HIGH COURT OF AUSTRALIA

NETTLE J

VLADO BOSANAC PLAINTIFF

AND

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Bosanac v Commissioner of Taxation
[2019] HCA 41
Date of Hearing: 18 October 2019
Date of Judgment: 22 November 2019
P41/2019

ORDER

1. Application dismissed.

2. The plaintiff pay the defendants' costs of the application to this Court.

Representation

M L Robertson QC with J W R Fickling for the plaintiff (instructed by Cove Legal)

S J Sharpley QC with T L Jonker for the first defendant (instructed by Australian Government Solicitor)

Submitting appearances for the second and third defendants

CATCHWORDS

Bosanac v Commissioner of Taxation

Income tax (Cth) – Appeal against objection decision – Where Commissioner of Taxation ("Commissioner") issued amended assessments of taxable income following commencement of audit – Where taxpayer objected to amended assessments – Where objection decision made in respect of taxpayer's objection ("Objection Decision") – Where further amended assessments made consequent upon Objection Decision – Where taxpayer appealed against Objection Decision under Pt IVC of *Taxation Administration Act 1953* (Cth) ("Act") but not against further amended assessments – Where Commissioner conceded certain amounts incorrectly assessed as income ("Conceded Amounts") – Whether appeal under Pt IVC of Act was against Objection Decision or against further amendment assessments – Whether Commissioner's assessment excessive to extent of Conceded Amounts.

Administrative law – Judicial review – Jurisdictional error – Where primary judge determined appeal against Objection Decision under Pt IVC of Act – Where Full Court of Federal Court of Australia determined appeal against decision of primary judge – Where taxpayer sought writs of certiorari in respect of decisions of primary judge and Full Court – Whether primary judge and Full Court each misconstrued jurisdiction – Whether primary judge and Full Court committed jurisdictional error – Whether taxpayer's application for judicial review, after expiration of time in which to seek special leave to appeal, sufficient basis to dismiss application.

Words and phrases – "amended assessment", "disallowance of objection", "excessive assessment", "falsa demonstratio non nocet", "grounds of objection", "jurisdictional error", "misconceive jurisdiction", "non-jurisdictional error", "objection decision", "objection to assessment", "refusal of relief", "taxable income", "taxation decision", "taxation objection", "taxpayer's burden of proof", "wide survey and exact scrutiny".

Taxation Administration Act 1953 (Cth), Pt IVC.
Income Tax Assessment Act 1936 (Cth), ss 166, 167.

1 NETTLE J. This is an application for constitutional or other writ[1]. The plaintiff seeks a writ of certiorari to quash the judgment and orders of the Full Court of the Federal Court of Australia (Greenwood, Burley and Colvin JJ) dismissing an appeal from the judgment and orders of the primary judge (Steward J) that the plaintiff's appeal against the Commissioner of Taxation's decision in respect of the plaintiff's taxation objection to amended assessments of income tax for the years of income ended 30 June 2006 to 30 June 2013 be dismissed; a writ of certiorari to quash the primary judge's judgment; and other orders including a writ of mandamus to compel the Commissioner to excise two amounts, totalling $600,000, from the plaintiff's assessable income for the year of income ended 30 June 2009.

2 The relevant procedural history may be briefly stated. In March 2014, the Commissioner commenced an audit into the plaintiff's tax affairs. On 25 February 2015, before the completion of the audit, the plaintiff for the first time lodged tax returns for the years of income ended 30 June 2006 to 30 June 2013. On completion of the audit, on 16 June 2015 the Commissioner issued notices of amended assessments that substantially increased the plaintiff's amount of taxable income from the amounts included in the plaintiff's 2015 lodgements ("the Amended Assessments"). In August 2015, the plaintiff lodged objections to the Amended Assessments, the outcome of which was a decision of the Commissioner on 1 June 2016 to revise the plaintiff's taxable income ("the Objection Decision"). On 8 June 2016, the Commissioner issued notices of further amended assessments reflecting the outcome of the Objection Decision ("the Further Amended Assessments"). Pursuant to s 14ZZ of the *Taxation Administration Act 1953* (Cth), the plaintiff commenced an appeal in the Federal Court against the Objection Decision.

3 The basis of the plaintiff's claim for certiorari is said to be that the primary judge and the Full Court misconceived the nature of the plaintiff's appeal: as an appeal in respect of the Amended Assessments rather than as an appeal in respect of the Further Amended Assessments. The plaintiff contends that the primary judge, and the Full Court, thereby misconceived their respective jurisdictions, with the result that their judgments and orders are a nullity, and that the plaintiff's appeal against the Objection Decision remains to be determined.

4 The basis of the plaintiff's claim for a writ of mandamus is that, because the Commissioner's counsel conceded before the primary judge that the Commissioner no longer contended that two amounts totalling $600,000 that the

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1 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14], 92-93 [21] per Gaudron and Gummow JJ, 137-138 [152] per Kirby J, 139-141 [157]-[163] per Hayne J.

Commissioner had treated as taxable income derived by the plaintiff in the 2009 year were income, the Commissioner is bound to reduce the 2009 further amended assessment by $600,000.

5 No satisfactory explanation has been offered as to why the plaintiff adopted the course of seeking writs of certiorari and mandamus rather than special leave to appeal against the Full Court's judgment, or why the plaintiff delayed until now, long after the expiration of the time for seeking special leave, in order to make this application. They are sufficient reasons in themselves to dismiss the application[2]. In case it be thought, however, that the plaintiff might otherwise have had a realistic chance of success, it is appropriate to explain why that is not so.

The facts

6 On 25 February 2015 the plaintiff lodged for the first time income tax returns for the 2006 to 2013 years of income, which disclosed the following taxable income:

Income tax year	**Taxable income**
2006	$0
2007	$0
2008	$4
2009	$0
2010	$242,928
2011	$500,263
2012	$31,566
2013	$0

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2 See *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 473-474 [13] per McHugh J; 177 ALR 491 at 495; *Plaintiff S3/2013 v Minister for Immigration and Citizenship* (2013) 87 ALJR 676 at 678 [9]-[14] per Gageler J; 297 ALR 560 at 562-563; *Annam v Minister for Immigration and Border Protection* [2019] HCATrans 135 at 10:373-379 per Nettle J.

The plaintiff was assessed in accordance with those returns, but he now accepts that they were inadequate.

7 Following completion of the audit, on 16 June 2015 the Commissioner issued the Amended Assessments, and notices of shortfall penalty, as follows:

Notice	**Year ended**	**Amount of tax payable**
Notice of amended assessment	30 June 2006	$777,462.50
Notice of amended assessment	30 June 2007	$860,761.93
Notice of amended assessment	30 June 2008	$725,749.65
Notice of amended assessment	30 June 2009	$442,888.61
Notice of amended assessment	30 June 2010	$292,913.70
Notice of amended assessment	30 June 2011	$488,968.55
Notice of amended assessment	30 June 2012	$195,689.95
Notice of amended assessment	30 June 2013	$151,644.32
Notice of assessment of shortfall penalty	30 June 2006	$693,549.24
Notice of assessment of shortfall penalty	30 June 2007	$621,721.99
Notice of assessment of shortfall penalty	30 June 2008	$400,585.16
Notice of assessment of shortfall penalty	30 June 2009	$197,584.58

Notice	**Year ended**	**Amount of tax payable**
Notice of assessment of shortfall penalty	30 June 2010	$70,787.57
Notice of assessment of shortfall penalty	30 June 2011	$68,658.90
Notice of assessment of shortfall penalty	30 June 2012	$30,197.67
Notice of assessment of shortfall penalty	30 June 2013	$13,483.10

8 As already observed, in August 2015 the plaintiff lodged taxation objections to the Amended Assessments, which resulted in the Commissioner issuing the Objection Decision on 1 June 2016. The effect of the Objection Decision was to revise the plaintiff's taxable income upwards in some years and downwards in others. On 8 June 2016 the Commissioner issued the Further Amended Assessments, in accordance with the Objection Decision, as follows:

Year	**Amended assessment of taxable income**	**Further amended assessment of taxable income**	**Annual tax payable as per the further amended assessment**
2006	$1,636,933.00	$1,649,335.00	$783,428.45
2007	$1,893,359.00	$1,458,196.00	$658,411.10
2008	$1,604,623.00	$2,813,459.00	$1,287,858.40
2009	$1,001,911.00	$1,480,107.00	$665,249.75
2010	$684,008.00	$590,206.00	$249,295.75
2011	$1,108,427.00	$849,485.00	$368,560.50
2012	$469,242.00	$482,917.00	$202,185.55
2013	$383,005.00	$388,753.00	$154,317.10

9 On 1 August 2016 the plaintiff filed in the Federal Court a notice of appeal against the Objection Decision, defined in his notice of appeal as the "Notice of objection decision ... for the [plaintiff] dated 1 June 2016 in respect of the amended assessment of the [plaintiff] for the years ended 30 June 2006 to 30 June 2013 inclusive". The plaintiff did not lodge a taxation objection pursuant to Pt IVC of the *Taxation Administration Act* against the Further Amended Assessments. That led the primary judge to observe that his Honour did not need to set out the adjustments made by the Further Amended Assessments.

10 Before the primary judge, the plaintiff abandoned his objection in relation to the primary tax assessments in respect of the 2006, 2010 and 2011 years of income, leaving only the 2007 to 2009, 2012 and 2013 years of income in issue. As the primary judge held[3], that meant that the onus was on the plaintiff to prove on the balance of probabilities the extent to which the "impugned assessment[s]" were excessive. And as the primary judge found[4], the plaintiff failed to do so, because:

> "Where a taxpayer fails to retain records which evidence the course of a business, or fails to create such documents, he or she may well face a great difficulty in demonstrating excessiveness. This was the very problem which the [plaintiff] faced here."

11 The plaintiff appealed to the Full Court on a number of grounds, including that the primary judge erred in treating the matter as a question of whether the *Amended* Assessments were excessive, as opposed to whether the *Further* Amended Assessments were excessive (Ground 1), and that the primary judge erred in failing to hold that, by reason of the Commissioner's concession as to the $600,000 that the Commissioner had treated as taxable income derived in the 2009 year of income, the amended assessment in respect of the year of income ended 30 June 2009 was excessive to the extent of, at least, $600,000 (Ground 3).

Certiorari: what was the subject of the appeal to the primary judge?

12 The Full Court did not accept that the primary judge erred in treating the issue as whether the Amended Assessments were excessive. Their Honours reasoned that a taxation objection to an assessment does not, of itself, produce an amended assessment (or, as here, a taxation objection to an amended assessment does not of itself produce a further amended assessment), and, therefore, that even where, as here, the Commissioner issues a further amended assessment to give effect to an objection decision in respect of an objection against an amended

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3 *Bosanac v Commissioner of Taxation* [2018] FCA 946 at [9] per Steward J.

4 *Bosanac v Commissioner of Taxation* [2018] FCA 946 at [9] per Steward J.

assessment, the issue of the further amended assessment does not alter the subject matter of the taxpayer's appeal against the objection decision. As the Full Court stated[5]:

> "By s 14ZY of the [*Taxation Administration Act*], if a taxation objection has been lodged then the Commissioner must decide whether to allow it, wholly or in part, or disallow it: s 14ZY(1). The outcome is an 'objection decision': s 14ZY(2). It is no part of the objection decision to amend an assessment. The decision concerns only the merits of the objection. Under s 170(1), item 6 of the [*Income Tax Assessment Act 1936* (Cth) ('the ITAA')] the Commissioner has power to amend an assessment as a result of an objection made by a taxpayer. Indeed, an amendment in exercise of that power may be expected if an objection is upheld given the statutory consequences of an assessment[6]. Issues of validity may arise in respect of the assessment the subject of a valid objection where that assessment has not been amended to conform to the outcome on the objection, particularly given the conclusive evidentiary character afforded to a tax assessment under the legislation. A challenge to the validity of an assessment would confront the terms of s 175 of the ITAA[7]. However, what is significant for present purposes is that the determination of the objection is a separate exercise of power to any amendment to the assessment that may be made consequent upon an objection."

13 There is no error in that reasoning. Section 14ZZO of the *Taxation Administration Act* provides that:

> "In proceedings on an appeal under section 14ZZ to a court against an objection decision:
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> (a) the appellant is, unless the court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and

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5 *Bosanac v Commissioner of Taxation* [2019] FCAFC 116 at [15] per Greenwood, Burley and Colvin JJ.

6 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 199 per Brennan J.

7 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 157 [24] per Gummow, Hayne, Heydon and Crennan JJ.

(b) the appellant has the burden of proving:

(i) if the taxation decision concerned is an assessment – that the assessment is excessive or otherwise incorrect and what the assessment should have been; or

(ii) in any other case – that the taxation decision should not have been made or should have been made differently."

Consequently, where, as here, an objection decision is a decision partly to disallow an objection against an assessment, the issue on appeal against the objection decision is, perforce of s 14ZZO(b)(i), whether the assessment is excessive or otherwise incorrect and what the assessment should have been.

14 Granted, s 14ZZO(b)(i) is awkwardly drafted, for, in terms, it applies only "if the taxation decision concerned *is an assessment*", and, as has been seen, an objection decision is not an assessment but rather a decision to allow or disallow an objection against an assessment. Plainly, however, the reference in s 14ZZO(b)(i) to "an assessment" is intended to apply in circumstances where "the taxation decision concerned is a *taxation objection decision in respect of an objection against an assessment*". That construction alone is consistent with each of the preceding relevant provisions of Pt IVC of the *Taxation Administration Act* and precisely equates to the effect of the former s 190(b) of the ITAA (from which s 14ZZO(b)(i) was derived[8]). It is also confirmed by s 14ZZQ(1) of the *Taxation Administration Act*, which provides that:

> "When the order of the court in relation to the decision becomes final, the Commissioner must, within 60 days, take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision."

15 The distinction between an assessment the subject of objection and an objection decision made in response to the objection is, however, important inasmuch as s 14ZV of the *Taxation Administration Act* provides that:

> "If the taxation objection is made against a taxation decision, being an assessment or determination that has been amended in any particular, then a person's right to object against the amended assessment or amended determination is limited to a right to object against alterations or additions in respect of, or matters relating to, that particular."

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8 See Australia, House of Representatives, *Taxation Laws Amendment Bill (No 3) 1991*, Explanatory Memorandum at 281 [26.40].

And s 14ZVC(3) provides that:

> "A person cannot object under this Part against a taxation decision to which this section applies on a particular ground if:
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> (a) the ground was a ground for an objection the person has made against another decision to which this section applies; or
>
> (b) the ground could have been a ground for an objection the person has made against another decision to which this section applies."

16 Hence, if a taxpayer wishes to object against an amended assessment (or, as in this case, a further amended assessment) issued in response to a taxation objection, the taxpayer may only do so in respect of the alterations and additions comprising the amendment (or further amendment) and only on grounds not raised in the previous taxation objection. As the Full Court explained[9]:

> "Where an assessment has been amended in any particular then the right of objection in respect of the amended assessment is limited to a right to object against alterations or additions to that particular: s 14ZV. So, an amendment does not trigger a fresh right to object to the whole of the assessment. If, after an objection decision, the Commissioner exercises the power to amend the assessment the subject of an objection then the amended assessment may be the subject of an objection under s 175A of the ITAA, but the taxpayer cannot object on a ground raised in a previous objection: s 14ZVC. So, in the case of an amended assessment not only is the objection to be confined to any amended particular, it must not re-agitate grounds dealt with by an objection to an earlier assessment in respect of the same tax liability."

17 The plaintiff argued that it has long been established that there can never be more than one operative assessment at any one time in respect of a year of income and, therefore, that an amended assessment cannot properly be conceived of as having an existence separate from the original assessment which, upon issue of the amended assessment, the amended assessment replaces. In the plaintiff's submission, it followed that both the primary judge and the Full Court were in error in holding that the subject matter of the appeal was whether the Amended Assessments, as opposed to the Further Amended Assessments, were excessive, and that both the primary judge and the Full Court thereby committed jurisdictional errors of misconceiving the nature of their tasks.

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9 *Bosanac v Commissioner of Taxation* [2019] FCAFC 116 at [13] per Greenwood, Burley and Colvin JJ.

18 That argument must be rejected. It may be accepted that there can never be more than one assessment of income tax operative at any one time in respect of a year of income. In that sense, an amended assessment has no existence separate from the assessment whence it derives: it is an amended version of the original assessment, not a "new assessment"[10]. But, as has been seen, a taxpayer's statutory rights of objection and appeal are prescribed in terms that frame the objection and appeal process as if an original assessment and an amended assessment were two different assessments; thus limiting the taxpayer's right of objection against the amended assessment to such particulars as have been amended vis-à-vis the original assessment and, on appeal, prohibiting the taxpayer from relying on grounds of objection to the amended assessment which have been or could have been taken as grounds of objection to the original assessment.

19 Further, s 14ZW(1B) of the *Taxation Administration Act* provides in part that, if s 14ZV applies to a taxation objection (as it did here), the relevant taxation objection must be lodged before the end of whichever of the following periods ends last:

> "(c) the 4 years after *notice of the assessment* or determination that has been amended by the *amended assessment* or amended determination to which the taxation objection relates has been served on the person;
>
> (d) the 60 days after the notice of the *amended assessment* or amended determination to which the taxation objection relates has been served on the person." (emphasis added)

Correspondingly, s 14ZY provides, in part, that, where a taxation objection has been lodged with the Commissioner within the required period, the Commissioner must decide whether to allow it, wholly or in part, or disallow it[11].

20 Given, therefore, that the time for filing a taxation objection against a notice of amended assessment does not begin to run until the issue of the notice of amended assessment, a taxation objection against an original assessment cannot be regarded as an objection against the amended assessment, and an appeal from the Commissioner's disallowance of objection against the original assessment cannot be regarded as an appeal against disallowance of an objection

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10 *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* (1928) 42 CLR 39 at 54 per Isaacs J; *Cadbury-Fry-Pascall Pty Ltd v Federal Commissioner of Taxation* (1944) 70 CLR 362 at 381 per Latham CJ.

11 *Taxation Administration Act*, s 14ZY(1).

against the amended assessment. Read together, ss 14ZV and 14ZW(1B) show that the integers of an objection to an original assessment and an objection to an amended assessment are intended to comprise separate taxation objections and be subject to different limitation periods.

21 To similar effect, s 14ZZN of the *Taxation Administration Act* provides in substance that an appeal to the Federal Court against a taxation objection decision must be lodged with the Court within 60 days after the taxpayer is served with notice of the decision. Since the appeal in this case was an appeal against the Objection Decision in respect of the plaintiff's taxation objection against the Amended Assessments, and since there could be no decision to disallow an objection against the Further Amended Assessments unless and until the plaintiff first lodged a taxation objection against the Further Amended Assessments (which the plaintiff did not do), there could be no appeal against an objection decision in respect of the Further Amended Assessments. That conclusion is fortified by s 14ZZO of the *Taxation Administration Act*, which, in substance and subject to the court providing otherwise, confines the scope of an appeal under s 14ZZ to the grounds stated in the taxation objection to which the decision relates.

22 Moreover, as the Full Court observed, in this matter it made no difference in effect whether the appeal were properly conceived of as being against the Amended Assessments or as against the Further Amended Assessments, or, it may be interpolated more accurately, as against the Objection Decision relating to the Amended Assessments. For the reasons explained, the burden was on the plaintiff to establish on the balance of probabilities the true amount of his taxable income for the years of income in question, and the plaintiff failed to do so. As the Full Court observed[12]:

> "So, even assuming [that the primary judge was in error in deciding the question as one of whether the Amended Assessments were excessive], in order to succeed on the present appeal it would be necessary to show that the primary judge erred in finding that [the plaintiff] had simply failed to demonstrate the nature and extent of his income during the relevant years. Even if it was the Further Amended Assessments that were the subject of the appeal to the primary judge, the same reasoning would apply.
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> Not only is the appeal ground not to be upheld, it does not go anywhere unless the main findings of the primary judge are also

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12 *Bosanac v Commissioner of Taxation* [2019] FCAFC 116 at [54]-[55] per Greenwood, Burley and Colvin JJ.

demonstrated to be in error. As the balance of these reasons show, no such error has been demonstrated."

23 It follows that, even if the primary judge and the Full Court had been in error in conceiving of the question on appeal as one of whether the *Amended* Assessments were excessive (and, for the reasons given, their Honours were not), it would have been an error devoid of relevant consequence: a case of *falsa demonstratio non nocet*[13] or, at most, a non-jurisdictional error of law made in exercise of the Full Court's appellate jurisdiction to decide the plaintiff's appeal against the primary judge's orders[14]. And, for the same reason, even if the approach adopted by the primary judge and the Full Court had amounted to a jurisdictional error, it would have been appropriate to refuse constitutional or prerogative writ relief in the exercise of the residual discretion on the basis that the supposed error could not possibly have made a difference to the outcome of the matter[15].

The $600,000 concession

24 As the primary judge recorded, counsel for the Commissioner conceded in the course of the appeal against the Objection Decision that two deposits that the Commissioner had treated as taxable income – one for $250,000, which the plaintiff had claimed was a repayment of a loan made to Advanced Ocular Systems Limited, and the other for $350,000, which the plaintiff had claimed was a repayment of another loan to Advanced Ocular Systems Limited – were not

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13 See and compare *Diocesan Trustees of the Church of England in Western Australia v Solicitor-General* (1909) 9 CLR 757 at 761-763 per Griffith CJ, 767-768 per Barton J, 771 per O'Connor J; *Cooney v Ku-Ring-Gai Corporation* (1963) 114 CLR 582 at 594 per Taylor J; *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 543 [57] per Kiefel CJ, Gageler and Nettle JJ; 355 ALR 216 at 231.

14 See *Craig v South Australia* (1995) 184 CLR 163 at 177-180 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; see also *Federal Court of Australia Act 1976* (Cth), Pt III Div 2.

15 See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5] per Gleeson CJ, 92 [17], 106-109 [51]-[58] per Gaudron and Gummow JJ, 136-137 [145]-[150] per Kirby J, 156 [217] per Callinan J; *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 at 270 [85] per Nettle and Gordon JJ; 363 ALR 599 at 620; cf *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429 per Latham CJ.

taxable income. But, as the primary judge held[16], it did not follow that the plaintiff thereby succeeded in establishing that the taxable income for the 2009 year of income was overstated by that or any other amount. As his Honour reasoned, the plaintiff needed to go further than attack the basis on which the Commissioner had issued the Amended Assessments[17]. He needed to lead evidence constituting "a wide survey and an exact scrutiny of [his business] activities"[18] in order to prove positively what his taxable income was in each year. And since that was something that the plaintiff failed to do, the Commissioner's concession as to the $250,000 and $350,000 did not avail him. As the primary judge explained[19]:

> "The amount of tax payable under the first amended assessment for that year was $442,888.61 (subsequently adjusted upwards to $643,048 in the second amended assessment issued for the 2009 year). That reflected undisclosed assessable income, according to the Commissioner Reasons for Decision for issuing the amended assessment, of $1,001,911. The limited concession made by the Commissioner does not discharge the taxpayer's onus of showing that the undisclosed assessable income of $1,001,911 was not income derived by him in that year."

25 As became apparent in the course of oral argument before this Court, the motivation for the plaintiff's efforts to paint the appeal to the primary judge as an appeal against the Further Amended Assessments, as opposed to an appeal against the Amended Assessments, was a notion that the Further Amended Assessments were not default assessments issued under s 167 of the ITAA – in respect of which the plaintiff accepted that it would have been incumbent on him

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16 *Bosanac v Commissioner of Taxation* [2018] FCA 946 at [75] per Steward J.

17 *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81 at 89 per Mason J; *Macmine Pty Ltd v Federal Commissioner of Taxation* (1979) 53 ALJR 362 at 366 per Gibbs J, 371 per Stephen J, 381 per Murphy J; 24 ALR 217 at 225, 234-235, 255; *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614 at 624-625 per Brennan J.

18 *Western Gold Mines NL v Commissioner of Taxation (WA)* (1938) 59 CLR 729 at 740 per Dixon and Evatt JJ. See also *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at 663 [69] per Gaudron, Gummow, Kirby and Hayne JJ; *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 297 [19] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

19 *Bosanac v Commissioner of Taxation* [2018] FCA 946 at [75] per Steward J.

to show his true assessable income for the year of income in question[20] – but assessments issued under s 166 of the ITAA, in respect of which the plaintiff contended that it was sufficient in order for him to succeed, at least to the extent of $600,000, to demonstrate that the Commissioner was in error in classifying the $600,000 as income.

26 As both the primary judge and the Full Court concluded, however, that notion was misplaced. As Brennan J discerned in *Federal Commissioner of Taxation v Dalco*[21], although it will often be the case that the grounds of objection and the Commissioner's notice of objection decision define the issues for determination by a court entertaining an appeal against a disallowance of objection, the grounds of objection and the Commissioner's notice of objection decision are not pleadings, and, therefore, subject to the applicable rules of procedure and directions for the conduct of the litigation, it is always open for the Commissioner upon giving proper notice to the taxpayer to put the taxpayer to proof:

> "It is not the grounds of the objection against an assessment but the objection itself which is treated as an appeal and forwarded to [the court] for hearing and determination: ss 187(1)(b), 197, 199. It would be inappropriate for a court determining an appeal to make an order altering the tax liability assessed (s 199) unless the court were satisfied that the amount to which it proposed to alter the assessment represented the true tax liability of the taxpayer. Although the grounds of objection limit the grounds of appeal, *the ultimate question for the court hearing the appeal is not whether the grounds have been made out but whether the amount assessed as taxable income is wrong. 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.*" (emphasis added)

27 More specifically, as the majority of this Court held in *Federal Commissioner of Taxation v ANZ Savings Bank Ltd*[22], when approving Brennan J's observations in *Dalco*, regardless of whether an appeal is concerned with an assessment issued pursuant to s 167 or s 166 of the ITAA, the question for the court hearing an appeal against disallowance of an objection to assessment is not whether the grounds of objection have been made out, but

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20 See *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63 at 87-88 per Latham CJ.

21 (1990) 168 CLR 614 at 621.

22 (1994) 181 CLR 466 at 479 per Brennan, Deane, Dawson and Toohey JJ.

whether the taxpayer has discharged the burden[23] of proving that the assessment is excessive.

28 Admittedly, as the Full Court observed[24], although the nature of the task for a court on appeal against a disallowance of objection is the same irrespective of whether the assessment the subject of objection was issued under s 166 or s 167 of the ITAA, the differences between s 166 and s 167 assessments sometimes mean that the manner in which a taxpayer may demonstrate that an assessment is excessive is different depending on whether it is a s 166 or s 167 assessment:

> "In the case of an assessment under s 167 of the ITAA there is a lump sum assessment of taxable income rather than the computational process under s 166 of the ITAA of considering allowable deductions that may produce the taxable income. So, for example, in the case of an assessment under s 166 it is possible for the taxpayer to accept aspects of the calculations (*assuming the Commissioner does not seek to advance a different position on the appeal*) and focus upon whether certain deductions should have been allowed. Whereas, in the case where the assessment is made under s 167, the taxpayer will have to demonstrate by evidence both sides of the equation because the assessment involves the exercise of a power to make a lump sum assessment of the taxable income based on the information available to the Commissioner." (emphasis added)

29 In this case, however, the Commissioner did advance a different position on appeal. As the primary judge recorded[25], although the Commissioner conceded that the two amounts totalling $600,000 were not taxable income, the Commissioner "did not otherwise admit the underlying factual foundation alleged by the [plaintiff]". Thus, as both the primary judge and the Full Court reasoned, in effect, the position remained that the amount of taxable income for which the Commissioner contended was the amount shown in the Objection Decision. In substance, the only effect of the Commissioner's concession was that the plaintiff was relieved of the necessity of negativing the inference, otherwise available, that the two amounts totalling $600,000 were taxable income. The onus remained

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23 Then imposed by s 190(b) of the ITAA, and now imposed by s 14ZZO(b)(i) of the *Taxation Administration Act*; see *Federal Commissioner of Taxation v ANZ Savings Bank Ltd* (1994) 181 CLR 466 at 478-479 per Brennan, Deane, Dawson and Toohey JJ.

24 *Bosanac v Commissioner of Taxation* [2019] FCAFC 116 at [57] per Greenwood, Burley and Colvin JJ.

25 *Bosanac v Commissioner of Taxation* [2018] FCA 946 at [52] per Steward J.

on the plaintiff to adduce evidence sufficient to establish on the balance of probabilities the true amount of his taxable income (of course, making such forensic use as could be made of the Commissioner's concession that the conceded amounts were not assessable income[26]) and thereby that the amount of taxable income as determined by the Commissioner exceeded the true amount. The plaintiff was not entitled to proceed on the basis that the conceded amounts could simply be deducted from the amount of taxable income that the Commissioner had determined in the relevant year of income.

30 That reasoning was correct. As has been seen, although the Commissioner and a taxpayer may agree to confine an appeal to a specific point of law or fact – and where that occurs, the taxpayer might succeed in the appeal by demonstrating that he or she is entitled to succeed on that point – in the absence of such an arrangement, the Commissioner is entitled to rely on any deficiency in the taxpayer's proof of the excessiveness of the amount assessed in order to uphold the assessment[27]. Equally, if all the facts are known, and the amount of taxable income in dispute depends only on the legal complexion of the established facts, the taxpayer may succeed by demonstrating on the balance of probabilities that the amount in question does not bear that legal complexion[28]. But where, as here, an appeal proceeds on the basis that not all of the material facts are known, either because the taxpayer has been less than forthcoming in making disclosures to the Commissioner or for some other reason, the taxpayer cannot succeed by showing only that the basis of the Commissioner's assessment was in some respect erroneous; since for all that can be told, unless and until the taxpayer proves to the contrary, there may be other income of which the Commissioner was not aware and which the Commissioner has not taken into account. In order to succeed in such a case, the taxpayer must discharge the burden of demonstrating on the balance of probabilities the true amount of the taxpayer's taxable income and thus that the amount determined by the objection decision is excessive. Here, that required the kind of wide survey and exact scrutiny of the plaintiff's business activities to which the primary judge referred and which was conspicuously absent from the plaintiff's presentation.

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26 See *Bosanac v Commissioner of Taxation* [2019] FCAFC 116 at [64] per Greenwood, Burley and Colvin JJ.

27 *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614 at 624 per Brennan J.

28 *Bailey v Federal Commissioner of Taxation* (1977) 136 CLR 214 at 221 per Mason J, 221-222 per Jacobs J, 228 per Aickin J; *Macmine Pty Ltd v Federal Commissioner of Taxation* (1979) 53 ALJR 362 at 371 per Stephen J; 24 ALR 217 at 235.

31 In the result, there is no basis for compelling the Commissioner to reduce the further amended assessment in respect of the 2009 year of income by the amount of $600,000.

Conclusion

32 For these reasons, the application is dismissed with costs.