayer him or herself with care, no such special burden exists.

As a matter of practice, before you reach a Court or Tribunal it is unlikely a taxpayer's direct oral evidence will be accepted in its entirety by an ATO officer. However, there are circumstances where putting the taxpayer directly in front of the ATO officers is useful. In many cases, that will be the best way to resolve a dispute early and completely. That is because just as ATO officers may be criticised for missing the wood for the trees, so do advisers. Where a client is reasonable and rational, has a clear explanation for why something happened a particular way, and is a reliable historian, often the worst way of convincing anyone – at any stage – is by writing it down, disconnecting it from their direct experience and expression, and smothering it in a series of legal arguments.

That advice most frequently applies for disputes involving families, estates, and individual taxpayers. However, particularly on matters of transaction structure, it has parallels in corporate disputes. The most convincing reason of why a labyrinthine transaction structure was chosen, which has put a decision maker offside, will come from outside the tax lawyers, tax accountants and the tax team. To choose some deliberately simple examples:

a. if asked why an offshore company was formed in the BVI or Cayman Islands, a company secretarial staff member will likely be able to give 10 reasons why that is the company's preferred jurisdiction for offshore entities (cost of formation, cost of compliance, familiarity to counterparties in financial or co-investment transaction, underlying legal system, etc);

b. if asked why an intercompany investment was 100% equity at one level it may relate to group treasury requirements for that country, that investment or (if you're lucky) a banking covenant.

That material is what litigators refer to as "lay evidence". Evidence from a layperson – that is, someone who is not an expert – on an aspect of a matter. The persuasiveness of it as a matter of law is governed by the usual standard of proof referred to in *Cassaniti* above. Outside of a Part IVC review in the Court or Tribunal, the material is as persuasive as the deponent and recipient allow it to be.

2.3.2 Expert evidence

Generally, there should be a delineation between expert evidence as to value – which is frequently required at all stages of tax disputes – and expert evidence generally.

In tax matters, you often have evidence about valuation. For example:

a. In the application of the CGT provisions (including, for example, the market value substitution rule, small business CGT concessions (Maximum Net Asset Value test, etc), goodwill valuations);

b. transfer pricing;

c. GST (particularly where the margin scheme applies);

d. employee share schemes;

e. on consolidation.

The manner in which valuation is to be determined in tax matters is well known. For most cases, you look to the test in *Spencer v Commonwealth* (1907) 5 CLR 415:

> what it is worth to a man of ordinary prudence and foresight, not holding his land for merely speculative purposes, nor, on the other hand, anxious to sell for any compelling or private reason, but willing to sell as a businessman would be to another such person, both of them alike uninfluenced by any consideration of sentiment or need.

Valuation evidence can establish a baseline consensus – a shared reality between taxpayers and the Commissioner – but in order to do so it must be based on the relevant test, supported by the contemporaneous and relevant documents, and put in a way that is actually persuasive in the context of a "dispute". It also must be of the right asset, at the right time and in the right conditions.

That is easy to say in the abstract, and difficult to practically achieve without considerable work determining what each of those matters are. If the valuation is being established relatively close to the actual transaction, it may be very useful at any stage. If a valuation is establishing a historic value based on limited documents in a manner in which the parties are apart, it may be good money after bad.

Non-Valuation Expert Evidence

In a Court or Tribunal dispute, there has been a trend over at least the last decade for a Court to often find it is not assisted by an expert report. For example, in a case considering whether cauliflower rice was not GST-free as it was "food marketed as a prepared meal" for GST purposes and in which the Commissioner ultimately succeeded the Federal Court said this about the expert evidence:[62]

> 16. The Commissioner of Taxation sought to rely upon an expert report of Mr Field. Mr Field had extensive experience in product development, particularly in relation to food. He had been an executive at Coles including heading a team of executive chefs and was head of Coles private label and worked on the development of some of the first chilled private label ready meals….
>
> …
>
> 77. There were significant difficulties with the evidence of Mr Field. The difficulties arise from the form of the questions asked, the nature of his experience, the methods he adopted and the opinions he expresses.
>
> 78. The first question asked of Mr Field was to identify products which a consumer might wish to purchase as substitutes for each of the Products. As discussed further below at paragraph [105], the statutory question looks to the kinds of foods marketed as prepared meals and thereby looks at the activities of the seller. Mr Field was asked to approach the identification of a genus of products by reference to the conduct of consumers. That is not the statutory question.

[62] *Simplot Australia Pty Ltd v Commissioner of Taxation* [2023] FCA 1115; 117 ATR 298.

> …
>
> 80. …Even if it were possible to consider that one might have an expertise in supermarket shopping, Mr Field was not such an expert. It may be accepted that a person may have expertise in marketing. But Mr Field did not give a report on how the products he identified were marketed beyond describing their packaging.

To similar effect, in a very different context, in *Bosanac v Commissioner of Taxation* [2018] FCA 946 at [98-110] Steward J rejected as expert **evidence** the applicant's accountant's affidavit that quantified taxable income as it was made with:

> …no accounting records or receipts or invoices of the applicant to inspect…[but] instead inspected and analysed other documents, and records exhibited to his affidavit, not for the purpose of summarising their effect, but for the purpose of giving his opinion about the applicant's taxable income.

In *SNF (Australia) Pty Ltd v Commissioner of Taxation* [2010] FCA 635, Mr Seve could give an expert witness opinion:

> …founded upon his experience in and knowledge of transfer pricing…about markets and market behaviour generally, but in relation to specific markets and the comparable transactions primary evidence would be required…Mr Seve can provide expert evidence (like an economist) to assist the Court on comparability.

After receiving this evidence, the Court could then determine the ultimate issue concerning arm's length consideration in the context of the interpretation and application of Division 13 of the ITAA 1936. Contrast the outcomes in *Bosanac* and *SNF*:

a. In *Bosanac*, the expert purported to determine the taxable income of the taxpayer (i.e. what the Court is required to do based on primary evidence) which is not allowable;

b. In *SNF,* Mr Seve could give an expert witness opinion on what was market behaviour generally and how comparability analysis is performed so the Court could inform itself to make the decision on what was arm's length consideration under Division 13 of the ITAA 1936.

To give further examples of the twists and turns of when expert evidence may be legally relevant, expert evidence on foreign law is generally receivable if it is:

a. evidence on the content of the foreign law; **but**

b. not on the application of the foreign law (*Noza Holdings Pty Ltd v Commissioner of* Taxation [2010] FCA 990 at [13] per Gordon J); **unless**

c. describing the manner in which a discretion may be exercised with reference to a pattern or course of decisions.[63]

However, some expert evidence on the application of foreign law may be said to be relevant: *Idoport Pty Ltd v National Australia Bank* (2000) 50 NSWLR 640.

Probably the most general observation that can be made about non-valuation expert evidence, and creating a baseline reality between taxpayers and the Commissioner (or a Court), is that it will depend entirely on whether the decision maker is open to being convinced in an administrative setting, or relevant at all in a Court setting.

[63] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) CLR 331 citing in part *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1989) 22 FCR 209.

3. Conclusion

In ATO reviews and disputes, there is no single formula for success. The taxpayer's burden remains constant, but success depends on anticipating how facts will be tested. Sometimes contemporaneous records carry the day; sometimes the credibility of oral testimony proves decisive; sometimes the Commissioner's assumptions can be unravelled by careful early preparation.

It is no easy task. Advisors must navigate not just the tax laws, but the psychology of persuasion, the evidentiary choices available, and the long game of litigation strategy. The overarching lesson is that meticulous record-keeping, early evidence gathering, and a clear presentation of the taxpayer's position are indispensable to minimising exposure and successfully navigating the review and dispute matrix.