PS LA 2008/6 - Fraud or evasion

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Australian Government
Australian Taxation Office

PS LA 2008/6
Fraud or Evasion

This Law Administration Practice Statement provides guidance to ATO staff involved in matters where there has been, or is suspected to have been, fraud or evasion.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What is this practice statement about?

This practice statement provides guidance to ATO staff considering fraud or evasion in the context of the unlimited time periods which allow the Commissioner to amend assessments (or to seek the payment of indirect tax which has been underpaid) due to fraud or evasion.

It deals specifically with the exceptions to the statutory time limits when we have formed an opinion of fraud or evasion. See **Appendix 1** for the relevant legislative sections.

This practice statement outlines:

- what is fraud or evasion
- the policy reasons for having an unlimited amendment period where there is fraud or evasion
- the principles underpinning our approach to fraud or evasion
- the procedures and work practices to be followed, including technical engagements and referrals, in considering fraud or evasion.

This practice statement is supplemented by the *Fraud or evasion guideline* (period of review). The principles and processes set out in these documents recognise that fraud and evasion are both serious matters, and never to be inferred lightly.

2. What is fraud or evasion?

Although we discuss them together in this practice statement, fraud and evasion are two separate and distinct concepts.

Fraud

For the purposes of this practice statement, 'fraud' may be described as making false statements knowingly or without belief in their truth (including such as when made recklessly, careless as to whether it is true or false), to deceive the Commissioner.[1]

Evasion

The threshold for an opinion of evasion is not as high as fraud. A taxpayer's behaviour may not constitute fraud but be nevertheless sufficiently blameworthy to constitute evasion.

'Evasion' is best explained by reference to the judgment of Dixon J in *Denver Chemical Manufacturing v. Commissioner of Taxation*[2] (*Denver*) in which his Honour noted it would be unwise to attempt to define the word 'evasion' but nevertheless suggested a 'blameworthy act or omission on the part of the taxpayer' was contemplated.[3]

The High Court's guidance from *Denver* as to what constitutes evasion, including the notion that some blameworthy act or omission is contemplated, has been applied by the Federal Court and State Supreme Courts ever since.[4] Refer to Appendix 1 of the *Fraud or evasion guideline* (period of review) for an overview of how evasion has been considered by the High Court.

[1] Refer to Appendix 2 of the *Fraud or evasion guideline* (period of review) for an overview of how fraud has been construed by the judiciary.
[2] (1949) 79 CLR 296.
[3] *Denver Chemical Manufacturing v. Commissioner of Taxation* (1949) 79 CLR 296 at 313.
[4] *Commissioner of Taxation v. Burness (as Trustee for the Bankrupt Estate of Robert Bottazzi, a Bankrupt)* [2009] FCA 1021; *Kajewski & Ors v. Federal Commissioner of Taxation* [2003] FCA 258; *Evenfont Pty Ltd v. Commissioner of Taxation* [2008] NSWSC 1371; *Evans v. Federal Commissioner of Taxation 89 ATC 4540*; *MacFarlane v. Federal Commissioner of Taxation* 86 ATC 4477; *Saffron v. Federal Commissioner of Taxation* 93 ATC 4456 (per Beaumont J.).

An opinion of evasion is a serious matter. It requires culpable conduct of the taxpayer, as described further below.

What is a 'blameworthy act or omission'?

The notion of a 'blameworthy act or omission':

- lies somewhere between innocent mistake and intention to defraud
- usually involves (in a taxation context) making a wrong statement or taking an incorrect position without a credible explanation
- involves culpable conduct; being something more than mere avoidance or the mere withholding of information or supplying misleading information; such as an intention to withhold information from the Commissioner on the basis the Commissioner would likely take a different view of the tax outcome if the relevant act or omission (for example omission to disclose information) had not occurred and instead accurate representations or disclosures had been made.

The material facts must be examined to assess whether the relevant conduct is 'blameworthy'.

Evasion is to be assessed objectively, based on the standard of a reasonable person in the position of the taxpayer. In other words, evasion involves conduct that a reasonable person seeking to comply with their tax obligations would not engage in.

When does evasion arise in a self-assessment environment?

The leading High Court authorities for the meaning of evasion relate back to periods before the introduction of self-assessment into the tax system. So, although the meaning of evasion has not changed, the circumstances in which it arises have changed in some cases.

Under self-assessment, taxpayers are not usually required to include detailed information in their tax returns. Consequently, evasion involving deliberate withholding of information does not usually occur at the return stage. Rather, such withholding of information might occur through a wilful or reckless failure to keep records or to supply information in the course of a tax audit. It may also occur in relation to a failure to provide information required by the Commissioner in a fuller return or schedule.

However, simpler instances of evasion will arise at the return stage; for example where income is intentionally omitted from a tax return with no credible explanation.

We may, therefore, amend a taxpayer's assessment beyond the normal time limits because they evaded the payment of tax, even though the view has been formed that no fraud has been committed.

3. What are the policy reasons for unlimited amendment periods where there is fraud or evasion?

The policy of Australian taxation law is generally to provide **certainty and finality** after a specified period, both for the taxpayer and for the Commissioner, in regard to the tax liability of the taxpayer for a year of income or an accounting period.

For instance, the statutory time limits that apply for amending income tax assessments (two years or four years) emphasise our duty to make timely enquiries and appropriate assessments.[5]

The time limits for amending assessments under a self-assessment system are premised on the good conduct of the taxpayer, tax agents, and others concerned with the assessment.

Fraud and evasion, however, involve culpable misconduct. The exceptions to the statutory time limits that apply where the Commissioner is of opinion that there has been fraud or evasion[6] make clear that a taxpayer is not entitled to the benefit of a time limit for an amended assessment if the previous assessment is less than it ought to be (or where refunds or credits have been over-claimed) because of dishonesty or other blameworthy conduct.

4. What is our approach to fraud or evasion?

Fraud and evasion are both serious matters, never to be lightly inferred.

To form an opinion that there has been fraud or evasion, we must exercise sound judgement and fairness. This applies equally to deciding what, if any, action should be taken. To help to ensure this, the opinion should be formed only:

- by an Executive Level 2 (EL2) or a Senior Executive Services (SES) officer

[5] Subsection 170(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).
[6] For example, item 5 of the table in subsection 170(1) of the ITAA 1936.

- in accordance with ATO policies and practices
- bearing in mind the weight Parliament has placed on the benefits of certainty and fairness for taxpayers.

Amended assessments based on fraud or evasion are expected to be very much the exception to the rule. The making of an amended assessment based on fraud or evasion would normally be justified only if action to amend the assessment has been prevented by the fraud or evasion or prompted by its disclosure.

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: for example where an amended assessment to give effect to the outcome of a lengthy tax audit in which the issue of fraud or evasion was not raised, was issued just outside the limited amendment period due to administrative error.

As a matter of practice, in some instances it may not be necessary for the Commissioner to form an opinion that there was fraud or evasion to make any amendment. For instance, a tax shortfall involving fraud or evasion may be adjusted within the period of review. In other cases, the taxpayer may consent to legally extend the period of review.[7]

Appendix 2 sets out the principles underpinning our approach to cases that raise issues of fraud or evasion and our commitment to ensure that these cases are resolved fairly, appropriately, and as early as possible.

5. What work practices apply in relation to fraud or evasion cases?

Our work practices must provide assurance that the amendment power is being used appropriately and not merely to overcome period of review issues.

To help to ensure this, make sure you:

- keep the taxpayer informed
- seek specialist assistance
- notify the appropriate areas.

You should consider if there is behaviour that may indicate fraud or evasion at the earliest practicable opportunity in an audit. This allows us to obtain and consider relevant evidence before any opinions of fraud or evasion are formed.

In the normal course of communication, a taxpayer should also be made aware that you are looking into the issue of possible fraud or evasion. Advise the taxpayer of our preliminary view in a position paper and invite their comment before forming any opinion about fraud or evasion.

Seek specialist assistance

The fraud or evasion exception carries risk that always warrants technical assistance.

In the first instance, consult with the technical advisory area within your business line on matters of fraud or evasion.

If the level of risk warrants it, you should also seek formal assistance from Tax Counsel Network (TCN) following the usual procedures.[8] However, sufficient TCN involvement in a fraud or evasion matter will usually be achieved through TCN's membership on the National Fraud or Evasion Advisory Panel (see below).

While a tax technical officer may be engaged to provide assistance, it is still the authorised opinion maker who is responsible for forming the opinion of fraud or evasion. The opinion maker is not obliged to form the same opinion as TCN or other technical advisors on whether or not fraud or evasion has occurred. However, we do not expect that an opinion maker would come to a different judgment if advised by TCN that it is not open to form an opinion that there has been fraud or evasion.

Referrals to the National Fraud or Evasion Advisory Panel

You **must** obtain advice from the National Fraud or Evasion Advisory Panel (Panel) before recommending, or forming, an opinion that there has been fraud or evasion in a particular case.

The Panel provides advice to case officers and opinion makers to ensure that decisions on fraud or evasion are objective and consistent.

The Panel advises on the case for forming an opinion of fraud or evasion, and related matters, consistent with our policies.

[7] For example, subsection 170(7) of the ITAA 1936.

[8] Law Administration Practice Statement PS LA 2012/1 *Engagement of Tax Counsel Network on high risk technical issues* sets out when and how to engage officers of Tax Counsel Network on high risk technical issues.

Notify Public Groups and High Wealth Individuals (PGH) Tax Crime of all fraud opinions

If you form an opinion of fraud for the purpose of period of review, you must notify the Tax Crime area in the PGH business line.[9]

The ATO reports on all instances of suspected fraud to the Australian Institute of Criminology under the Commonwealth Fraud Control Framework.

Refer evasion to PGH Aggressive Tax Planning (ATP) as appropriate

Some cases of tax evasion may involve aggressive tax planning. Aggressive tax planning is the use of transactions or arrangements that have little or no economic substance and are created predominantly to obtain a tax benefit not intended by the law.

If you come across an arrangement of this nature, refer the matter to the ATP area in the PGH business line.

The ATP area considers what action is appropriate, including the possible application of the promoter penalty laws.[10]

6. Who can form an opinion of fraud or evasion?

Only EL2 or SES officers can form an opinion that a taxpayer or entity has been involved in fraud or evasion.[11]

The EL2 or SES officer must form the opinion personally. However other ATO officers may, under the *Taxation Authorisation Guidelines*, make the actual adjustment.[12]

Collection and recovery of GST, WET and LCT

Refer to the *Taxation Authorisation Guidelines* to ensure you are properly authorised to make a decision to extend the time to collect or recover underpayments of Goods and Services Tax, Wine Equalisation Tax or Luxury Car Tax.[13]

7. When is the opinion of fraud or evasion to be made?

A separate opinion of fraud or evasion must be formed for each year or period of tax being amended outside the period of review.

Duly authorised opinion makers must also ensure that an opinion of fraud or evasion has been made:

- after advice has been received from the National Fraud or Evasion Advisory Panel
- before issuing an (amended) assessment.

8. More information

For more information, see:

- Fraud or evasion guideline (period of review)
- PSLA 2012/1 (link available internally only)
- Taxation Authorisation Guidelines (link available internally only)
- CEI 2014/05/09 Tax Crime and External Fraud (link available internally only)
- ATP Referral (link available internally only)
- Referring suspected tax crime to PGH (link available internally only)

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[9] See *Referring Suspected Tax Crime to PGH*.
[10] Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).
[11] Refer to paragraph 1.6.1 of the *Taxation Authorisations Guidelines*. You may need to consider if more specific guidelines apply if the authorised power falls within one of the topics listed in Chapters 2 to 7 of the *Taxation Authorisations Guidelines* (for example, Excise, FOI, GST, Superannuation and Registrations).
[12] Refer to paragraph 1.3.4 of the *Taxation Authorisations Guidelines*.
[13] For tax periods commencing prior to 1 July 2012, refer to paragraphs 4.13.1 to 4.13.3 of the *Taxation Authorisation Guidelines* for determinations under (former) paragraph 105-50(3)(b). For tax periods starting on or after 1 July 2012, refer to paragraph 1.3.4 of the *Taxation Authorisation Guidelines*.

Appendix 1

Exceptions to the statutory time limits where the Commissioner has formed an opinion of fraud or evasion

The Commissioner must form an opinion that there has been fraud or evasion as a condition precedent[14] to …	**… under this provision**
amending an income tax assessment at any time	Subsection 170(1) of the ITAA 1936
amending an assessment of a net amount, net fuel amount or amount of indirect tax at any time in relation to tax periods or fuel tax periods starting on or after 1 July 2012	Paragraph 155-60(c) of Schedule 1 to the TAA
seeking payment of any unpaid net amount, net fuel amount or amount of indirect tax after the period these amounts would normally cease to be payable[15]	Paragraph 105-50(3)(b) of Schedule 1 to the TAA [Subsection 105-50(4) is a sunset clause that limits section 105-50 to payments and refunds that relate to tax periods and fuel tax return periods that start before 1 July 2012.[16] Section 105-50 was repealed on 1 January 2017.]
amending a fringe benefits tax assessment at any time[17]	Paragraph 74(3)(d) of the FBTAA 1986
amending a franking assessment at any time	Section 214-120 of the *Income Tax Assessment Act 1997 (ITAA 1997)*
amending an excess non-concessional contributions tax assessment at any time.	Section 292-320 of the ITAA 1997
making adjustments to correct tax cost setting calculation errors	Section 705-315 of the ITAA 1997
amending an assessment of a person's taxable profit in relation to a petroleum project at any time	Paragraph 67(2)(a) of the *Petroleum Resource Rent Tax Assessment Act 1987*

[14] *McAndrew v. Federal Commissioner of Taxation* (1956) 98 CLR 263; *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614 at 622.

[15] Section 105-50 of the Schedule 1 to the TAA restricts the Commissioner to collecting any unpaid net amount, net fuel amount or amount of indirect tax (together with any relevant general interest charge under section 105-80) within four years after it became payable unless the Commissioner has, within four years of the underpayment, required payment of the unpaid amount by giving a notice (paragraph 105-50(3)(a)) or if the Commissioner is satisfied that the unpaid amount was avoided by fraud or evasion (paragraph 105-50(3)(b)).

[16] Section 105-50 is also limited by paragraph 105-50(4)(b) to payments and refunds that relate to liabilities or payments that arose before 1 July 2012 where those payments or liabilities do not relate to any tax periods or fuel tax return periods.

[17] Paragraphs 74(3)(a) to (c) of the *Fringe Benefits Tax Assessment Act* 1986 (FBTAA 1986) must also be satisfied for the Commissioner to amend an assessment at any time on the basis of paragraph 74(3)(d).

Appendix 2

Principles

The following principles outline the Commissioner's approach to cases that address the issues of fraud or evasion and our commitment to ensure that these cases are resolved fairly, appropriately, and as early as possible.

Principle 1: We will consider fraud or evasion as soon as practicable during an audit or review

The process of collecting evidence during an audit can be drawn-out and complicated, and may include the exercise of the Commissioner's formal access powers and enquiries with other revenue jurisdictions. As such, evidence of fraud or evasion may not come to hand until later in the review or audit process, once evidence collection is complete. We will ensure that consideration of fraud or evasion occurs **as soon as practicable** in the audit process, to determine whether action on an assessment that is outside the relevant period of review should continue.

In cases 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.

Principle 2: We will always distinguish between making general enquiries and making allegations of fraud or evasion

Where we make enquiries in relation to periods outside the general periods of review, we will ensure that the taxpayer is informed that such enquiries do not imply that we are alleging fraud or evasion.

If we consider that fraud or evasion may apply we will generally express these concerns in a position paper sent to the taxpayer who will be given an opportunity to respond before an opinion is formed.

In exceptional cases the taxpayer may not be given an opportunity to respond before the opinion is formed; for example in the case of a covert audit, where there is a risk of evidence destruction or asset dissipation, or where the outcome of an audit might otherwise be compromised.

Principle 3: We have a process in place to ensure we only make a finding of fraud when it is appropriate and where evidence of fraud exists

In the ordinary case, we will first consider whether or not there was evasion. We will only make an opinion of fraud where the arguments applying the law to the relevant facts are strong and those facts are in turn supported by evidence.

Reasonable inferences may be made from evidence in certain cases, where it is necessary to draw a conclusion based on an assessment of all facts and relevant circumstances.

Principle 4: The Taxation Authorisation Guidelines provide that an opinion of fraud or evasion must be made by an EL2 or an SES officer

A finding of fraud or evasion can only be made by an ATO officer who has authority to do so.

You must refer to the *Taxation Authorisation Guidelines* in determining whether you have authority to form an opinion of fraud or evasion.

If you are considering fraud or evasion you are required to apply our practice statements and *Fraud or evasion guidelines*.

It is not sufficient that a 'reason for decision' paper or a fraud or evasion submission has been submitted and reviewed by a technical panel consisting of an EL2 or an SES officer. A fraud or evasion submission must always be referred to an authorised opinion maker (EL2 or SES officer) as a separate step to getting advice from a panel. The EL2 or SES officer must complete the opinion template which requires them to make an independent opinion.

You must ensure that an opinion of fraud or evasion has been made before the issuing of an assessment.

If we state in a 'reasons for decision' paper that we have made an opinion of fraud or evasion, we must ensure that an opinion has in fact been made before issuing the paper.