

THE GUNN CLUB
CHALLENGING A DETERMINATION UNDER DIVISION 13

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In a paper presented to the Gunn Club in April of this year¹ David Russell QC adverted to potential difficulties in making challenges to Division 13 audits or assessments on procedural or administrative law grounds, and concluded that taxpayers will generally “be concerned to establish that the price paid or given was the arm’s length price or, if it was not, that such price is ascertainable and more favourable than that adopted by the ATO.”² It is part of the purpose of this paper to question that conclusion.

To be fair, Mr Russell’s paper was concerned primarily with the inter-action between Division 13 and Australia’s double tax agreements, the possible relevance of the latter as sources of taxing power and the ATO’s approach to the determination of arm’s length price, particularly its preference for profit methods over the comparable uncontrolled price or “CUP method.” In dealing with these matters, he raised the question “whether the Commissioner, by forming a view that it is neither possible nor practicable to ascertain the arm’s length price, can produce the result that any challenge to his determination of the price to be taken into account must, in the courts, be on administrative grounds only, or whether a taxpayer is entitled to prove (if it can) what the arm’s length price actually is and, if successful in so doing, succeed if that price is such as to make the assessment excessive.”³ He ultimately concluded that “the taxable fact is the arm’s length price, not the ATO’s opinion as to what it should be”⁴ but he also referred to a paper on “Transfer Pricing: the Process and Validity of Assessments,” where the author had concluded that if the Commissioner’s state of satisfaction in relation to the parties not dealing at arm’s

¹ “Transfer Pricing: Is a Collision Coming?” David Russell QC

² Ibid at p26-7

³ Ibid p5

⁴ Ibid at p25

length was open to judicial review, as he thought it was, then a taxpayer would succeed in showing an assessment is excessive by demonstrating that the Commissioner's state of satisfaction was affected by an error of law, without any need to objectively establish the arm's length consideration.⁵

It is the purpose of this paper to enquire further into the role of the Commissioner's determinations under Division 13 and into the scope for an attack on an assessment or rather, perhaps, the relevant determination on which it is based, on administrative law grounds rather than by seeking to establish an arm's length consideration and to do so by comparing and contrasting a determination under Division 13 with a determination under Part IVA. The enquiry will be confined to the operation of Division 13 in isolation, and will not extend to the application of the Division in conjunction with or, if this is possible, supplemented by a double tax agreement.

An attack based on administrative law grounds would be mounted in a court, rather than in the Administrative Appeals Tribunal, although an attack on an assessment in the latter forum would usually be supported by an argument that the Commissioner had erred in exercising the relevant discretions. The question whether it would be wise in particular circumstances to refer a matter involving a determination under Division 13 to the Administrative Appeals Tribunal or to lodge an appeal to a court, would sometimes be a difficult one. The appeal to a court will be on administrative law grounds only; the reference to the Tribunal, on the other hand, will involve a full "merits review" with the Tribunal being in the same position as the Commissioner had been when deciding the objection.⁶ Not to take advantage of a merits review in the Tribunal in relation to the exercise of a discretion of the exceptional width involved in a Division 13 determination would ordinarily be a risky course, particularly as its exercise would usually be associated with the exercise of other discretions as to the remission of penalties. However, in a case where a taxpayer was confident of being able to show an error in the exercise of the Division 13 discretion, with the result that, subject to the discussion in *Kolotex* below, the matter would be

⁵ Transfer Pricing: the Process and Validity of Assessments," Bradley Jones, Vol 5 "The Tax Specialist" April 2002 at p189

⁶ That "the legality/merits distinction is not as clear as is often assumed" has been noted regularly – see, for example, "The Integrity Branch of Government" by the Hon J Spigelman (2004) 78 ALJ 724 at 730 - but the distinction is valid enough nonetheless. See *Moreau v F C of T* (1926) 39 CLR 65 at p69; *Denver Chemical Manufacturing Co v C of T (NSW)* (1949) 79 CLR 296 at p312; *Australasian Jam Company v F C of T* (1953) 88 CLR 23 at p37.

referred back to the Commissioner for the re-exercise of the discretion according to law, then it might be considered that the advantages of going to a court, rather than to the Administrative Appeals Tribunal, outweighed the disadvantages flowing from the lack of opportunity for a merits review and re-exercise of the relevant discretions. It will be suggested in the following that one of the significant advantages of doing so is that it permits a direct attack on the exercise of the Commissioner's discretions rather than a simple re-exercise of those discretions by the Tribunal and that it thus places the Commissioner in the position of having to justify the decisions he has made in a way he does not have to do in the Tribunal.

The Provisions of Division 13

Division 13 contains our domestic laws against transfer pricing. Section 136AD deals with circumstances where a taxpayer has "supplied" or "acquired" something called "property," all of which terms are widely defined in sec 136AA(1), under an "international agreement," as defined in sec 136AC. There are four subsections in sec 136AD:

- subsec (1) deals with supplies of property for less than arm's length consideration;
- subsec (2) with supplies of property for no consideration;
- subsec (3) with acquisitions of property for excessive consideration; and
- subsec (4) with the determination of the arm's length consideration in circumstances where it is not possible or not practicable to ascertain it.

By way of example, section 136AD(1) provides as follows:

"136AD(1) Where –

- (a) a taxpayer has supplied property under an international agreement;
- (b) the Commissioner, having regard to any connection between any two or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any two or more of those parties, were not dealing at arm's length with each other in relation to the supply;

- (c) consideration was received or receivable by the taxpayer in respect of the supply but the amount of the consideration was less than the arm's length consideration in respect of a supply; and
- (d) the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the supply,

then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the supply shall be deemed to be the consideration received or receivable by the taxpayer in respect of a supply."

Subsections (2) and (3) are different only in that they deal with situations where no consideration was received and where property was acquired for consideration exceeding the arm's length consideration respectively and, in the case of subsec (2), in that the following words are added at the end of the subsection:

"... at the time when the property was supplied or, as the case requires, any of the property was first supplied, or at such later time or times as the Commissioner considers appropriate."

It is perhaps meant to be implicit in the other two sub-sections that the arm's length consideration deemed to be received or receivable (or given or agreed to be given) by the taxpayer will be so deemed to have been received, given etc at the time when the actual consideration was paid given etc. If so this could lead to difficulties for the Commissioner in applying the Division to ongoing transactions, such as interest free loans, where the only consideration given might be a promise at the outset, such as a promise to repay a loan.

It will be apparent that the subsections involve two matters of fact, those in paragraphs (a) and (c), and two of discretion, those in para (b) and (d). Paragraph (b) involves satisfaction that the parties were not dealing at arm's length and (d) a determination that the subsection should apply. Subsection (4) involves another matter of discretion, providing as follows for the situation where the arm's length consideration cannot be ascertained:

"136AD(4) For the purposes of this section, where, for any reason (including an insufficiency of information available to the Commissioner), it is not possible or not practicable for the Commissioner to ascertain the arm's length consideration in respect of the supply or acquisition of property, the arm's length consideration in respect of the supply or acquisition shall be deemed to be such amount as the Commissioner determines."

Subsection (4) therefore involves a third possible exercise of discretion by the Commissioner, i.e., the discretion to determine the amount of the arm's length consideration where, as a matter of fact, it is not possible or practicable for the Commissioner otherwise to ascertain the arm's length consideration. Where the Commissioner exercises the discretion in paragraph (d) of subsecs (1), (2) or (3), then the relevant arm's length consideration is deemed to be "received or receivable" in the case of subsecs (1) and (2) or "given or agreed to be given by the taxpayer" in the case of subsec (3).

The Questions to be Addressed in this Paper

The main purpose of this paper is to consider the consequences of an error of law by the Commissioner in exercising any of the three possible discretions available in relation to a supply or acquisition under an international agreement. Potential errors could include failing to exercise the relevant discretion altogether, having regard to irrelevant matters, failing to have regard to relevant matters or arriving at conclusions so manifestly unreasonable as to constitute a relevant error. There are at least four questions which need to be addressed in considering the consequences of such errors:

1. Is the error reviewable at all or is it inextricably involved in the "due making" of the assessment and thus protected from attack by sec 177?
2. Does a taxpayer discharge the burden of proof that an assessment, based on the exercise of one or more discretions, is excessive, merely by showing that the decision itself has miscarried?
3. Assuming the relevant error is reviewable, is a court confined, in considering the validity of the exercise of discretion, to the materials before the decision maker at the time the decision was made?
4. What rights does a taxpayer have to obtain the evidence necessary to attack an assessment based on error in the exercise of a relevant discretion?

The Contrasting Provisions of Part IVA

Before embarking on a consideration of those questions, and because relevant authorities deal mainly with determinations under Part IVA, it is also worth reminding ourselves how the exercise of a determination under that Part comes to be made. The conditions for the making of a determination are set out in sec 177D which provides that the Part applies to any relevant scheme where:

“(a) a taxpayer (in this section referred to as the ‘relevant taxpayer’) has obtained, or would but for sec 177F obtain, a tax benefit in connection with the scheme; and

(b) having regard to –

[the familiar eight matters]

it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme or of enabling the relevant taxpayer and another taxpayer or other taxpayers each to obtain a tax benefit in connection with the scheme (whether or not the person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers).”

Section 177F(1) then provides that if these conditions are satisfied the Commissioner may:

“(a) in the case of a tax benefit that is referable to an amount not being included in the assessable income of the taxpayer of a year of income – determine that the whole or a part of that amount shall be included in the assessable income of the taxpayer of that year of income; or

(b) ... , or

(c) ... , or

(d);

and, where the Commissioner makes such a determination, he shall take such action as he considers necessary to give effect to that determination.”

Subsection (2) allows the Commissioner who has made such a determination also to determine that the relevant amount is included in assessable income by virtue of whatever provision he chooses.

It will be apparent that under Part IVA the Commissioner exercises only one discretion, i.e. the discretion whether to make a determination under sec 177F(1), and that the matters referred to in sec 177D i.e., the existence of a scheme, a tax

benefit in connection with the scheme, and a conclusion as to purpose, are matters of objective fact involving no questions of discretion.

Whether the exercise of a discretion under Division 13 is part of the “due making” of the assessment

The first issue requiring consideration in the context of determinations under Division 13 is the role of secs 175 and 177. Section 175 provides that:

“The validity of an assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.”

And subsection (1) of section 177 provides that:

“The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the Taxation Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.”

Does the “due making” of the assessment, rendered inviolate even in objection proceedings, extend to the making of Division 13 determinations and the exercise of the associated discretions as to satisfaction that the parties are not dealing at arm’s length and, in appropriate cases, determinations of arm’s length price under subsec (4)? If it does so, then a taxpayer could contest an assessment only by challenging the objective facts on the existence of which a valid determination depends i.e., the supply or acquisition of property under an international agreement and the absence of any consideration (sub (2)) or the deficiency or excessiveness of arm’s length consideration (subsec (1) and (3)). This would seem to be an extraordinary result, particularly as it would lead to the determination under sec 136AD(4) being incontestable, yet it is a result to which some of the cases on determinations under Part IVA might be thought to point.

The most recent of those cases is the decision of the Full Federal Court in *FC of T v Sleight*⁷, in which the Commissioner’s appeal against the allowance of a deduction for expenses in connection with a teatree farm was upheld on the basis that Part IVA applied. One of the questions raised by the taxpayer concerned the

⁷ *FC of T v Sleight* 2004 ATC 4477

validity of the determination made under Part IVA, which it was said had not been made by a properly authorised officer and in any event had miscarried because the person who made it failed to consider the personal circumstances of the taxpayer. The answer to the latter suggestion, according to Hill J at p4497, lay in the provisions of secs 175 and 177. His Honour referred to the decisions in *George v F C of T*⁸, *D F C of T v Richard Walter Pty Ltd*⁹ and *F C of T v Peabody*¹⁰ and concluded at p4498 that:

“The question whether the Commissioner’s discretion as to whether there was a scheme to which Part IVA applied miscarried (sic) is thus not an issue in an appeal. Rather the issue will be, relevant to the present appeal, whether the determination having been made, there was a scheme to which the provisions of Part IVA applied and if so, whether there was a tax benefit obtained in connection with that scheme. These will be matters of fact and the burden will lie on the taxpayer to show that objectively there was no scheme in connection with which the taxpayer obtained a tax benefit. If the taxpayer satisfies that burden he or she will have shown the assessment was excessive. That will not be shown by the taxpayer demonstrating that the person who made the determination in some way erred in making it so that the discretion conferred upon the Commissioner miscarried.”

In support of this conclusion, Hill J quoted the following passage from the judgment of Mason CJ in *Richard Walter*¹¹ in which the Chief Justice said that a determination under sec 177F:

“... is a determination going to substantive liability and, in conformity with the interpretation of sec 177F(1) adopted in *George, McAndrew, F J Bloemen and Dalco*, is put in issue by an appeal which challenges the assessment on the ground that it is excessive.”

Of these comments Hill J said¹²--

⁸ *George v F C of T* (1952) 86 CLR 183, where it was held the taxpayer was not entitled to particulars of matters taken to account in making a default assessment under sec 167, including matters taken into account by the Commissioner in failing to be “satisfied” with the return as furnished.

⁹ *D C of T v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 184, where the taxpayer was denied a declaration, sought in proceedings based on sec 39B of the Judiciary Act, that Part IVA assessments were void and of no effect on the basis that sec 175 and 177 protected them in all proceedings otherwise than those under Part IVC of the Taxation Administration Act, provided that a purported assessment is a bona fide attempt to exercise the power conferred by the Act. Recently, in *D F C of T v Warrick (No. 2)* 2004 ATC 4779 at p4796 French J rejected, an argument that the High Court decision in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 required a reconsideration of the line of authority, and particularly the *Richard Walter* decision, on secs 175 and 177.

¹⁰ *F C of T v Peabody* (1993-1994) 181 CLR 359 where the taxpayer succeeded only because the tax benefit the Commissioner purported to cancel was not a tax benefit obtained in connection with a Part IVA scheme

¹¹ 183 CLR at p184

“In other words, it is not open to a taxpayer to challenge an assessment under Part IVA by showing some error in the making of that determination.” (My emphasis)

With respect to Hill J, and to Carr and Hely JJ who agreed with him, this is not an accurate way of expressing what the Chief Justice said. On the contrary, what Mason CJ said implies, if it does not expressly indicate, that an error in the making of a determination, which is itself a pre-condition for the existence of a tax liability, will go directly to showing that an assessment is excessive i.e., to showing that the ascertainment of the “substantive liability” is incorrect. It follows, therefore, that a taxpayer should be able to challenge an assessment under Part IVA by showing an error in the making of the determination, provided the taxpayer does so in an appeal against an objection decision rather than in separate proceedings of the kind involved in *Richard Walter*.

Mason CJ noted that “the making of the determination forms part of the process of assessment and goes to the *ascertainment of the substantive liability of the taxpayer to tax*”¹³ (his emphasis, seemingly to distinguish the situation before him from the contrasting situation on an appeal from an objection decision). It was in this context that his Honour made the observations relied upon by Hill J. The former Chief Justice had made those observations after noting¹⁴ how *George, McAndrew*,¹⁵ *Bloemen*¹⁶ and *Dalco*¹⁷ had all distinguished between the procedure by which tax is assessed and the substantive liability, with only the former involving the “due making” of the assessment. Only in a situation such as that involving the default assessment the subject of the decision in *George’s case*, might the question of the Commissioner’s satisfaction be part of the “due making” of the assessment.

¹² 2004 ATC at p4498

¹³ *D C of T v Richard Walter* 183 CLR at 178

¹⁴ 183 CLR at 182

¹⁵ *McAndrew v F C of T* (1956) 98 CLR 263 where it was held that although the onus is on a taxpayer to do so, proof that there has been a full and true disclosure and thus that an amended assessment should not have been issued, will also involve proof that the assessment is “excessive”

¹⁶ *F J Bloemen* (1981) 147 CLR 360 where it was found that on production of a notice of assessment, a court is bound, both in proceedings by way of appeal and in the exercise of its general jurisdiction to rule that the assessment was duly made

¹⁷ *F C of T v Dalco* (1990) 168 CLR 614 where the High Court overturned the decision below and held that the burden on a taxpayer is to prove the assessment excessive, a burden not necessarily discharged by showing an error by the Commissioner in forming a judgment as to the amount of a default assessment under sec 167

Hill J made no reference in *Sleight* to the decision in *Jackson v F C of T*.¹⁸ There, Gummow J, in reaching the conclusion that a taxpayer was entitled to appropriate disclosure, whether by way of discovery or subpoenae, in relation to the Commissioner's reasoning process in making determinations under Part IVA, had said at p470:

“The Commissioner's determinations under sec 177F(1) and (2) will lack the authority of the Act if the Commissioner did not address himself to the questions which the sub-sections formulate, if his conclusions were affected by some mistake of law, if he took some extraneous reason into consideration or excluded from consideration some factor which could affect his determination.”

To support these propositions, his Honour referred to the decisions of the High Court in *Avon Downs Pty Ltd v F C of T*¹⁹, and *Kolotex Hosiery (Australia) Pty Ltd v F C of T*.²⁰ He went on to distinguish between obtaining the details of the Commissioner's reasoning process in relation to matters going to the obtaining of a “tax benefit” which was “in connection with a scheme,” which he held were states or absence of affairs which exist or do not exist irrespective of the reasoning process of the Commissioner and to which the reasoning process was therefore irrelevant, and in relation to the reasoning process which supported the making of the determination itself. In relation to the latter, his Honour found that because “the taxpayer seeks to establish that the assessments were excessive because these determinations, made by the respondent in exercise of discretionary powers, were a crucial element in the process of assessment but lacked ‘the authority of the Act’ in the sense discussed in the authorities I have mentioned” this was an issue upon which appropriate discovery could be granted. In so doing his Honour appeared to have recognised, as Mason CJ later recognised in *Richard Walter*, that a taxpayer could show that an assessment was excessive by demonstrating that the exercise of a discretion on which it was based had miscarried. It would miscarry, according to *Avon Downs*, if the Commissioner took some extraneous matter into consideration or excluded from consideration some factor which would affect his determination.²¹

¹⁸ *Jackson v F C of T* (1989) 87 ALR 461

¹⁹ *Avon Downs Pty Ltd v F C of T* (1949) 78 CLR 353

²⁰ *Kolotex Hosiery (Australia) Pty Ltd v F C of T* (1975) 132 CLR 535

²¹ *Avon Downs Pty Ltd v F C of T* 78 CLR 353, Dixon J at p360 – see also Mason CJ in *D C of T v Richard Walter Pty Ltd* 183 CLR 168 at 188

(Curiously, in the recent decision in *Rio Tinto Ltd v Commissioner of Taxation*,²² noted further below, Sundberg J made reference to the decision of Gummow J in *Jackson's case* but no reference to the decision in *Sleight*.)

Hill J also made no reference in *Sleight* to the later decision in *F C of T v Jackson*²³ where the issue was whether the Commissioner must amend a prior assessment where he made a determination under sec 177F after the disallowance of an objection to the earlier assessment and an appeal was instituted. In the course of analysing the operation of the relevant provisions Hill J, with whom the other members of the court agreed, said that:

“In proceedings under Part IVC of the Act, where a determination under sec 177F has purported to be made and is relied upon by the Commissioner, it will be open to a taxpayer to challenge the existence of the conditions precedent to the making of the determination, for example, the existence of a scheme, whether there was a tax benefit, and whether the necessary conclusion as to purpose is to be arrived at. ***It will also be open to a taxpayer to show that no determination was made, or that an invalid determination was made, with the consequence that no amount was to be included in assessable income as a result of the section or alternatively, that a deduction otherwise allowable to him will continue to be allowable***”²⁴ (My emphasis)

It is impossible to see how this could be reconciled with what was said in *Sleight*. It appears, therefore, that there is a conflict in the area, one which is important not only for forensic questions associated with a taxpayer's rights in relation to a determination under Part IVA but also with the rights of a taxpayer in connection with a determination made or purportedly made under Division 13. The idea that it is not open to challenge an assessment based on a determination under Part IVA by showing an error in the making of the determination is, with respect, a curious one. It would mean that the determination is part of the “due making” of an assessment protected from examination by secs 175 and 177 and it would mean that, short of acting mala fides, the Commissioner could take irrelevant considerations into account in making the determination, ignore relevant considerations and generally act quite unreasonably.

²² [2004] FCA 335

²³ *F C of T v Jackson* (1990) 96 ALR 586

²⁴ *F C of T v Jackson* 96 ALR 586 at 594

This is not what the High Court in *Richard Walter* seems to have contemplated would occur, Mason CJ having said, for example, quoting *Avon Downs*, that on an appeal to a court

“... the taxpayer is at liberty to challenge the exercise of any relevant discretion by the Commissioner. Thus, on appeal, the Court will set aside the assessment if any relevant exercise of discretion by the Commissioner is affected by error of law, if he has taken an extraneous factor into account or if he has failed to consider a material factor.”²⁵

In fact, in *F C of T v Cripps & Jones Holdings Pty Ltd*²⁶ the Full Federal Court noted that:

“So completely have these authorities [*McAndrew* and *Bloemen*] confined the scope of ‘due making’ of an assessment within the meaning of sec 177 that the majority of the High Court in *MacCormick’s case* (1984) 158 CLR 622 at p624 were able to say of sec 177(1):

“That section does not, of course, apply in proceedings on appeal against the assessment of the company tax.”

The matters claimed by the taxpayer in *Sleight* to have led to the discretion to apply sec 177F miscarrying were a failure, in considering the existence of a dominant purpose of tax avoidance, to take into account the personal circumstances of Mr Sleight. This seems to have been a matter going not to the exercise of the discretion but to the satisfaction of the pre-conditions for the making of the determination. In fact, once the pre-conditions for the exercise of a Part IVA determination have been satisfied, it is somewhat difficult to see what matters, other than the satisfaction of those pre-conditions, might be taken into account by the Commissioner in making a determination. Although not quite a *Finance Facilities* type situation where the word “may” in the legislation effectively means “shall”²⁷ it would perhaps be a rare situation where, the pre-conditions being satisfied, the Commissioner would fail to make a determination.²⁸ Perhaps it is for these reasons that Hill J took the approach he did in *Sleight* and seemingly treated the determination under Part IVA as if it

²⁵ *D C of T v Richard Walter* 183 CLR at p188

²⁶ *F C of T v Cripps & Jones Holdings Pty Ltd* 87 ATC 4977 at p4986

²⁷ *Finance Facilities Pty Ltd v F C of T* (1970 – 1971) 127 CLR 106 cf *Commr of State Revenue (Vic) v Royal Insurance Ltd* 94 ATC 4960 at p4963

²⁸ A possible example might be where the dominant purpose was borderline and the consequences penal because of the inability to make a sec 177F(3) adjustment

were equivalent to the state of dissatisfaction required for the making of a default assessment in the situation considered in *George*.²⁹

The kind of discretions which the Commissioner may exercise under Division 13 are plainly quite different to the limited discretion under Part IVA. Under Division 13, the only pre-conditions for a determination that it should apply are a supply of property under an international agreement and an absence, inadequacy or excess of consideration, while the only pre-condition for the setting of an arm's length price under subsec 136AD(4) is that it is not possible or practicable for the Commissioner to ascertain "**the** arm's length consideration" in respect of the supply or acquisition. Plainly there would be many factors which it might be relevant for the Commissioner to take into account in being satisfied that parties were not dealing at arm's length, in arriving at an arm's length consideration for the purpose of subsec 136AD(4) and in determining that the relevant provision should apply.

Because of the width of the discretions conferred under subsec (4) and under paragraph (d) of each of the preceding subsections, it may not be easy to identify those matters which should, or should not, be taken into account. The following comments by Lockhart J in *Coco v Deputy Commissioner of Taxation*³⁰ are relevant:

"What factors a decision maker is bound to take into account is determined by construction of the statute conferring the discretion.

Where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision maker is bound to take a particular matter into account unless an implication that the decision maker is bound to do so is to be found in the subject matter, scope and purpose of the Act.

To establish the ground of taking into account an irrelevant consideration, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard. ...

²⁹ In considering an earlier draft of this paper, Tony Slater QC raised the question whether there might be a distinction between decisions involving the exercise of a discretion expressly conferred (sec 80B(5) – *Brian Hatch*; sec 73B(13) – *Zoffanies*, sec 177F, sec 136AD) and decisions which involve no more than a state of satisfaction or dissatisfaction, (sec 167 – *George, Dalco*; sec 170(2)(a) – opinion that the avoidance of tax is due to fraud or evasion) with only the latter kind being protected as part of the "due making." Even if this were not so, the distinction could be relevant to what is required to show "excessiveness" of the assessment.

³⁰ *Coco v Deputy Commissioner of Taxation* (1993) 115 ALR 670 at p675-6

It will usually be easier to identify matters irrelevant to the power than it will be to establish that the decision-maker has failed to take into account a relevant matter.”

To these remarks might be added those of Barwick CJ and Windeyer J in *Giris Pty Ltd v F C of T*,³¹ speaking of the wide discretion conferred on the Commissioner by sec 99A of the Act i.e., to form an opinion that it would “be unreasonable” to apply the section, and to do so having regard to a series of matters and “to such other matters, if any, as he thinks fit,” Barwick CJ said:

“I have been unable to find any content for the word ‘unreasonable’ in the context of the two sections except considerations of a kind upon which a legislature acts in deciding whether an enactment or its particular terms are or are not unreasonable having regard to the interests of the public generally, of the citizen to be affected, of the revenue and of the requirements of those policies, political, economic and fiscal which the Parliament is prepared to sanction. Some facts are specified for the Commissioner’s attention in arriving at his opinion as to unreasonableness but he has given no hint of what bearing any or all of them ought to have or may have on his judgment. In addition he is required to have regard to any facts which he think appropriate to be considered in relation to the formation of his opinion. This view of the discretion gives to the Commissioner a wide charter which it might have been thought he was ill equipped to exercise. What he is required to decide, in my opinion, is in truth a function of the legislature, rarely delegated to an official.”³²

Barwick CJ went on to add, in the context of a claim (rejected by him and the other members of the Court) that the section created an unchallengeable tax, that a court:

“... can determine whether the opinion is held bona fide and, although as I have said, the discretion is wide and though being really legislative in nature, what is relevant to its formation may range over an extremely wide spectrum of fact and consideration, the court can determine whether or not the opinion was formed arbitrarily or fancifully, or upon facts or considerations which could not be regarded as relevant even to such a question as the unreasonableness of applying a taxing provision to a particular taxpayer in respect of the income of a particular year.”³³

Windeyer J, while also noting the width of the Commissioner’s discretion, said that:

“... I assume that he is to be guided and controlled by the policy and purpose of the enactment, so far as that is manifest in it. That would exclude from his consideration any matter which it would be unlawful for him to take as a criterion, such as the state of residence of a trustee or of the beneficiaries of a trust. It would also, I think, exclude all merely fanciful and prejudiced tests

³¹ *Giris v Commissioner of Taxation* 119 CLR 365

³² 119 CLR at 372

³³ 119 CLR at p374

which were hypothetically suggested in argument, such as vocation, religion, colour of skin or hair. Nevertheless the statute seems to allow great latitude to the Commissioner in forming his opinion. That he has formulated certain considerations by which he is guided, and made them publicly known, may be important as shewing that in the exercise of his statutory discretion he acts honestly, consistently, and, as he thinks, in accordance with the legislative purpose.”³⁴

Factors relevant for the Commissioner to take into account in arriving at an arm’s length consideration would therefore include the kinds of matters dealt with at such length in the various Tax Office Rulings on the question of an arm’s length price. Purporting to choose a “CUP” which was not in fact comparable with the particular transaction would involve consideration of an irrelevant matter.³⁵ It might also be arguable that the use of economic analyses which rely upon the adjustment of profits by a percentage, rather than the ascertainment of consideration in respect of a particular supply or acquisition, for the purposes of determining a price under sec 136AD(4) would involve an improper consideration, or perhaps a failure to exercise the discretion, although, if the Commissioner were to be so constrained then Division 13 would become practically unworkable. Another issue relevant to the determination of a price under subsec 136AD(4) would be the relevance of an agreement to supply product at a particular price, under a supply agreement, when the price of comparable product in ensuing periods varies with changes in the market but the taxpayer continues to comply with the terms of the supply contract. Matters relevant to the making of a determination that Division 13 should apply would obviously include whether the profit shifting at which the Division was directed has occurred. Although the operation of Division 13 is not dependent on the existence of a tax avoidance purpose, at least one significant factor would ordinarily be whether the particular arrangements actually involved such a purpose.

It would certainly be extraordinary if, having regard to all the possibilities for error in exercise of the relevant discretions, a taxpayer were not permitted to challenge an assessment by pointing to those errors and, even if the position were otherwise in relation to determinations under Part IVA, it is suggested that the position will be

³⁴ 119 CLR at p384 and see also *Industrial Equity Ltd v F C of T* (1990) 170 CLR 649 at p659 in relation to the exercise of powers being circumscribed by the “purpose” for which they are conferred.

³⁵ As to the question of comparability, the decision in *Copperart Pty Ltd v F C of T* 93 ATC 4779 (reversed on appeal in 94 ATC 4259 but without criticising this aspect of the decision of Hill J) provides useful comments at p4800 on the hypothesis required for determining an arm’s length price. Refer also *Estee Lauder Pty Ltd v F C of T* 88 ATC 4412 at p4421 (see also 89 ATC 4299) and *Boxvale Holdings Pty Ltd v F C of T* 89 ATC 4927.

different in relation to assessments based on Division 13. Indeed, it appears from the decision in *Giris* that if these matters were not reviewable then the legislation itself would be unconstitutional.

Whether assessment proved excessive merely by showing invalid exercise of discretion

The consequences provided for in sec 136AD(1) flowing from the making of a determination by the Commissioner under paragraph (d) i.e., that for all purposes of the Act consideration equal to the arm's length consideration shall be deemed to be the consideration received or receivable by the taxpayer, follow only from the making of a determination. In the absence of a determination the consideration would simply be that received or receivable by the taxpayer in respect of the relevant supply. Intuitively, therefore, it should follow that the making of an invalid determination, or the failure to make a determination, would leave the relevant transaction untouched by the provisions of Division 13.

The discussion under the previous heading was concerned with the situation where a taxpayer suggests that a discretion actually exercised has been invalidly exercised. It could be suggested that the position where a taxpayer seeks to argue that the relevant discretion has not been exercised at all should be different and that even though the making of a determination under Division 13 might be regarded as a pre-condition of the tax consequences for which it provides, the actual existence of a determination is so much bound up with the assessment process that it is covered by the notion of "due making." In *Sleight's case*, the taxpayer had argued that a determination was invalid because it was made in the name of a tax officer, albeit expressed to be a determination made by the Commissioner to cancel a tax benefit. Rather than rely on the "due making" provisions of sec 177, however, Hill J expressed agreement with the reasons of the trial judge who had relied on the decision in *Mochkin v F C of T*³⁶ where Ryan J had noted that the Commissioner's powers were not intended to be exercised only by him or his delegate but also through a properly authorised officer. Because the evidence showed the tax officer concerned was properly authorised, the determination was valid. It must be queried whether this does not involve the very "curial diving" into the recesses of the revenue which authority suggests sec 177 was

³⁶ *Mochkin v F C of T* 2002 ATC 4565 at 4485

designed to render unnecessary.³⁷ However, it suggests that sec 177 should not be regarded as any obstacle to an argument that, in particular circumstances, no determination has been made.

Would it follow, though, that by proving a determination either did not occur or was invalid a taxpayer would discharge its obligation to prove an assessment excessive?

In *Dalco*³⁸ the Full Court of the Federal Court found that in making a default assessment under sec 167(b) i.e., on the basis that the Commissioner was “not satisfied with the return furnished,” the Commissioner had proceeded on a wrong basis. He had done so because, although a judgment might quite reasonably have been formed that the taxpayer controlled the affairs of various companies and trusts, that did not of itself provide the basis for a judgment that income derived by any one or more of them was in truth or reality income derived by the taxpayer. The question expressed for the opinion of the High Court was whether, in proceedings on appeal against an assessment made under sec 167(b), the taxpayer discharges the burden of proving an assessment is excessive where he does not prove that the amount assessed in fact exceeds his taxable income but shows the Commissioner formed a judgment as to the amount of his taxable income on a wrong basis.³⁹ It was held, of course, that a taxpayer does not do so and is obliged to show that the amount assessed exceeds his actual liability.

In the course of delivering what was the principal judgment of the court, Brennan J said that:

“In a case arising under sec 167(b), there are two functions for the Commissioner or his delegate to perform: first, he must decide whether he is satisfied with the return furnished, and, if he is not, he must form a judgment of the amount on which tax ought to be levied. In *George’s case*, it was held that the former function was a procedural step and was thus part of the making of the assessment, the due making of which is conclusively proved by the production of a notice of assessment: sec 177(1). By contrast, in proceedings on appeal against an assessment the function of forming a judgment of the amount on which tax ought to be levied is not conclusively proved by the production of a notice of assessment. That is because sec 177 distinguishes ‘between the procedural mechanism by which the taxable

³⁷ Indeed, in *D F C of T v Warrick (No 2)* 2004 ATC 4779 French J disposed of an argument that the person who purportedly issued the assessments was not authorised to do so” by saying that sec 177 “was proof against it.”

³⁸ *C of T v Dalco* 168 CLR 614

³⁹ 168 CLR at p619

income and tax is ascertained or assessed on the one hand and on the other hand the substantive liability of the taxpayer. The former involves the due making of the assessment”⁴⁰

However, his Honour went on to conclude that because of the evidentiary onus cast on a taxpayer by sec 190(b):

“The burden which rests on a taxpayer is to prove that the assessment is excessive and that burden is not necessarily discharged by showing an error by the Commissioner in forming a judgment as to the amount of the assessment.”⁴¹

In the foregoing it has been suggested that the exercise of a discretion under Division 13 is not part of the “due making” of the assessment but goes to the ascertainment of substantive liability. Because the exercise of the relevant discretions involved in the making of the determinations are essential pre-requisites for the consequences for which the Division provides, it is suggested that by demonstrating that the discretions have either not been exercised at all or have miscarried, a taxpayer will also demonstrate that the assessment is excessive.⁴²

It is also suggested that to do so will in many instances be both necessary and sufficient to overcome the consequences of the application of Division 13. Indeed, unless proof of a proper arm’s length price goes to demonstrate that the amount of the consideration was in fact an arm’s length consideration, so that one of the objective pre-conditions for the operation of sec 136AD is not satisfied, then a taxpayer will have no other remedy but to attack the exercise of the discretions. Once having successfully done so then, subject to the question discussed below, it would seem that a court (but not the Tribunal) would, unless satisfied no Division 13 determination could properly be made in the circumstances, have to refer the matter back to the Commissioner for re-assessment in accordance with its reasons. This possible outcome of an appeal to a court, rather than a reference to the Tribunal, will itself be a matter relevant to the decision which of those courses is preferable.

Whether a court will be confined to considering the materials before the decision maker when the decision was made

⁴⁰ 168 CLR at 620

⁴¹ 168 CLR at p621. A similar approach was taken by the Full Court of the Federal Court in *Revlon Manufacturing Ltd v FC of T* 96 ATC 4031, see especially at p4047

⁴² The passage from *FC of T v Jackson* 96 ALR 586 at p594, quoted earlier, shows that the same will be true of a determination under sec 177F which a taxpayer demonstrates is invalid

If a taxpayer elects to refer the relevant objection decision to the Administrative Appeals Tribunal then there is an easy answer to the question whether the Tribunal, in considering the relevant decision, can examine material other than the material before the decision maker. Because the Tribunal stands in the shoes in the Commissioner and because it is undertaking a “merits review” it will be entirely at liberty to consider material which was not before the decision maker. If, however, the appeal is to a court, then the court is not in that position and can undertake judicial review only. The nature of that review is described in a classic formulation of principle by Dixon J in *Avon Downs Pty Ltd v F C of T*,⁴³ where his Honour said of the requirement in sec 80(5) that a private company establish “to the satisfaction of the Commissioner” that the relevant requirements for the carry forward of losses were met, that:

“But it is for the Commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision it is true, is not unexaminable. If he does not address himself to the question which the subsection formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.”⁴⁴

This statement has been frequently referred to in subsequent cases as setting out the limits of the jurisdiction of a court with regard to the review of the exercise of discretionary powers. Among those cases are *Thomas v F C of T*,⁴⁵ *F C of T v Brian Hatch Timber Co (Sales) Pty Ltd*,⁴⁶ *Kolotex Hosiery (Australia) Pty Ltd v F C of T*,⁴⁷

⁴³ *Avon Downs Pty Ltd v F C of T* 9 ATD 5 at p10

⁴⁴ 9 ATD at p5

⁴⁵ *Thomas v F C of T* 72 ATC 4094 at p4096

⁴⁶ *F C of T v Brian Hatch Timber Co (Sales) Pty Ltd* 72 ATC 4001 at p4002, 4010, 4012

⁴⁷ *Kolotex Hosiery (Australia) Pty Ltd v F C of T* 75 ATC 4028 at p4031, 4048 and 4054

Giris Pty Ltd v F C of T,⁴⁸ *Perron v F C of T*,⁴⁹ and *Duggan & Ryall v F C of T*.⁵⁰ One might have been excused for thinking that if the principle was as expressed by Dixon J in *Avon Downs*, then only the material before the decision maker could possibly be relevant to judicial review. Because of the decision in *Kolotex* referred to below, however, it appears that this is an oversimplification of the position.

Before considering *Kolotex*, however, it should be noted that, in the Division 13 context, the issue will arise only in relation to material relevant to the exercise of the Commissioner's various discretions. In relation to the questions whether the objective conditions for the making of a determination under Division 13 are satisfied, it is plain that the court will receive any material which is relevant to the satisfaction of those conditions, whether or not before the decision maker. Thus, any evidence relevant to whether there is a supply under an international agreement and whether or not arm's length consideration was provided for the supply will be admissible. This will tend to blur the boundaries of the admissibility issue in any event because plainly evidence relevant to whether an arm's length consideration was provided for the supply will also be relevant to whether or not the Commissioner properly exercised his discretions. The position may also be complicated by reference to other matters taken account at the time of a decision on an objection, because sec 169A(3) provides as follows:

"169A(3) In determining whether an assessment is correct, any determination, opinion or judgment of the Commissioner made, held or formed in connection with the consideration of an objection against the assessment shall be deemed to have been made, held or formed when the assessment was made."

The proper operation of this subsection in a case where a determination was made at the time of making the assessment will be somewhat problematic. It is not clear, for example, whether a determination made at the time of considering an objection is intended to supplant a determination at the time of the making of the assessment. Nor is it clear whether the Commissioner can support an opinion held at the time of the assessment by having regard to matters not considered until the time of the objection decision. It would not seem that sec 169A(3) would authorise him to do so.

⁴⁸ *Giris Pty Ltd v F C of T* 69 ATC 4015

⁴⁹ *Perron v F C of T* 72 ATC 4169

⁵⁰ *Duggan & Ryall v F C of T* 72 ATC 4239

It is certainly possible, however, that the question will be whether a court is confined to considering the materials before the Commissioner at the time of a decision on the objection, rather than at the time of the assessment, thus tending to further obscure the role and function of a court undertaking judicial review.

In *F C of T v Brian Hatch Timber Co (Sales) Pty Ltd*,⁵¹ Windeyer J, after referring to the judgment of Dixon J in *Avon Downs*, said –

“I would emphasise that the passage from the judgment of Dixon J that I have quoted seems to me to show that it is the material that was before the Commissioner that this court has to consider, to see whether it can be said that in failing to be satisfied by that material he must have been moved by some misconception of it or by some extraneous consideration.”⁵²

In *Kolotex Hosiery (Australia) Pty Ltd v F C of T*⁵³ the claim by the taxpayer for a deduction of losses incurred in past years was disallowed by the Commissioner on the ground that he was not satisfied of the matters referred to in sec 80A. It appeared that the course of reasoning which the Commissioner followed involved errors of law and that had the Commissioner not been misled by those errors he would, on his then understanding of the facts and the law, have been satisfied. During the proceedings the Commissioner sought to rely, in support of his original decision, on different grounds to justify his failure to be satisfied. Mason J at first instance⁵⁴ held that although the original reasoning was faulty, the Commissioner’s conclusion was justified on the alternative grounds. In the Full Court the majority, Gibbs and Stephen JJ, Barwick CJ dissenting, affirmed the decision below. In the course of his judgment, Gibbs J said:

“It seems that a court in deciding whether some ground has appeared to justify a review of the Commissioner’s conclusion that he is not satisfied should consider the question on the basis of the material which was before the Commissioner even though further material is before the court – *F C of T v Brian Hatch Timber Co ...*. However, it would appear to me that once it was decided that the conclusion of the Commissioner should be disturbed, for example, on the ground that it was based on error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the court, because if the matter were referred back to the Commissioner to consider the question he would obviously be entitled and bound to consider all the information available.

⁵¹ *F C of T v Brian Hatch Timber Co (Sales) Pty Ltd* 72 ATC 4001

⁵² 72 ATC at p4010

⁵³ *Kolotex Hosiery (Australia) Pty Ltd v F C of T* 75 ATC 4028

⁵⁴ 73 ATC 4094

Both parties in the present case put their submissions on the footing that once this court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the court.

There is no doubt that the decision of the Commissioner was affected by error ... in my judgment, if the conclusion of the Commissioner is examined it will be found to have been correct.”⁵⁵

Stephen J made similar comments, as follows –

“Consideration is, in the first instance, to be confined to material which was before the Commissioner when he made his assessment ...; but once it is established that the Commissioner has, in this case through error of law, failed to properly perform his statutory function the court will then determine what state of mind concerning the matters in sec 80A(1) ... will amount to a discharge of that function and will do so having regard to the facts then before it, viewed in the light of what the court regards as the true effect of the legislation.”

Assuming that what Gibbs and Stephen JJ had to say should be accepted, and Barwick CJ in dissent rejected their approach, this would mean that even if it could be shown that the Commissioner had, for example, failed to take relevant matters to account or taken irrelevant matters to account when making a Division 13 determination, if there were matters, not known to the Commissioner at the time of the making of the determination but adduced in evidence at the hearing, which would have justified the making of the determination, then the validity of the determination will be established. With respect to the decision of the majority in *Kolotex*, however, this would seem to involve an anomalous and unsatisfactory entry into the field of merits review and, at the end of the day, effectively substitute the opinion of the court for the opinion of the Commissioner.⁵⁶ This is precisely what a court should be unable to do.⁵⁷

The rights of a taxpayer to obtain the necessary evidence

⁵⁵ 75 ATC 4048, 4049

⁵⁶ See the discussion of *Kolotex* and other authorities in this area collected in the judgment of Martin CJ in *Crusher Holdings Pty Ltd v Commr of Taxes (NT)* 94 ATC 4646 at 4650.

⁵⁷ In his article “The Integrity Branch of Government,” the Hon J Spigelman noted at (2004) 78 ALJ 736 that “what may be considered relevant considerations, proper purposes, a rule of policy, uncertainty etc, let alone more vague tests such as proportionality or abuse of power, will naturally expand if a court does not have a clear conception of what kinds of facts, matters and considerations should be seen as relating exclusively or primarily to the merits.”

Reference should also be made to what was said by the Full Federal Court in *FC of T v Cripps & Jones Holdings Pty Ltd* 87 ATC 4977 at p4984 to the effect that “if the integrity of the doctrine that the discretion belongs to the administrator, and not to the court, is to be preserved, the court must not only refrain from interfering, upon discretionary grounds, with a lawful decision, but it must also refrain from justifying an unlawful decision, by reference to a discretion which lawfully belongs to the administrator under a different head of power.”

Plainly, a taxpayer seeking to attack the exercise of a discretion on administrative law grounds will be handicapped if unable to obtain details of the matters taken into account in the exercise of the relevant discretions. The High Court has on a number of occasions considered a taxpayer's entitlement to information concerning the facts taken into account by the Commissioner in arriving at his decisions. In *Giris Pty Ltd v F C of T*, for example, Barwick CJ said:

“... in my opinion, the Commissioner is under a duty in each case to form an opinion and the taxpayer is entitled to be informed of it, and upon the taxpayer's request, the Commissioner should inform the taxpayer of the facts he has taken into account in reaching his conclusion.”⁵⁸

Again, in *Kolotex*, his Honour said that:

“If, as is the case in the present matter, there is more than one such matter upon which the Commissioner's state of mind is of the essence of the assessment, the Commissioner should arrive at and record his satisfaction or lack of it as to each of these matters along with its factual basis ... further ... the Commissioner must expose to the taxpayer, particularly if so requested, both his state of mind at the relevant time and its basis.”⁵⁹

Consistently with these comments the Commissioner has, in ATO Practice Statement PSLA 2003/5, specified that:

“... any decision to make a Division 13 determination or apply the corresponding Treaty Articles must be adequately documented. The documentation must include all facts and considerations taken into account by the decision-maker as well as references to all reports or other written material considered in making the decision.”

The importance of obtaining the factual basis upon which the Commissioner exercises his discretion is obvious. As the High Court said in *Duggan v F C of T*, in relation to sec 99A:

“... if the Commissioner selects factors on which he bases his opinion and in describing them makes it clear that he has misconceived the relevant facts, that is, facts which he has chosen to treat as relevant and to elevate to the status of factors on which his opinion is based, his opinion then ceases, in my view, to be of any legal effect. It is as if he has failed to reach any opinion or has reached it upon the basis of irrelevant facts.”⁶⁰

⁵⁸ *Giris Pty Ltd v F C of T* 119 CLR 365 at p373

⁵⁹ *Kolotex Hosiery (Australia) Pty Ltd v F C of T* 132 CLR 353 at p541

⁶⁰ *Duggan v F C of T* 129 CLR 365 at p370

Recently, in *Rio Tinto Ltd v Commissioner of Taxation*⁶¹ Sundberg J, on an application by the taxpayer seeking an order for the Commissioner to file a more complete Statement of Facts Issues and Contentions than had been filed, reviewed these and a number of other authorities in relation to a taxpayer's rights to particulars, especially those relating to an application of Part IVA, and concluded, in relation to the Commissioner's conclusion that sec 46A applied, that:

“The Commissioner must have been satisfied that the dividend arose out of, or was made in the course of a transaction etc by way of dividend stripping. And he must have reached that state of satisfaction after having taken into consideration the matters listed in sec 46A(3). But there is no mention in the document of any facts or matters that form the basis for the respondent's state of mind. I refer to Barwick CJ's judgment in *Kolotex ...* . Nor is there any reference to the sub-section (3) matters – either whether those in paras (a), (b) and (c) exist or whether any other matters were taken into consideration under para (d). Nor is there any statement of the facts or matters that led the respondent to conclude that the correct amount of the dividend rebate was nil.”

The Commissioner had drawn the attention of the court to the fact that much of the information about the way he put his case, and his reasoning process relating to the contentions, was available to the taxpayer in other documents and particularly in a Position Paper which had been provided to the taxpayer, as well as to the Commissioner's Notice of Decision on the objection which contained “an elaborate exposition of the respondent's position on each issue.” On the basis of that material the Commissioner claimed to have made clear to the taxpayer his view of the facts and the application of the law. Sundberg J rejected these arguments and said:

“It is now well-established that the statement takes the place of pleading so that after the exchange of statements the parties to a tax appeal know the case each has to meet. A statement that leaves a taxpayer uncertain as to how the case is put against it is embarrassing and oppressive. A statement that does not disclose the facts on which the respondent has based his assessment and the manner in which he has arrived at it, suffers from these twin vices. ... The statement takes the place of pleadings, and the appellant taxpayer is by the Rules entitled to have a proper statement just as much as a respondent is entitled to pleadings disclosing the case against it. It is no answer to the requirement for a Statement of Claim that the respondent well knows aliunde the case against him.”

In the result the Commissioner was obliged to provide a more detailed statement.

⁶¹ *Rio Tinto Ltd v Commissioner of Taxation* [2004] FCA 335

The above quoted statements suggest that the Commissioner would be wise, when making determinations under Division 13, to proceed in a careful and deliberate fashion. Ideally the decision maker or delegated decision maker would formally record the findings of facts made for the purpose of exercising the relevant discretions and formally identify the matters taken into account in their exercise. However, it appears that this is not, or not yet, an established practice of the Commissioner. In the result, a taxpayer may well be assisted, by an apparent lack of formality in the existing process, to show that the exercise of the relevant discretions and the making of the vital determinations are fatally flawed.

The most appropriate way of gathering the evidence to demonstrate that this is so will depend upon the circumstances. A request under the Freedom of Information Act, for example, may supply useful documentation but will not necessarily provide the reasons for the making of a determination under Division 13. It is likely to require supplementation by requests for proper particulars, an appropriate pleading by the Commissioner such as that sought in *Rio Tinto* and even by the administration of carefully crafted interrogatories of the kind which were employed in *Cripps & Jones*.⁶² One way or another, therefore, it should be possible to gather the information to mount an attack on the Commissioner's decision, based on administrative law grounds.⁶³ However, much of this would be irrelevant if the AAT is chosen as the tribunal to review the decision rather than a court, because in the AAT it will not be necessary to prove any error on the part of the Commissioner in order to have the Tribunal conduct its own review and reach its own decision, "on the merits."⁶⁴

What may be conceived to be a tactical advantage, therefore, of seeking judicial review in a court rather than an enquiry in the AAT is that, in the former, it is the Commissioner's conduct in making relevant determinations which will come under the judicial microscope. It is suggested that this conduct will frequently be found wanting, if only because there has not yet been an adequate judicial examination of the issues to provide the Commissioner with the necessary guidance. In the

⁶² *F C of T v Cripps & Jones Holdings Pty Ltd* 87 ATC 4977 see p4983

⁶³ For a general discussion on the extent of an administrator's obligation to give reasons for decisions, see Aronsen Dyer and Groves "Judicial Review of Administrative Action" at p554 et seq and Professor D J Galligan's "Discretionary Powers" at p267 et seq

⁶⁴ *Copperart Pty Ltd v F C of T* 94 ATC 4259 at p4265

meantime it is suggested that the Commissioner may have developed a false sense of security because he has conducted the extensive examinations into the question of arriving at an arm's length price which are evident from the voluminous nature of his own rulings on the subject. But following these rulings will not necessarily mean complying with the requirements for valid determinations under Division 13.