TR 2011/5 - Income tax: objections against income tax assessments

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Taxation Ruling

Income tax: objections against income tax assessments

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What this Ruling is about

1. This Ruling explains what constitutes a valid objection against an income tax assessment as provided for under section 175A of the *Income Tax Assessment Act 1936* (ITAA 1936) and Part IVC of the *Taxation Administration Act 1953* (TAA). In particular it is about:

- what is an income tax assessment;
- the distinction between objections and amendment requests;
- who can object;
- what comprises a valid objection;
- objections against assessments based on private rulings;
- limitations on objection rights;
- multiple objections against an assessment;
- withdrawal of objections;
- the requirement to make an objection decision;

- matters the Commissioner considers when making an objection decision;
- the effect of an objection decision;
- amending assessments before and after an objection decision; and
- review of, or appeal against, an objection decision.

2. All references to legislation in this Ruling are to the TAA unless otherwise indicated.

Class of entity/arrangement

3. This Ruling applies to all entities that receive an income tax assessment, including an assessment based on a private ruling, for a relevant income year, and wish to object against the assessment because they are dissatisfied with it.

Background

4. The former objection and appeal provisions contained in the tax laws, in particular in Part V of the ITAA 1936, were repealed in 1992. These were replaced by a single set of generic objection and appeal provisions in Part IVC of the TAA. The various tax laws administered by the Commissioner contain provisions giving taxpayers rights to object. In each case the relevant procedure for making an objection is governed by Part IVC of the TAA. That Part applies to objections where the taxation decisions to which the objections relate were notified on or after 1 March 1992.

5. Amendments which came into operation from 1 July 1992 extended the period within which a taxpayer could object against an assessment from 60 days to four years. The amendments were introduced as part of improvements to self assessment. Further amendments in 1999 introduced a two-year objection period for shorter period of review (SPOR) taxpayers but maintained the four-year objection period for non-SPOR taxpayers.[1]

6. As a result of the Government's response to the *Report on Aspects of Income Tax Self Assessment* announced in December 2004, further changes to provisions relating to the amendment of income tax assessments and objections against assessments were introduced by the *Tax Laws Amendment (Improvements to Self Assessment) Act (No.2) 2005*. The amendments apply to assessments for the 2004-05 and subsequent income years.

[1] The SPOR taxpayer concept was repealed by Part 4 of Schedule 1 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*.

7. The period within which the Commissioner can amend an assessment under section 170 of the ITAA 1936 has been shortened from four to two years for most taxpayers (the 'standard amendment period'). In certain circumstances the Commissioner can amend an assessment within four years or has an unlimited time within which to amend an assessment. Time limits for lodging objections under section 14ZW have also been altered to correspond to the new amendment periods.

8. Before the 2004-05 income year, a non-taxable notice or advice was not an assessment as it did not state any liability. An assessment of nil liability ('nil assessment') for the 2004-05 and later income years is an assessment, as defined, and attracts limited objection rights. Taxpayers cannot object against a nil assessment unless they are seeking an increase in their liability.[2]

8A. In 2013, changes were made to the definition of assessment. Prior to the change, an assessment did not extend to the ascertainment of the total of a taxpayer's tax offset refunds for an income year. The change results in taxpayers being able to object against the amount of their tax offset refund (including nil amounts) in relation to assessments for the 2013-14 and later income years made on or after 1 July 2013.[2A] The change was introduced by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013*. This Act introduced the loss carry back measure which allows corporate entities who had paid tax in the past to obtain a refund of it if they were subsequently in a tax loss position by claiming a refundable tax offset. Although the change was introduced in the context of the loss carry back measure, the change applies to all refundable tax offsets.

Previous Ruling

9. This Ruling updates Taxation Ruling TR 96/12 *Income tax: objections against income tax assessments* (TR 96/12). Accordingly, TR 96/12 is withdrawn from 15 December 2010, the date of issue of the draft of this Ruling (TR 2010/D10).

10. TR 96/12 continues to apply in relation to objections lodged against assessments for the 2003-04 income year and earlier years.

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[2] Subsection 175A(2) of the ITAA 1936.

[2A] There are transitional rules that apply in relation to objection rights for amounts of total tax offset refunds for the 2012-13 income year. For the 2012-13 income year, the Commissioner may issue a notice specifying the amount of a taxpayer's total tax offset refunds. For full self-assessment taxpayers, the Commissioner is deemed to provide a notice when the taxpayer lodges its 2012-13 income tax return. The calculation of this amount is not an assessment. However, taxpayers have a separate right to object against this notice: see subsections 67-115(2) and 67-135(1) of the *Income Tax (Transitional Provisions) Act 1997.*

Ruling

Objection against an income tax assessment

11. A taxpayer who is dissatisfied with an income tax assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the TAA: subsection 175A(1) of the ITAA 1936.

12. Section 175A of the ITAA 1936 applies to original assessments and amended assessments. It applies to assessments where there is no tax payable, referred to in this Ruling as 'nil assessments', where the taxpayer is seeking an increase in the taxpayer's liability. It also applies in relation to objections against assessments where the taxpayer is seeking an increase in the total of the taxpayer's tax offset refunds.[2B] However section 175A of the ITAA 1936 does not apply to the ascertainment of a tax loss.

13. The right to object against an assessment in section 175A of the ITAA 1936 has been extended to some other liabilities; for example, Medicare levy,[3] HEC assessment debt,[4] a compulsory repayment amount related to the Higher Education Loan Program[5] and FS assessment debt.[6]

[2B] As a result of the change to the meaning of assessment referred to in paragraph 8A, the right to object against an assessment under section 175A of the ITAA 1936 now encompasses the right to object against the total of a taxpayer's tax offset refunds for assessments made on or after 1 July 2013 for the 2013-14 and later income years. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their total tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

[3] Subsection 251R(7) of the ITAA 1936.

[4] The term 'HEC assessment debt' is defined in section 34 of the *Higher Education Funding Act 1988* (HEFA). An HEC assessment debt is assessed under section 106T of that Act. Section 106V of the HEFA permits the Commissioner to specify the amount in an income tax notice of assessment issued under section 174 of the ITAA 1936.

[5] The term 'compulsory repayment amount' is defined in subsection 1(1) in Schedule 1 to *the Higher Education Support Act 2003* (HESA). A compulsory repayment amount is assessed under section 154-35 of that Act. Subsection 154-40(1) of the HESA permits the Commissioner to specify the amount in an income tax notice of assessment issued under section 174 of the ITAA 1936.

[6] The term 'FS assessment debt' is defined in section 3 of the *Student Assistance Act 1973* (SAA) and in section 19AB of the *Social Security Act 1991* (SSA). An FS assessment debt is assessed under section 12ZM of the SAA or under section 1061ZZFH of the SSA or under section 15.23 of the Social Security Student Financial Supplement Scheme 1998 (SFSS). Section 12ZO of the SAA, section 1061ZZFI of the SSA and section 15.24 of the SFSS permit the Commissioner to notify the amount of an FS assessment debt in an income tax notice of assessment issued under section 174 of the ITAA 1936. The SFSS was promulgated by the Commonwealth of Australia Special Gazette No. S 306, 26 June 1998.

Distinction between an objection and an amendment request

14. There are differences of substance between:

- an objection lodged by a taxpayer against an assessment under section 175A of the ITAA 1936; and
- a taxpayer requesting an amendment of an assessment under section 170 of the ITAA 1936.

An objection is a formal avenue of dispute resolution which attracts appeal rights, while a request for amendment of an assessment is a procedure which does not attract appeal rights and may be used to correct a mistake or omission where there is no dispute about the facts or the law.[7]

Who can object

15. Taxpayers who are dissatisfied with their assessment can object against it.[8]

16. A taxpayer is 'dissatisfied' for the purpose of section 175A of the ITAA 1936 if the Commissioner makes an assessment that is adverse to the taxpayer and the taxpayer has grounds for challenging that assessment.

17. This would be so even if a taxpayer objects against an assessment because the taxable income or tax payable in the assessment is too low. For example, a taxpayer may regard an assessment as too low because they consider that certain income should be included in that assessment rather than in an assessment for a different income year, or in an assessment for a different taxpayer.[9] Further, a taxpayer may be dissatisfied with an income tax assessment and object against it even though the assessment is in accordance with their own erroneous income tax return.[10]

18. Trustees in bankruptcy can object whereas the bankrupt individual does not have standing to object.[11]

19. Liquidators appointed under the *Corporations Act 2001* (Corporations Act) can object in the name, and on behalf, of the relevant company.

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[7] See *Law Administration Practice Statement PS LA 2008/19 Request for amendment of income tax assessments*.
[8] Subsection 175A(1) of the ITAA 1936.
[9] *Henderson v. Federal Commissioner of Taxation* (1970) 119 CLR 612; 70 ATC 4016; (1970) 1 ATR 596; *Isaacs v. Federal Commissioner of Taxation* (2006) 151 FCR 427; 2006 ATC 4330; (2006) 63 ATR 390
[10] *AAT case 5540* (1990) 21 ATR 3083 at 3090; *Case X2* 90 ATC 105 at 111-112.
[11] *McCallum v. Federal Commissioner of Taxation* (1997) 75 FCR 458; 97 ATC 4509; (1997) 36 ATR 256

20. A company that has been deregistered cannot object as the taxpayer company has ceased to exist on deregistration.[12] However, if a company is reinstated, it is taken to have continued in existence as if it had not been deregistered.[13] Thus directors and other officers (as defined in section 9 of the Corporations Act) of the reinstated company may lodge objections in the company's name.

What comprises a valid objection

21. In order to be valid, an objection against an assessment must relate to some element of:[14]

- the amount of the taxable income or net income as the case may be (or that there is no taxable income or net income) of the taxpayer;
- the tax payable on that taxable income or net income as the case may be (or that no tax is payable); or
- the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refund).[14A]

22. An objection must also meet the requirements of section 14ZU in order to be valid. An objection will be valid if it:

- is made in an approved form;
- is lodged within the period prescribed by section 14ZW; and
- states fully and in detail the grounds relied upon by the taxpayer.

Approved form

23. For an objection to be made in the approved form, it must:

- be in the form approved in writing by the Commissioner;
- contain a signed declaration;
- contain the required information; and

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[12] See *Taxation Ruling IT 2353 Income tax: effect of company dissolutions on taxation disputes* for a discussion of the effect of a company deregistration part-way through the objections process.

[13] Subsection 601AH of the Corporations Act.

[14] The exception to this requirement is assessments made under section 169 of the ITAA 1936, which also attract objection rights under Part IVC of the TAA. These are considered in paragraphs 58 and 76 of this Ruling.

[14A] The right to object against an assessment of a taxpayer's tax offset refunds under section 175A of the ITAA 1936 was introduced by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013* and applies to assessments for the 2013-14 and later income years made on or after 1 July 2013. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

- be given in the manner that the Commissioner requires.

See paragraph 14ZU(a) and subsection 388-50(1) of Schedule 1.

Time limits for lodging objections

24. For an assessment made on or after 1 July 2004, the time within which a taxpayer must lodge an objection against the assessment will generally correspond with the amendment period applicable to the taxpayer's assessment under subsection 170(1) of the ITAA 1936.[15]

Late lodgment of objections

25. Where the relevant period for lodging an objection has expired, a taxpayer may nevertheless lodge an objection, together with a written request that the objection be dealt with as if it had been lodged in time.[16] Where such a request is refused, the taxpayer may apply to the Administrative Appeals Tribunal (AAT) for review of that decision.[17]

Grounds relied on

26. Under paragraph 14ZU(c), the grounds stated in an objection will be sufficient if they:

- clearly indicate to the Commissioner that the taxpayer is objecting against the assessment;
- are precise enough to direct the Commissioner to the aspects of the assessment the taxpayer considers to be incorrect; and
- give reasons why the taxpayer considers the assessment to be incorrect.

27. The grounds must be directed at challenging the substantive liability imposed by the relevant provisions of the taxation Acts which give rise to the assessment.[18] The grounds cannot involve arguments about the application of the Commissioner's administrative policies, including the exercise of the Commissioner's powers of general administration.

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[15] Paragraph 14ZW(1)(aa) of the TAA.
[16] Subsection 14ZW(2) of the TAA.
[17] Subsection 14ZX(4). *Law Administration Practice Statement PS LA 2003/7 Taxation objections - Late lodgment* deals with taxation objections that are lodged late.
[18] *FC of T v. Dalco* 90 ATC 4088 at 4097.

Objection against a private ruling

28. A taxpayer to whom a private ruling applies may also object against it if they are dissatisfied with it.[19] However, taxpayers cannot object against a private ruling if there is an assessment for the taxpayer for the income year to which the ruling relates. If this is the case, the taxpayer can only object against the assessment.[20]

Limitation on objection rights

29. If an objection relates to an original assessment, a taxpayer may object against any element of, or particular in, that assessment with which they are dissatisfied. However, if an assessment is a nil assessment, a taxpayer cannot object against it unless they are seeking an increase in their tax liability or seeking an increase in the total of the taxpayer's tax offset refunds.[21]

30. If an objection relates to an amended assessment, the taxpayer can only object against the elements or particulars that were amended, and matters relating to those elements or particulars.[22]

Multiple objections against an assessment

31. Regardless of whether an objection relates to an original or amended assessment, section 175A of the ITAA 1936 permits a taxpayer to lodge, subject to the time limits for lodging a valid objection, multiple objections in relation to some element of, or a particular in, that assessment, up to the moment when the Commissioner makes an objection decision.

32. Once the Commissioner has made an objection decision under section 14ZY, the Commissioner is *functus officio*[23] concerning that element or particular in that assessment. This means the Commissioner cannot reconsider the objection decision on that particular.[24]

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[19] Subsection 359-60(1) of Schedule 1.
[20] Paragraph 359-60(3)(a) of Schedule 1.
[21] Subsections 175A(2) and 175A(3) of the ITAA 1997. See also *Re Creative Bottle Decorators Pty Ltd and Federal Commissioner of Taxation* [2010] AATA 847; (2010) 80 ATR 793. The right to object against an assessment of a taxpayer's tax offset refunds only applies in relation to assessments for the 2013-14 and later income years made on or after 1 July 2013. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.
[22] Section 14ZV.
[23] The *functus officio* doctrine provides that a person who is vested with decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This doctrine is subject to the statute under which the decision is made. See *Minister for Immigration and Ethnic Affairs v. Bhardwaj* (2002) 209 CLR 597; (2002) 187 ALR 117; [2002] HCA 11 (*Bhardwaj*) at CLR 603 per Gleeson CJ.
[24] *Minister for Immigration and Ethnic Affairs v. Bhardwaj* (2002) 209 CLR 597; (2002) 187 ALR 117; [2002] HCA 11 per Gleeson CJ.

33. Where the objection decision has been made in relation to a particular in an original assessment, a taxpayer may object against that assessment again in relation to a different element or particular, subject to the time limits for lodging an objection against the assessment.

Withdrawal of objections

34. If a taxpayer withdraws an objection, the Commissioner does not need to make a decision on the objection.[25] An objection on the same issue or issues may be lodged again at a later time, provided it is lodged within the stipulated time limits.

Requirement to make an objection decision

35. Under subsection 14ZY(1) the Commissioner is required to decide a valid objection, and determine whether to:

- allow the objection wholly;
- allow the objection partly; or
- disallow the objection.

36. The decision is called an objection decision. The Commissioner must serve written notice of the decision on the taxpayer.

37. If the Commissioner has not made an objection decision against an assessment within certain time limits, the taxpayer may give the Commissioner a written notice requiring the Commissioner to make an objection decision.[26] The notice may be given if the Commissioner has not made a decision within:

- the end of the period of 60 days (the original 60-day period) after the day on which the objection was lodged, or after the day on which a decision is made to extend the time for lodging the objection, whichever is the later; or
- the end of the period of 60 days after the Commissioner receives information requested in a written notice served on the person within the original 60-day period.

[25] *Higgs v. Federal Commissioner of Taxation* (1984) 2 FCR 556; 84 ATC 4680; (1984) 15 ATR 1055.
[26] Subsection 14ZYA(2).

38. The Commissioner is deemed to have made an objection decision under subsection 14ZY(1) disallowing an objection if the Commissioner has not made an objection decision within 60 days after being given a notice by the taxpayer.[27] The Commissioner is required to serve a written notice of this deemed decision on the taxpayer under subsection 14ZY(3).

Matters the Commissioner considers when making an objection decision

39. In deciding an objection, the Commissioner can consider grounds not directly raised by the taxpayer but are nevertheless relevant for deciding that objection against the assessment.[28]

Effect of an objection decision

40. Once the Commissioner has made an objection decision, the objection process in relation to the relevant elements or particulars covered by the objection is completed, insofar as the Commissioner is concerned. The Commissioner is *functus officio*.

41. Taxpayers who are further dissatisfied with that objection decision must seek redress before the AAT or the Federal Court in accordance with the requirements in section 14ZZ.

42. An objection decision in relation to an assessment for a particular income year only applies to that year, and does not create a precedent for subsequent income years.

43. Similarly, any amendment to an assessment to give effect to an objection decision only applies to:

- the taxpayer whose issue was the subject of the objection; and
- the income year(s) the subject of the objection.

Amendment of assessment before an objection decision

44. The Commissioner can amend a taxpayer's assessment at any time within the time limits in section 170 of the ITAA 1936, even if the taxpayer has lodged an objection against the assessment under Part IVC, and the objection is yet to be decided.[29]

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[27] Subsection 14ZYA(3).
[28] *Fletcher & Ors v. FC of T* 88 ATC 4834; *Lighthouse Philatelics Pty Ltd v. FC of T* 91 ATC 4942; *FC of T v. ANZ Savings Bank Ltd* (1994) 181 CLR 466; 94 ATC 4844; (1994) ATR 11.
[29] *Fabry v. Federal Commissioner of Taxation* (2003) 132 FCR 239; 2003 ATC 4885; (2003) 54 ATR 64) at ATC 4891-4892; *Epov v. FC of T (No.2)* 2007 ATC 5009; (2007) 68 ATR 8.

Amendment of assessment after an objection decision

45. There is no time limit on the Commissioner's discretion to amend an assessment as a result of an objection made by a taxpayer pursuant to paragraph (b) of item 6 in the table in subsection 170(1) of the ITAA 1936.

46. This includes amending an assessment to correct an error in the assessment brought about by giving effect to an objection decision. The Commissioner can also amend an assessment to give effect to an entire objection decision where, in making the objection decision, the Commissioner has relied on grounds additional to those relied on by the taxpayer in its objection. However the amendment must relate to the Commissioner's acceptance of at least one of the grounds relied on by the taxpayer.[30]

Review of, or appeal against, an objection decision

47. A taxpayer who is dissatisfied with the Commissioner's objection decision may either apply to the AAT for a review of that decision, or appeal to the Federal Court against the decision.[31] The taxpayer may seek a review of the entirety of the objection decision under section 14ZZ even if they are dissatisfied with only part of the decision.

48. The taxpayer is limited to the grounds stated in the objection to which the decision relates, unless the AAT or the Federal Court orders otherwise.[32]

49. The taxpayer has the burden of proving to the AAT or the Federal Court that an assessment is excessive. For assessments made on or after 1 July 2013 in relation to the 2013-14 or later income years, the taxpayer has the burden of proving that the assessment is excessive or where the taxpayer contends that the assessment should be higher, that the assessment is incorrect. In all cases, the taxpayer must also prove what the correct amount of the assessment is.[33]

50. A decision of the AAT or the Federal Court becomes final when the appeal period has expired and no appeal has been lodged against the decision.[34]

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[30] *Boyded Industries Pty Ltd v. FCT* 85 ATC 4551 at ATC 4554-5.
[31] Section 14ZZ.
[32] Paragraphs 14ZZK(a) and 14ZZO(a) respectively.
[33] Paragraphs 14ZZK(b) and 14ZZO(b) respectively. See also paragraphs 7.36 to 7.38 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013. The High Court's decision in *Federal Commissioner of Taxation v. Dalco* 90 ATC 4088 at 4092 and 4093 confirms that the taxpayer must prove, not just that the assessment is too high, but what the correct amount of the assessment ought to be.
[34] Subsections 14ZZL(2) and 14ZZQ(2) respectively.

51. There is no time limit on the Commissioner's discretion to amend an assessment to give effect to a decision on a review by the AAT or appeal to the Federal Court pursuant to paragraph (a) of item 6 in the table in subsection 170(1) of the ITAA 1936.

Date of effect

52. Subject to the qualifications mentioned below, it is proposed that the Ruling will apply both before and after its date of issue to objections against income tax assessments for the 2004-05 and later income years. Where the Commissioner has already decided an objection against an assessment for an income year about a particular issue, the Ruling will apply to any further objections lodged after 15 December 2010 against that assessment about the same issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling.[35] The Ruling will not replace the views in Taxation Ruling TR 96/12 *Income tax: objections against income tax assessments* for income years up to and including 2003-04.

Commissioner of Taxation
19 October 2011

[35] See paragraphs 75 and 76 of Taxation Ruling TR 2006/10.

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Objection against an income tax assessment

53. Subsection 175A(1) of the ITAA 1936 provides that a taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the TAA.[36]

What is an income tax assessment?

Definition of assessment

54. The term 'assessment' for the purposes of subsection 175A(1) of the ITAA 1936 is defined by subsection 6(1) of the ITAA 1936.[37] Paragraph (a) of the definition provides that 'assessment' means the ascertainment of:

- the amount of taxable income (or that there is no taxable income); and
- the tax payable on that taxable income (or that no tax is payable).[38]

54A. For the 2013-14 and later income years the term 'assessment' also includes the ascertainment of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds).[38A]

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[36] The principles in this Appendix may provide guidance in relation to other Acts or associated regulations which provide for similar rights of objection under Part IVC.

[37] The term 'assessment' in relation to a tax-related liability, is defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997). The table within this definition lists provisions of taxation laws that define 'assessment'. Item 1 in this table refers to the income tax definition of assessment in subsection 6(1) ITAA 1936. This Ruling does not deal with assessments of administrative penalty under Division 298 of Schedule 1 to the TAA.

[38] For the 2011-12 income year only, additional income tax in the form of a one-year progressive levy to taxable income (temporary flood and cyclone reconstruction levy) applies to individuals with a taxable income exceeding $50,000. This levy is imposed by section 4-10 of the *Income Tax (Transitional Provisions) Act 1997* and is added to the income tax worked out under section 4-10 of the ITAA 1997. As the imposition of this levy forms part of an 'assessment', it also attracts objection rights under Part IVC of the TAA.

[38A] This extended definition of 'assessment' applies to assessments made on or after 1 July 2013 for these income years.

55. Subsection 251R(7) of the ITAA 1936 provides that the expressions 'income tax' and 'tax' include Medicare levy and Medicare levy (fringe benefits) surcharge.[39] These amounts form part of an 'assessment' for the purposes of subsection 175A(1) of the ITAA 1936 and attract objection rights under Part IVC of the TAA.[40]

56. For taxpayers who are trustees of a unit trust or trust estate, paragraphs (b) to (d) of the definition in subsection 6(1) of the ITAA 1936 provide that 'assessment' means the ascertainment of:

- the net income of the trust or the trust estate (or that there is no net income); and
- the tax payable on that net income (or that no tax is payable).[41]

56A. For the 2013-14 and later income years, the term 'assessment' also includes the ascertainment of the total of a taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).[41A]

57. Paragraphs (a) to (d) do not contain an exhaustive definition of the term 'assessment' for the purposes of subsection 6(1) of the ITAA 1936. There are other paragraphs in the definition which also provide taxpayers with objection rights under Part IVC of the TAA by virtue of subsection 175A(1) of the ITAA 1936. These definitions will not be considered in detail for the purpose of this Ruling. A full list of the other paragraphs comprising the definition of 'assessment' in subsection 6(1) of the ITAA 1936 is set out in Appendix 2.

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[39] Medicare levy is imposed on a taxpayer's taxable income by section 5 of the *Medicare Levy Act 1986* (MLA). A levy surcharge is imposed in the circumstances listed in sections 8B to 8G of the MLA and on reportable fringe benefits in accordance with section 10 of the *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999*. Medicare levy and Medicare levy (fringe benefits) surcharge are assessed under the ITAA 1936: subsection 251R(7) of the ITAA 1936. Section 251X of the ITAA 1936 requires an income tax notice of assessment issued under section 174 of the ITAA 1936 to specify the total of Medicare levy or Medicare levy (fringe benefits) surcharge payable by a taxpayer for the income year.

[40] See paragraph 84 below concerning the right to object under subsection 175A(1) of the ITAA 1936 against assessments of other liabilities that may be included on an income tax notice of assessment.

[41] The net income of a trust for an income year is calculated in accordance with section 95 of the ITAA 1936. The net income is assessed to beneficiaries and/or the trustee in accordance with Division 6 of Part III of the ITAA 1936, and in particular sections 97, 98, 98A, 99, 99A of the ITAA 1936. Section 97 of the ITAA 1936 provides that a beneficiary who is 'presently entitled to a share of the income of the trust estate' is to be assessed on 'that share' of the net income of the trust estate. Therefore, no right of objection arises for a trustee for net income which is distributed to beneficiaries under section 97 of the ITAA 1936. In these circumstances, the objection rights reside with the beneficiary. See *Law Administration Practice Statement PS LA 2010/1 Approach to cases involving Division 6 of Part III of the Income Tax Assessment Act 1936* which advises ATO officers of the approach to be taken about, among other things, objections and appeals involving net income of a trust or trust estate.

[41A] This extended definition of 'assessment' applies to assessments made on or after 1 July 2013 for these income years.

58. In addition, there is a small group of assessments that fall within the scope of subsection 175A(1) of the ITAA 1936 which are not covered by the definition of 'assessment' in subsection 6(1) of the ITAA 1936. These are found in sections 126, 132 and 148 of the ITAA 1936, and are assessed under section 169 of the ITAA 1936. These assessments also attract objection rights under Part IVC of the TAA.

59. The definition of 'assessment' in paragraphs (a) to (d) of subsection 6(1) of the ITAA 1936 includes ascertaining that taxpayers have no taxable income or no net income as the case may be, because their total allowable deductions equal or exceed their total assessable income. The definition also covers instances where the Commissioner ascertains that there is taxable income or net income as the case may be, but no tax is payable, for example, because the taxable income is below the tax-free threshold or because tax offsets (or rebates) reduce the tax otherwise payable to nil. From the 2013-14 income year, the definition also includes ascertaining the total of a taxpayer's tax offset refunds for an income year or that the taxpayer can get no such refunds.[41B] These are referred to as 'nil assessments' in this Ruling.

60. The meaning of 'assessment' does not extend to ascertaining the amount of a tax loss.[42] The scheme of the tax legislation is such that an amount of a tax loss may be deductible in a later income year under specific provisions of the *Income Tax Assessment Act 1997* (ITAA 1997).[43] It is those provisions that set out how the amount of a tax loss shall be calculated and the extent to which it can be deducted in the later income year. Determining the deductibility of an amount of tax loss under the relevant provisions is part of the process of ascertaining the amount of taxable income (or that there is no taxable income) and the tax payable (or that there is no tax payable) of the later income year. It follows that a taxpayer may dispute the amount of a tax loss that is allowable as a deduction in a later income year by objecting against the income tax assessment made in the later income year, subject to subsection 175A(2) of the ITAA 1936 regarding nil assessments.[44]

[41B] This extension to the definition applies to assessments made on or after 1 July 2013 for the 2013-14 and later income years.

[42] See paragraph 2.51 and example 2.5 in the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.

[43] The term 'tax loss' is defined in subsection 995-1(1) of the ITAA 1997.

[44] Subsection 175A(2) of the ITAA 1936 is discussed at paragraphs 152 to 153 below.

Process of assessment

61. An assessment is, however, not simply the notice which issues to a taxpayer. In *Batagol v. Federal Commissioner of Taxation* (1963) 109 CLR 243; (1963) 13 ATD 202 (*Batagol*), Kitto J noted that assessment means (CLR at 252; ATD at 204):

> … the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case.[45]

62. An assessment must:

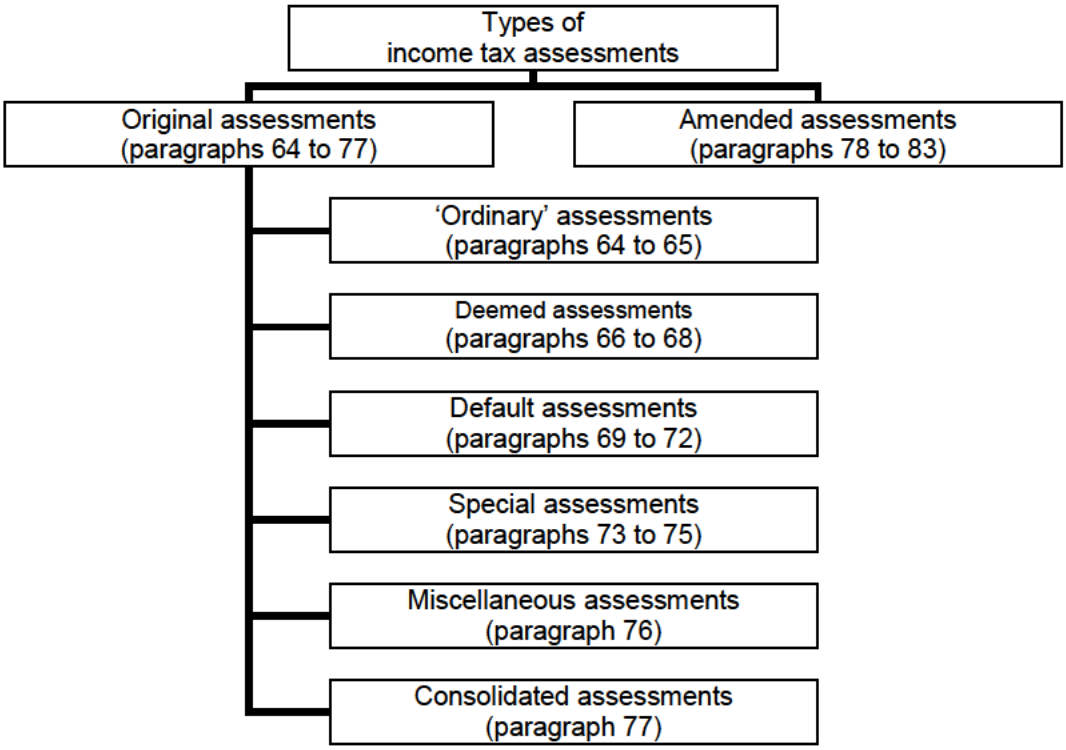
- be the result of an 'act or operation of the Commissioner' (*R v. Deputy Commissioner of Taxation, ex parte Hooper* (1926) 37 CLR 368, at 373 per Isaacs J);
- lead to an ascertainment, on consideration of all relevant circumstances, including sometimes the Commissioner's opinion, of the taxpayer's taxable income and their tax payable (*R v. Deputy Commissioner of Taxation, ex parte Hooper* (1926) 37 CLR 368;
- be definitive in character, rather than tentative or provisional[46] (*Federal Commissioner of Taxation v. S Hoffnung & Co Ltd* (1928) 42 CLR 39; (1928) 1 ATD 310; *FJ Bloemen Pty Ltd and Simons v. Federal Commissioner of Taxation* (1981) 147 CLR 360; 81 ATC 4280; (1981) 11 ATR 914); and
- be served on the taxpayer by way of a notice of assessment. This is the completion of the process where the 'Commissioner ... serves a notice that he has assessed the taxable income then the tax becomes due and payable' (*Batagol*, CLR at 252; ATD at 204, per Kitto J).

[45] The effect of the changes to the definition of 'assessment' in subsection 6(1) of the ITAA 1936 made by the *Tax Laws Amendment (Improvements to Self Assessment) Act (No.2) 2005* is that there now can be an assessment that no tax is payable, that is, a nil assessment.

[46] The Commissioner is authorised to issue alternative assessments for the same income, benefit or transaction for one or more taxpayers. See *Federal Commissioner of Taxation v. Stokes* (1996) 72 FCR 160; (1996) 97 ATC 4001; (1996) 34 ATR 478. Alternative assessments are not regarded as tentative or provisional, and are definitive in character. *Law Administration Practice Statement PS LA 2006/7 Alternative Assessments* outlines the Commissioner's practice for issuing alternative assessments.

Types of assessments

63. Income tax assessments may occur as original assessments and amended assessments. There are a number of different kinds of original assessments; namely, ordinary assessments, deemed assessments, default assessments, special assessments, miscellaneous assessments and consolidated assessments. These are discussed in the ensuing paragraphs, as follows.



Original assessments

'Ordinary' assessments

64. The Commissioner makes an assessment of income tax under section 166 of the ITAA 1936 for taxpayers who receive a formal notice of assessment. Such assessments are referred to as 'ordinary assessments' in this Ruling.

65. Section 166 of the ITAA 1936 provides:

> 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;
>
> (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).[46A]

Deemed assessments

66. Under section 166A of the ITAA 1936, companies and various other entities who are subject to a 'full' self-assessment system (under which they self-assess their income and the amount of tax they have to pay) are deemed to have been assessed by the Commissioner.

67. The Commissioner is not required to issue a formal notice of assessment after the entity has lodged its income tax return. For the 2013-14 and later income years, the assessment also includes the ascertainment of the taxpayer's total of the tax offset refunds (including nil amounts).[46B] Instead the Commissioner is taken to have made an assessment and the return itself is deemed to be a notice of assessment of the entity's taxable income (or that there is no taxable income) and of the amount of tax payable thereon (or that no tax is payable). The assessment is deemed to be made on the day the return is lodged.

68. A deemed assessment under section 166A of the ITAA 1936 is an assessment for the purposes of lodging an objection. The objection period commences from the date the notice of the deemed assessment is deemed to be served on the taxpayer under section 166A of the ITAA 1936, that is, the date of lodgment.

Default assessments

69. In certain circumstances, the Commissioner may make an assessment of the amount on which, in the Commissioner's judgment, tax ought to be levied. That amount then becomes the taxpayer's taxable income for the purposes of section 166 of the ITAA 1936. This is referred to as a 'default' assessment under section 167 of the ITAA 1936.

70. A default assessment may be made where:

- a taxpayer has failed to furnish a return;
- the Commissioner is dissatisfied with the return furnished; or
- the Commissioner has reason to believe that a person who has not furnished a return has derived taxable income.

[46A] Section 166 of the ITAA 1936 was amended by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013* to include a reference to an assessment of the total of a taxpayer's tax offset refunds. This amendment applies to assessments for the 2013-14 and later income years made on or after 1 July 2013.

[46B] This applies to deemed assessments arising on or after 1 July 2013 for the 2013-14 and later income years.

71. Depending on whether an assessment has issued prior to the default assessment issuing, a default assessment may be issued as an original or amended assessment, subject to the time limits in section 170 of the ITAA 1936. The taxpayer can object against a default assessment.

72. Paragraphs 8 to 16 of *Law Administration Practice Statement PS LA 2007/24 Making default assessments: section 167 of the Income Tax Assessment Act 1936 and other similar provisions* provide direction to tax officers on making default assessments.

Special assessments

73. Section 168 of the ITAA 1936 enables the Commissioner to make special assessments. Under subsection 168(1) of the ITAA 1936 the Commissioner may at any time during any year, or after the end of a year, make an assessment of:

- the taxable income derived by a taxpayer in that year or any part of that year (or that there is no taxable income);
- the tax payable on that taxable income (or that no tax is payable); and
- the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).[46C]

74. In some cases the income in respect of which such an assessment is made is derived in a period of less than a year. In those cases, subsection 168(2) of the ITAA 1936 provides that the assessment under subsection 168(1) of the ITAA 1936 is to be made as if the beginning and end of that period were the beginning and end respectively of the income year.[47]

75. Special assessments are commonly issued in the case of:

- businesses entering liquidation
- deceased persons; and
- persons not resident in Australia.

[46C] Section 168 of the ITAA 1936 was amended by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013* to include a reference to an assessment of the total of a taxpayer's tax offset refunds. This amendment applies to assessments for the 2013-14 and later income years made on or after 1 July 2013.

[47] See the Explanatory Handbook to the Income Tax Assessment Bill 1935 which introduced subsection 168(2) of the ITAA 1936 for the rationale behind this provision. This provision was originally enacted as subsection 169(2) of the ITAA 1936 and was subsequently renumbered as subsection 168(2) of the ITAA 1936. The Explanatory Handbook for this provision stated: 'Sub-clause(2) will permit of trading stock on hand being brought to account in an assessment for a period of less than a year, in the same manner as it would be brought to account if the period were a full year.'

Miscellaneous assessments

76. Section 169 of the ITAA 1936 authorises the Commissioner to assess a taxpayer where a liability to pay tax (including a nil liability) arises under the tax laws.[48] The right to assess under section 169 of the ITAA 1936 is separate and distinct from the ordinary right to assess under section 166 of the ITAA 1936 and the Commissioner is not compelled to elect to assess under one provision or the other.[49]

Consolidated assessments

77. Section 219 of the ITAA 1936 concerning consolidated assessments has been repealed and replaced by section 169AA of the ITAA 1936. Section 169AA of the ITAA 1936 facilitates the issuing of assessments and the collection of income tax where there are several agents that receive income from the one foreign resident or absent resident. Essentially, section 169AA of the ITAA 1936 allows the Commissioner to consolidate the income tax assessments of different agents if they are for the same foreign resident or an Australian resident absent from Australia.

Amended assessments

78. An amended assessment is an assessment that has been amended under section 170 of the ITAA 1936.

79. Under section 173 of the ITAA 1936, except as otherwise provided, every amended assessment is an assessment for the purposes of the ITAA 1936. Therefore the right to object against an assessment under section 175A of the ITAA 1936 includes the right to object against an amended assessment, subject to the limitations in section 14ZV discussed in paragraphs 154 to 171 below.

80. If amended assessments are issued for different income years, a single objection can be made where the amended assessments raise common facts and issues.[50]

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[48] See for example, under sections 126, 132 and 148 of the ITAA 1936 and sections 295-605 and 345-100 of the ITAA 1997.

[49] *Cadbury-Fry-Pascall Pty Ltd v. Federal Commissioner of Taxation* (1944) 70 CLR 362; (1944) 7 ATD 471 per Latham CJ; *Lever Bros Pty Ltd v. Federal Commissioner of Taxation* (1948) 77 CLR 78; (1948) 8 ATD 388, for example per Williams J.

[50] In *McDermott Industries (Aust) Pty Ltd v. FC of T* 2003 ATC 4410; (2003) 52 ATR 423 the Federal Court held that in these circumstances a single application to the Court in respect of the appealable objection decision was competent.

Relationship of an amended assessment to the original assessment

81. Numerous cases over the years have attempted to explain the position of an amended assessment in relation to the original assessment, such as *Federal Commissioner of Taxation v. S. Hoffnung & Co. Ltd.* (1928) 42 CLR 39; (1928) 1 ATD 310, *Federal Commissioner of Taxation v. Trautwein (*1936) 56 CLR 211; (1936) 4 ATD 92, *Deputy Commissioner of Taxation v. Faint* [1988] 2 Qd R 494, *Federal Commissioner of Taxation v. The Swan Brewery Company Limited* (1991) 30 FCR 553; 91 ATC 4637; (1991) 22 ATR 295, *Federal Commissioner of Taxation v. Stokes* (1996) 72 FCR 160; (1996) 97 ATC 4001; (1996) 34 ATR 478, and *NMRSB Limited & Ors v. Federal Commissioner of Taxation* (1998) 81 FCR 378; 98 ATC 4188; (1998) 38 ATR 308.

82. From the discussions in these cases, it is apparent that an amended assessment does not cancel, revoke, extinguish or replace the original assessment. Rather, its role is to alter the original assessment by amending it in a particular or particulars, with a view to imposing a fresh liability, or at least, by adjusting the components or elements that went to determining the taxable income or tax payable amounts previously notified.

83. It is clear from these authorities that at any given time, there is only one assessment in operation for a given income year, which fixes with certainty the taxpayer's taxable income (or that there is no taxable income) and the tax payable thereon (or that there is no tax payable).[50A] Thus, an amendment of an existing assessment is not a new assessment.[51]

Objections against assessments of other liabilities

84. The right to object against an income tax assessment as provided for by subsection 175A(1) of the ITAA 1936 has been extended to assessments of the following liabilities:

- HEC assessment debt in connection with the Higher Education Contribution Scheme;[52]
- a compulsory repayment amount in connection with the Higher Education Loan Program;[53] and

[50A] For the 2013-14 and later income years, the assessment also includes the ascertainment of the taxpayer's total of the taxpayer's tax offset refunds (including nil amounts).

[51] See *Stokes v FC of T* 96 ATC 4393; (1996) 32 ATR 500 per Davies J, citing with approval what Latham CJ said in *Cadbury-Fry-Pascall Pty Ltd* v. *Federal Commissioner of Taxation* (1944) 70 CLR 362; (1944) 7 ATD 471; at CLR 381; ATD 482.The Full Federal Court in *Federal Commissioner of Taxation v. Stokes* (1996) 72 FCR 160; (1996) 97 ATC 4001; (1996) 34 ATR 478 expressed a similar view.

[52] The term 'HEC assessment debt' is defined in section 34 of the *Higher Education Funding Act 1988* (HEFA). An HEC assessment debt is assessed under section 106T of that Act. Section 106V of the HEFA permits the Commissioner to specify the amount in an income tax notice of assessment issued under section 174 of the ITAA 1936.

- an FS assessment debt in connection with the Student Financial Supplement Scheme.[54]

Extending the right to object to these liabilities is achieved by making Part IV of the ITAA 1936 (in which section 175A of the ITAA 1936 is located) apply to them as if they were income tax.[55]

Distinction between objections and amendment requests

85. There are differences of substance between an objection against an assessment under section 175A of the ITAA 1936 and an amendment of an assessment under section 170 of the ITAA 1936.

86. Where taxpayers are within the time limits for amending an assessment, they may request an amendment to correct a mistake or omission where there is no dispute about the facts or the law.[56] Amendments are generally processed faster. In contrast, an objection is a formal avenue of dispute resolution that involves full consideration of the facts and the application of the law to those facts.

87. *Law Administration Practice Statement PS LA 2008/19 Request for amendment of income tax assessments* provides direction to tax officers in identifying a request for an amendment and distinguishing it from an objection.

Who can object

88. Taxpayers who are dissatisfied with an income tax assessment made in relation to them may object against it in the manner set out in Part IVC of the TAA: subsection 175A(1) of the ITAA 1936.

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[53] The term 'compulsory repayment amount' is defined in subsection 1(1) in Schedule 1 to the *Higher Education Support Act 2003* (HESA). A compulsory repayment amount is assessed under section 154-35 of that Act. Subsection 154-40(1) of the HESA permits the Commissioner to specify the amount in an income tax notice of assessment issued under section 174 of the ITAA 1936.

[54] The term 'FS assessment debt' is defined in section 3 of the *Student Assistance Act 1973* (SAA) and in section 19AB of the *Social Security Act 1991* (SSA). An FS assessment debt is assessed under section 12ZM of the SAA or under section 1061ZZFH of the SSA or under section 15.23 of the Social Security Student Financial Supplement Scheme 1998 (SFSS). Section 12ZO of the SAA, section 1061ZZFI of the SSA and section 15.24 of the SFSS permit the Commissioner to notify the amount of an FS assessment debt in an income tax notice of assessment issued under section 174 of the ITAA 1936. The SFSS was promulgated by the Commonwealth of Australia Special Gazette No. S 306, 26 June 1998.

[55] **HEC assessment debt:** subsection 106U(1) of the HEFA*;* **Compulsory repayment amount:** section 154-60 of the HESA*;* **FS assessment debt:** section 12ZN of the SAA, section 1061ZZFG of the SSA and section 15.22 of the SFSS.

[56] See items 1 to 4 in the table in subsection 170(1) and subsection 170(3) of the ITAA 1936 which sets the time limits for amending original and amended assessments respectively.

89. Subsection 14ZL(1) states that Part IVC applies if a provision of an Act (such as subsection 175A(1) of the ITAA 1936) provides that a 'person' who is dissatisfied with an assessment may object against it in the manner set out in that Part. The term 'person' in subsection 14ZL(1) refers to natural persons, bodies corporate and bodies politic: *Russell v. Federal Commissioner of Taxation* [2008] FCA 343 at [44]; 2008 ATC 20-010 at 8123; see also the definition of 'person' in the *Acts Interpretation Act 1901* (Cth) (AIA 1901).

90. In *McCallum v. Federal Commissioner of Taxation* (1997) 75 FCR 458; 97 ATC 4509; (1997) 36 ATR 256 (*McCallum*), Lehane J held in effect that the 'person' referred to in Part IVC of the TAA is the taxpayer referred to in section 175A of the ITAA 1936 who is dissatisfied with an assessment made in relation to that taxpayer.

Meaning of 'dissatisfied'

91. The term 'dissatisfied' refers to a decision by the Commissioner which is adverse to the taxpayer. In the context of objections against assessments, a taxpayer 'dissatisfied' would seem to mean a person in receipt of an assessment which leads to the creation of a debt in favour of the Commonwealth which has an immediate and direct effect in a legal sense upon the taxpayer: *CTC Resources NL v. Federal Commissioner of Taxation* (1994) 48 FCR 397; 94 ATC 4072; (1994) 27 ATR 403 (*CTC Resources*) per Gummow J at FCR 405; ATC 4079; ATR 411.[57]

92. A person is not relevantly 'dissatisfied' if their motivation for objecting against their assessment is merely abstract or hypothetical. In *CTC Resources* Gummow J stated,[58] in the context of an objection decision relating to a private ruling, that a 'mere curiosity or interest in having a formal ruling by the Commissioner for some collateral commercial purpose of the applicant is not sufficient to amount to 'dissatisfaction' in the relevant sense.[59]

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[57] This has been confirmed by Hill J in *Corporate Business Centres International Pty Ltd v. Federal Commissioner of Taxation* (2004) 137 FCR 108; 2004 ATC 4430; (2004) 55 ATR 476 where Hill J further noted that Gummow J in *CTC Resources* was not looking to state an exhaustive test of what the word 'dissatisfied' meant. In *McCallum v. Federal Commissioner of Taxation* (1997) 75 FCR 458; 97 ATC 4509; (1997) 36 ATR 256 Lehane J (with Whitlam J agreeing) relied upon Gummow J's statement in *CTC Resources* in concluding that a bankrupt is likely to lack standing to apply to the AAT for a review of an objection decision because the bankrupt would be unable to show that they are relevantly 'dissatisfied' with the objection decision.

[58] *CTC Resources*, at FCR 408; ATC 4082; ATR 414.

[59] It would be different where an objection is lodged against a private ruling which relates to a proposed scheme or arrangement in serious contemplation: see subsection 359-5(1) of Schedule 1 to the TAA and the definition of scheme in subsection 995-1(1) of the ITAA 1997. The taxpayer in that case would be relevantly 'dissatisfied' with the private ruling for the purposes of lodging an objection. However it is not the intention of this Ruling to discuss in detail what constitutes valid objections against private rulings. This is addressed in Taxation Ruling TR 2006/11 *Income tax, fringe benefits tax and product grants and benefits: Private Rulings*, and in particular, paragraphs 58 to 61 of that ruling.

93. In the same case, Hill J said at FCR 432; ATC 4100; ATR 435:

> ... the word ['dissatisfied'] must bear more than its ordinary dictionary meaning of `displeased with' or `not contented with'. More is required than mere lack of satisfaction with the objection decision. It can hardly be said that a university lecturer, learning of the disallowance of an objection by a public company of which he or she was neither a director or shareholder, could, because he or she was not happy with the objection decision, refer the matter to the Court...

Increase in taxpayer's liability

94. A taxpayer can object against an assessment on the basis that the taxable income or the tax payable is too low.Subsections 175A(2) and 175A(3) of the ITAA 1936 provide that taxpayers can only object against a nil assessment if they are seeking an increase in their tax liability.[59A] The assessment as it stands may be considered to be adverse to the taxpayer where the taxpayer wishes to challenge an element in the assessment, for example, whether their assessable income was calculated correctly. This may ultimately lead to an increase in the taxpayer's tax liability, but this fact alone does not prevent the taxpayer from objecting against an assessment on the basis that they are 'dissatisfied' with the original assessment.[60]

95. This position finds support in the Full Federal Court's decision in *Isaacs v. Federal Commissioner of Taxation* (2006) 151 FCR 427; 2006 ATC 4330; (2006) 63 ATR 390. This case concerned the exercise of the Commissioner's discretion under section 139E in Division 13A of the ITAA 1936 (employee share scheme provisions), and whether this discretion formed part of the process of making the relevant income tax assessment. In considering this issue, the Court made the following observations about the taxpayer's objection to have his assessment increased:

> It is unusual, to say the least, that a taxpayer claims to be dissatisfied because the Commissioner has issued an assessment that requires too little tax to be paid. Nevertheless, **the Commissioner accepts that it is competent for a taxpayer to object against an assessment on the ground that the assessment is for too little tax** (see *Henderson v. Commissioner of Taxation* (1970) 119 CLR 612). Clearly enough a taxpayer would not adopt such a course except for some collateral reason. Such a reason would be that the taxpayer wished to contend that the

[59A] Taxpayers also have the right to object against an assessment if the taxpayer is seeking to increase the total of the taxpayer's tax offset refunds. The right to object against an assessment of a taxpayer's tax offset refunds only applies in relation to assessments made on or after 1 July 2013 for the 2013-14 and later income years. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

[60] *Henderson v. Federal Commissioner of Taxation* (1970) 119 CLR 612; 70 ATC 4016; (1970) 1 ATR 596; *Re Murphy and Commissioner of Taxation* [2004] AATA 1265; *Waverley Council v. FC of T* 2009 ATC 10-095; (2009) 73 ATR 243.

> income that the taxpayer wants to have included as assessable income of the taxpayer in a particular year of income, is not income of that taxpayer in another year of income, or is not income of another taxpayer.[61] [emphasis added]

96. It may be more convenient for the taxpayer to seek an amendment (within the relevant time limits) to rectify an error or omission which may ultimately lead to an increase in the taxpayer's tax liability. This is especially so where there is no dispute about the facts or the application of the tax laws to the facts.[62] An example of such a situation may be when a taxpayer discovers they have accidentally claimed a deduction in the wrong income year. This may also have a bearing on whether there was a voluntary disclosure for the purposes of the administrative penalty provisions in Division 284 of Schedule 1.[63] In addition, amendment requests are generally processed faster.

Taxpayer error

97. A taxpayer may be dissatisfied with an income tax assessment and therefore may object against it even though the assessment is in accordance with the taxpayer's own erroneous income tax return.

98. The AAT per Senior Member P M Roach has held:

> ... I am not persuaded that an applicant whose taxable income is assessed in accordance with his own erroneous return has no right of objection to an excessive assessment. Such a person is 'dissatisfied with the assessment' and in my view entitled to object. He does not have to be able to point to some 'wrongdoing' (as it were) on the part of the Commissioner. It is sufficient that he is dissatisfied with the assessment, even though he is the sole cause of that dissatisfaction.[64]

99. Again, it may be more convenient for a taxpayer to seek an amendment to their assessment (within the relevant time limits) to rectify the error or omission, instead of lodging an objection.[65] This may also have a bearing on whether there was a voluntary disclosure for the purposes of the administrative penalty provisions in Division 284 of Schedule 1.[66]

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[61] *Isaacs v. Federal Commissioner of Taxation* (2006) 151 FCR 427 at 433; 2006 ATC 4330 at 4335; (2006) 63 ATR 390 at 395.
[62] See paragraphs 85 to 87 above.
[63] See Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* which outlines the Commissioner's interpretation of section 284-225 of Schedule 1 to the TAA, which applies to voluntary disclosures.
[64] *AAT Case 5540* (1990) 21 ATR 3083 at 3090; *Case X2* 90 ATC 105 at 111-112.
[65] See paragraphs 85 to 87 above.
[66] See Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* which outlines the Commissioner's interpretation of section 284-225 of Schedule 1 to the TAA, which applies to voluntary disclosures.

Effect of insolvency on a taxpayer's right to object[67]

100. Subsection 175A(1) of the ITAA 1936 provides that a 'taxpayer' who is dissatisfied with an assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the TAA. For the purposes of subsection 175A(1) of the ITAA 1936, subsection 6(1) of the ITAA 1936 provides that, unless the contrary intention appears, the term 'taxpayer' means 'a person deriving income or deriving profits or gains of a capital nature'. Ordinarily that person will be the entity in relation to whom an income tax assessment is made.

101. However, in the case of an individual who is subject to proceedings under the *Bankruptcy Act 1966*, or a company that is subject to insolvency proceedings under the Corporations Act, a party other than the individual or company in relation to whom an income tax assessment was made may have a statutory right to lodge an objection against the assessment.

Individual insolvency – Bankruptcy

102. The Court in *McCallum* held that lodging an objection against an income tax assessment should be regarded as a legal proceeding for the purposes of paragraph 134(1)(j) of the *Bankruptcy Act 1966*.[68] That provision permits a trustee of a bankrupt estate to bring, institute or defend any action or other legal proceeding relating to the administration of the estate. Therefore, trustees in bankruptcy can lodge an objection against an income tax assessment issued to the bankrupt individual. The bankrupt individual does not have standing to object.

Company insolvency – Liquidation

103. Subsection 471A(1) of the *Corporations Act 2001* (Corporations Act) provides that while a company is being wound up in insolvency or by the Court, a person cannot perform or exercise a function or power as an officer of the company. Subsection 471A(1A) of the Corporations Act makes exceptions for situations where:

- a liquidator is appointed for the purposes of the winding up of the company; or
- the liquidator's written approval or the Court's approval is obtained.

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[67] This Ruling does not consider non-bankruptcy arrangements for individuals or non-liquidation arrangements for companies.

[68] *McCallum*, per Lehane J at ATC 4520-4521 with whom Whitlam J agreed at ATC 4519. The decision in *McCallum* was applied in *Robertson v. Federal Commissioner of Taxation* (2004) 137 FCR 513; 2004 ATC 4209; (2004) 55 ATR 106.

104. Paragraph 477(2)(a) of the Corporations Act provides that a liquidator may bring or defend any legal proceeding in the name of, and on behalf of, the company. The term 'legal proceeding' is not defined for the purposes of that paragraph. For the reasons given in *McCallum,* the Commissioner considers that 'legal proceeding' in paragraph 477(2)(a) of the Corporations Act includes lodging an objection against an income tax assessment.

105. This conclusion is supported by the decision of the Federal Court in *Pearson & Ors v. FC of T & Anor* 2001 ATC 4104; (2001) 46 ATR 367. This case considered whether certain parties had standing to appeal an objection decision disallowing a company's objection against an income tax assessment where the company had gone into liquidation after lodging the objection and the liquidator did not consent to the appeal being made by any of those parties. Spender J noted that, pursuant to paragraph 477(2)(a) of the Corporations Act, it was the liquidator who had the responsibility for challenging the appealable objection decision.[69]

106. Therefore, even though a liquidator is not the relevant 'taxpayer' for the purposes of subsection 175A(1) of the ITAA 1936, a liquidator has standing to lodge an objection in the name, and on behalf, of the company. Following the appointment of a liquidator, the board of directors, the secretary or the public officer of the company do not have standing to lodge an objection on behalf of the company.

Effect of deregistration on a company's right to object

107. Any objection lodged under Part IVC by, or on behalf of, a company that has been deregistered, will be invalid as the taxpayer company ceased to exist on deregistration.[70] This is because there is no legal person in existence who may be dissatisfied with an assessment or who may lodge an objection against the assessment.

108. The effect of the deregistration of a company part-way through the Part IVC objection, review or appeal process is discussed in Taxation Ruling IT 2353 *Income tax: effect of company dissolutions on taxation disputes*.

Company reinstatement

109. If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered.[71] Thus, a person who was a director of the company immediately before deregistration becomes a director again from the time when the company is reinstated and is able to lodge objections in the company's name, along with other officers of the company as defined in section 9 of the Corporations Act.

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[69] *Pearson,* at ATC 4110; ATR 373.
[70] Section 601AD of the Corporations Act.
[71] Subsection 601AH(5) of the Corporations Act.

What comprises a valid objection

110. A valid objection against an assessment must relate to some element of:

- the amount of the taxable income or net income as the case may be (or that there is no taxable income or net income) of the taxpayer; for example, whether a particular outgoing is an allowable deduction; or
- the tax payable on that taxable income or net income as the case may be (or that no tax is payable); for example, whether a tax offset should be allowed; or
- for the 2013-14 and later income years the ascertainment of the total of a taxpayer's tax offset refunds (or that the taxpayer can get no such refund).

111. A notice of assessment may contain more information than is contemplated by the definition of 'assessment.'[72] For example, it may contain details of credits for pay as you go (PAYG) amounts withheld or PAYG instalments and amounts for administrative penalty arising under Division 286 of Schedule 1 to the TAA.[72A] Such items do not form part of the process of making of an 'assessment' and cannot be made the subject of a valid objection for the purposes of section 175A of the ITAA 1936.[73]

How valid objections are to be made

112. Under section 14ZU an objection against an assessment will be validly made if it:

(a) is made in the approved form;

(b) is lodged within the period set out in section 14ZW; and

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[72] Except for certain liabilities that specifically attract objection rights under subsection 175A(1) of the ITAA 1936: see paragraph 84 above.

[72A] Prior to the changes introduced by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013*, an assessment did not extend to the ascertainment of a taxpayer's tax offset refunds even though details of these amounts were included in a taxpayer's notice of assessment.

[73] See for example *Webb v. Federal Commissioner of Taxation (No. 2)* 93 ATC 5123 at 5129; (1993) 125 ALR 523 at 531 (concerning PAYG credits) and *Consolidated Media Holdings v. FC of T* 2011 ATC 20-259 at [64] to [66] (concerning administrative penalty amounts under Division 286 of Schedule 1). However, a person dissatisfied with these items may ask the Australian Taxation Office to take a 'second look', in the interests of procedural fairness and in line with the Taxpayers' Charter. This is not to suggest that this is the only recourse taxpayers have. For example, taxpayers can also defend recovery of an assessment amount in a court of competent jurisdiction: *Perdikaris v. DFC of T* (2008) 172 FCR 412 at 419; 2008 ATC 20-075 at paragraph 21; (2008) 73 ATR 875 at 882 where the Full Federal Court upheld the primary judge's conclusions in *Perdikaris v. DC of T (No.2)* 2007 ATC 5371 at 5404; (2007) 67 ATR 825 at 863.

(c) states in it, fully and in detail, the grounds relied on by the taxpayer.

In the approved form

113. A person making a taxation objection must make it in the 'approved form': paragraph 14ZU(a).

114. For the purposes of paragraph 14ZU(a) of the TAA, the expression 'approved form' is defined in subsection 6(1) of the ITAA 1936 as follows:

> In this Act, unless the contrary intention appears . . . ***approved form*** has the meaning given by section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*.

'Approved form' is defined similarly in subsection 995-1(1) of the ITAA 1997.[74]

115. In accordance with the approved form requirements in section 388-50 in Schedule 1, a taxation objection must:

- be in the form approved in writing by the Commissioner;
- contain a signed declaration;
- contain the required information; and
- be given in the manner that the Commissioner requires.

116. The standard approved form templates *Objection form (for tax professionals)* (NAT 13044) and *Objection form (for taxpayers)* (NAT 13471) are available on the Australian Taxation Office (ATO) website at http://www.ato.gov.au. These forms contain details of the declaration requirements for objections as well as details regarding how to lodge objections.[75]

117. It is not necessary to use a printed form or electronic template published by the Commissioner. An objection by letter or other paper document will be in the approved form for the purposes of paragraph 14ZU(a) provided it:

- is in writing;
- contains the necessary signed declaration;
- contains the requisite information; and
- is lodged in the required manner.[76]

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[74] The definition of 'this Act' in subsection 6(1) of the ITAA 1936 and in subsection 995-1(1) of the ITAA 1997 includes Part IVC of the TAA, in so far as that Part relates to the ITAA 1936, the ITAA 1997 or Schedule 1 to the TAA.

[75] These forms have been approved in writing by the Commissioner in accordance with subsection 388-50(1) of Schedule 1.

[76] This Ruling constitutes approval in writing by the Commissioner under subsection 388-50(1) of Schedule 1 for such objections to be in the approved form.

Time limits for lodging objections

118. A person making a taxation objection must lodge it with the Commissioner within the period set out in section 14ZW: paragraph 14ZU(b).

119. As a result of the *Tax Laws Amendment (Improvements to Self Assessment) Act (No.2) 2005,* the time limits for lodging objections in section 14ZW were amended to correspond with the new amendment periods in section 170 of the ITAA 1936.[77] These time limits apply to objections against income tax assessments where the assessments are made on or after 1 July 2004.[78]

Time limits for original assessments

120. If the standard amendment period of two years applies to an assessment, an objection must be lodged with the Commissioner within two years after the notice of assessment is given to the taxpayer. In all other cases, the objection must be lodged within four years after the notice of assessment is given to the taxpayer.[78A]

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[77] See items 28 to 31 of Schedule 1 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005.*

[78] See item 32 of Schedule 1 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005* which applies the revised time limits to objections against taxation decisions concerning income tax made in the 2004-05 or later income years.

[78A] In determining the exact date on which the amendment period ends, the following should be noted:

- Section 36 of the *Acts Interpretation Act 1901* states that, if an Act requires or allows a thing to be done; and the last day for doing the thing is a Saturday, a Sunday or a holiday; then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday. However the application of this rule is subject to a contrary intention in the relevant Act or provision: see subsection 2(2) of the *Acts Interpretation Act 1901*. There is no such contrary intention in relation to the TAA.
- Subsection 163(1) of the *Evidence Act 1995* provides that a letter from a Commonwealth agency addressed to a person at a specified address is presumed (unless there is contrary evidence) to have been sent (and therefore given to a taxpayer) by prepaid post to that address on the fifth business day after the date that purports to be the date on which the letter was prepared.
- Subsection 160(1) of the *Evidence Act 1995* provides that a letter sent by prepaid post addressed to a person at a specified address in Australia was received at that address on the fourth working day after having been posted. In this section, working day means a day that is not a Saturday or Sunday or a public holiday in the place where the letter was addressed. This presumption will apply in relation to letters sent by the ATO if the presumption in subsection 163 of the *Evidence Act 1995* does not apply.

Time limits for amended assessments

121. The objection period for an amended assessment also generally mirrors the objection period for the original assessment:

- if the amendment period for the original assessment is the standard amendment period of two years, an objection against an amended assessment must be lodged within whichever of the following periods ends last:
  - two years after notice of the original assessment was served on the taxpayer; or
  - 60 days after notice of the amended assessment was served on the taxpayer.[79]
- for all other taxpayers, an objection against an amended assessment must be lodged within whichever of the following periods ends last:
  - four years after notice of the original assessment was served on the taxpayer; or
  - 60 days after notice of the amended assessment was served on the taxpayer.[80]

122. Therefore, if a notice of amended assessment was served less than 60 days before the end of the two-year or four-year objection period for the original assessment of an income year, the taxpayer would still have 60 days in which to lodge an objection against the amendment assessment. If the notice of amended assessment was served more than 60 days before the end of the two-year or four-year period, the taxpayer could object against either the amended assessment or the original assessment for the remainder of the two-year or four-year objection period applying to the original assessment. An objection against the amended assessment is subject to the limitation in section 14AZV.[80A] This is illustrated below using the standard amendment period of two years.

Example 1 – Objecting against an amended assessment within time limits

Scenario 1- Amended assessment received more than 60 days before the end of the amendment period

123. *Skye receives an original assessment on 1 August 2010. In May 2011 the Commissioner issues an amended assessment to Skye including an extra $100 of interest income. Skye received the amended assessment on 20 May 2011.*

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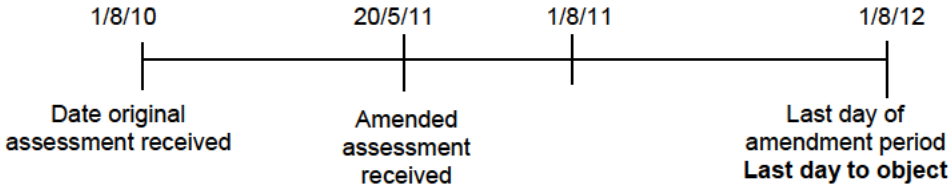
[79] Subsection 14ZW(1BA).
[80] Subsection 14ZW(1B).
[80A] See section 14ZV and *Case 1* [2007] AATA 45. Limitations on lodging objections against amended assessments are discussed in further detail in paragraphs 152 to 174.

124. *Skye is an individual taxpayer subject to the standard amendment period of two years in item 1 of the table in subsection 170(1) of the ITAA 1936.*

125. *The last day for Skye to lodge an objection against her amended assessment is 1 August 2012.*

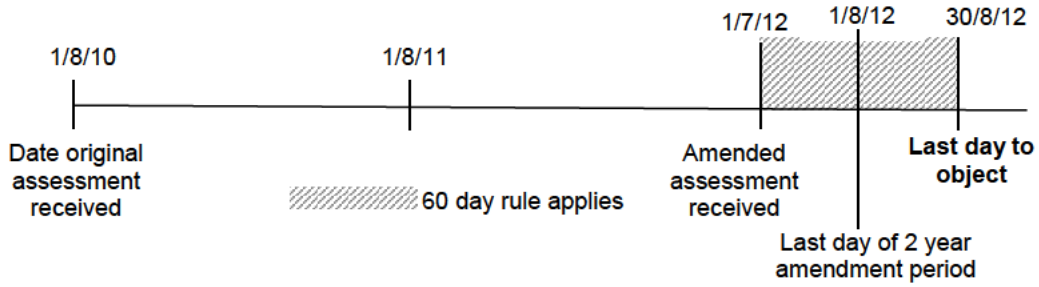


Scenario 2 – Amended assessment received less than 60 days before the end of the amendment period

126. *Bill receives an original assessment on 1 August 2010. The Commissioner identified that Bill had made an error in relation to his claim for work related expenses and issued an amended assessment disallowing $500 of the deduction claimed. Bill received the amended assessment on 1 July 2012.*

127. *Bill is an individual taxpayer subject to the standard amendment period of two years in item 1 of the table in subsection 170(1) of the ITAA 1936.*

128. *The last day for Bill to lodge an objection against his amended assessment is 30 August 2012, which is the later of either two years after the receipt of the original assessment or 60 days after receipt of the amended assessment.*



129. Where an assessment has been amended more than once, the notice, for the purpose of determining the objection period, is the notice of the original assessment for the income year: subsection 14ZW(1C).

Late lodgment of objections

130. Where the relevant period for lodging an objection has expired, a taxpayer may lodge the objection together with a written request asking the Commissioner to deal with the objection as if it had been lodged within that period (subsection 14ZW(2)).

131. The request must state fully and in detail the circumstances concerning, and the reasons for, the taxpayer's failure to lodge the objection with the Commissioner within the required period (subsection 14ZW(3)). The onus is on the taxpayer to demonstrate that the discretion to deal with the objection as though it was lodged within time should be exercised in the taxpayer's favour.

132. After considering the request, the Commissioner must decide whether to grant an extension of time or refuse it (subsection 14ZX(1)) and must give the taxpayer written notice of the decision (subsection 14ZX(2)).

133. Where such a request is refused, the taxpayer may apply to the AAT for review of that decision: subsection 14ZX(4).

134. Guidance for tax officers in making decisions on requests to deal with late taxation objections as if they were lodged within time is provided in *Law Administration Practice Statement PS LA 2003/7 Taxation objections – late lodgment*.

Grounds relied on must be stated fully and in detail

135. Taxpayers lodging a taxation objection must state in the objection, fully and in detail, the grounds that they rely on: paragraph 14ZU(c).

136. In *R v. DC of T (WA); ex parte Copley* (1923) 30 ALR 86; [1923] R & McG 47 (*Copley*), the High Court considered whether certain letters constituted valid objections under subsection 37(1) of the *Income Tax Assessment Act 1915-1918*. Despite some differences between the wording of subsection 37(1) and the present legislation, the observations of the court apply with equal force to the current law as both provisions are intended to have the same effect. Knox CJ said (ALR at 87):

> I think it is effective notice of objection under the Act if the written communication is expressed in words that are reasonably calculated to convey to the understanding of the person to whom it is addressed (1) that the taxpayer contends that the assessment is not in accordance with the law, and (2) the grounds on which that contention is based.

137. Higgins J made these observations (ALR at 87):

> The word 'objection' used in the section is not technical, and we are to apply the ordinary meaning. The section does not say that the word 'objection' must be used; and in my opinion if the fault alleged is stated directly and not inferentially stated in such a manner that the Commissioner may know in what respect his assessment is attacked that is enough. The word 'submit' as used in the letter

> seems to me to include an objection but with the addition of deference and courtesy.

138. Starke J said (ALR at 88):

> It has been laid down in this Court that an objection need not be in formal language, or in language that lawyers would adopt, and that must be so, because the Act has frequently to be acted upon by persons who have no knowledge of the law and who are very often a considerable distance from legal assistance.

139. Subsequently in *H R Lancey Shipping Co Pty Ltd v. FC of T* (1951) 9 ATD 267 (*Lancey*), Williams J expressed a similar view. His Honour said (ATD at 273):

> The grounds of objection need not be stated in legal form, they can be expressed in ordinary language, but they should be sufficiently explicit to direct the attention of the respondent to the particular respects in which the taxpayer contends that the assessment is erroneous and his reasons for this contention. In each case the sufficiency of the grounds is a matter for the Court. Vague grounds such that the assessment is excessive are not, in my opinion, a compliance with the Act.

140. Based on the *Copley* and *Lancey* cases, an objection will meet the requirements of paragraph 14ZU(c) if it:

- clearly indicates to the Commissioner that the taxpayer is objecting against the assessment;
- is precise enough to direct the Commissioner to the aspects of the assessment considered to be incorrect; and
- gives reasons as to why the taxpayer considers the assessment to be incorrect.

141. The requirement that the grounds be stated fully and in detail does not mean that the grounds have to be lengthy or complicated.[81] As a general rule, a letter or document from a taxpayer or their authorised agent which indicates that an assessment is wrong in a particular respect and suggests reasons for the alleged error, will satisfy the requirement that the grounds of objection be stated fully and in detail.

142. In considering the grounds contained in a taxation objection, the Commissioner will also have regard to:

- the context in which the objection is lodged
- other information mentioned in the objection or in the Commissioner's possession; and
- the relevant taxpayer's income tax returns.[82]

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[81] *Szajntop v. Federal Commissioner of Taxation* (1993) 42 FCR 318 at 323; 93 ATC 4307 at 4312; (1993) 25 ATR 469 at 474 (*Szajntop*).
[82] See for example *Szajntop* and *AAT Case 6404* (1990) 21 ATR 3795; 90 ATC 643.

143. A taxpayer's grounds of objection need not necessarily have good prospects of success. They merely need to be intelligible grounds of objection that are stated fully and in detail.[83] It must however show, as a matter of law, how such ground is relevant to the question of the correctness of the assessment, namely the calculation of the taxpayer's taxable income or net income, or the tax payable on that income or for the 2013-14 and later income years the total of the taxpayer's tax offset refunds.[84]

144. For example, the High Court held in *FC of T v. Dalco* 90 ATC 4088 that the term 'excessive' as it applies to an assessment under review[85] refers to the *amount* of the assessment and not to any unauthorised step in the process of calculating that amount.[86] That is, the amount of an assessment might not be excessive in fact, though the reasons which led to the assessment were erroneous. Therefore the taxpayer's grounds of objection need to be directed at challenging the substantive liability imposed by the relevant provisions in the taxation Acts which give rise to an assessment.

145. The Commissioner is duty-bound to assess the correct amount of a taxpayer's taxable income or net income (as the case may be), tax payable on that income (including nil amounts) and for the 2013-14 and later income years the total of the taxpayer's tax offset refunds notified under the assessment process. Where an assessment is challenged by an objection under Part IVC, the Commissioner must apply the law to the calculation of a taxpayer's substantive liability under the assessment. Thus, arguments about the application of the Commissioner's administrative policies, including the exercise of the Commissioner's powers of general administration, which have a bearing on whether the taxpayer is ultimately liable to pay the full liability as notified in an assessment (for example, in the course of a settlement of a taxation dispute), do not amount to a valid ground of objection against that assessment.

146. Although a taxpayer is not restricted to any particular form of words in stating the grounds of their objection against an assessment, vague or general challenges to an assessment will not qualify as valid objections. Without more, a statement, for example, that an assessment is wrong in fact and law, or is excessive, is not a statement of grounds fully and in detail.[87]

147. General letters of complaint against the taxation system are also not valid objections.

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[83] *Szajntop*, FCR at 323; ATC at 4312; ATR at 474.
[84] *Clark v. FC of T* [2007] FCA 1426 at paragraph [24].
[85] See paragraphs 14ZZK(a) and 14ZZO(a).
[86] *Dalco,* per Brennan J at ATC 4094.
[87] *Lancey's* case, ATD at 273.

Objection against a private ruling

148. A taxpayer to whom a private ruling applies may object against it in the manner set out in Part IVC if they are dissatisfied with it: subsection 359-60(1) of Schedule 1.[88]

149. As noted in paragraph 89 earlier, the reference to 'person' in subsection 14ZL(1) is a reference to natural persons, bodies corporate and bodies politic. Therefore, if a private ruling is issued to a partnership, it is the partners who can object against the ruling. This is because under the general law, a partnership is not a separate legal entity. Therefore, a partnership is not a 'person' for the purposes of Part IVC proceedings.

150. Where an assessment has issued to a taxpayer in respect of a year to which a private ruling relates, it is not possible to object against the private ruling (paragraph 359-60(3)(a) of Schedule 1). If this is the case, the taxpayer can only object against the assessment.

150A. If an objection decision has been made in relation to a private ruling then the right of the taxpayer to object against the relevant assessment relating to the matter ruled on is limited to a right to object on grounds that neither were, nor could have been, grounds for the taxation objection against the ruling.[88A] This avoids duplication of objections.

151. Where a private ruling covers a number of income years, the taxpayer is able to object against the ruling in respect of the income years for which the taxpayer has not yet been given an assessment.

Limitations on objection rights

Nil assessments and carry forward loss situations

152. The effect of subsections 175A(2) and 175A(3) of the ITAA 1936 is that taxpayers cannot object against a nil assessment unless they are seeking an increase in their liability or an increase in the total of the taxpayer's tax offset refunds.[88B]

153. The meaning of 'assessment' does not extend to the ascertainment of the amount of a tax loss. Taxpayers can only object against a tax loss in the year that they are able to deduct the loss. The deductibility of a tax loss is determined in the year that the taxpayer has income against which to offset the loss, in accordance with normal deduction principles.

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[88] Section 359-60 of Schedule 1 applies to things done on or after 1 January 2006.
[88A] See section 14ZVA.
[88B] The right to object against an assessment of the total of a taxpayer's tax offset refunds for an income year only applies in relation to assessments made on or after 1 July 2013 for the 2013-14 and later income years. As a transitional measure, a separate objection right has been introduced for taxpayers in relation to their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

Amended assessments

154. Section 14ZV provides that if an objection is made against an assessment that has been amended in any particular, the taxpayer's right to object against the amended assessment is limited to a right to object against alterations or additions in respect of, or matters relating to, that particular. The intent of section 14ZV is to limit the grounds of objection against an amended assessment to those which could not have been raised against the original assessment.

155. Taxpayers still retain their objection rights in respect of other particulars in the original assessment, subject to the time limits for lodging objections against original assessments discussed in paragraphs 118 to 120 above.

What is a 'particular'

156. What amounts to a 'particular' in the context of the limitation in section 14ZV has been judicially considered. The leading cases are *Federal Commissioner of Taxation v. Jackson* (1990) 27 FCR 1; 90 ATC 4990; (1990) 21 ATR 1012 (*Jackson*) and *Epov v. FC of T (No.2)* 2007 ATC 5009; (2007) 68 ATR 8 (*Epov*). In *Jackson*, the Full Federal Court considered the requirements of the predecessor provision[89] to section 14ZV in the context of amending assessments by relying on determinations under Part IVA of the ITAA 1936. In *Epov*, the Full Federal Court considered the operation of section 14ZV in the context of the Commissioner's power to amend an assessment under section 170 of the ITAA 1936.

157. Hill J, in delivering the leading judgment in *Jackson*, quoted with approval the Full Federal Court's judgment in *FC of T v. Offshore Oil N.L* 80 ATC 4457; (1980) 11 ATR 189 (per Deane, Franki and Lockhart JJ), which was a decision concerning the former wording in subsection 185(2) of the ITAA 1936, the predecessor provision to section 14ZV. Hill J observed at FCR 15; ATC 5001-2; ATR 1025:

> Lockhart J., with whose judgment Franki J. also expressed agreement, said at p.4466 that the words 'any particular' refer to 'the constituent elements in the assessment of taxable income, treating them as separate sources of liability'. In a passage of some significance, his Honour said at pp.4466-4467:
>
> > An amended assessment may not increase the amount of taxable income; but, by the process of amendment, change the constituent elements going to make up the reassessed taxable income. New sources of income may be introduced, new deductions allowed, old deductions previously allowed now disallowed or vice versa. The possibilities are numerous. In the result, the taxable income may be more or less than it was under the original assessment or remains the same.

[89] The predecessor provision, subsection 185(2) of the ITAA 1936, was worded in substantially the same terms as the current section 14ZV of the TAA.

158. Hill J went on to apply the term 'particular' in the context of the process by which a taxpayer's taxable income (and therefore the tax payable) is calculated:

> The process of calculation of taxable income involves commencing with assessable income and subtracting therefrom allowable deductions, not treating net amounts as assessable income.[90]

159. In *Epov*, the Full Federal Court re-iterated the well-established position that the phrase 'in any particular' means 'in some specific or definite respect':

> The courts have held the phrase 'in any particular' to mean 'in some specific or definite respect': *Hughes v. Phillips* (1948) 75 CLR 436 at 443 (per Dixon J). In other words if a taxpayer wished to object to an assessment, then he or she could do so. If they did not and the [Commissioner] served an amended assessment, the taxpayer's grounds for objection were limited to the specific items addressed in the amended assessment. The object of s 14ZV was to prevent a taxpayer treating the amended assessment as an assessment with unlimited rights of objection under Part IVC of the TAA….[91]

160. Therefore, a 'particular,' in the context of section 14ZV refers to a specific or definite constituent element in the assessment of the taxable income (or that there is no taxable income) or tax payable thereon (or that there is no tax payable). Such elements are treated as separate sources of liability and amount to a separate 'particular' for the purposes of section 14ZV. This is clear from the statement by Lockhart J in *FC of T v. Offshore Oil N.L* 80 ATC 4457 at 4466; (1980) 11 ATR 189 at 200, quoted with approval by Hill J in *Jackson*.

161. Further, where an amended assessment is issued as a result of the application of Part IVA of the ITAA 1936, and the amended assessment does not alter the amount of taxable income or tax payable, this still amounts to a change in the constituent element(s) in the assessment. Such an alteration is still regarded as a change in the 'particulars' of the assessment so as to attract fresh objection rights in respect of each changed element in the process of applying Part IVA of the ITAA 1936. See the decisions in *Jackson* and *Puzey v. Federal Commissioner of Taxation* (2003) 131 FCR 244; 2003 ATC 4782; (2003) 53 ATR 614.

162. So in effect, a 'particular' for the purposes of section 14ZV is any constituent element that has been added or altered in the amended assessment *in the process* of calculating a taxpayer's taxable income or tax payable, irrespective of whether this altered element ultimately leads to a change in the amount of taxable income or tax payable. Each of the constituent elements in this process should be viewed as representing a separate source of liability, the sum of which make up the whole of the taxpayer's assessment, being an amount of taxable income (or that there is no taxable income) and the tax payable on that taxable income (or that there is no tax payable).

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[90] *Jackson*, at FCR 17; ATC 5003; ATR 1027.
[91] *Epov*, at ATC 5015; ATR 17.

What are matters 'relating to' a particular

163. Under section 14ZV, a person dissatisfied with a particular in an amended assessment may also object against matters 'relating to' that particular.

164. The phrase 'relating to' is synonymous with phrases such as 'connected with' and 'in respect of'. In order for something to be 'related to' another thing, there needs to be more than a mere connection between the two things. The connection or relationship needs to be a relevant one. What is 'relevant' depends on the statutory purpose and context in which the phrase appears.

165. The Commissioner considers that in the context of section 14ZV, the requisite connection needs to be between the particular that has been amended and matters that relevantly relate to this specific particular, to the extent that those matters can be regarded as being bound up with, or involved in, the particular that has been amended. This means that a taxpayer who is dissatisfied with the inclusion of additional income in the amended assessment could object against the amended assessment on the basis that they be allowed a corresponding deduction for the expenses incurred in deriving that additional income. This deduction could exceed the amount of additional income included in the amended assessment.[92]

166. However, these 'related' matters could not have been featured in the original assessment. If they were in the original assessment and remained unaltered by the amended assessment, the taxpayer can only challenge these in an objection against the original assessment.[93]

167. The following example illustrates the operation of section 14ZV:

Example 2 – Objection against an amended assessment

168. *The Commissioner issued an original assessment to Tania including interest income of $200. Tania's claim of a deduction for bank fees in relation to that interest income was disallowed. Later the Commissioner issued an amended assessment to Tania including additional interest income of $130. Tania may object against the amended assessment only on grounds relating to that additional interest income of $130.*

[92] Refer to Examples 1 and 2 in the Explanatory Memorandum to Clause 79 of the Taxation Board of Review (Transfer of Jurisdiction) Bill 1986 which introduced the former equivalent to section 14ZV, namely subsection 185(2) of the ITAA 1936.
[93] See *Case 1/2007* 2007 ATC 101.

169. *Tania retains her right to object separately against the original assessment on grounds that relate to the interest income of $200 or on grounds that relate to other particulars of the original assessment that were not the subject of the amended assessment. For example, if Tania is still within the time limits for lodging an objection against her original assessment, she may lodge a separate objection against her original assessment concerning her entitlement to a deduction for bank fees which was previously denied by the Commissioner in her original assessment.*

170. *Tania objects against the amended assessment on the grounds that the additional interest income should only be $50 not $130 and that she is entitled to a deduction of $20 for the bank fees paid in relation to that additional interest income. The Commissioner allows the objection in part and issues a second amended assessment showing the interest income reduced to $50 but disallowing the $20 deduction for the bank fees.*

171. *Tania cannot object against the deduction decision in the second amended assessment because the Commissioner has decided the objection on this 'particular' and is now* functus officio*. If she is dissatisfied with this decision, she may seek a review of the decision under section 14ZZ. As she is still within the time limit to do so, she also objects to her original assessment on the grounds that the Commissioner should have allowed the deduction of a similar kind in her original assessment.*

Private rulings

172. Under section 14ZVA, a taxpayer affected by a private ruling where an assessment has issued in respect of the scheme[94] covered by the ruling cannot object against the private ruling but must lodge an objection against the assessment.[95]

173. However, section 14ZVA imposes a further limitation on objection rights against an assessment where the assessment reflects the application of a private ruling against which the taxpayer has previously objected. In such a case, the taxpayer is limited to a right to object against the assessment on grounds that neither were, nor could have been, grounds for objecting against the private ruling.

174. To the extent to which an assessment:

- relates to facts that are materially different from those dealt with in the private ruling; or
- deals with the application of provisions not dealt with in the private ruling (for example, the application of Part IVA of the ITAA 1936)

[94] The term 'scheme' is used in the context of the private rulings system in Division 359 of Schedule 1 and is not intended to refer to tax avoidance schemes.
[95] See paragraph 359-60(3)(a) of Schedule 1.

the limitation imposed on the taxpayer's right to object against the assessment by section 14ZVA of the TAA does not apply.

Multiple objections against an assessment

175. Section 175A of the ITAA 1936 makes no express limitation on the number of objections that can be lodged against an assessment. It is still the case that, as stated at paragraph 33 of TR 96/12, the question of multiple objections against an assessment has not been considered directly or conclusively by any judicial authority.

176. At paragraph 33 of TR 96/12 the Commissioner ruled that taxpayers could object against an assessment as many times as necessary during the limited period for lodging an objection in order to arrive at the correct tax position. Taxpayers could lodge multiple objections in relation to the same particular in an assessment, even if the Commissioner had previously decided the objection in relation to that particular. Therefore the Commissioner could make more than one objection decision in relation to the same particular.

177. At paragraphs 42 to 44 of TR 96/12 two alternative views were discussed, namely:

- that a single objection against an assessment completely exhausts the taxpayer's right to object against that assessment; and
- that taxpayers have the right to lodge multiple objections against an assessment but not in relation to the same issue.

178. The focus of the discussion about multiple objections against assessments at paragraphs 32 to 44 of TR 96/12 was on the right of taxpayers to object against an assessment. However, the limits on the Commissioner's power to make an objection decision also need to be taken into account.

179. Since TR 96/12 issued, there has been further judicial consideration of the limits on the powers of administrative decision makers to remake a decision under a statute; see for example *Minister for Immigration and Ethnic Affairs v. Bhardwaj* (2002) 209 CLR 597; (2002) 187 ALR 117; [2002] HCA 11, *Evans v. Superannuation Tribunal* (2002) 125 FCR 239, *Kabourakis v. The Medical Practitioners Board of Victoria* [2006] VSCA 301, *McGrory v. FC of T* [2004] AATA 609 and *The Taxpayer v. Commissioner of Taxation* [2006] AATA 84.

180. Having regard to these judicial developments, the Commissioner now considers it necessary to distinguish the legal position of multiple objections *before* an objection decision is made from the legal position *after* an objection decision is made.

Multiple objections before an objection decision is made

181. Before an objection decision is made about an element of, or a particular in, an assessment, taxpayers may lodge as many objections as they wish, up to the moment when the Commissioner makes an objection decision under section 14ZY. The Commissioner will deal with all these objections together and make a single objection decision about that element or particular.[96]

Multiple objections after an objection decision is made

182. After an objection decision is made about some element or particular in an assessment, a taxpayer may lodge further objections against the same assessment, but not about the same particular. In other words, a taxpayer can only object once in relation to any particular in an assessment. This is because the statutory scheme of Part IVC is such that the Commissioner is *functus officio*[97] once an objection decision is made under section 14ZY concerning an objection against some element, or particular, of an assessment.

The functus officio doctrine and the scheme of Part IVC

183. There is no general principle or presumption of administrative law that once administrative decision makers have made their decisions they are *functus officio*.[98] For example, subsection 33(1) of the AIA 1901 enables an administrative decision maker, such as the Commissioner, to exercise a power under an enactment from time to time as occasion requires, unless there is a contrary intention in the relevant statute. The question then is whether the relevant statute under which the decision maker was acting manifests a contrary intention to allowing a reconsideration of an earlier decision.

184. The operation of subsection 33(1) of the AIA 1901 was considered by the Full Federal Court in *Minister for Immigration, Local Government and Ethnic Affairs v. Kurtovic* [1990] FCA 22; (1990) 21 FCR 193 (*Kurtovic*).[99] Justice Gummow made the following observations at FCA [19]; FCR 211:

> But in any given case, a discretionary power reposed by statute in the decision maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or

[96] As to the effect of an objection decision refer to paragraphs 207 to 210 below.
[97] The *functus officio* doctrine provides that a person who is vested with decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This doctrine is subject to the statute under which the decision is made: *Minister for Immigration and Ethnic Affairs v. Bhardwaj* (2002) 209 CLR 597; (2002) 187 ALR 117; [2002] HCA 11 (*Bhardwaj*) at CLR 602-603 per Gleeson CJ.
[98] ibid.
[99] In *Kurtovic*, a previous deportation order had been revoked, and the Minister made a new deportation order. The Full Federal Court found that the relevant statute did not demonstrate a contrary intention concerning the Minister's discretionary power to make a deportation order.

> representations in question, treating them as a substantive exercise of power. The result is that when the decision maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be *ultra vires*. The matter is one of interpretation of the statute conferring the particular power in issue.

185. Therefore it is necessary in each case to interpret the extent of the statutory power conferred on the decision maker and determine whether this includes a power to reconsider an earlier decision.

186. The scheme of Part IVC suggests that the Commissioner's power to make an objection decision under section 14ZY is to be used only once. Firstly, there is no express provision empowering the Commissioner to reconsider an objection decision once that decision has been made. Secondly, the elaborate system of review in Part IVC allows taxpayers who are dissatisfied with objection decisions to apply to the AAT for review of, or to appeal to the Federal Court against, those decisions. This is a significant factor against implying a power to reconsider objection decisions. Thirdly, the requirements of good administration and the need for taxpayers affected by objection decisions to know where they stand mean that finality is a powerful consideration in determining whether the power to decide an objection can be exercised more than once.[100] These factors lead to the conclusion that the scheme of Part IVC demonstrates a contrary intention to the operation of subsection 33(1) of the AIA in relation to the Commissioner's power to make objection decisions.

187. Further, the Commissioner's amendment powers in section 170 of the ITAA 1936 permit the amendment of the same particular multiple times within the limited amendment period.[101] The amendment powers are distinct from the Commissioner's ability to decide an objection under section 14ZY of the TAA. The amendment powers also evidence a contrary intention to the operation of subsection 33(1) of the AIA to permit reconsideration of an objection decision.

188. Thus, the Commissioner is *functus officio* once an objection decision is made under subsection 14ZY(1) of the TAA, and cannot reconsider the objection on the same particular.[102] Taxpayers who are further dissatisfied with the objection decision must seek redress before the AAT or the Federal Court in accordance with the requirements in section 14ZZ of the TAA. This is the effect of the statutory scheme governing objections against income tax assessments and their subsequent review as provided for in section 175A of the ITAA 1936 and Part IVC of the TAA.[103]

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[100] *Bhardwaj* at CLR 603 per Gleeson J.

[101] See items 1 to 4 in the table in subsection 170(1) of the ITAA 1936 which sets the time limits for amending original assessments, and subsection 170(3) of the ITAA 1936 for amending amended assessments. These are commonly referred to as the 'limited amendment period'.

[102] In a case involving an analogous review mechanism in section 344 of the *Superannuation Industry (Supervision) Act 1993,* the AAT held that the

189. However, where an objection decision has been made in relation to a particular in an original assessment a taxpayer may object against that assessment in relation to a different particular. This is because the Commissioner is *functus officio* only in respect of the particular that was the subject of the objection decision.[104] What amounts to a 'particular' has been considered in paragraphs 156 to 162 above, and applies in this context.

Example 3 – multiple objections against a single element or particular in an assessment

190. *Before lodging her 2007-08 income tax return, Rajitha rang the ATO and was told that she could not claim a deduction for her home office expenses, including the full cost of a computer. She lodged her return without claiming the deduction and an income tax assessment for the 2007-08 income year was issued accordingly.*

191. *Later Rajitha read an article in a newspaper and concluded that people in her situation are entitled to claim a deduction for their home office expenses. In September 2009, Rajitha lodged an objection against her 2007-08 income tax assessment concerning her entitlement to a deduction for home office expenses.*

192. *In October 2009, Rajitha became aware of a recent court decision where a person in a similar situation was held to be entitled to a deduction for home office expenses. Rajitha promptly wrote to the ATO, concerning her objection, adding as a ground of the objection that the outcome of the court decision equally applied to her situation.*

Commissioner did not have the power to reconsider his decision where the taxpayer had a right to seek a review of that decision by the AAT. See *The Taxpayer v. Commissioner of Taxation* [2006] AATA 84.

[103] Similarly, in cases such as *Export Development Grants Board v. EMI (Australia) Ltd* (1985) 9 FCR 269, *Evans v. Superannuation Tribunal* (2002) 125 FCR 239, *Kabourakis v. The Medical Practitioners Board of Victoria* [2006] VSCA 301 and *McGrory v. FC of T* [2004] AATA 609 at [31], the courts have held that where the relevant statute provided comprehensive review and appeal powers concerning decisions under that enactment, this suggests an intention contrary to the presumption embodied in subsection 33(1) of the AIA. It has also been noted that a statutory right of review might disclose an intention inconsistent even with a right of self-correction: *Evans v. Superannuation Tribunal* (2002) 125 FCR 239 at 247.

[104] The Commissioner may nevertheless take a second look at the relevant particular and determine whether it may be appropriate to amend the assessment in accordance with section 170 of the ITAA 1936 – see item 6 in the table in subsection 170(1) of the ITAA 1936. This is consistent with the approach set out in Corporate Management Practice Statement PS CM 2007/01 *Respecting clients' rights of review* and Corporate Management Procedure and Instruction CMPI 2007/01/02 *Handling requests for review*.

193. *The Commissioner subsequently issued an objection decision allowing in part Rajitha's objection against her 2007-08 assessment concerning the deduction for home office expenses. The objection decision disallowed Rajitha's claim under section 8-1 of the ITAA 1997 for a deduction for the full cost of the computer she purchased. An amended assessment for the 2007-08 income year was issued accordingly.*

194. *Rajitha has exhausted her objection rights in relation to her 2007-08 assessment in respect of her claim for a deduction for the full cost of the computer. This is because the Commissioner is* functus officio *in respect of this particular of Rajitha's 2007-08 assessment and cannot remake the objection decision. However, if Rajitha is dissatisfied with the objection decision concerning the deduction for the cost of the computer, she can apply for a review of the decision by the AAT or appeal the decision to the Federal Court under section 14ZZ.*

195. *Rajitha still has objection rights in relation to other elements or particulars concerning her original 2007-08 assessment. For example, she may wish to dispute the calculation of her taxable income on the basis that certain amounts should be exempt. She may want to challenge the calculation of the Medicare levy, on the basis that her taxable income should be lower than shown on the notice of assessment. Each of these aspects represents a different issue or particular in Rajitha's 2007-08 assessment, attracting separate objection rights up until the point at which the Commissioner makes an objection decision on that issue.*

Withdrawal of an objection

196. The Commissioner is under no obligation to make a decision on an objection after the taxpayer has notified the withdrawal of the objection. Sweeney J in *Higgs v. Federal Commissioner of Taxation* (1984) 2 FCR 556; 84 ATC 4680; (1984) 15 ATR 1055 held that once the Commissioner is notified of a withdrawal, the objection in question is considered to no longer exist. Sweeney J observed at FCR 559; ATC 4682; ATR 1058:

> While there is no express provision in the Assessment Act dealing with the withdrawal of objections, it would be absurd to read [former equivalent to section 14ZY] as requiring the respondent to consider an objection, and either disallow it, or allow it wholly or in part, and serve the taxpayer with written notice of his decision, when the taxpayer had communicated to him that the objection was withdrawn (see *Dymocks Book Arcade Ltd v FC of T (1936)* 3 ATD 373 at pp.373-374 per McTiernan J.).
>
> In my opinion, the applicant was at liberty to withdraw his objections and communicate that withdrawal to the respondent (see *Boal Quay Wharfingers Ltd v. King Lynn Conservancy Board* (1971) 3 All E.R. 597).
>
> When he did so, there was no occasion for the respondent to make any decision because **there were then no objections on foot.** His

> acknowledgement of receipt of the letter of withdrawal did not amount to a decision of any kind. [emphasis added]

197. An objection on the same issue(s) may be lodged again at a later time, provided the objection is within the time limits stipulated in section 14ZW[105] or the Commissioner makes a decision to treat a late objection as if it had been lodged within time.[106]

Requirement to make an objection decision

198. If an objection has been lodged with the Commissioner within the required period, the Commissioner must decide under subsection 14ZY(1) whether to:

- allow it wholly;
- allow it in part; or
- disallow it.

199. The Commissioner's decision is called an 'objection decision' (subsection 14ZY(2)). In addition, the Commissioner will generally provide reasons for the objection decision and inform taxpayers of their external review rights if they are dissatisfied with the decision.[106A] The notice will generally include reasons for the objection decision and inform taxpayers of their external review rights if they are dissatisfied with the decision.

200. If the Commissioner does not make an objection decision within a certain period, a taxpayer may give the Commissioner a written notice requiring the Commissioner to make an objection decision (subsection 14ZYA(2)). The notice may be given if the Commissioner has not made a decision within:

- the end of the period of 60 days (the original 60-day period) after the day on which the objection was lodged, or after the day on which a decision is made to extend the time for lodging the objection, whichever is the later; or
- the end of the period of 60 days after the Commissioner receives information requested in a written notice served on the taxpayer within the original 60-day period.

Section 14ZYA only applies if the taxpayer has lodged a valid objection: *Case 32/97* 97 ATC 353; (1997) 36 ATR 1063.

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[105] See paragraphs 118 to 129 above.
[106] See paragraphs 130 to 134 above.
[106A] Generally in practice, the reasons for the decision and information on review rights are provided to the taxpayer with the notice of the objection decision.

201. The Commissioner is deemed to have made an objection decision disallowing an objection if the Commissioner has not made an objection decision within 60 days after being given a notice by the taxpayer: subsection 14ZYA(3). The Commissioner is required to serve a written notice of this deemed decision on the taxpayer under subsection 14ZY(3).

Matters the Commissioner considers when making an objection decision

202. In deciding an objection, the Commissioner is not limited to only considering the grounds raised by the taxpayer in their objection. The Commissioner can take into account other matters, including those that were not directly raised by the taxpayer and that are relevant for the purposes of arriving at the correct tax position in the relevant assessment the subject of the taxpayer's objection: *Lighthouse Philatelics Pty Limited v. FC of T* 91 ATC 4942 (*Lighthouse Philatelics)*; *Fletcher & Ors v. FC of T* 88 ATC 4834 (*Fletcher*); *Federal Commissioner of Taxation v. ANZ Savings Bank Ltd* (1994) 181 CLR 466; 94 ATC 4844; (1994) ATR 11 (*ANZ Bank*).

203. In *Lighthouse Philatelics*, the Full Federal Court made the following observations regarding the scope of the Commissioner's powers when considering an objection (at ATC 4948):

> … The Commissioner cannot be said to be confined in the course of considering the taxpayer's 'objection' to the matters raised by the taxpayer in that 'objection'. He has an obligation to administer the Act and may determine to allow the objection for grounds totally unrelated to those raised by the taxpayer, if that be the correct course, just as he could form the view, based on a reconsideration of the matter, that the assessment should be confirmed for reasons which he had not previously considered. His task is to ensure that the correct amount of tax is paid, 'not a penny more, not a penny less'.

204. Similarly, in relation to the former objection and appeal provisions found in Part V of the ITAA 1936,[107] the Full Federal Court in *Fletcher* observed (at ATC 4845-4846):

> Section 185 provides for the making of an objection by a 'taxpayer dissatisfied with any assessment''. Thereafter, by virtue of sec. 186, the Commissioner incurs a duty to consider the objection, to disallow it or to allow it either wholly or in part, and to notify the taxpayer of his decision. In considering the objection, the question for the Commissioner is the correctness of the original decision, that question being considered in the light of the terms of the objection but taking account of all the information then available to the Commissioner regarding the amount of the taxable income of the taxpayer and the amount of the tax payable thereon. It may well happen, for example, that, between the date of the original assessment and the date of determination of an objection, new information comes to the Commissioner or that there is some

[107] These now appear in much the same form in sections 175A of the ITAA 1936 and Part IVC of the TAA.

> change in the relevant law. Subject to the limitations imposed by sec. 170 of the Act, these are matters properly to be taken into consideration by the Commissioner, in any case, in determining whether to issue an amended assessment. As the issue of an amended assessment is a possible result of the consideration by the Commissioner of an objection to an assessment, it must be appropriate for the Commissioner to take account of such matters in determining an objection to an assessment.

205. In *ANZ Bank*, the High Court agreed with the Commissioner's argument that if the Commissioner's basis for determining the assessable income of a taxpayer is shown to be wrong because of the inclusion of a particular amount, the basis on which the Commissioner determined the deductions against that income to arrive at the taxpayer's taxable income can also be reviewed. This is so even though the taxpayer did not object against the deduction.

206. Thus, the Commissioner, in the process of making an objection decision, may expand the scope of the objection to consider grounds not raised by the taxpayer, but which are nonetheless relevant for the purpose of arriving at the correct objection decision against the assessment for the year in question.[107A] The Commissioner should explain, in the objection decision, how these additional grounds are relevant to determining the objection in order to support the correct assessment. The taxpayer may seek a review of the entirety of the objection decision under section 14ZZ, even if they are dissatisfied with only part of the decision, such as the additional grounds in the decision not featured in their objection.

Effect of an objection decision

207. Once the Commissioner has made an objection decision, the objection process is completed, to the extent that the Commissioner is concerned.

208. There is no express provision in the ITAA 1936, ITAA 1997 or the TAA empowering the Commissioner to reconsider an objection decision once it is made. As stated in paragraphs 183 to188 above, the statutory scheme of Part IVC is such that the Commissioner is *functus officio*[108] once an objection decision in relation to a particular in an assessment is made under section 14ZY.

209. Thereafter, taxpayers who are dissatisfied with an objection decision must seek redress before the AAT or the Federal Court under section 14ZZ discussed in paragraphs 222 to 230 below.

[107A] See paragraphs 217 and 218 for an explanation of the rules that apply once an objection decision has been made.

[108] The *functus officio* doctrine provides that a person who is vested with decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This doctrine is subject to the statute under which the decision is made. See *Bhardwaj* at CLR 602-603 per Gleeson CJ.

210. An objection decision made in relation to an assessment for a particular income year does not create a precedent for subsequent income years.[109] If taxpayers require certainty in respect of subsequent income years, they should apply for a private ruling. Taxation Ruling TR 2006/11 *Income tax, fringe benefits tax and product grants and benefits: Private Rulings* discusses the process for obtaining a private ruling.

Objection decision is distinct from amending an assessment as a result of an objection

211. Under paragraph (b) of item 6 of the table in subsection 170(1) of the ITAA 1936, the Commissioner may amend an assessment at any time as a result of an objection made by a taxpayer. This power is distinct from the power to make an objection decision even though an amendment under this paragraph involves the implementation of an objection decision.

212. For example, in *Case W119* 89 ATC 944, one of the issues was the power of the AAT to increase, or to direct the increase of, assessments as a consequence of determining the correctness of the assessments. The AAT, in concluding that the Commissioner's power to amend an assessment *can* arise as a result of considering an objection, clearly noted at ATC 950 that such an amendment is brought about by reason of the decision of the Commissioner, and is not brought into existence by reason of any decision on the objection to wholly allow, partly allow or to disallow the objection. The AAT referred to the Full Federal Court's decision in *Fletcher* where the Full Federal Court observed that the issuing of an amended assessment is a possible result of the Commissioner considering an objection to an assessment.[110]

Amendment of assessment before an objection decision

213. Where the Commissioner is within the limited amendment period, applying to the original assessment[111] a taxpayer's assessment may be amended at any time within this limited amendment period to arrive at the taxpayer's correct tax position for a given year.

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[109] *Heavy Minerals Pty Ltd v. Federal Commissioner of Taxation* (1966) 115 CLR 512; (1966) 14 ATD 282.
[110] *Fletcher,* at ATC 4845 – 4846.
[111] This is the amendment periods for original assessments referred to in items 1 to 4 of the table in subsection 170(1) of the ITAA 1936.

214. During a limited amendment period, the Commissioner is not bound to amend an assessment solely on the grounds raised by an objection. The Commissioner can make such alterations in, or additions, to the relevant assessments as necessary to correct the assessment. This process of amendment includes the addition of new items of income or the allowance of deductions not previously allowed: see *Jackson* per Hill J at FCR 15; ATC 5001; ATR 1025, cited with approval by the Full Federal Court in *Epov* at ATC 5015; ATR 17.

215. Further, in *Epov* at ATC 5015; ATR 17 it was held that the Commissioner's power of amendment during a limited amendment period was not stayed or otherwise rendered inoperable if a taxpayer institutes appeal proceedings against an objection decision under Part IVC.[112] Although the proceedings in *Epov* were Court proceedings, the Commissioner considers that the same principle applies during the period after an objection is lodged and before an objection decision is made.[113]

Amendment of assessment after an objection decision

216. Under paragraph (b) of item 6 of the table in subsection 170(1) of the ITAA 1936, the Commissioner may amend an assessment at any time as a result of an objection made by a taxpayer.

Objection decision outside the limited amendment period

217. Where an objection decision is made outside the limited amendment period, the Commissioner may amend the assessment in respect of the particulars of the assessment that were the subject of the objection.[114] The scope of paragraph (b) of item 6 of the table in subsection 170(1) of the ITAA 1936 is broad enough to support an amendment outside the limited amendment period in order to correct an error in the assessment brought about by giving effect to an objection decision.

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[112] This has been applied by the AAT in *YWXJ v. Commissioner of Taxation* [2010] AATA 326.

[113] In *Fabry v. Federal Commissioner of Taxation* (2003) 132 FCR 239; 2003 ATC 4885; (2003) 54 ATR 64 (*Fabry*), the Federal Court held that the Commissioner's power to amend assessments under the ITAA 1936 should not be read down in light of section 26 of the *Administrative Appeals Tribunal Act 1975 (*AAT Act*).* Section 26 of the AAT Act restricts the power of decision makers to alter their decision after an application for review concerning that decision has been made to the AAT. Thus, to the extent that section 26 of the AAT Act and subsection 170(1) of the ITAA 1936 are in conflict, section 26 of the AAT Act must give way to subsection 170(1) of the ITAA 1936.

[114] See for example the majority decision by the Full High Court in *FCT v Australia and New Zealand Savings Bank Limited* (1994) 181 CLR 466 at 481; 94 ATC 4844 at 4851; (1994) 29 ATR 11 at 21. The majority noted that the Commissioner cannot use the former equivalent to item 6 in the table in subsection 170(1) of the ITAA 1936 for original assessments. Nor can the Commissioner use the former equivalent to section 14ZZQ to effect amendments that are beyond the scope of

218. The Commissioner may consider grounds in addition to those relied on by the taxpayer in its objection, but which are nonetheless relevant in making the correct objection decision. The Commissioner may amend the relevant assessment to give effect to the entire objection decision provided the amendment relates to the Commissioner's acceptance of at least one of the grounds relied on by the taxpayer in its objection.[115]

Objection decision within the limited amendment period

219. Where an objection decision is made within the limited amendment period applying to the original assessment, the Commissioner continues to have the power to amend the assessment about matters unrelated to the objection until the end of that period.

Application of amendments as a result of an objection decision

220. Any amendment under paragraph (b) of item 6 in the table in subsection 170(1) of the ITAA 1936 only applies to the taxpayer whose issue was the subject of the objection. Likewise, the amendment only applies to the income year(s) the subject of the objection.

221. Other taxpayers who have a similar issue can request an amendment to their assessment (subject to the time limits). Alternatively, they can lodge an objection against the assessment. If the taxpayer is out of time for lodging an amendment or an objection, they may lodge an objection together with a written request asking the Commissioner to deal with the objection as if it had been lodged within time.[116]

Review of, or appeal against, an objection decision

222. Under section 14ZZ, if a person is dissatisfied with the Commissioner's objection decision the person may either apply to the AAT for review of the decision or appeal to the Federal Court against the decision. Under sections 14ZZC and 14ZZN respectively, an application to the AAT or an appeal to the Federal Court must be lodged within 60 days after the person making the application or appealing is served with a notice of the objection decision.[117]

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implementing the decision of the AAT or a Court on a review or appeal of an objection decision.

[115] *Boyded Industries Pty Ltd v. FCT* 85 ATC 4551 at ATC 4554-5.

[116] Refer to paragraphs 130 to 134 for details about late lodgment of objections.

[117] See paragraphs 199 and 201 above concerning notice of an objection decision.

223. The person dissatisfied with an objection decision under section 14ZZ of the TAA is usually the taxpayer who was dissatisfied with the assessment for the purposes of objecting against the assessment under subsection 175A(1) of the ITAA 1936.[118] If a taxpayer is bankrupt, it is the trustee in bankruptcy who has standing to appeal against, or apply for review of the objection decision.[119]

224. Similarly, where a company is in liquidation, liquidators (acting on behalf of the company) have standing to appeal against, or apply for review of the objection decision.[120] However, a beneficiary of a trust, where the corporate trustee has gone into liquidation, may only appeal against an objection decision for an assessment of the corporate trustee in special or exceptional circumstances.[121]

225. If the Commissioner purports to make an objection decision where the taxpayer had no right to object, the AAT has no jurisdiction to review that decision.[122]

226. The taxpayer is limited to the grounds stated in the taxation objection to which the decision relates unless the AAT or the Court (as the case may be) orders otherwise: paragraphs 14ZZK(a) and 14ZZO(a) respectively.[122A]

227. It is not necessary for the AAT to make a formal order under paragraph 14ZZK(a) permitting the scope of the review to be enlarged to include an alternative argument.[123]

228. In *Federal Commissioner of Taxation v. ANZ Savings Bank Limited* (1994) 181 CLR 466 at 476; 94 ATC 4844 at 4848; (1994) 29 ATR 11 at 17 the High Court held that an appeal to the Federal Court against an objection decision relates to the objection decision in its entirety albeit that a taxpayer is dissatisfied with only part of that decision. Further the Court noted that the Commissioner is not limited to the grounds raised in the objection decision to support the assessment at the appeal stage (at CLR 479; ATC 4850; ATR 19):

> In several decisions it has been held that the Commissioner may support the amount of the assessment on a ground not taken into account at the time the assessment was made. [Footnote reference: See, for instance, FC of T v. Wade (1951) 9 ATD 337; (1951) 84 CLR 105. See also FC of T v. Reynolds 81 ATC 4131; (1981) 34

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[118] Subsection 14ZL(1); *McCallum*. See paragraphs 91 to 99 concerning who is a person dissatisfied.
[119] Refer to paragraphs 88 to 109 above about who can object.
[120] *Pearson & Ors v. FC of T & Anor* 2001 ATC 4104; (2001) 46 ATR 367. See paragraphs 88 to 109 above about who can object.
[121] *Pearson & Ors v. Federal Commissioner of Taxation & Anor (No.2)* (2001) 116 FCR 357; 2001 ATC 4635; (2001) 48 ATR 117.
[122] *Case 21/94* 94 ATC 222; *Case* 25/*96* 96 ATC 311.
[122A] Note also the decision in *Healy v. FC of T* 2013 ATC 10-311; [2013] AATA 281 where the AAT held at paragraph 45 that it is not bound by the grounds on which the decision maker reaches his decision. The AAT is required to reach the correct and/or preferable decision and is not constrained by the decision-maker's reasoning. In this case, the AAT also held (at paragraph 44) that its jurisdiction was enlivened by the objection decision itself, rather than the reasons attached to that decision.
[123] *Samba v. FC of T* 2005 ATC 4526; (2005) 59 ATR 747.

> ALR 463.] The Commissioner will be required to give proper notice to the taxpayer and, where appropriate, will be directed to furnish particulars. But, as Kitto J. observed in FC of T v. Wade: [Footnote reference: (1951) 9 ATD at 344; (1951) 84 CLR at 117.] ``No conduct on the part of the commissioner could operate as an estoppel against the operation of the Act.''

229. When an objection decision is appealed directly to the Federal Court, the Court is not limited to considering the appeal against an objection decision only on administrative law grounds. In *Kajewski & Ors v. FC of T* 2003 ATC 4375 at 4378 – 4379; (2003) 52 ATR 455 at 459, the appeal involved questions of both fact and law and the taxpayer was entitled to challenge the entire factual and legal basis upon which the amended assessment was issued, subject only to the limitation in paragraph 14ZZO(a) referred to above in paragraph 226.

230. The taxpayer has the burden of proving to the AAT or the Federal Court (as the case may be) that an assessment is excessive. For assessments made on or after 1 July 2013 in relation to the 2013-14 and later income years, the taxpayer has the burden of proving that the assessment is excessive or where the taxpayer contends that the assessment should be higher, that the assessment is incorrect. In all cases, the taxpayer must also prove what the correct amount of the assessment is.[123A]

When a decision becomes final

231. A decision of the AAT becomes final where no appeal to the Federal Court is lodged against the decision.[124] An order of the Federal Court constituted by a single Judge becomes final where no appeal to the Full Federal Court is lodged.[125] Where no application for special leave to appeal to the High Court is made against an order by the Full Federal Court, the Full Federal Court's order becomes final.[126] Similarly, where an application for special leave to the High Court is refused, the order of the Full Federal Court becomes final.

232. In these situations the taxpayer will not be able to object again in respect of the matters dealt with by the AAT or the Court. The doctrine of *res judicata*[127] prevents a taxpayer from raising an issue already decided judicially.

[123A] Paragraphs 14ZZK(b) and 14ZZO(b) respectively. See also paragraphs 7.36 to 7.38 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013. The High Court's decision in *Federal Commissioner of Taxation v. Dalco* 90 ATC 4088 at 4092 and 4093 confirms that the taxpayer must prove, not just that the assessment is too high, but what the correct amount of the assessment ought to be.

[124] Subsection 14ZZL(2).

[125] Paragraph 14ZZQ(2)(a).

[126] Paragraph 14ZZQ(2)(b).

[127] The doctrine of *res judicata* means that an issue that has been finally decided by a court cannot be reconsidered, either in the same court or in a different court.

233. Under paragraph (a) of item 6 of the table in subsection 170(1) of the ITAA 1936, the Commissioner may amend an assessment at any time to give effect to a decision on a review by the AAT or appeal to the Federal Court.

Appendix 2 – Definition of Assessment

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

234. Subsection 6(1) of the ITAA 1936 defines 'assessment' as:

(a) the ascertainment:

(i) of the amount of taxable income (or that there is no taxable income); and

(ii) of the tax payable on that taxable income (or that no tax is payable); and

(iii) of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or

Note 1: A taxpayer does not have a taxable income if the taxpayer's deductions equal or exceed the taxpayer's assessable income: see subsection 4-15(1) of the *Income Tax Assessment Act 1997*.

Note 2: A taxpayer may have no tax payable on an amount of taxable income if that income is below the tax-free threshold or if the taxpayer's tax offsets reduce the taxpayer's basic income liability to nil.

(b) for a taxpayer that is the trustee of a unit trust that is a corporate unit trust (within the meaning of section 102J) – the ascertainment:

(i) of the net income of the trust (within the meaning of section 102D) (or that there is no net income); and

(ii) of the tax payable on that net income (or that no tax is payable); and

(iii) of the total of the taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or

(c) for a taxpayer that is the trustee of a unit trust that is a public trading trust (within the meaning of section 102R) – the ascertainment:

(i) of the net income of the trust (within the meaning of section 102M) (or that there is no net income); and

(ii) of the tax payable on that net income (or that no tax is payable); and

(iii) of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or

(d) for a taxpayer that is the trustee of a trust estate (other than a trustee to which paragraph (b) or (c) applies or the trustee of a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a

non-complying approved deposit fund or a pooled superannuation trust) – the ascertainment:

(i) of so much of the net income of the trust estate as is net income in respect of which the trustee is liable to pay tax (or that there is no net income in respect of which the trustee is so liable); and

(ii) of the tax payable on that net income (or that no tax is payable); and

(iii) of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or

(e) the ascertainment of the amount of interest payable under section 102AAM (about distributions from non-resident trust estates); or

(f) the ascertainment of an amount of additional tax under section 128TE; or

(g) the ascertainment of an amount of tax under section 159ZZZH; or

(h) the ascertainment of the amount of income tax payable on the no-TFN contributions income as defined by section 295-610 of the *Income Tax Assessment Act 1997* (or that no tax is payable); or

(i) the ascertainment of an amount of FHSA misuse tax (within the meaning of the *Income Tax Assessment Act 1997*) (or that no tax is payable).

This definition applies in relation to assessments made on or after 1 July 2013 for the 2013-14 income year or later income years.

Appendix 3 – Detailed contents list

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IT 2353, TR 2006/10; TR 2006/11, MT 2012/3

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TR 96/12

Subject references:

- amendment of assessments
- income tax
- objections
- tax disputes

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