PS LA 2008/6 - Fraud or evasion

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This document has changed over time. This version was published on *8 December 2012*

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2008/6

FOI status: may be released

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SUBJECT: **Fraud or evasion**

PURPOSE: **To provide instruction to staff on how to deal with taxpayers that have committed or are suspected of having committed fraud or evasion**

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SCOPE

1. This practice statement considers fraud or evasion in the context of the unlimited time limit allowed for the Commissioner to seek the payment of tax, which has been underpaid, due to fraud or evasion.

2. If the Commissioner forms the opinion that there has been fraud or evasion:

   - Subsection 170(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) permits the Commissioner to amend the assessment at any time
   - Paragraph 105-50(3)(b) of Schedule 1 to the *Taxation Administration Act 1953* (TAA) permits the Commissioner to seek payment of any unpaid net amount, net fuel amount or amount of indirect tax beyond the period these amounts would normally cease to be payable.[1] 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[2]
   - For tax periods or fuel tax periods starting on or after 1 July 2012 paragraph 155-60(c) of Schedule 1 to the TAA permits the Commissioner to amend an assessment of a net amount, net fuel amount or amount of indirect tax at any time
   - Paragraph 74(3)(d) of the *Fringe Benefits Tax Assessment Act 1986* permits the Commissioner to amend an assessment at any time by making such alterations or additions to it as the Commissioner thinks necessary[3]

3. This practice statement outlines:

   - the procedures to be followed for collecting information on fraud or evasion and the circumstances in which the information should be referred to the Serious Non-Compliance business line (SNC) by tax officers
   - schemes which may be subject to promoter penalty laws and the procedures for referring these schemes to the Aggressive Tax Planning (ATP) business line
   - the procedures to be followed if assistance is required by a business line in determining whether a taxpayer has evaded the payment of tax
   - the policy reasons for having an unlimited amendment period where there is fraud or evasion (Appendix 1 of this practice statement)
   - the circumstances in which the Commissioner's opinion on fraud or evasion can be judicially reviewed (Appendix 2 of this practice statement)
   - fraud case law and discusses three High Court cases involving evasion (Appendixes 3 and 4 of this practice statement respectively)

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[1] Section 105-50 of the First Schedule 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)).

[2] 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.

[3] Paragraphs 74(3)(a) to (c) of the FBTAA must also be satisfied for the Commissioner to amend an assessment at any time on the basis of paragraph 74(3)(d).

4. Tax officers should consult the Corporate Management Practice Statement PS CM 2007/02 Fraud Control and the Prosecution Process where behaviour is encountered which involves possible fraud or other offences against the revenue system. PS CM 2007/02 contains examples and indicators of fraud which should be considered in determining whether a matter is to be brought to the attention of SNC or Integrity Assurance.

STATEMENT

Time period for amending assessments

Section 170 of the ITAA 1936

5. The periods in which the Commissioner may amend an assessment under the ITAA 1936 are specified in section 170. Subsection 170(1) contains a table of items that specify the amendment period for taxpayers according to the item that applies to the taxpayer. The period permitted by subsection 170(1) for amendment is generally either two or four years after the Commissioner gives notice of the assessment to the taxpayer.

6. However, under item 5 of the table there is no restriction on the time period within which the Commissioner can amend an assessment where the Commissioner is of the opinion that 'there has been fraud or evasion'. To make an amended assessment under this provision the Commissioner must form an opinion to this effect and form it validly. Paragraphs 28 to 31 of this practice statement discuss these requirements.

Indirect taxes

7. For tax periods and fuel tax return periods that commence before 1 July 2012 an assessment is not automatically issued after the lodgement of an activity statement. A taxpayer's liability to pay or their entitlement to receive a refund does not depend on an assessment and any unpaid net amount, net fuel amount or indirect tax ceases to be payable four years after it became payable. Under subsection 105-5(1) of Schedule 1 to the TAA, the Commissioner may make an assessment of a net amount, or a net fuel amount at any time, and the Commissioner can subsequently amend such an assessment under section 105-25. The Commissioner must require payment by giving notice within four years after a net amount or net fuel amount becomes payable (paragraph 105-50(3)(a)) otherwise the amount ceases to be payable. The four year rule does not apply where an amount was avoided by fraud or evasion (paragraph 105-50(3)(b)) and in these circumstances the Commissioner is not restricted to the four-year time limit to recover any unpaid net amount or net fuel amount.

8. For tax periods and fuel tax return periods that commence on or after 1 July 2012, an assessment system applies to indirect taxes. Generally, an assessment is taken to be made when an activity statement is lodged. The activity statement is treated as being a notice of assessment issued on the day the activity statement is given to the Commissioner. The Commissioner may amend an assessment of an assessable amount within the period of review. This is generally four years and one day from the day the Commissioner gives notice. However, under paragraph 155-60(c) of Schedule 1 to the TAA, the Commissioner can amend an assessment at any time where he or she is of the opinion that 'there has been fraud or evasion'.

Procedures to be followed in fraud or evasion cases

Tax Evasion Reporting Centre

9. The Tax Evasion Reporting Centre (TERC) collects information about alleged tax evasion on behalf of the business lines. TERC operates its own call centre and receives information via phone, fax, mail and email.

10. Tax officers may be directly approached by a member of the public who has information about another taxpayer who has potentially engaged in fraud or evasion, resulting in a lesser amount of tax being paid than otherwise would be the case.

11. In such cases the person with this information should be referred by the tax officer to TERC. Links which provide TERC contact details are contained in the Other references section of the table at the end of this practice statement.

Aggressive tax planning and promoter penalty laws

12. Some cases of tax evasion encountered by tax officers may involve aggressive tax planning.[4] 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 that is not intended by the law. Tax officers who encounter arrangements of this nature are required to refer the relevant information via the aggressive tax planning referral template available on the intranet.

13. ATP will consider action including the possible application of the promoter penalty laws under Division 290 of Schedule 1 to the TAA. The two objects of Division 290 are to deter the promotion of tax avoidance and tax evasion schemes and to deter the implementation of schemes that have been promoted on the basis of conformity with a product ruling, in a way that is materially different from that described in the product ruling.[5]

14. Tax officers should note that where a scheme involves tax evasion, the normal four year time limit on the Commissioner's ability to make an application for a civil penalty in relation to conduct involving that scheme under section 290-50 of the promoter penalty laws, does not apply and no time limit is imposed on the Commissioner.[6]

Tax officers encountering suspected fraud

15. Tax officers may in the course of an audit encounter behaviour which is suspected to be fraudulent. For the purposes of subsection 170(1) of ITAA 1936, and paragraphs 105-50(b) and 155-60(c) of Schedule 1 to the TAA, fraud may be briefly described as making false statements knowingly, recklessly or without belief in their truth, to deceive the Commissioner. Appendix 3 of this practice statement contains an overview of how fraud has been construed by the judiciary.

16. PS CM 2007/02 requires tax officers who have a suspicion or a strong indication that fraud may have been committed against the revenue system to refer the matter to SNC.[7] Where there is doubt as to whether fraud has been committed SNC may be contacted for advice. Formal referrals to SNC are

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[4] See PS LA 2008/15 Taxpayer Alerts.

[5] See PS LA 2008/7 Application of the promoter penalty laws (Division 290 of Schedule 1 to the *Taxation Administration Act 1953*) to promotion of tax exploitation schemes and PS LA 2008/8 Application of the promoter penalty laws (Division 290 of Schedule 1 to the *Taxation Administration Act 1953*) to schemes involving product rulings.

[6] Subsection 290-55(6).

[7] See paragraph 53 of PS CM 2007/02.

acknowledged in writing and the acknowledgment will provide advice on whether any existing compliance activity should continue.[8]

Business Lines and fraud or evasion

17. Evasion is best explained by reference to the judgment of Dixon J in *Denver Chemical Manufacturing v. Commissioner of Taxation* 79 CLR 296 in which his Honour described evasion[9] as a 'blameworthy act or omission on the part of the taxpayer'. Appendix 4 of this practice statement contains an overview of how evasion has been considered by the High Court.

18. Circumstances may arise where a taxpayer's behaviour is not considered to constitute fraud but is nevertheless sufficiently blameworthy to constitute evasion. The threshold for finding evasion is not as high as fraud.

19. Accordingly, a business line may decide to amend a taxpayer's return beyond the normal time frame because a taxpayer has evaded the payment of tax, even though the view has been formed that fraud has not been committed.

20. Cases in which a taxpayer's activities result in an evasion of tax but do not constitute fraud should not be referred to SNC.

Law and Practice involvement

21. If the taxpayer has committed an omission or act, which in the opinion of the business line is clearly evasion, it is not necessary for the matter to be referred to tax technical officers in Law and Practice.

22. In other circumstances the business line may be uncertain as to whether a taxpayer has evaded the payment of tax.[10]

23. Where uncertainty exists as to whether a person's behaviour has resulted in an evasion of tax, and if the level of risk warrants it,[11] assistance may be sought from tax technical officers in Law and Practice. Generally, engagement of Law and Practice will not be appropriate when the question is essentially factual, but it may be appropriate when the question concerns the meaning of evasion and potentially has a wide application to other cases.

24. If the business line decides to seek assistance from a tax technical officer the business line must prepare a report outlining the act or omission which potentially qualifies as evasion, and the basis upon which the business line has formed this view.

25. Although a tax technical officer from Law and Practice may be engaged to provide assistance it is still the business line that is responsible for making the decision as to whether it is appropriate to amend the taxpayer's assessment, on the basis of evasion. It is important to note that the business line in receiving written advice from Law and Practice is not obliged to form the same opinion on whether or not evasion has occurred. However, it would be

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[8] A more detailed discussion of referrals of external fraud to SNC is contained in paragraphs 53 to 58 of PS CM 2007/2.

[9] *Denver Chemical Manufacturing v. Commissioner of Taxation* 79 CLR 296 at 313.

[10] There may be circumstances where the issue of evasion is relevant to the remission of penalties (for example see PS LA 2007/3 at paragraph 46 and PS LA 2007/4 at paragraphs 34 and 35). If tax officers are uncertain as to whether there has been evasion in the context of penalties the procedures outlined in paragraphs 20-27 may be followed and the first sentence in paragraph 26 should be read as referring to making a decision in respect of penalties and not amending a taxpayer's assessment. Tax officers who are unsure as to whether evasion has occurred in deciding to remit shortfall interest charge and general interest charge for a shortfall period (see paragraphs 70-71 of PS LA 2006/8) may also seek assistance on the same basis outlined above for the remission of penalties.

[11] PS LA 2012/1 outlines the principles guiding the management of high risk technical issues, including the engagement of tax technical officers in Law and Practice on those issues.

expected that a business line officer would not form an opinion that there has been fraud or evasion if advised by Law and Practice that it is not open to do so.

Authorisation

General

26. The *Taxation Authorisation Guidelines* provide information about what laws apply to the exercise of authorised powers conferred by delegates on officers and provide guidance about how to exercise those powers. Unless otherwise specified the general area of the *Taxation Authorisations Guidelines* apply.[12] Paragraph 1.6.1 of the *Taxation Authorisations Guidelines* authorise an Executive Level 2 (EL 2) officer to make a determination or form an opinion in the name of a Deputy Commissioner that a taxpayer or entity has been involved in fraud or evasion or has intentionally disregarded the tax law.

27. The opinion should be recorded in writing and should note concisely the basis for the opinion. It is necessary only to outline the basis for the opinion and it is not necessary to seek to justify it. In particular, it is not appropriate to say that the opinion has been formed because advice has been received that it could be formed. The fact of having received advice is itself irrelevant.

28. If an officer takes the advice and accepts it, the reasons the officer adopts become his or her own reasons. For example, if an officer is advised that a certain statement may constitute a fraudulent misrepresentation, and accepts that advice, forming an opinion that there has been an avoidance of tax due to fraud, the officer should say, 'I formed the opinion that there has been fraud because in my opinion such and such a statement is a fraudulent misrepresentation.' That sufficiently explains the basis of the opinion.

29. However the officer should not say, 'I formed the opinion that there was fraud *because* I was advised that such and such a statement was a fraudulent misrepresentation'. Also if asked what was taken into account the officer should not say 'I took into account advice that there has been fraud or evasion'. The advice, as such, is irrelevant. What was taken into account, in this example, is the statement and its alleged fraudulent quality, not the advice.

30. If tax officers state that they rely on legal advice obtained from the Australian Government Solicitor or counsel to form an opinion on fraud or evasion there is a risk that legal professional privilege may be waived on both the advice and the brief.

31. The EL 2 officer must form the opinion personally. However an Executive Level 1 officer is permitted by paragraph 1.3.4 of the *Taxation Authorisation Guidelines* to make the actual adjustment.

Section 105-50 of Schedule 1 to the TAA

32. For tax periods commencing prior to 1 July 2012 tax officers who wish to extend the time to collect or recover goods and services tax (GST), wine equalisation tax (WET) or luxury car tax (LCT) in accordance with paragraph 105-50(3)(b) of Schedule 1 to the TAA, should consult paragraphs 4.13.1 to 4.13.3 of the *Taxation Authorisation Guidelines* to determine the officer level required for authorisation purposes.

[12] Other authorisation guidelines may apply outside of the general authorisation guidelines if the authorised power falls within one of the topics listed in chapters 2-7 of the *Taxation Authorisations Guidelines*. The topics in the *Taxation Authorisation Guidelines* which officers may need to consider outside of the general guidelines include: Excise, FOI, GST, Superannuation and Registrations.

33. For tax periods starting on or after 1 July 2012, the general *Taxation Authorisation Guidelines* will apply.

Policy

34. The policy of Australian income tax law is generally to provide finality after a specified period, both for the taxpayer and for the Commissioner, in regard to the income tax liability of the taxpayer for a year of income. Underlying this policy is the public interest in certainty. In 2005 Parliament, with effect from 19 December 2005, reduced the relevant amendment periods for assessments with a view to increasing that certainty, thus emphasising the duty of the Commissioner to make timely enquiries and appropriate assessments.

35. Prior to making these changes the Treasurer released *Report on Aspects of Income Tax Self Assessment* (ROSA) in August 2004. This report[13] recognised that certainty was not to be provided to people who 'engage in calculated behaviour to evade tax' and that such people 'should remain permanently at risk'.

36. The time limit for making amended assessments is therefore premised on the good conduct of the taxpayer, tax-agents, and others concerned with the assessment. The Commissioner is entitled to assume such good conduct and rely on it in his administration of the Act. Both fraud and evasion involve culpable misconduct. Item 5 of subsection 170(1) of ITAA 1936 makes it clear that a taxpayer is not entitled to the benefit of a time limit for a favourable assessment if that assessment is less than it ought to be in consequence of dishonesty or other blameworthy conduct.

37. Fraud and evasion are both serious matters, never lightly to be inferred. The opinion that there has been fraud or evasion in relation to an assessment is therefore to be formed carefully and advisedly by senior officers in accordance with this practice statement and other Tax office procedures, bearing in mind the weight Parliament has placed on the benefit of certainty 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. Item 5 is no basis for making corrections to assessments that could and should have been made within the ordinary time limits but were not.

38. On the other hand, when fraud or evasion is clearly established, an amended assessment will be justified no matter how much time has elapsed since the assessment was made. Action in these circumstances is necessary to maintain the public's confidence in the integrity of the Commissioner's administration.[14]

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[13] 'Exclusions from the two year period' paragraph 3.2.1 at page 31 of ROSA.

[14] The policy discussion in Appendix 1 should also be taken into account by tax officers who are considering whether fraud or evasion has occurred in the context of indirect taxes or fringe benefits tax (see paragraphs 2 and 7 of this practice statement).

Judicial review of Commissioner's opinion

39. Taxation officers should be aware that a decision to amend a taxpayer's assessment on the basis that there is fraud or evasion can be subject to judicial review.

40. *Australasian Jam Co Pty Ltd v. Federal Commissioner of Taxation* 88 CLR 23 (*Australasian Jam*) is a case in which a single judge of the High Court, Fullagar J, considered the issue of whether the Commissioner had properly formed an opinion on fraud or evasion.

41. His Honour stated[15] that the taxpayer's appeal would only succeed if the Commissioner had not 'entertained' an opinion on fraud or evasion or if the Commissioner's opinion on fraud or evasion was 'based upon a misconception' or if the opinion 'was arrived at 'capriciously, or fancifully, or upon irrelevant or inadmissible grounds' (per Rich and Dixon JJ in *Australasian Scale Co Ltd. v. Commissioner of Taxes (Qld*)'. Second Commissioner of Taxation, Mr Mair, was examined about the formation of his view that an avoidance of tax had been due to evasion. Fullagar J concluded that the Commissioner's opinion on fraud or evasion was not misconceived or unreasonable and held that the Commissioner's amended assessments were authorised by the ITAA 1936.

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

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

43. In *Kajewski v. Federal Commissioner of Taxation* 2003 ATC 4375; 52 ATR 455 the taxpayer submitted that the appeal should be heard by way of a re-hearing de novo which would allow the Federal Court to stand in the shoes of the original decision maker, the Commissioner. Drummond J rejected this argument stating that paragraph 14ZZO(a) of the *Taxation Administration Act 1953* does not allow the taxpayer to put all relevant material before the court:[16]

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

[15] *Australasian Jam Co Pty Ltd v. Federal Commissioner of Taxation* 88 CLR 23 at 37.
[16] *Kajewski v. Federal Commissioner of Taxation* 2003 ATC 4375 at 4378-4379;52 ATR 455 at 459.

44. In *Weyers & Anor v. FC of T* 2006 ATC 4523; 63 ATR 268 Dowsett J considered the formation by the Commissioner of an opinion that there had been an avoidance of tax due to evasion under paragraph 170(2)(a) of the ITAA 1936. His Honour placed the onus of proof on the taxpayer in attempting to challenge the formation of the Commissioner's opinion that evasion had occurred:[17]

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

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

Fraud case law

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

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

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

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

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

48. An illustration of fraud in a tax matter is contained in *Masterman v. FC of T; MacFarlane v. FC of T* 85 ATC 4015; 16 ATR 77. In this case, incorrect tax returns were lodged for the 1972 to 1979 years. Amounts had been claimed as tax deductions in respect of employees that did not exist. Enderby J in the Supreme Court concluded that the statements made in returns 'can only be described as frauds on the Commissioner of Taxation'.[18]

49. Drummond J in *Kajewski & Ors v. FC of T* 2003 ATC 4375; 52 ATR 455 at ATC 4400; ATR 483 confirmed that the meaning of fraud for the purposes of paragraph 170(2)(a) of the ITAA 1936 is to be determined by reference to common law:[19]

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

[18] 85 ATC 4015 at 4016; 16 ATR 77 at 79.

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

Evasion case law

Barripp

50. In *Barripp v. Commissioner of Taxation (NSW)* (1940) 6 ATD 58 it was explained by the taxpayer, Mr Barripp, that he did not return income from the sale of a property in the year ended 30 June 1927 because of advice received from his accountant. An amended assessment including the profit on the sale of property was issued to Mr Barripp in 1938. Mr Barripp claimed that his accountants[20] 'explained to him that it was not assessable until the mortgages on the properties on which the profit was made, were paid off'.

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

52. Bavin J[21] stated that Mr Barripp 'was fully aware of his obligations to return this profit as income' and that he gave a 'false explanation of his failure'. Mr Barripp had received sums in earlier years under the same conditions as the year under review, and he had correctly returned those amounts as income in the year of receipt. Roper J described the taxpayer's explanation for omitting income from his return as 'vague and unsatisfactory'.[22] Mr Barripp appealed against the decision of the Supreme Court to the full court of the High Court, which dismissed the appeal.

53. Starke J did not accept the taxpayer or the accountant's reasons for omitting income made from the sale of property. His Honour concluded[23] that the profit on sale was 'knowingly omitted from the appellant's return and was concealed from tax authorities for many years'.

54. The judgment of McTiernan J took into account the deliberateness of the omission and the failure of the taxpayer to provide any credible explanation for his conduct:[24]

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

Denver Chemical Manufacturing

55. The leading case on evasion is *Denver Chemical Manufacturing Co. v. Commissioner of Taxation* 79 CLR 296 (*Denver Chemical Manufacturing*), which was decided by the Full High Court. The case required the interpretation of evasion in the context of state income tax legislation.

56. Subsection 210(1) of the *New South Wales Income Tax (Management) Act 1936* provided the NSW Commissioner of Taxation with the power to amend any assessment 'where the Commissioner is of opinion that there has been an avoidance of tax and that the avoidance is due to fraud or evasion –

[20] 6 ATD 58 at 65.
[21] 6 ATD 58 at 66.
[22] 6 ATD 58 at 68.
[23] 6 ATD 58 at 71.
[24] 6 ATD 58 at 71.

at any time'. The wording of subsection 210(2) of the *New South Wales Income Tax (Management) Act 1936* is very similar to the wording that existed in paragraph 170(2)(a) of the ITAA 1936, which applied until 19 December 2005.

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

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

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

60. Correspondence ensued between the company's head office in New York and Mr Woodward. In 1929 head office forwarded copies of the relevant balance sheet, accounts and other information to Mr Woodward. The detailed accounts forwarded by the company's head office were not submitted to the NSW Commissioner of Taxation. Mr Woodward adopted an approach of[25] 'we shall not file them unless we are compelled to do so'.

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

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

63. McTiernan J and Webb J of the High Court agreed with the judgement of Dixon J. Dixon J said:[26]

> I think it is unwise to attempt to define the word 'evasion'. The context of s.210(2) shows that it means more than avoid and also more than a mere withholding of information or the mere furnishing of misleading information. It is probably safe to say that some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible is contemplated. An intention to withhold information lest the Commissioner should concede the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion.

64. Matters of a blameworthy nature before Dixon J included:

- the Commissioner had provided advice to Denver on how to calculate its liability for tax and Denver's Mr Woodward chose to ignore this advice after receiving different advice from his neighbour
- no clarification of the new method of returning sales income in 1923 or later years was sought by Denver from the Commissioner, and

[25] *Denver Chemical Manufacturing Co v. C of T (NSW)* 79 CLR 296 at 301.
[26] *Denver Chemical Manufacturing Co v. C of T (NSW)* 79 CLR 296 at 313.

- Denver withheld profit and loss and balance sheet information from the Commissioner for the 1927 and 1928 financial years, which would have revealed sales income from outside NSW.

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

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

Australasian Jam

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

68. The taxpayer argued that its closing stock was valued at the market selling price, and that such a price could be determined by supposing a sale *en bloc* on the last day of the accounting period. Fullagar J described this argument as being 'based on a foundation that is not really tenable'.[27] His Honour stated that the words 'market selling value' contemplated a sale 'in the ordinary course of the company's business'[28] and stated that the[29] 'supposition of a forced sale on one particular day seems to have no relation to business reality'.

69. His Honour held:[30]

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

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

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[27] *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 31.
[28] *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 31.
[29] *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 32.
[30] *Australasian Jam Co Pty Ltd v. FC of T* 88 CLR 23 at 39-40