

DEFAULT ASSESSMENTS AND THEIR CONTEST BEFORE BOARDS OF REVIEW, OR — GIVE A SUCKER AN EVEN BREAK

P. Gerber*

Section 167 *Income Tax Assessment Act* 1936 provides that where no return has been furnished, or the Commissioner is dissatisfied with the information disclosed in the return received, he may make a default assessment upon such amount upon which, in his judgment, income tax ought to be levied.

This section merely complements s.166, which vests upon the Commissioner the obligation to issue assessments either from the returns and/or from any other information. This is a mandatory obligation from which the Commissioner cannot be restrained by, say, an injunction unless a taxpayer is able to show bad faith — *Lucas v. O'Reilly*.¹

For the present purposes, I do not propose to make a distinction between cases where assessments have been lodged but the Commissioner has formed the opinion that the taxpayer has under-declared his assessable income, and those cases where no returns have been lodged at all. In either event, a taxpayer has set in train the kind of entertainment which is half ballet and half comic opera — ballet in the sense that all the steps are neatly predetermined and choreographed; comic opera in the sense that the cases are invariably highly amusing and often stretch credulity to the limit.

The whole drama commences with the overture, or 'investigation' as it is known in the trade. This is carried out by an investigation officer from the Tax Office who is distinguishable from other officers in the Office by the fact that he holds the unshakeable belief that a family of six can live comfortably on \$86 a week. This entrenched view is of some importance since the usual method of arriving at taxable income is by what is known as an 'asset betterment' basis. One simply adds living expenses to any increase in assets, deducts capital receipts, and hey presto, there is the taxpayer's income. If, on July 1 you have six terra cotta ducks nailed to your lounge room wall and on June 30 the ducks have flown the coop and been replaced by a Jackson Pollock, you either had a very good day at the races, or else you've fiddled the books. Given the present rate of tax and the current attitude of the High Court to family trusts and schemes, no honest taxpayer can buy a Jackson Pollock any more, with the possible exception of Mr Holmes a Court who, I believe, recently made an unsuccessful takeover bid for six Pollocks at the Guggenheim.

Let me say at once — there is no magic in an asset betterment statement. It is sometimes treated by judges as holy writ, and the place where it is delivered declared a sacred site. It is, of course, nothing more or less than a piece of evidence, to be considered along with other evidence in deciding the issue to which it is relevant, (cf. McGarvie J, *L'Esrange v. F.C. of T.*²).

The principle question in relation to default assessments relates to onus of proof. If the Commissioner has arrived at an arbitrary amount — be it by way of asset betterment or some other ritual — is it for the taxpayer to establish not only that the assessment is excessive but, more importantly, by how much? It is in this area that major disputations have occurred and, indeed, different approaches have been adopted by the various Boards.

* LL.B., D.Jur., Member, Taxation Board of Review No. 3 (Brisbane)

1. 79 A.T.C. 4081.

2. 78 A.T.C. 4744 at 4664.

The strict approach, one shared by most Board Members, can best be stated by quoting from a decision of Mr Fairleigh Q.C., reported in *Case L5*:

Although a Board of Review is only an executive body in an administrative hierarchy and its decision is not an adjudication, its functions when conducting a review are quasi-judicial; and (apart from purely procedural matters) when the Board is deciding an issue *inter partes*, it cannot proceed in a way in conflict with the way in which a Court would proceed. The Board cannot resort to any arbitrary expedient because it feels some dissatisfaction with the opinion as expressed by the Commissioner. The taxpayer has the burden of showing not only that an assessment is wrong, but also by how much it is wrong (*Buckley & Young Ltd. v. Commr. of I.R. (N.Z.)* 78 A.T.C. 6019, at 6031).³

With the utmost respect to my former distinguished colleague, I am not wholly convinced that this view is wholly correct. In other words, I am not persuaded that the onus is invariably on the taxpayer to displace the *exact* amount asserted by the Commissioner where that amount is arrived at arbitrarily; it is in my opinion sufficient if the taxpayer can show that the betterment income is excessive, in the sense that it includes non-assessable income, say the proceeds of betting. My own Board struck this problem in an acute form in *Case L2*.⁴ It is proposed to quote at some length from the case to illustrate what I considered at the time to be the correct position in law.

The two taxpayers in these references are Chinamen who jointly own and run a restaurant in a northern city of New South Wales. In addition, both bet heavily on the TAB with, so it was alleged, considerable success. I am satisfied that in each of the years now under review, both taxpayers showed substantial gains over losses from their betting, and that these gains are included in the 'betterment income' in the amended assessments now under review. It was agreed between the parties that the sole issue was whether the accretions, year by year, were the result of gambling, as contended for by the taxpayers, 'or the produce of an income earning activity', as alleged by the Commissioner.

Both taxpayers deposed that they kept the proceeds of the restaurant separate from the cash used for gambling, and such corroborative evidence as there was, supported this assertion. Despite the fact that both taxpayers were inscrutable — one spoke virtually no English — and used a system of 'book-keeping' which had already fallen into disuse by the beginning of the T'ang dynasty, I see no reason for disbelieving the evidence; viz: (i) that the 'betterment income', year by year, reflected their betting gains; (ii) that the takings from their two activities were kept in separate bags and that the day's 'special' never came off the menu. (In case it is thought that the above conclusions are somewhat unworldly and naive, it is worth pointing out that when these two gentlemen told a somewhat incredulous investigator that the increase in their assets were due to betting wins, they were advised that henceforth, they should collect all their major winnings by cheque. They did — and quadrupled their winnings in the following year. This evidence was objected to on the grounds of 'relevance', but admitted subject to objection. In my opinion, this evidence is admissible, not to prove that the earlier sums in dispute were winnings, but to establish that betting can, given certain skills, be made into a most profitable hobby.)

Accepting the taxpayer's evidence, it follows that their objection to the amended assessments must succeed. The case was fought out on an 'all or nothing' basis, and the two taxpayers have persuaded me that they won 'all'. It is therefore not strictly

3. 79 A.T.C. 20 at 27.

4. 79 A.T.C. 7.

necessary to deal with the Commissioner's legal argument. However, in deference to counsel's careful submission, I will briefly do so.

Thus, counsel for the Commissioner submitted that:

The authorities, in relation to cases in which the taxpayer alleges that the unexplained difference (in a betterment statement) was the produce of gambling, indicate that the taxpayer will only have discharged the burden of proof cast upon him by sec.190(b) if the taxpayer can prove, in relation to each tax year precisely what monies were earned from gambling, what monies were lost on gambling, and what the precise end result was; or alternatively, he must prove the precise amount of the taxable income from all sources which would give rise to taxable income.

When I queried whether this required proof to the nearest cent, counsel persisted in his assertion that the law did indeed demand that degree of precision, relying on two decisions of my own Board to support it; (12 T.B.R.D. Case M36; 13 T.B.R.D. Case N48).

Whenever "betterment income" is the subject of a reference to a Board of Review, the following propositions may be stated: (i) the amount assessed is only *prima facie* evidence that it is correct; (ii) there is no presumption that whenever there is a surplus of assets over returned income, the surplus must be income; (iii) it is for the taxpayer to show that the assessment is excessive. The problem, as I see it, is whether the taxpayer carries the further onus of quantifying the extent to which the assessment is excessive or, having established that the assessment is excessive, does the onus now shift to the Commissioner to establish the amount of assessable income in excess of the amount returned? This reference raised the problem acutely since the taxpayers' 'system' of establishing assessable income from their business is incapable of being verified, so that there is no corroboration that — in the absence of any other source of income — the increase in their assets is due to gambling wins.

A not dissimilar problem arose in *Krew v. F.C. of T.* 71 ATC 4213. In that case, central to the appeal was the question whether the appellant did start off, in the first year under review, with a lump sum (52,000 pounds) itself the alleged product of earlier successful gambling, which was asserted to have been the source of subsequent gambling wins. Did these wins account, year by year, in accretions of capital, as alleged by the taxpayer, or did they come from the taxpayer's metal dealing business, as alleged by the Commissioner? Walsh J concluded that:

"There is acceptable evidence to indicate that some money which found its way into the appellant's bank account did probably come from his betting activities, and that in the circumstances, some money of that description ought to have been left out of account in the betterment statement." (at p.4218)

Dealing with one year (1950/1951), his Honour held:

"Whilst I think it is not possible on the evidence to arrive at a complete knowledge of all the appellant's transactions, so that no problems are left unresolved, I do not regard that as a sufficient reason for refusing to accept it as probable that there was, in that year, a substantial accretion to the appellant's assets which was derived from gambling. *I think he should succeed in relation to that year.*" (at p.4222 — emphasis added)

Dealing with the next year, his Honour held:-

"For reasons similar to those I have stated in relation to the preceding year, I think it is likely that in this year a large amount from gambling did go into the business and that this was sufficient to account for the discrepancy of 7,389 pounds shown in the betterment statement. As to this year the appellant should succeed." (at p.4223)

In the following year, his Honour decided that the discrepancy between income returned and the betterment income

“is explained substantially by the flow into the bank accounts of cash which was, more likely than not, the proceeds of betting. I do not think I should try to reach such a precise result as would be obtained by treating the additional income attributed by the Commissioner to the taxpayer as being rightly included in his taxable income as to the relatively small amount of 500 pounds, but wrongly included as to the balance. I think that the taxpayer should succeed in relation to this year.” (at p.4223)

With respect to the remaining years, his Honour found the taxpayer had not discharged the burden of proof and he failed in toto.

It is against this background that his Honour's general statement of the law must be seen. In other words, Walsh J found for the taxpayer in those years where it was “likely” or “more likely than not” that a large amount of cash from gambling found its way into the taxpayer's business or bank account notwithstanding the three propositions he laid down:- (i) “it is clear that the onus of proof in relation to the main issues of fact in the case is on the appellant”; (ii) “it must be shown in respect of a particular year that the challenged assessment was wrong”; (iii) if it is not proved that the whole of the amount of income which is in dispute has been wrongly included as taxable income, then material must be provided upon which the amount of income which should have been excluded can be ascertained”⁵

It could be said that the result Walsh J. reached defied one of his own ‘rules’, viz. mere proof that only part of the amount in dispute has been wrongly included is not enough, ‘material must be provided upon which the amount of income which should have been excluded can be ascertained’.

There can be little doubt that in judicial proceedings, that is now the rule. Moller J. put it succinctly in a New Zealand case — *Lancaster v. C. of I.R.*:⁶ the onus of proof in objection proceedings requires that the final question must always be: ‘On all the evidence, has the taxpayer discharged the onus of demonstrating that the Commissioner's assessment was wrong and, if so, why it was wrong, and how far it was wrong?’⁷ The reason for placing such a strict onus on taxpayers is obvious enough. The Commissioner could not reasonably be expected to bear the onus of proving matters peculiarly within the knowledge of taxpayers. It can therefore be cogently argued that there are sound enough reasons why the Tax Act required a taxpayer to provide satisfactory evidence to support his calculations of his assessable income, and that he should lose unless he can provide sufficient evidence to discharge that onus.

But what about the case where the Commissioner makes an arbitrary assessment on a mere hunch or, in the terminology of equity, according to the length of his foot? That this can happen is illustrated by an old Board case⁸ where the Commissioner got it into his head that the taxpayer, a wharf labourer, had moonlighted as an SP bookie, and decided to double his taxable income. This is what the Chairman, Mr Gibson, had to say:

The receipt of money is, of course, not necessarily the derivation of assessable income and, fully realizing this, the Commissioner, through his officers, went to considerable trouble, by way of interviews with the taxpayer and his wife and the exploration of other avenues of inquiry, to discover the sources of the taxpayer's receipts over and above his wages. It would appear from the evidence called and tendered on behalf of

5. *Ibid.* at 8,9.

6. [1969] N.Z.L.R. 589.

7. *Ibid.* at 591.

8. 15 C.T.B.R. Case 81.

the Commissioner that in the end the Commissioner was unable to discover anything more definite as to the possibly assessable nature of those receipts than that there appeared to be some grounds for suspecting that they were wholly derived from starting price book-making and punting and possibly gambling at the game of two-up.

The only other suggested sources of the taxpayer's receipts other than wages were punting and gambling at two-up. The taxpayer said that he only played two-up occasionally and never on the wharfs and, in view of the devotion of his spare time to punting on horse races, I believe his statement. He admitted both gains and losses at two-up, but does not appear to have alleged that the net result was a gain in either of the two years concerned. The taxpayer did, however, allege that he made large gains in each year by punting and his evidence received some confirmation from that of his namesake, who spoke to some extent from his observation and who said, also, that the taxpayer was considered by his fellow workmen to be very lucky at the races. I hold that such net betting gains as were made by the taxpayer during each year are not assessable income. If the taxpayer's onus were a matter of sheer quantitative proof of the amount of his net punting gains during each year, it could not be held that the onus was discharged. But if a similar onus were placed on every person whose receipts for any year were, because of successful punting, in excess of such of those receipts as were definitely of an assessable nature, I do not see how any arbitrary assessment based on the whole of those receipts could ever be proved to be excessive unless the person concerned confined his punting to booked bets and could produce documentary evidence of the results of his betting from every bookmaker concerned. My opinion is that where the Commissioner arbitrarily assesses the whole of a taxpayer's receipts or estimated receipts from whatever source they may have been derived, and the taxpayer established to the satisfaction of the Board that none of his receipts in excess of those proved to be assessable income could have been derived from a source which is productive of assessable income, he has discharged his onus of proving that the assessment is (*pro tanto*) excessive. If strict proof of the actual amount of non-assessable receipts were essential, any assessment which treated as assessable income the whole of the receipts of a taxpayer who during the year of income was a successful punter would be practically invulnerable. In this case the taxpayer has, to my satisfaction, established that, except for his wages and the savings bank interest, his receipts or incomings for the years under review could not have been derived from any source which produced assessable income.

What saved this wharfie was the fact that he was able to establish, by way of exclusion, that none of the receipts included as income by the Commissioner came from a source productive of assessable income. That was enough in that case to discharge the requisite onus.

Going back to our Chinese punters, their system of bookkeeping was inadequate to exclude the possibility that all the betterment income came from the restaurant. Against this background, the majority decision was probably wrong. What I did, for my sins, was to seek refuge in a distinction, arguably spurious, that there is a lesser weight in the burden of proof in hearings before Boards of Review than that which applies to taxpayers in the Supreme Court. I approached the problem on the assumption that a Board of Review is the *alter ego* of the Commissioner and, pursuant to s.193, is able to substitute its opinion for that of the Commissioner; a Board must not act arbitrarily and be guided by the evidence. However, once it has been shown on the evidence that the Commissioner's opinion on which he based his arbitrary assessment is wrong, it is submitted that any presumption in favour of the assessment is spent. Henceforth a Board commences its enquiries *de novo* and decides for itself the extent — if any — the returns need to be amended year by year. This seems to me to be irrefutable logic. Once the foundations are shown to be rotten, we are surely entitled to demolish the edifice erected upon those foundations, if only for reasons of safety. Unlike

courts of law, Boards of Review are not bound by the strict rules of evidence. This is, of course, strenuously disputed by the Commissioner. His view was eloquently put in the submission made by Mr Graham of counsel in the Chinese Punters case (*Case L2*).

MR GRAHAM: The authorities in relation to cases in which the taxpayer alleged that the unexplained difference was the product of gambling indicate that the taxpayer will only have discharged the burden of proof cast upon him by s.190(b) if the taxpayer can prove in relation to each tax year precisely what moneys were earned from gambling, what moneys were lost on gambling and what the precise end result was; or alternatively, prove the precise amount of the taxable income of the taxpayer from all sources which would give rise to taxable income. Obviously if a taxpayer could account for all his increase in wealth in precise figures both as to gambling and as to taxable sources of income, he would have sufficiently discharged the onus.

In the instant case, there is no precise evidence offered as to what amounts, if any, were in fact earned in any of the tax years by any of the taxpayers from gambling activities. There is also totally imprecise evidence as to what the business profits of the taxpayers were from all sources whereunder they derived assessable income.

In the case of the business of the restaurant conducted in partnership by the taxpayers during the six tax years, there were, according to the evidence, cash register receipt records relating to the receipts of the business which were destroyed and not retained by the taxpayer. There is evidence that there was no cash book maintained, there was no day book maintained into which entries were made of the precise daily takings of the business. The most that is available to establish the income of the restaurant was certain documents coupled with certain assertions made by the taxpayers to their tax agents annually from which the tax agents have attempted to derive what were the profits for the business.

Of course, the profit of the business was measured by taking the sales income and deducting from it the expenses. Insofar as the expenses were paid by cheque, it is open to verification as to what those expenses were. Insofar as there were cash payments, there are no contemporaneous records and reliance is placed upon the statements made as to what amounts were paid or drawn. So far as sales income is concerned, no records were kept and all that could be done was to total the amount of moneys, cash moneys banked to what was said to be the partnership bank account and to add to those moneys the amounts said to have been paid as wages in cash and the amounts said to have been drawn in cash from time to time by the proprietors.

This method of calculating the sales income of the business is totally lacking in the precision that would be required were the taxpayers to sufficiently discharge the onus of proof cast upon them.

DR GERBER: Mr Graham. You have called no evidence, but in fact this is a review of the decision of the Commissioner on an asset betterment basis and we have simply no idea how these figures in dispute have been arrived at. It appears that there may well be a substantial betting component in the betterment obtained and as far as I can see from all that we have before us as to how that decision was arrived at, they could simply be figures plucked out of the air. Whatever figure the Commissioner puts on the taxpayer, it is up to him to extract the non-assessable components. You say the Commissioner has *carte blanche* to put any figure on it. We do not know on what basis it was arrived at.

MR GRAHAM: It falls to the taxpayer to prove that either there having been a net increase in wealth, there having been an assessment founded upon that net increase of wealth. The taxpayer can only succeed in challenging the assessment and discharging the onus of proof by proving to the satisfaction of the Board that the amount returned was the total taxable income from all business sources which gave rise to the production of

assessable income, or by the taxpayer proving that the gambling wins which were not assessable were precisely the amount of the betterment and it falls to the taxpayer to prove the positive or negative as the case may be to be able to succeed in relation to the challenge to the assessment.

DR GERBER: You are saying that unless there is a complete breakdown to the nearest cent, the taxpayer must fail?

MR GRAHAM: Yes. He keeps a book and he records in it what he backed, how much he got, what he backed on several horses and what he lost. He comes along and says to the Board, "That is what I invested, that is what I got out and I can prove to the Board's complete satisfaction what my net winnings were." Now, in this instance, the Board, with respect, cannot say, "Well, he might have had some gambling income, therefore he succeeds." If the taxpayer wants to say that he probably had some net gambling winnings in some or all of the years, the authorities make it clear in s.190 clearly, beyond argument, that he has to prove what the extent of that gambling winning was and it simply is not sufficient that the Board may take the view that the taxpayer might have had . . .

THE CHAIRMAN: I would have thought what the Chief Justice wrote in *Gauci's* case ((1975) 135 CLR 81) rather watered that down a bit. The way the Chief Justice approached it, this taxpayer gave evidence which was not in fact refuted and he did have winnings and there is some backing, anyway, for it. Would that not be a sufficient reversal? Are you not turning it into, as I think was said in that case, "the scourge of the taxpayer", or something like that, rather than just a mechanical instrument for making the whole Act work? I mean, to get down to the final cent seems to me to present an impossible goal for anybody.

MR GRAHAM: If it comes to proof, it is not a discharge of the onus on the taxpayer to say what he paid approximately for, say, his motor car. He has to prove what he paid and what he earned and it comes down to this: if he cannot prove dollars, he cannot invite the Board to speculate. If the taxpayers are unable to prove that they must fail.

Well rightly or wrongly, the majority found against the Commissioner and he did not appeal. In my own decision, I said:

We have on the one side the Commissioner's assessments, which I have concluded are erroneous in the sense that I am satisfied, on the probabilities, they are excessive; on the other side, we have sworn testimony that — year by year — the increments included in the amended assessments are accounted for by racing wins. Having formed the impression that both taxpayers were witnesses of truth, have I any option but to allow the objections? I think not. Lest it be thought that this places an impossible burden on the Commissioner, it is perhaps trite to observe that in the instant case it was clear — or should have been — that both taxpayers had relatively substantial betting wins year by year. The Commissioner chose to ignore this, apparently for no better reason that it proved impossible to quantify these winnings. However, that is not good enough. There are more ways of skinning a cat than making it into sweet and sour pork. Thus, the Commissioner could, for example, have arrived at a reasonable estimate of the taxpayers' true income by comparing the turn-over and mark-up in other Chinese restaurants in the area; a method the Deputy Commissioner in Queensland employed with dramatic effect in *Case K54*, 78 ATC 523, where this Board accepted the Commissioner's formula for arriving at non-mutual income based on this kind of investigation in preference to the taxpayer's formula, which was a mere guess. In those cases where the Commissioner carried the onus — as in this case — he must go into evidence or lose. Instead of going into evidence, in this case counsel chose the more uncertain and risky method of hoping to get damaging admissions in cross-examination — and failed. *Volenti non fit assessable income.*

As pointed out before, since I have accepted the two taxpayers as witnesses of truth and the case was fought on an "all or nothing" basis, the taxpayers must succeed in toto and no concluded opinion is required on the question of onus of proof. I have dealt with the argument merely in deference to the careful submission addressed to us by Mr Graham.

My decision has since been attacked on a number of grounds and, indeed, has been specifically rejected by a Board of Review in New Guinea and 'distinguished' by members of other Boards. Firstly, it is said that I was wrong in suggesting that the Commissioner had other sources from which he could have arrived at assessable income, such as for example investigating the profit margins in other Chinese restaurants in the area. It is said that this kind of evidence cannot be tested by an appellant since the Commissioner is bound by the secrecy provisions of the Act. Nevertheless, there is impressive support for my view. Thus, in *Gamini Bus Co. v. C. of T. (Colombo)*,⁹ the Privy Council held that the Commissioner was entitled to reject a taxpayer's returns and to estimate the amount of its income by reference to returns of income, expenditure and profits made by other bus companies, on the assumption that profits of a bus company bore a fairly constant ratio to expenditure on petrol, oil, etc. I adopted much the same approach in *Case K54*.¹⁰ To this extent, I remain unrepentant.

The more important criticism turns on the question whether Boards have indeed a greater flexibility in arriving at assessable income than do the courts. CCH put the matter succinctly:

Reverting to the position of a Board of Review in respect of an assessment under sec.167 which comes before it for review, it is clear that the position of the Board is, by reason of the powers conferred upon it by sec.193, different from that of a Court. It seems that before a *Board*, the onus would not fall so heavily upon the taxpayer to establish not only that the Commissioner's judgment of the amount upon which tax ought to be levied is incorrect, but to show, either that there ought to be a complete omission, or that some other amount should be substituted for the amount of the taxable income determined by the Commissioner. Once it is shown that the Commissioner's judgment of the amount upon which tax ought to be levied is incorrect, it would appear to become the function and duty of the Board to determine the amount upon which, in its opinion, income tax ought to be levied, i.e., it becomes the function of the Board to take the place of the Commissioner in regard to the application of sec.167. Nevertheless, it should be emphasised that the onus of proof is upon the taxpayer to establish that the Commissioner's determination of the amount upon which income tax ought to be levied is incorrect and, until he does this, the question of the substitution by the Board of the amount upon which it considers income tax ought to be levied would not arise. With respect, however, it may be doubted in some cases whether Boards of Review have carried out their function under sec.193 of determining an appropriate amount upon which tax ought to be levied when the Commissioner's determination has been shown to be incorrect, but instead have followed the principles laid down by the courts where sec.167 assessments have been in issue of requiring the taxpayer to establish affirmatively the amount which ought to be substituted for the amount determined by the Commissioner.¹¹

Thus, where a default assessment is appealed at first instance to the Supreme Court, the court can examine the facts and figures upon which the assessment is based. However, for better or worse, the *Income Tax Assessment Act*, confers the power of assessment on the

9. [1952] A.C. 571.

10. 78 A.T.C. 523.

11. 6 A.F.T.R. 79-635.

Commissioner, not the courts. On the other hand, Boards of Review have the power to *review* the Commissioner's decision (cf. s.192).

On one view, therefore, the Board's power is one of initial assessment, whilst the power of the Courts is limited to correcting errors in the process of assessment. It is true that s.199 is couched in wide terms ('the Supreme Court hearing an appeal . . . may make such order as it thinks fit, and by such order confirm, reduce, increase or vary the assessment'), however, the better view is that having found error in the process of assessment, the Court can only set the assessment aside and remit it to the Commissioner for amendment in conformity with the Court's order. This was the view which found favour with a majority of the High Court in the *Australian Machinery Case*.¹² On the other hand, Williams J. opined:

The section confers upon the Court certain specific powers. If it dismisses the appeal it can expressly confirm the assessment although the dismissal would have this effect without an express order. But the process of assessment is so complex that the cases would be rare in which the court could itself reduce or increase the amount of an assessment. It would generally be necessary to remit the matter to the Commissioner in some form in order that he should calculate the correct amount. There is no authority to do so specifically conferred by the section. It is thus necessary to the effective operation of the section that the general words should be given their full natural grammatical meaning.¹³

This view found an echo in Barwick C.J. in *Bailey's case*¹⁴ although it received scant support from the other judges of the court as then constituted. This is what the learned Chief Justice said:

The assessment to which, for example, ss 161, 168, 169, 170(2) and 190(b) of the Income Tax Assessment Act 1936 as amended refer, is not the notice of assessment served upon the taxpayer pursuant to s.174 or the amount of money of which payment is required by such notice. The assessment of income tax is the process of applying the Act to a state of fact. The duty of the Commissioner is to assess the tax upon the material contained in the return or otherwise in the possession of the Commissioner (s.166), there being provision in s.167 for the Commissioner himself to determine in the given circumstances the assessable income of the taxpayer. It is that process of assessment which, by virtue of s.190(b), an appellant taxpayer must satisfy the Board of Review or an appellate court is 'excessive'. If some step in that process which affects the amount of tax lacks the authority of the Act the assessment is 'excessive': and the powers of s.195 or of s.199, as the case may be, become available.

I have elsewhere indicated, and now confirm, that, in my opinion, it is that process which must be exposed to the Court and with which the Court is exclusively concerned in an appeal by the taxpayer. The Act confers on the Commissioner the power and duty of assessment. It does not confer them upon the Court. It is, of course, otherwise in the case of the Board of Review: see ss 192 and 193. Thus, the power of the court given by s.199 is not a power of initial assessment but a power to correct error in the process of assessment adopted by the Commissioner, the Court being enabled to rectify the error by taking one of the appropriate courses specified in s.199.

On balance, therefore, a taxpayer, faced with a default assessment which he wants to appeal faces slightly better odds by taking his case before a Board of Review than to the Supreme Court of a State or Territory. But, as in all cases the results often depend on the luck of the draw.

12. A.T.R. 359.

13. *Ibid.* at 402.

14. *Baily v. Federal Commissioner of Taxation* (1977) 136 C.L.R. 214 at 216-217.