KEYNOTE SPEECH

TAX LITIGATION IN THE ADMINISTRATIVE APPEALS TRIBUNAL

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I INTRODUCTION

In Australia at least, tax litigation is often a genuinely unique creature that is quite distinct from other forms of civil and administrative litigation. Naturally, there are similarities that exist between these different forms of litigation, however, given the myriad of fundamental differences, taxation litigation merits its own study.

This paper outlines the procedures by which litigation matters commence (in Australia) and are otherwise conducted. While the paper primarily focuses on those procedures that occur at first instance, some brief comments concerning the appellate process are also provided. The paper concludes with additional commentary on the relatively new Small Business Taxation Division in the Administrative Appeals Tribunal ('AAT'). It should be noted that all comments in this paper relate to the process as it is conducted in Australia.

Whilst much of the following material is descriptive, the main purpose of this paper is to highlight key points of interest that often present as areas of dispute and, consequently, would benefit from further academic consideration as a means to guide and inform relevant decision-makers.[1]

II TAX LITIGATION IN AUSTRALIA

The primary means by which tax litigation is governed is contained in Part IVC of the *Taxation Administration Act 1953* (Cth) ('*TAA 1953*'), which applies to taxation generally and not income taxation in isolation. It should be noted that in this section, unless otherwise noted, all legislative references are to the *TAA 1953*.

As will be expanded upon, the operation of Part IVC of the *TAA 1953* ('Part IVC') hinges on the presence of an assessment. In the absence of an assessment, the taxpayer has an avenue to challenge the Commissioner of Taxation (the 'Commissioner') via section 39B

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1 See G Pagone, 'Brambles, Hedgehogs and Foxes' [2018] *Federal Judicial Scholarship* 1, which discusses the significant value that tax academics offer to the judiciary through independent conceptual analysis which can be applied to judicial decision-making roles.

of the *Judiciary Act 1903* (Cth) although, further discussion on this point is beyond the scope of this paper.[2]

Accordingly, discussion in this Part will proceed to detail the process for initiating taxation objections prior to commenting on the position that arises once a taxation objection has been made and decided upon by the Commissioner.

A *Taxation Objections*

Under Part IVC, the litigation process commences when a taxpayer lodges an objection against a taxation decision. A 'taxation decision' is defined in s 14ZQ to mean an 'assessment, determination, notice or decision against which a taxation objection may be, or has been, made'.[3] For its part, 'taxation objection' is defined in s 14ZL and refers to an objection that is permitted by another provision. For example, s 175A of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA 1936*') permits a taxpayer to object against an assessment made in relation to them under Part IVC.[4] This will often arise after the Commissioner has conducted an audit and concluded that the taxpayer has made an error in their original return, necessitating an amendment to the original assessment.[5] It should

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2 For consideration of the interaction of challenges under section 39B of the *Judiciary Act 1903* (Cth) with Part IVC applications see *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 136.

3 Examples of taxation decisions that are not reviewable have been previously explored: see Martin Booth and Heydon Miller, 'Managing Tax Disputes' (Conference Paper, Review to Dispute with the ATO, The Tax Institute, 22 August 2013) 15–16.

4 Examples of other reviewable decisions are provided in Robyn Thomas and John Balazs, 'Running a Matter in the Administrative Appeals Tribunal' (Conference Paper, NSW 7th Annual Tax Forum, The Tax Institute, 22 May 2014) 5–6.

5 Under Australia's self-assessment regime, taxpayers prepare and lodge returns as the first step in the assessment process. These returns are normally accepted at face value by the Commissioner and an assessment is raised based on that information. This is then subject to the Commissioner having the power to amend that assessment within a timeframe that is determined by the taxpayer's circumstances: see *Income Tax Assessment Act 1936* s 170 ('*ITAA 1936*'). In most circumstances where the taxpayer does not have simple affairs, this time limit is normally four years from the date that the assessment is provided to the taxpayer. A notable exception to this time limit is where the Commissioner forms the view that the taxpayer had engaged in fraud or evasion, in which case there is no limit as to when the Commissioner may amend the assessment: see *ITAA 1936* s 170(1) item 5. This process gives rise to a number of potential research points which are identified later in this paper. For an overview of the provisions regarding time limits see generally Booth and Miller (n 3). For comments on taxpayer behaviour that constitutes fraud or evasion see, eg, Australian Taxation Office ('ATO'), *Fraud or Evasion* (PSLA 2008/6, 20 March 2008); David Marks and Fletcher Heinemann, 'Effectively Managing Tax Disputes – What is Your Strategy?' (Conference Paper, Queensland Tax Forum, The Tax Institute, 24–25 August 2017); Murray Shume, 'Forming an Opinion of "Fraud or Evasion" – Is this the Commissioner's Unchallengeable Right to an Unlimited Amendment Period?' [2017] (April) *Australian Tax Law Bulletin* 3; Mathew Leighton-Daly, 'Are You Facing an Unlimited Amendment Period Due to Fraud or Evasion?' (2015) 19(2) *The Tax Specialist* 66; Daniel Slater and Stephen Chen, 'Finding Fraud or Evasion in the Corporate Tax Environment' (2015) 49(10) *Taxation in Australia* 603; Mark Robertson and Peter Godber, 'Fraud or Evasion?' (Conference Paper, National Tax Convention, The Tax Institute, 18–20 March 2015).

be noted that an amended assessment is also treated as an assessment for these purposes.[6]

To perhaps complicate matters further, it is possible to object against an assessment that is entirely based upon the taxpayer's own submissions (that is, where the taxpayer has lodged a return and there has been no audit or amendment by the Commissioner). This demonstrates the concept that an assessment is a taxation decision against which an objection may be raised under the process described above. This may occur where the taxpayer has taken a conservative approach in applying the taxation law in preparing their return due to an ambiguity in the law. While the taxpayer may be of the genuine opinion that the more taxpayer-favourable approach is correct, the return may be prepared on the basis of the more revenue-favourable interpretation with the assessment subsequently raised on that basis and it is that assessment to which the taxpayer raises the objection. Note in this case, no audit has been undertaken and there is no dispute generated through the audit process arising from an amended assessment. One of the practical advantages of taking this approach, rather than an alternative method (such as lodging on the genuine taxpayer-favourable view and waiting for an audit, or seeking a private binding ruling under Division 359 of Schedule 1) is that it mitigates the taxpayer's exposure to penalties if the Commissioner takes an alternative view to that held by the taxpayer.

For the purposes of this paper, the discussion will be limited to objections against income tax assessments, although, as has been indicated, objections may be raised on other matters.[7]

The objection process is governed by Division 3 of Part IVC. Under s 14ZW, the taxpayer may generally object to the taxation decision at any time during the amendment period outlined in *ITAA 1936* s 170. If, however, that time has elapsed, the taxpayer generally has 60 days to lodge the objection after they have been served with notice of the taxation decision.[8] There is scope for an objection to be lodged out of time, however, this is at the Commissioner's discretion.[9]

Turning to the objection itself, the content of the objection is governed by s 14ZU. This provision is deceptively critical in that a number of factors arising in the litigation process are affected by the manner in which the objection is framed. In particular, s 14ZU(c) requires that the taxpayer must state 'fully and in detail' the grounds upon which the

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6 *ITAA 1936* (n 5) s 173.

7 For example, private rulings: see *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*') s 359-60(1). Objections may also be made where the Commissioner has failed to take certain actions, such as not making an objection decision: at s 155-30; or failing to make a private ruling: at s 359-50. See also Thomas and Balazs (n 4).

8 *Tax Administration Act 1953* s 14ZW(1)(c) ('*TAA 1953*').

9 Ibid s 14ZX. The Commissioner's approach to exercising this discretion — including expectations concerning the information that the taxpayer is to include with their request — has previously been outlined by the ATO: see ATO, *How to Treat a Request to Lodge a Late Objection* (PSLA 2003/7, 30 July 2003).

objection relies.[10] This is an important and frequently overlooked requirement in practice as subsequent review and appeals rights are limited (in the absence of leave) to the grounds stated in the objection.[11]

It should also be noted that, while there is no formal burden of proof in the ruling process, the taxpayer, in effect, does bear the burden of convincing the Commissioner of their position (this observation can be extended to the process during audit for the same reasons). This arises from the nature of the ruling process and is ultimately a practical observation — the taxpayer is making submissions to the Commissioner and attempting to advocate a particular position in order to convince the Commissioner of the correctness of their position. Relevantly, this is the same as private negotiations in other civil matters, most clearly in settlement negotiations, where one party is trying to convince the other party to alter their position. However, in taxation matters this reality is more acute since, as will be discussed below, should the Commissioner be unconvinced of the taxpayer's position, the taxpayer does bear the formal burden of proof once the matter goes to litigation under s 14ZZK(b).[12]

B *Proceedings Before the Administrative Appeals Tribunal*

Once the Commissioner has made an objection decision, if the taxpayer is dissatisfied with that decision, the taxpayer may exercise further review rights under Part IVC.

At this point, the taxpayer is faced with a decision themselves: under s 14ZZ, for reviewable objection decisions (which are the type of objection decisions discussed here), the taxpayer may choose to have this reviewed in the AAT or the Federal Court. This decision may be dictated by certain considerations, for example, if the objection relates to the review of the exercise of a discretion vested in the Commissioner, this will normally necessitate commencing proceedings in the AAT, since the exercise of a discretion itself does not constitute a question of law and, therefore, is normally beyond the Federal Court's jurisdiction.[13]

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10 For further guidance see ATO, *Income Tax: Objections Against Income Tax Assessments* (TR 2011/5, 19 October 2011). See also Alan Krawitz, 'Handling a Tax Dispute from Assessment to Litigation' (Conference Paper, Contentious Tax, The Tax Institute, 9 September 2014) 24–25; Robert Richards, 'Handling a Tax Dispute: Drafting the Objection and Negotiating a Solution' (Conference Paper, Manoeuvring the Maze: Tax Forum, The Tax Institute, 24 May 2007) 9–10.

11 For example, in reviews before the Administrative Appeals Tribunal ('AAT'): see *TAA 1953* (n 8) s 14ZZK(a).

12 For a discussion of how this formal burden of proof permeates the entire process, including pre-litigation stages see Eddy Moussa and Madeleine Daly, 'Burden of Proof in Tax Disputes and Why it Matters' (Conference Paper, NSW 11th Annual Tax Forum, The Tax Institute, 25 May 2018).

13 The distinction between a question of fact and question of law, and the implications for the litigation process is explored in further detail below. In respect of the matters to be considered in choosing the venue in which to commence litigation see Timothy Poli, 'Deciding to Appeal an Objection Decision and Assessing Your Prospects' (Conference Paper, Disputes & Litigation Half Day, The Tax Institute, 15 September 2016) 6–8; Krawitz (n 10) 27–32; Rodney Dunne, Helen Lacey and Arlene Macdonald,

Where the taxpayer elects to commence proceedings in the AAT, the process is governed by Division 4 of Part IVC. The AAT is generally governed by the *Administrative Appeals Tribunal Act 1975* ('*AAT Act*'), although Part IVC modifies this operation in some very important respects.[14]

One important modification that bears significant practical implications is the non-application of s 41 of the *AAT Act*, which provides the AAT with the power to stay the implementation of decisions that are subject to its review. Section 14ZZB removes the AAT's power in this regard with respect to Part IVC proceedings, which then implements s 14ZZM. In the context of a valid notice of assessment being conclusive evidence of the debt being owed to the Commissioner,[15] this means that the Commissioner may pursue recovery proceedings (which may result in bankruptcy or insolvency of the taxpayer), even while a legitimate challenge to the assessment is underway pursuant to Part IVC.[16]

The provision of most significance with an AAT review is s 14ZZK. As noted earlier, in challenging the taxation decision, that provision limits the taxpayer to the grounds stated in the taxation objection, although the taxpayer may seek leave to amend those grounds if they wish to pursue a fresh argument.[17]

Of perhaps greater significance, though, is s 14ZZK(b), which places the burden of proof upon the taxpayer. While not strictly a reverse burden of proof (after all, such reviews are applications brought by the taxpayer), this legislative position does create some significant practical problems for taxpayers. For example, the taxpayer may find themselves in a position where they are required to prove a negative element of the law (such as they did not have an intention to enter into a transaction with the intention of making a profit in a *Myer Emporium*[18] sense). The ability and the means by which a

'Running a Tax Dispute at the AAT; Part 1: The Choice Between the AAT or the Federal Court' (Conference Paper, South Australian Convention: In Tune with Tax, The Tax Institute, 4 May 2007).

14 See *TAA 1953* (n 8) ss 14ZZA–14ZZJ.

15 See *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473. The relevant legislative provision is now found in *ITAA 1997* (n 7) s 350-10(1) item 2 (replacing former section 177 of the *ITAA 1936*).

16 Alleviating the potential injustice associated with this regime, the Commissioner has published an administrative practice statement to deal with such scenarios: see ATO, *Collection and Recovery of Disputed Debts* (PSLA 2011/4, 14 April 2011). As a general rule, the Commissioner will normally agree to suspend recovery proceedings pending the outcome of a Part IVC review upon the taxpayer paying 50 per cent of the debt at the outset (noting that the remaining half will continue to accrue general interest charge while it remains outstanding, which will become part of the amount recoverable should the review not be resolved in the taxpayer's favour). For further discussion see Krawitz (n 10) 34–35.

17 *TAA 1953* (n 8) s 14ZZK(a). With respect to the granting of leave, this is largely left to the AAT's discretion as the AAT has the power to determine its own procedure and is not bound by the formal rules of evidence: see *Administrative Appeals Tribunal Act 1975 (Cth)* ('*AAT Act*') s 33).

18 *Commissioner of Taxation v The Myer Emporium Ltd* (1987) 163 CLR 199.

taxpayer may meet this burden has been a matter of interest for some time, with recent judicial comment providing some guidance.[19]

In the context of a challenge to an assessment, s 14ZZK(b)(i) provides the second critical element that taxpayers face. This provision requires that the taxpayer prove that the assessment is excessive and, importantly, what the assessment should have been.

In understanding the heavy onus that this places on taxpayers, it is apposite to note that the general understanding that the Commissioner does not need to have any basis — let alone a reasonable basis — for adopting their position which forms the basis of the assessment. This position is most clearly stated by Mason J (as his Honour then was) in discussing the former s 190(b) of the *ITAA 1936* (now contained in s 14ZZK) in *Gauci v Federal Commissioner of Taxation*:

> The Act does not place any onus on the Commissioner to show that the assessments were correctly made. Nor is there any statutory requirement that the assessments should be sustained or supported by evidence. The implication of such a requirement would be inconsistent with s. 190(b) for it is a consequence of that provision that unless the appellant shows by evidence that the assessment is incorrect, it will prevail.[20]

This statutory position is normally justified on the basis that the taxpayer has an informational advantage vis-à-vis the Commissioner, in that while the taxpayer inherently has a comprehensive knowledge of their own circumstances, the Commissioner must obtain information from other sources.[21]

In fairness, the Commissioner usually does provide some basis for their position. For example, the Commissioner often uses a technique known as 'asset betterment assessments' in which the Commissioner analyses the taxpayer's declared position compared with their known asset position. If there is an unexplained discrepancy between income reported and accumulated assets, the Commissioner may then use their powers under s 167 of the *ITAA 1936* to issue a default assessment.[22] However, it is clear from the interpretation of s 14ZZK(b)(i) that it is insufficient for the taxpayer to undermine the Commissioner's approach, even successfully. Doing so successfully merely

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19 *Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385. See also commentary on this case and the practical implications of the decision in Gareth Redenbach, 'How Taxpayers can Discharge their Burden of Proof' (Conference Paper, VIC 7th Annual Tax Forum, The Tax Institute, 17–18 October 2019). Further discussion of the considerations and problems associated with the taxpayer's burden of proof in litigation is provided in Moussa and Daly (n 12); Clare Thompson, 'Taking a Dispute to the AAT and Proving your Case' (Conference Paper, Contentious Tax, The Tax Institute, 9 September 2014); Daniel Grosch and Angela Wood, 'The Taxpayer's Heavy Burden' (2013) 47(6) *Taxation in Australia* 358; Bradley Jones, 'The Role of the Burden of Proof in Tax Appeals' (2009) 43(11) *Taxation in Australia* 650.

20 (1975) 135 CLR 81, 89 ('*Gauci v FC of T*'). See also *Commissioner of Taxation v Dalco* (1990) 168 CLR 614. This interpretation may be traced at least as far back as 1936 in *Trautwein v Commissioner of Taxation* (1936) 56 CLR 63, 87–88; *George v Commissioner of Taxation* (1952) 86 CLR 183.

21 See, eg, *Gauci v FC of T* (n 20) 89 (per Mason J).

22 For an example of the use of asset betterment analyses and their legitimacy see *Gashi v Commissioner of Taxation* (2013) 209 FCR 301.

establishes that the assessment was excessive. The taxpayer is also required to establish, using evidence, what the assessment should have been — not doing so merely establishes that the assessment was excessive, but does not satisfy the second requirement in s 14ZZK(b)(i), leading to the taxpayer failing to discharge their burden.[23]

The Commissioner's ability to levy assessments without a reasonable basis, whilst in strict compliance with the terms of s 14ZZK, may be tempered by obligations imposed under the Model Litigant rules.[24] This area — at least as it relates to obligations for the Commissioner to provide a basis for their position in litigation (potentially in contrast to s 14ZZK) — remains relatively unexplored.

In respect of the conduct of a matter before the AAT, as has been noted,[25] the AAT may, subject to any statutory requirements, follow its own procedure[26] and is not bound by the formal rules of evidence.[27] So, for instance, there is no restriction on the AAT admitting hearsay evidence that may otherwise be precluded from a judicial proceeding. This is tempered by the weighting that the AAT may attribute to such evidence.

The AAT is also permitted to admit evidence that was not considered when the assessment was raised, or even had not been available at that time. This is an application of the principle that the AAT should base its decisions on the best available evidence at the time that the AAT (and not the original decision maker) makes its decision.[28] This reflects the normal situation, in that the AAT conducts a hearing *de novo* and is not reviewing the correctness of the original decision. Whilst not strictly the case in taxation

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23 There are numerous cases in which the taxpayer has failed for not submitting evidence as to what the assessment should have been (whether or not the evidence submitted did establish that the assessment was excessive) and reiterating that merely identifying inaccuracies in the Commissioner's process leading to the assessment is insufficient. For some recent examples see *Bosanac v Commissioner of Taxation* [2019] HCA 41 (and the decision of the Full Federal Court in that matter: *Bosanac v Commissioner of Taxation* [2019] FCAFC 116); *HFTS and Commissioner of Taxation* [2019] AATA 5164; *NGFZ and Commissioner of Taxation* [2019] AATA 5410.

24 See Paula Thorne and Brad Prentice, 'Tax Litigation from the Commissioner's Perspective' (Conference Paper, Annual States' Taxation Conference, The Tax Institute, 27 July 2016), noting that this considers the Model Litigant rules as they apply to the State Commissioners, although the same consideration arises in a Commonwealth context. See also Eugene Wheelahan, 'Model Litigant Obligations: What Are They and How Are They Enforced?' (Seminar Paper, Federal Court Ethics Seminar Series, 15 March 2016); Ron Jorgensen and Megan Bishop, 'The Rule of Law and the Model Litigant Rules' (2011) 45(11) *Taxation in Australia* 678; ATO, 'Our Obligations as a Model Litigant' (Web Page, 25 October 2018) <https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/model-litigant>.

25 Above n 16.

26 *AAT Act* (n 17) s 33(1)(a).

27 Ibid s 33(1)(c).

28 See *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 399 where His Honour, Kirby J, states: 'But ultimately, it was for the Tribunal to reach its own decision upon the relevant material *including any new, fresh or additional material that had been received by the Tribunal as relevant to its decision*' (emphasis added).

matters (given that Part IVC is premised on a review of the assessment in question), this principle does also apply in this context.

An interesting consideration is the application of certain common law principles developed for the conduct of litigation. Of particular note in this regard are the decisions in *Browne v Dunn*[29] and *Jones v Dunkel*.[30] Both of these principles were developed in the criminal law jurisdiction, although they are also relevant to civil litigation. The application in the latter jurisdiction is less clear than in criminal proceedings, with the emphasis of both principles being on fairness in proceedings.

In brief, *Browne v Dunn* requires that where a party intends to present a theory of the case that contradicts a particular witness' account, that contradiction should be put to the witness directly. This is designed to provide the court with as much material as possible to reconcile competing accounts of the factual matrix submitted. The rule in *Jones v Dunkel* allows a court, in certain circumstances to draw negative inferences where one party does not call a witness who may have been expected to assist that party's case. These summaries are necessarily severely abbreviated in this part and both have been subject to much academic consideration in a general context.[31] However, there is still significant debate as to their application in particular contexts and precious little has been written on their application (or non-application) in taxation litigation.[32]

C *Beyond the Administrative Appeals Tribunal*

Following the outcome of the review in the AAT, the disappointed party may appeal to the Federal Court (or, in some cases, directly to the Full Federal Court[33]).[34] Importantly, such appeals are restricted to questions of law only.[35] The appealing party must also lodge its appeal within 60 days of being served with the notice of the AAT's decision.[36]

The distinction between a question of law and question of fact represents perhaps the most significant focus for parties seeking to appeal. To continue pursuing the litigation process, the party needs to identify a question of law emanating from the AAT's decision.

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29 (1893) 6 R 67 (HL).

30 (1959) 101 CLR 298.

31 For a detailed overview of both principles see John D Heydon, LexisNexis Butterworths, *Cross on Evidence: Australian Edition*, [17435]–[17460], [1215] for a discussion of the principles in *Browne v Dunn* and *Jones v Dunkel* respectively.

32 For example, see the brief comments in Jonathon Leek, 'Tax Dispute Resolution in the Modern Era' (2017) 21(2) *The Tax Specialist* 51, 59 (both principles). See also Stephen Linden, 'Evidence' (Conference Paper, Effectively Managing Tax Disputes: From Audit to Litigation, The Tax Institute, 16 April 2013).

33 This may occur where the AAT was constituted by a Presidential Member, who are all Judges of the Federal Court: see *Federal Court of Australia Act 1976* (Cth) s 20(2); *AAT Act* (n 17) s 44(3).

34 *AAT Act* (n 17) s 44(1).

35 Ibid s 44(1).

36 *TAA 1953* (n 8) s 14ZZN.

Put more directly, the party needs to identify an error of law (which thereby gives rise to the relevant question) in the AAT's reasoning. Without identifying such a question of law, the Federal Court will not have jurisdiction to hear the appeal.

Distinguishing between questions of law and questions of fact can be a somewhat fraught process. As this is the central tenet of the Federal Court's jurisdiction to hear tax appeals, it is often one of the first points to be dealt with at a hearing. Drawing the distinction in any meaningful way is far beyond the scope of this paper. However, it is sufficient to note that this is a frequent matter dealt with in appellate hearings[37] as well as some, but far from extensive, commentary.[38]

D *The Small Business Taxation Division*

On 1 March 2019, the Small Business Taxation Division ('SBTD') within the AAT began dealing with tax matters meeting certain criteria aimed at identifying small business tax disputes.[39] The SBTD has been established as a means of addressing small business concerns regarding the stress and intimidation associated with litigating against the Australian Taxation Office, as well as the asymmetry in expertise, time and resources associated with this process[40] and is designed 'to provide a cost effective review process that is accessible to small businesses and tailored to achieve resolution at the earliest opportunity in an individual case'.[41]

The operative provisions facilitating the SBTD are found in the *Administrative Appeals Tribunal Regulation 2015* ('*AATR 2015*').

In brief, where a small business taxpayer has a dispute with the Commissioner, the matter may be heard in the SBTD for a reduced fee (further reduced if the amount in dispute is

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37 Two significant decisions addressing this matter are *Haritos v Commissioner of Taxation* (2015) 233 FCR 315 and *Collector of Customs v Pozzolanic Enterprises Pty* (1993) 43 FCR 280, which was considered at length by the High Court in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389. It is also important to note that this concept is also incorporated into State appellate procedure (see, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148) and is not restricted only to revenue law matters, with the consequence that this issue is dealt with throughout all jurisdictions and legal subject areas.

38 See, eg, Justice Duncan Kerr, 'What is a Question of Law Following *Haritos v Federal Commissioner of Taxation*?' (Seminar Paper, Hot Topics Seminar: Commonwealth Compensation, 25 November 2016); Jennifer Batrouney, 'The Distinction Between Questions of Fact and Questions of Law in Section 44 Appeals to the Federal Court' (Seminar Paper, Tax Bar Association Seminar, 20 May 2014); Justice Stephen Gagelar, 'What is a Question of Law?' (2014) 43(2) *Australian Tax Review* 68.

39 For cross-jurisdictional commentary on the operations and efficacy of specialist small tax dispute resolution mechanisms see Melinda Jone and Andrew Maples, 'Small Tax Dispute Resolution in New Zealand: Is There a Better Way? A Consideration of Overseas Processes' (2019) 25(2) *New Zealand Journal of Taxation Law and Policy* 137 (which includes some brief comments on the AAT's Small Business Taxation Division: at 171–172. See also Andrew Maples, 'Resolving Small Tax Disputes in New Zealand – Is There a Better Way?" (2011) 6(1) *Journal of the Australasian Tax Teachers Association* 96.

40 Assistant Treasurer, Stuart Robert, 'Backing Small Business – Simplifying and Resolving Tax Disputes' (Media Release, 12 February 2019).

41 AAT, 'Guide to the Small Business Taxation Division' (Report, 1 March 2019) 4 [2].

less than AUD5,000) and with the expectation that the parties are either unrepresented or that the Commissioner will pay the costs of the taxpayer's equal representation. Matters in the SBTD are to be decided by the AAT within 28 days of the last submissions being received.[42]

The reduced fee of AUD500 is provided for in s 20(1A) of the *AATR 2015*. Where the amount of the tax in dispute is less than AUD5,000, a further reduced fee of AUD91 is outlined in s 20(2).[43]

To access the reduced fee of AUD500 in s 20(1A) of the *AATR 2015*, the review must be of a 'small business taxation decision'. This term is defined in s 5 as being a decision made under a taxation law (essentially any law over which the Commissioner has administration powers) and, importantly, in relation to a 'small business entity'. This latter term takes its definition from the *Income Tax Assessment Act 1997* ('*ITAA 1997*'), which details the relevant definition in s 328-110. In essence, to qualify as a small business entity, the entity needs to be carrying on a business and have annual turnover of less than AUD10 million.

Of some interest are these two elements determining the SBTD's jurisdiction. Strictly speaking, the considerations set out below have not arisen recently, as these elements are obtained from division 328 of the *ITAA 1997* ('Division 328'), which are the criteria used to determine access to certain small business concessions (outlined in the table at *ITAA 1997* s 328-10 and most notably include the variety of concessions (mainly aimed at simplification) contained in Division 328 and the capital gains tax concessions in division 152 of the *ITAA 1997*). However, as the SBTD's jurisdiction is determined by these concepts, they have become arguably more likely to arise in a litigation context.

Firstly, a dispute may arise as to whether the taxpayer is carrying on a business. As a practical matter for litigation purposes, the question of whether a taxpayer had been carrying on a business has lost much of its past significance with the expansion of the income tax net (particularly with the introduction of the capital gains tax). However, by incorporating this concept into the SBTD's jurisdictional boundaries, this matter could become a live litigation issue again and may merit research in anticipation of this eventuality.[44]

Secondly, 'annual turnover' is defined in s 328-120(1) of the *ITAA 1997* to mean the ordinary income derived by the entity in the ordinary course of carrying on its business (for clarity, *ITAA 1997* s 328-120(2) states that these amounts are exclusive of applicable goods and services tax). As a jurisdictional matter, distinguishing between ordinary

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42 Further details beyond those discussed in this paper may be found in the AAT's Guide to the Small Business Taxation Division: see ibid.

43 Annual indexation of these fees is provided for in *Administrative Appeals Tribunal Regulation 2015* (Cth) s 27 ('*AATR 2015*'). A flat fee (unindexed) of AUD100 is provided for in *AATR 2015* s 20(3) in the circumstances set out in *AATR 2015* s 21.

44 As noted, this issue is one of the preconditions for accessing certain small business concessions and, consequently, arises somewhat frequently as a central issue in dispute at the lower end of the litigation hierarchy; for a recent example see *SWPD and Commissioner of Taxation* [2020] AATA 555.

income receipts that are received in the course of a business as opposed to those received in the 'ordinary course' of carrying on that business may become important in marginal cases. Whilst it may be clear that capital receipts are excluded (being a well-established exclusion from ordinary income), there may be more debate as to whether certain ordinary income receipts, whilst being received in the course of a business, are not received in the ordinary course of a business, even though they may have the requisite profit-making intention. The receipt in issue in the *Myer Emporium* decision immediately springs to mind as an example (although, it could be noted, it may be said that that particular taxpayer is unlikely to come within the SBTD's jurisdiction). Such considerations may require a more precise delineation of the boundaries of a taxpayer's ordinary course of business than what has hitherto been required when considering more fundamental matters, such as the (general) capital/revenue distinction.

III AREAS FOR FURTHER RESEARCH

Based on the above comments, the following areas, in no particular order, represent (from a practitioner/decision maker perspective) useful inquiries for academic research:

1. Question of fact versus question of law;
2. Commissioner of Taxation as a model litigant. This may also include the Commissioner's ability to pursue recovery proceedings whilst a Part IVC dispute is on hand;
3. Taxpayer's ability to meet their burden of proof;
4. Meaning of fraud or evasion;
5. Ability to challenge determinations (e.g. fraud or evasion) and interaction with the burden of proof;
6. What constitutes an assessment?
7. When does time begin to run on amendment period?
8. Considerations with how the Commissioner of Taxation needs to form a basis for their position, particularly the model litigant rules and to what degree does (or should) the Commissioner have a basis for the position adopted in an assessment. This may be different in an audit context in which purported full disclosure has been made as opposed to a deemed or default assessment scenario, or where fraud or evasion is alleged;
9. Choice of forum, specifically whether litigation should be commenced in the AAT or the Federal Court. This may lend itself to an empirical study to see whether there is any relationship between choice of forum, the particular issues at hand and the success rate of challenging assessments;
10. Application of *Browne v Dunn* and *Jones v Dunkel* to tax litigation; and
11. Identifying when a taxpayer is carrying on a business and the means by which the boundaries of the ordinary course of that business may be identified.

The references provided in the discussion with respect to these areas provide the start of a reading list on those topics. In this regard, most of the secondary references provided are practitioner articles and, whilst written to a high standard, have a heavy practitioner emphasis rather than a more conceptual academic focus. Consequently, all of these areas represent fertile ground for academic input.

As a final note, most, if not all of the above potential research topics may raise separate considerations when applied to state taxation. Where the differences are sufficient, these could constitute discrete research projects in their own right.