Federal Court of Australia

Buzadzic v Commissioner of Taxation [2024] FCAFC 50

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| Appeal from: | *Buzadzic v Commissioner of Taxation* [2023] FCA 954 |
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| File number(s): |  |
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| Judgment of: | **BROMWICH, ABRAHAM AND MCEVOY JJ** |
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| Date of judgment: | 17 April 2024 |
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| Catchwords: | **TAXATION** – where primary judge dismissed an appeal from the Administrative Appeals Tribunal affirming Commissioner of Taxation’s decision to disallow objections upon the basis of fraud or evasion, and to impose substantial penalties and shortfall interest charges – no error on the part of the primary judge established – leave refused to run an additional ground of appeal not run before the primary judge – appeal dismissed with costs  |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1)*Australian Charities and Not‑for‑profits Commission (Consequential and Transitional) Act 2012* (Cth)*Taxation Administration Act 1953* (Cth) ss 14ZZ, 14ZZK(b)(i), Sch 1, ss 284-75, 284-90(1)*Income Tax Assessment Act 1936* (Cth) ss 166, 167*Income Tax Assessment Act 1997* (Cth) Div 7A) |
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| Cases cited: | *Bosanac v Federal Commissioner of Taxation* [2019] HCA 41; 374 ALR 425*Buzadzic and Commissioner of Taxation (Taxation)* [2021] AATA 4820 *Buzadzic v Commissioner of Taxation* [2023] FCA 954*Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)* (1949) 79 CLR 296*Federal Commissioner of Taxation v Cassaniti* [2018] FCAFC 212; 266 FCR 385*Federal Commissioner of Taxation v Ross* [2021] FCA 766; 174 ALD 77*Gashi v Commissioner of Taxation* [2013] FCAFC 30; 209 FCR 301*Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315*Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431*Minister for Immigration and Border Protection v* ***SZVFW*** [2018] HCA 30; 264 CLR 541*Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; 67 ALJR 170*Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63 |
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| Date of hearing: | 27 February 2024  |
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| Counsel for the Appellant: | Dr B.F. Orow |
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| Solicitor for the Appellant: | MNG Lawyers |
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| Counsel for the Respondent: | Ms M Schilling and Ms F Shand |
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| Solicitor for the Respondent: | Australian Goverment Solicitor |

ORDERS

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|  | VID 709 of 2023 |
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| BETWEEN: | DANNY BUZADZICAppellant |
| AND: | COMMISSIONER OF TAXATIONRespondent |

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| order made by: | BROMWICH, ABRAHAM AND MCEVOY JJ |
| DATE OF ORDER: | 17 april 2024 |

THE COURT ORDERS THAT:

1. Leave to advance a further ground of appeal not run before the primary judge, asserting that the Administrative Appeals Tribunal failed to give reasons, be refused.
2. The appeal be dismissed.
3. The appellant pay the respondent’s costs as assessed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. The respondent to this appeal, the Commissioner of Taxation, made amended income tax assessments in respect of the appellant, Mr Danny Buzadzic, and his wife, Mrs Leisa Buzadzic, for the seven financial years ending 30 June 2007 to 30 June 2013. Those amended assessments, accompanied by substantial penalties and shortfall interest charges (**SIC**), were made upon a default basis under s 167 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**), in turn based upon a finding of fraud or evasion. Mr and Mrs Buzadzic objected to those assessments. The objections were disallowed by the Commissioner.
2. Mr and Mrs Buzadzic applied for a review of those objection decisions by the Administrative Appeals Tribunal. The decision in respect of Mrs Buzadzic was set aside by the Tribunal, but the decision in respect of Mr Buzadzic was affirmed: *Buzadzic and Commissioner of Taxation (Taxation)* [2021] AATA 4820. The Tribunal’s reasons were detailed and comprehensive.
3. By an application under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), Mr Buzadzic appealed from the Tribunal’s decision, that appeal being a proceeding confined to questions of law. That application was heard and dismissed by a judge of this Court: *Buzadzic v Commissioner of Taxation* [2023] FCA 954. His Honour’s reasons were detailed and clear, giving considerable latitude to the case advanced by Mr Buzadzic, and are without any obvious or apparent error.
4. By an amended notice of appeal, Mr Buzadzic appeals the primary judge’s orders dismissing his originating application. For the reasons that follow, the appeal must be dismissed with costs.

## The nature of the proceeding before the Tribunal

1. Section 166 of the ITAA 1936 provides that the Commissioner must make an assessment of the taxpayer’s taxable income, tax payable on that taxable income and the total of any offset refunds from income tax returns and any other information possessed, or from one or more of those sources. This is the standard way in which income tax liability is determined and entails an assessment of the available evidence.
2. In stipulated circumstances, s 167 of the ITAA 1936 empowers the Commissioner instead to make default assessments. As relevant to this proceeding, if not satisfied by a return that has been furnished, the Commissioner may make an assessment of the amount upon which, in his or her judgement, income tax ought to be levied, and that amount shall be the taxpayer’s taxable income for the purposes of s 166.
3. Mr Buzadzic had a right to object to an assessment under Pt IVC of the *Taxation Administration Act 1953* (Cth) (**Administration Act** or **TAA**) and, if dissatisfied by an adverse objection decision by the Commissioner, a right to apply to the Tribunal for a review of that decision under s 14ZZ of that Act. He exercised both rights. On the review before the Tribunal, he was limited to the grounds in his objection and had the burden of proving, to the civil standard of the balance of probabilities, that the assessment was excessive and what the assessment should have been: see s 14ZZK(b)(i) prior to amendment by the *Australian Charities and Not‑for‑profits Commission (Consequential and Transitional) Act 2012* (Cth); see also *Gashi v Commissioner of Taxation* [2013] FCAFC 30; 209 FCR 301 at [61]–[67] (Bennett, Edmonds and Gordon JJ).
4. The reason why, to succeed in a review of an objection decision, a taxpayer has the dual onus not just of showing that the Commissioner’s assessment was excessive, but of filling in the “*blank*” that demonstrating excessiveness would create by showing what the assessment should have been, is that the facts relating to the correct taxable income are peculiarly within the taxpayer’s knowledge: *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63 at 87 per Latham CJ. It is the second onus of proving what the seven assessments for Mr Buzadzic should have been that was at the heart of the case he brought before the primary judge and maintained on appeal. Contrary to an argument advanced by Mr Buzadzic in the course of the appeal, which is addressed in more detail below, there is no basis for inferring from statutory record-keeping and retention obligations, any lessening of the quality of evidence required to discharge that dual onus, and especially the second onus as to what the assessment should have been, even when the time for compulsory retention of records has passed.

## The amended assessments and the Tribunal decision

1. Mr Buzadzic operated a panel beating business and related businesses, including car towing and car rental businesses. He and his wife were associated with a group of at least 16 companies and three trusts. Mr Buzadzic and his assistants directed all financial matters concerning the group of entities. He controlled all bank accounts in his name or his wife’s name. He directed deposits to be made into those accounts and the funds to be transferred from those accounts to other entities in the group.
2. The Commissioner formed the view that there had been fraud and/or evasion and made the seven amended assessments for Mr Buzadzic in relation to five categories of transactions, being:
3. unexplained deposits in excess of $1,000 into his bank accounts or credit card accounts from group entities, third parties or unknown sources, with a penalty imposed of 75% of the shortfall amount for intentional disregard of a taxation law;
4. unexplained or unverified credit entries, being credit entries to his loan accounts in excess of $1,000, with a penalty imposed of 75% of the shortfall amount for intentional disregard of a taxation law;
5. interest paid on a term deposit in the 2008 and 2009 financial years, with a penalty imposed of 25% of the shortfall amount for failure to take reasonable care to comply with a taxation law;
6. a capital gain on a share investment in the 2010 financial year, with a penalty imposed of 75% of the shortfall amount for recklessness as to the operation of a taxation law; and
7. outstanding loans owed to other entities in the group giving rise to a deemed dividend under Div 7A of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**), with a penalty imposed of 50% of the shortfall amount for recklessness as to the operation of a taxation law.

A 20% uplift of those penalties was also applied for the 2008 to 2013 financial years because it had previously been applied in respect of the 2007 financial year.

1. Before the Tribunal, the Commissioner conceded certain disputed deposits and credit entries, but maintained that the review application should be dismissed because Mr Buzadzic had failed to establish his taxable income. The Tribunal accepted the Commissioner’s submission.
2. The Tribunal referred to clear deficiencies in the records provided. The Tribunal found that, with the exception of a small number of instances, Mr Buzadzic had not explained the provenance of the unexplained deposits and unverified credit entries and in particular that the amounts involved were not undeclared income and he had therefore not discharged his onus to establish his taxable income. That is, Mr Buzadzic was found to have failed to discharge the second onus to fill in the“*blank*” that would be left by making good the assertion that the Commissioner’s assessment was excessive to any degree.
3. The Tribunal also found that the deemed dividends applied only to the amounts in the final accounts for each of the entities: AAT[195], including table 14 to that paragraph.
4. To capture the flavour of the case Mr Buzadzic brought before the Tribunal, the Court notes that Mr Buzadzic ended up substantially abandoning reliance on his own forensic accounting evidence. This left the Tribunal with no explanation for the large volume of accounting records that had been tendered by him, including in particular MYOB files. This took place despite the Tribunal having indicated that it would be assisted by an expert report to explain these records. The Tribunal said it could not do this exercise for itself, noting that Mr Buzadzic instead relied upon external accountants and lawyers to attempt to do this, which was hardly the same and did not achieve the objective of assisting the Tribunal in any meaningful way.
5. The Tribunal said that it could expect to have explained to it the competing conclusions that should be reached based on the evidence led and to be directed to the specific material relied upon by the parties: AAT[51]. Necessarily this observation was more acutely focused upon Mr Buzadzic as the party bearing the onus. By way of example, Mr Buzadzic relied upon evidence from Mr Hadded, a principal from a firm of accountants who had acted for Mr Buzadzic and his wife between 2008 and 2011 and from July 2013, who deposed to a belief he held about the accuracy of accounting entries. The Tribunal found he had not provided an explanation of the basis for the belief that he held, effectively leaving that belief without any proven foundation.
6. The Tribunal also noted that the use of double entry accounting, relied upon by Mr Buzadzic in the course of his appeal submissions as being somehow conclusive as to what they described, did not in each instance explain the underlying transaction, nor why an entry did not reflect an amount that was sourced to a record. The Tribunal found that this meant that there needed to be comprehensive forensic examination of all of the accounts, such forensic examination not being in evidence before the Tribunal.
7. The Tribunal was unable to rely upon the accounting records to reach the conclusions asserted by Mr Buzadzic about the transactions that remained in dispute. In the absence of contemporaneous records and a forensic analysis of the ledger accounts relied upon, the evidence was simply not sufficient to discharge the onus. The assertions of Mr Buzadzic and his advisers relied upon would not suffice, especially to explain otherwise unexplained deposits and credit entries. Mr Buzadzic was unable, in the vast majority of instances, to produce supporting documentation for the reasons for deposits made many years ago, although he sought to explain some deposits. Those unsupported explanations were not accepted, being found to be speculative and unreliable, with only one exception.
8. The Tribunal made numerous adverse references to the poor and unpersuasive quality of the evidence before it. The primary judge correctly praised the approach taken by the Tribunal at multiple points in his Honour’s reasons. We agree with his Honour. The approach of the Tribunal was impeccable in the circumstances.

## The grounds of appeal

1. Impeaching the Tribunal’s conclusions before the primary judge was a daunting exercise, requiring a disciplined and focused identification of error. It required much more than a mere disagreement with the outcome and an attempt to relitigate the case that had been heard before the Tribunal. Yet in substance, that was what was attempted before the primary judge.
2. The first appeal ground is a global assertion of error on the part of the primary judge in finding that none of the grounds of appeal below were made out. Success on ground 1 therefore necessarily turns on success on one or more of appeal grounds 2 to 9, which describe the particular asserted errors on the part of the Tribunal relied upon. The primary judge at PJ[3] succinctly and accurately summarised the grounds of appeal before his Honour, all of which are specifically maintained on appeal in substantially the same form, using the same grouping of grounds in the notice of appeal before this Court as were used in the one below. His Honour noted that there was an issue as to whether all of the questions said to be raised in the notice of appeal were properly characterised as questions of law as required, a problem that recurred in this appeal.
3. The grounds of appeal below were summarised by the primary judge as follows, inserting the corresponding current appeal ground numbers from [2] to [9]:

[2] that the Tribunal applied the wrong test for burden of proof under s 14ZZK(b)(i) of the *Tax Administration Act 1953* (Cth) (the **Administration Act**) and/or that the Tribunal’s decision that Mr Buzadzic had not discharged the burden of proof was unreasonable (Grounds 1 and 2);

[3] that the Tribunal misconstrued and/or misapplied s 6-5 of the *Income Tax Assessment Act 1997* (Cth) (the **ITAA 1997**) (Ground 3);

[4] that the Tribunal erred by failing to exclude deposits, credit entries and other amounts that were explained or shown to be erroneous, from the assessments (Ground 4);

[5] that the Tribunal misconstrued and/or misapplied item 5 of s 170(1) of the ITAA 1936 (which relates to the amendment of an assessment if the Commissioner is of the opinion there has been fraud or evasion) and/or that the Tribunal applied the wrong test for burden of proof in connection with that provision and/or that the Tribunal made an unreasonable finding in relation to that provision (Grounds 5, 6 and 7);

[6] that the Tribunal misconstrued and/or misapplied the penalty provisions and/or that the Tribunal made unreasonable findings in relation to penalties (Grounds 8, 9, 10, 11 and 12);

[7] that the Tribunal failed to consider certain grounds of objection and submissions (Ground 13);

[8] that the Tribunal made certain unreasonable findings of fact and/or that there was no evidence or proper basis for certain findings (Grounds 14 and 15); and

[9] that the Tribunal failed to afford Mr Buzadzic procedural fairness in that it failed to properly consider the evidence tendered by Mr Buzadzic and/or to give it proper weight (Ground 16).

## An additional ground of appeal advanced in Mr Buzadzic’s submissions

1. Mr Buzadzic’s submissions before this Court raised what amounts to a further ground of appeal, asserting that [213] of the Tribunal’s reasons fail to satisfy the requirement to give reasons required by s 43(2B) of the AAT Act. In substance, he submitted that there was no material distinction between the ground of appeal run before the primary judge, (and maintained on appeal) asserting the Tribunal’s failure to consider aspects of his case, and the argument now raised before this Court that the Tribunal failed to give reasons in respect to those aspects. It cannot be accepted that there is no distinction between the concept of failure to give adequate consideration to a submission and the failure to give reasons, even though the argument entails addressing the same part of the Tribunal’s reasons. If it were a point to be made in any serious way, it could have, and should have, been advanced before the primary judge. Counsel for Mr Buzadzic declined an opportunity to explain why this ground was not run below and did not advance any compelling argument for the grant of leave to run it for the first time on appeal, noting that counsel on appeal also appeared as counsel below. Leave to advance this discrete ground for the first time on appeal must therefore be refused.

## Appeal ground 2 (grounds 1 and 2 below) – burden of proof

1. After the primary judge summarised Mr Buzadzic’s submissions before him in some detail at PJ[91], his Honour at PJ[93] characterised the thrust of grounds 1 and 2 below as being a contention that the Tribunal applied too high a standard of proof. It became apparent on the appeal submissions that the point being raised could more precisely be understood to be the flip side of that argument, being an assertion that a *lower quality* of evidence adduced by Mr Buzadzic should have been accepted as discharging the necessary civil onus of the balance of probabilities. This was advanced in argument as amounting in substance to the existence of some lower standard of proof, itself an untenable proposition: see *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; 67 ALJR 170 at 170-1.
2. Mr Buzadzic’s submissions that a lower quality of evidence was necessary was based on the proposition that the point at which the onus was required to be discharged by him was after the time at which he was required to retain records to meet the substantiation requirements for expense deduction claims, if called upon to do so by the Commissioner. There are a number of answers to this argument. The first is provided by the Tribunal itself:

*Reasonableness of proof required/lack of documents*

[108] The second general consideration concerns the reasonableness of the proofs required in the circumstances and an inability to produce documents. It was contended on behalf of the Applicants that no adverse finding should be made merely because the Applicants were unable to produce contemporaneous records. The submission was that it was not reasonable to expect a person to retain records of personal transactions (such as a private sale of furniture) for an indefinite period and that no adverse finding should be made merely because the Applicants were unable to produce contemporaneous records.

[109] While that proposition might be of some influence in some cases, the obligation and expectation to retain a document does not exist in a vacuum. Much depends on the nature of the transaction and whether it is of a kind that would result in retention of documents in the circumstances. This is not a case where a taxpayer has been assessed because they have failed to produce a supporting record in respect of a single isolated deposit which might have been explained by private transactions some time ago for which records are inherently unlikely to have been retained, and are potentially unobtainable when the time comes to establish their character and provenance some years after the event. The evidence, or lack of it, in the present matter needs to be seen in the context of the pattern of conduct, the manner in which Mr Buzadzic conducted his affairs, the number of discrepancies, the size of the discrepancies (bearing in mind that the Commissioner did not seek explanations for and did not question transactions of less than $1,000) and the period over which the discrepancies were identified. The present circumstances include three trusts and 16 companies with which Mr Buzadzic was associated, repeated intermingling of substantial volume and value of business transactions with private arrangements, repeated intermingling of funds of separate businesses and their owners and an apparent reluctance to do what the group’s external accountants usually ask of their clients. The deposits and credits to loan accounts that have been the subject of scrutiny were all in excess of $1,000 and were all unexplained. Most of the credits and deposits had their origins in entities that Mr Buzadzic controlled or was significantly associated with which carried on businesses. That of itself suggests that the transactions might not be explained away as private transactions for which records ought not be expected. To the contrary, those circumstances suggest that there might be expected to be a business record or trail that sets out the provenance of the deposits and credits and thus throw light on whether the deposits and credits reveal, or are the produce of, an undisclosed source of income.

1. Secondly, the record keeping and retention requirements imposed upon taxpayers accompanied the move to self-assessment of income tax many decades ago, such that receipts no longer had to be provided with income tax returns. Mr Buzadzic’s argument, especially orally, was to the effect that, where the Commissioner is making an assessment relating to tax for an earlier period, and the person is no longer required under the tax legislation to retain records for that period, “*the burden of proof on the balance of probabilities needs to be adjusted to take into account that that record does not exist*”. Mr Buzadzic’s oral submissions seemed to argue that it was somehow not fair, or inconsistent with the retention periods in the relevant legislation, to require him to produce records for a period outside those retention periods in order to discharge the onus by establishing that certain impugned sums of money were not income. No proper basis was identified for why the requirement to retain such records for substantiation purposes would give rise to a relaxation of the quality of evidence necessary to discharge the onus of proving that an assessment is excessive, and what the correct assessed sum should be.
2. Of course, if a taxpayer were able to prove that records had been kept, but not retained after a retention period, so were not available to support the argument that a particular expense had been incurred, that might, in some cases, be a reason for the Tribunal to accept other evidence to the same effect in order to discharge the onus, as the Tribunal’s reasons reproduced above tend to indicate. But that would be a matter for ordinary fact finding, bearing no resemblance to this case. That is simply a reflection of the fact that whether the onus is satisfied will depend on the circumstances of the case. Rather, Mr Buzadzic’s argument seemed to be no more than that the passing of the point of time at which records were required to be retained meant that secondary accounting records should be accepted at face value. That proposition cannot be accepted, especially in light of the Tribunal’s reasoning on this topic.
3. The primary judge was correct in concluding that there had been no error in the application of the onus of proof. His Honour described how the Tribunal carefully, thoroughly and explicitly explained what the onus was, and what was necessary to discharge it, highlighting key aspects of the authority his Honour quoted. This included reference to the helpful summary of the relevant principles by Derrington J in *Federal Commissioner of Taxation v* ***Ross*** [2021] FCA 766; 174 ALD 77 at [46]-[48] and the decision of Nettle J in ***Bosanac*** *v Federal Commissioner of Taxation* [2019] HCA 41; 374 ALR 425 at [29]-[30], with the primary judge emphasising passages in the latter that made the point abundantly clear.
4. The primary judge correctly found that the Tribunal had provided clear and logical reasons for concluding that Mr Buzadzic had not discharged the onus of proving what his taxable income was and had therefore not shown that the challenged assessments were excessive: PJ[98]. In that paragraph, his Honour gave the following summary of key failings in Mr Buzadzic’s case before the Tribunal, identifying the paragraphs in the Tribunal’s reasons:

(a) there were clear deficiencies in the records provided to the Tribunal; the basis for accounting entries remained unexplained; the manner in which funds flowed between the entities was not explained except in the form of generalisations (at [AAT][125]);

(b) the source and provenance of identified deposits and credit entries (and, in particular, the transactions that had given rise to the deposits or credit entries) remained unexplained (at [AAT][125]);

(c) the Tribunal was not satisfied that Mr Buzadzic had shown what the source or sources of money reflected in the disputed deposits and credits (including credits to eliminate apparent opening and closing loan account balance mismatches) was or were, and as a consequence had not shown that: the deposits from the Associated Entities [(being the 16 companies and three trusts associated with Mr Buzadzic)] and the unexplained credits were not attributable to amounts of undeclared income derived by Mr Buzadzic; and the deposits from the non-associated entities and unknown persons were not attributable to amounts of undeclared income derived by Mr Buzadzic from an unidentified source (at [AAT] [127]); and

(d) the Tribunal did not accept the unsupported explanations for the deposits proffered by Mr Buzadzic; the Tribunal considered Mr Buzadzic’s oral evidence concerning the deposits to be speculative and unreliable (at [AAT] [150]).

1. The primary judge provided similarly compelling summaries of the Tribunal’s reasons for not accepting Mr Buzadzic’s explanations for otherwise unexplained deposits into his bank accounts and unverified credit entries, why submissions seeking to explain away the Commissioner’s conclusion as to fraud or evasion were not accepted, and the approach to there being no primary records produced to verify claimed deductions. His Honour correctly found no inconsistency between the approach outlined by Steward J when a member of this Court in *Federal Commissioner of Taxation v Cassaniti* [2018] FCAFC 212; 266 FCR 385 at [87]-[88] and the approach taken by the Tribunal.
2. To the extent that the arguments advanced by Mr Buzadzic could be characterised as seeking merits review of the Tribunal’s decision rather than raising a question of law, and they certainly had that character as described by the primary judge (as did in the arguments advanced on appeal), his Honour took a generously beneficial approach. His Honour reframed the references to what Mr Buzadzic said the Tribunal should have made of the evidence before it as raising an issue of legal unreasonableness, citing *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332; and more specifically *Minister for Immigration and Border Protection v* ***SZVFW*** [2018] HCA 30; 264 CLR 541, quoting Kiefel CJ at [10]-[11]. His Honour was not satisfied that any of the findings or conclusions of the Tribunal under challenge were unreasonable in that sense. His Honour was correct to conclude that the findings and conclusions of the Tribunal were clear, logical and open on the evidence.
3. The primary judge was entirely correct to dismiss these grounds of appeal. It follows that no error on the part of his Honour has been identified, much less established. Appeal ground 2 must fail.

## Appeal ground 3 (ground 3 below) – income

1. This ground of appeal constitutes an attempt to sidestep the basis by which Mr Buzadzic was required to impugn the amended assessments. The proposition, rejected by the primary judge, is that the Commissioner had to show that items included in Mr Buzadzic’s taxable income via the amended assessments were in fact capable of being income before Mr Buzadzic was required to prove that they were not. This proposition was correctly rejected by his Honour. As the authorities cited earlier in these reasons make abundantly clear, once the default assessments were raised, Mr Buzadzic had to prove that the amounts in the amended assessments were excessive, and to prove, on the balance of probabilities, what his income in fact was. His Honour was correct to dismiss the suggestion that the Tribunal should have inferred that certain deposits of money were not income according to ordinary concepts. This untenable suggestion amounted to seeking impermissible merits review. This ground of appeal must fail.

## Appeal ground 4 (ground 4 below) – allowing an objection in part

1. This ground of appeal asserts that, to the extent that Mr Buzadzic was able to show that any part of the sum going towards an amended assessment was not income, then he was required to be given credit to that extent. This situation presented before the Tribunal, by reason of some concessions made by the Commissioner and some items that were explained by Mr Buzadzic.
2. However, the proposition underlying the ground is flawed. It misconstrues the obligation imposed upon Mr Buzadzic, which was not just to show that some part of the assessment made by the Commissioner related to something that was not income, but also the true amount of his taxable income. The primary judge made this clear by referring to what Nettle J had observed in *Bosanac* at [30]:

… 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. …

1. Mr Buzadzic asserted both before the primary judge and on appeal that a partial credit approach was both justified and required by what was said in ***Haritos*** *v Federal Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [235]-[236]. The primary judge at PJ[129] distinguished *Haritos* upon the basis that, there, the Full Court was dealing with a different situation in which the taxpayer and the Commissioner had agreed to limit the scope of the issues in dispute, citing the decision of Derrington J in *Ross* at [57]. Derrington J had correctly observed:

… As the Commissioner submitted, *Haritos* concerned circumstances where the taxpayers and the Commissioner had reduced the scope of the hearing to a number of particular disputed amounts which, depending upon the manner in which they were resolved, would increase or decrease the amount which the parties had otherwise agreed represented the taxpayers’ taxable income. In other words, the underlying circumstances in relation to the taxpayers’ taxable income were generally agreed with the remaining disputed items to be determined by the Tribunal, with the results of those determinations altering the otherwise accepted amount of taxable income. *Haritos* was not a case where, before the Tribunal, the taxpayers’ were still required to fully and completely establish the actual amount of their taxable income. …

1. The particular way the dispute was litigated in *Haritos* does not and cannot change the operation of the law in circumstances such as this case, where the Commissioner has maintained at all times the position that Mr Buzadzic had to prove what his taxable income was, even with some amounts that might make up that income being accounted for. It follows that the primary judge did not err and appeal ground 4 must therefore fail.

## Appeal ground 5 (grounds 5 to 7 below) – fraud or evasion

1. Mr Buzadzic’s challenge to the Commissioner forming an opinion as to fraud or evasion turns on the Tribunal’s reasons on this topic as follows:

[202] In this particular case, to discharge the onus regarding fraud and evasion, Mr Buzadzic needed to provide evidence as to the sources of the amounts deposited into the bank accounts. Based on the evidence before it, the Tribunal does not accept the explanations proffered by Mr Buzadzic for the deposits. The character of the amounts deposited remain unexplained and he has not proven the amounts to be non-assessable. In the absence of an accepted explanation for the amounts, Mr Buzadzic has failed to demonstrate the omission of these amounts from his assessable income were not attributable to a blameworthy act. Approached differently, the Tribunal has nothing on which it can evaluate the seriousness of any shortcoming, there is nothing on which the Tribunal can rest a conclusion that there was not such a blameworthy act.

[203] Mr Buzadzic contended that there was no basis on which the Tribunal could be satisfied that he had engaged in fraud or evasion because he was a panel beater with limited education who relied upon his employees and external accountants in order to comply with his taxation obligations. He had no knowledge of the provisions of the *Income Tax Assessment Act 1936* and could not *have understood that unverified credit entries comprising discrepancies in loan accounts with various companies and discrepancies between closing and opening balances of some loan accounts were assessable income*.

[204] There are a number of difficulties with this submission. First, it does not lay a foundation to come to a conclusion that there was not a blameworthy act. Second, a taxpayer is responsible for the acts of his employees and agents. The blameworthy act may be that of the taxpayer personally or of those *he is responsible for*. Third, a taxpayer does not discharge their onus of showing an absence of evasion based on a contention about their subjective level of understanding of the operation of the income tax legislation. To allow otherwise would be to reward fiscal naivety. Fourth, the submission reflects confusion about the reason why the *unverified credit entries* and *discrepancies between closing and opening balances* result in amounts being included in Mr Buzadzic’s assessable income. The Unverified Credit Entries comprise instances where the source of and reason for the reduction in Mr Buzadzic’s loan account could not be explained. In the absence of an explanation of the source of the moneys (whether by way of a cash receipt, set-off, payment by direction or otherwise) which gave rise to the reductions, Mr Buzadzic has not discharged his onus of demonstrating that the moneys which funded those reductions were not amounts of his assessable income. Similarly by not providing evidence of the basis of the adjustments made to the loan accounts as part of the year end process, Mr Buzadzic has not discharged his onus of demonstrating that the source of those adjustments was not to be found in amounts that were his assessable income (for example, in the form of dividends).

1. Mr Buzadzic submits that the Tribunal erred in concluding that the requisite blameworthiness existed. However, the problem with that submission is that there was no such conclusion. The Commissioner formed the opinion that there was blameworthy conduct. It was for Mr Buzadzic to discharge the onus of proving to the satisfaction of the Tribunal that there was no blameworthy conduct on his part. If he did not do so, the Commissioner’s opinion was not successfully impugned. As the primary judge correctly observed:

[135] Insofar as Mr Buzadzic challenges the Full Court’s judgment in *Binetter* [*v Federal Commissioner of Taxation* [2016] FCAFC 163; 249 FCR 534], this is a formal challenge, and he accepts that, as a single Judge, I am bound by the Full Court’s judgment. In that case, Perram and Davies JJ (Siopis J agreeing) stated at [93]:

In cases where the amendment power depends on the formation of an opinion by the Commissioner of fraud or evasion, the difference between merits review by the Tribunal and an appeal to the Court is that **the Tribunal re-considers whether, on the evidence before it, there was an avoidance of tax due to fraud or evasion**, whereas the Court will only interfere with the Commissioner’s exercise of the amendment power if the Commissioner did not form the requisite opinion or the Commissioner’s opinion that there was fraud or evasion is vitiated by some error of law: s 43 of the AAT Act; *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 544-545; *Jolly v Federal Commissioner of Taxation* (1935) 53 CLR 206 at 212-214; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360. Although the Tribunal re-examines whether, on the evidence before it, there was an avoidance of tax due to fraud or evasion, and is able to substitute its opinion for that of the Commissioner, **the issue for the Tribunal is whether the taxpayer has discharged the onus of showing that the opinion that there was fraud or evasion should not have been formed,** **and therefore, that the statutory condition for the power to amend is not satisfied**. Unless the taxpayer discharges that onus, the assessments are not shown to be excessive and the effect of s 14ZZK is that the Tribunal must affirm the amended assessments, such assessments having been made by the Commissioner in compliance with the statutory requirements: *McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284 at 303; *Millar v Federal Commissioner of Taxation* (2015) 101 ATR 827. In *Millar* Griffiths J correctly held that on a merits review before the Tribunal, the onus of proof imposed by s 14ZZK places on the taxpayer the burden of disproving fraud or evasion.

(Emphasis added.)

[136] See also *Binetter* at [94] and *Nguyen v Federal Commissioner of Taxation* [2018] FCA 1420; 265 FCR 355 at [115], [122], [130], [132] per Kenny J. As set out in the above passage, it is established that, in a proceeding before the Tribunal, the taxpayer bears the onus of showing that the opinion that there was fraud or evasion should not have been formed. I am bound by that proposition. I reject Mr Buzadzic’s challenge to that proposition.

[137] Insofar as Mr Buzadzic submits that the Tribunal erred in finding that “the requisite blameworthiness existed”, this submission misstates the finding of the Tribunal. The Tribunal did not make a finding to that effect. Rather, it was not satisfied that Mr Buzadzic had demonstrated that the shortfall in his taxable income was not attributable to a blameworthy act (at [205]).

1. As the Commissioner points out, the primary judge correctly observed at PJ[138] that, contrary to Mr Buzadzic’s submissions below and apparently maintained on appeal, the Tribunal did not err in finding that once the fraud or evasion opinion is formed in relation to a single particular of the assessment, the entire assessment is open to reconsideration, this being consistent with *Denver Chemical Manufacturing Co v Commissioner of Taxation (NSW)* (1949) 79 CLR 296 at 314-15 (Dixon J, with McTiernan, Williams and Webb JJ agreeing).
2. Appeal ground 5 was as misconceived as the ground of appeal below, and accordingly must fail.

## Appeal ground 6 (grounds 8 to 12 below) – penalties

1. Section 284-75 of Sch 1 of the TAA renders a taxpayer liable to an administrative penalty if, relevantly, that taxpayer makes a statement to the Commissioner (including via an agent, per s 284-25) that is false or misleading in a material particular, whether by what is in that statement or omitted from it. Section 284-90(1) Sch 1 then provides a table of base penalties calculated by reference to a percentage of the shortfall amount: 75% for an intentional disregard of a taxation law; 50% for recklessness as to the operation of a taxation law; and 25% for failure to take reasonable care to comply with a taxation law. Additionally, s 284-220 provides for an increase in those base penalty amounts of 20% (known as an uplift) if one of those three items of intentional disregard, recklessness or failure to take reasonable care had been worked out for the taxpayer previously. This regime gave rise to the imposition of the penalties summarised at [10] above.
2. This appeal ground challenges the Tribunal reasons in relation to penalties at AAT[213]. It is necessary to reproduce the immediately surrounding paragraphs to understand precisely what [213] is referring to:

[211] Mr Buzadzic was assessed to penalties on the following basis:

(a) in relation to the Unexplained Deposits, the Unverified Credit Entries, and the capital gain for the sale of the KAR shares, the base penalty amount was set at a rate of 75% of the relevant tax shortfall amounts on the basis that those shortfalls were caused by an intentional disregard of the law by Mr Buzadzic or his tax agents, pursuant to s 284-90(1) of Schedule 1 to the TAA;

(b) in relation to the *deemed dividends*, the base penalty amount was set at a rate of 50% of the relevant tax shortfall amounts on the basis that those shortfalls were caused by recklessness by Mr Buzadzic or his tax agents, pursuant to s 284- 90(1) of Schedule 1 to the TAA;

(c) in relation to the undeclared interest received from the NAB term deposit, the base penalty amount was set at a rate of 25% of the relevant tax shortfall amounts on the basis that those shortfalls were caused by a lack of reasonable care by Mr Buzadzic or his tax agents, pursuant to s 284-90(1) of Schedule 1 to the TAA; and

(d) the base penalty amounts in relation to the each of the tax Years ended 30 June 2008 to 30 June 2013 was to be increased by 20% under s 284-220(1)(c) of the Schedule 1 to the TAA as there had already been a prior imposition of a penalty.

[212] The Tribunal does not propose to increase the penalty imposed in respect of the undisclosed interest. The failure to provide the accountants with the bank statements for the term deposit for two Years was careless and the amount was small in nature.

[213] In so far as the balance of the amounts assessed to Mr Buzadzic are concerned, Mr Buzadzic’s predicament resulted from the complex manner in which he conducted his and his entities’ affairs – mixing business expenditure and personal expenditure on credit cards, moving moneys between his personal accounts and around the accounts of the Buzadzic Group entities and not always telling his bookkeeper and accountant of all amounts deposited into his personal accounts. He accessed moneys as he chose and appears to have assumed that service providers would clean up after him based on the information he gave to them. Mr Buzadzic’s most significant service provider, Mr Hadded/The Practice, failed to make inquiries that they knew they should have: Mr Hadded admitted his firm had a practice of sending out a questionnaire to its clients to complete but did not send one to Mr Buzadzic because they were of the view that Mr Buzadzic would not respond. Mr Buzadzic provided no explanation for his conduct. The Tribunal is not satisfied that he has discharged his onus of proving on the balance of probabilities that his conduct in respect of the balance of the shortfall assessed to him was not attributable to an intentional disregard of the law. Because the taxpayer has provided no explanation for the amounts assessed to him that ha[ve] been accepted by the Tribunal, and has provided no reason for excluding those amounts from his assessable income, the Tribunal is unable to be satisfied that the Commissioner’s assessment of the taxpayer’s conduct has resulted in a penalty assessment that is excessive. In these circumstances the Tribunal can be left with no option but leave the pre-existing basis on which penalty has been imposed undisturbed.

[214] Because it is not satisfied that the shortfall was not attributable to repeated culpable conduct the Tribunal does not consider it appropriate to remit the 20% uplift imposed under under s 284-220(1)(c) of Schedule 1 of the Administration Act.

[215] The Tribunal is not satisfied that the penalty assessments issued to Mr Buzadzic are excessive.

1. On appeal, Mr Buzadzic maintains in substance, but in shorter form, the submissions advanced before the primary judge. As the Commissioner correctly submits, he does so without engaging with the Tribunal’s reasoning. The primary judge summarised Mr Buzadzic’s submissions and then succinctly addressed them as follows, in a way that cannot be improved upon:

[145] Mr Buzadzic’s submissions in support of these grounds can be summarised as follows:

(a) Intentional disregard requires actual knowledge that the statements were false and misleading. The evidence must show that Mr Buzadzic understood the effect of the legislation and how it operated in respect of his tax affairs and then made a deliberate choice to ignore the law: see *Brown v Federal Commissioner of Taxation* [2001] FCA 596; 47 ATR 178; *Price Street Professional Centre Pty Ltd v Federal Commissioner of Taxation* [2007] FCA 345; 66 ATR 1 (***Price Street***). Such knowledge and understanding must involve dishonesty so as to separate intentional behaviour from lack of reasonable care and recklessness.

(b) On the evidence before the Tribunal, it was clear that Mr Buzadzic acted honestly and relied entirely on the bookkeeper and accountants. Further, “unexplained” deposits and “unverified” credit entries have never been accepted as income according to ordinary concepts or as taxable on any basis – how then can it be said that Mr Buzadzic understood the effect of the legislation and how it operated in respect of his tax affairs and that he made a deliberate choice to ignore the law? It clearly cannot.

(c) It also follows that there was no occasion for the imposition of a penalty uplift and, if and to the extent that any penalties are payable, the Commissioner and, on review, the Tribunal, should have exercised the powers under Subdiv 298-A of Sch 1 to the Administration Act to remit the 20% uplift penalty.

[146] There are a number of difficulties with these submissions. Insofar as Mr Buzadzic submits that, on the evidence before the Tribunal, he acted honestly, this fails to engage with the burden of proof and the conclusion reached by the Tribunal that Mr Buzadzic had not discharged his onus of proving that his conduct in respect of the shortfall was not attributable to an intentional disregard of the law (at [AAT][213]). Further, there is no indication in [213] of the Tribunal’s reasons that it misconstrued the notion of “intentional disregard of a taxation law”. The Tribunal appears to have correctly understood that this refers to actual knowledge that the statement made was false: see *Price Street* at [43]. In reaching this conclusion, it was open to the Tribunal to have regard to the conduct of Mr Buzadzic’s agents: see *Weyers v Federal Commissioner of Taxation* [2006] FCA 818; 63 ATR 268 at [165]-[168]. Insofar as Mr Buzadzic contends that the Tribunal’s conclusion was unreasonable, I do not accept that contention. The Tribunal provided clear and logical reasons for its conclusion. I consider that the Tribunal’s conclusion was open on the evidence.

[147] Insofar as Mr Buzadzic challenges the Tribunal’s conclusion (at [AAT][214]) that it was not appropriate to remit the 20% penalty uplift, I am not satisfied that any error has been shown in this regard. In light of the Tribunal’s conclusion at [213], it was open to the Tribunal to reach the conclusion that it did in relation to the 20% penalty uplift. I am not satisfied that this was unreasonable in the sense discussed in the authorities referred to above.

1. In his submissions to this Court, Mr Buzadzic did not even refer to what the primary judge said about the Tribunal’s reasoning, much less attempt to identify and establish error by his Honour. His Honour’s reasoning and conclusion are plainly correct. It follows that appeal ground 6 must fail.

## Appeal grounds 7(a) and (b) (grounds 13(a) and (b) below) – penalty relief

1. Before the Tribunal, Mr Buzadzic contended in the alternative, referring to the relevant provisions, that if, contrary to his denials, he did make a statement that was false or misleading in a material particular:
2. there was no shortfall amount for the purpose of penalties because he and his agent took reasonable care in connection with making each such statement so was not liable for administrative penalties; or
3. he was not liable for administrative penalties because he engaged an agent, gave all relevant information to ensure the proper preparation of his returns and, to the extent that the agent made statements that were false or misleading (again denied), that did not result from failing to take reasonable care, recklessness, or intentional disregard by his agent as to the operation of taxation laws.
4. It is common ground that the Tribunal did not expressly deal with these contentions and provisions in its reasons. The primary judge found at PJ[156] that despite this, AAT[213] (reproduced above at [42] in relation to appeal ground 6) encompassed findings and conclusions on those contentions and provisions. His Honour concluded that it was implicit that the Tribunal considered that Mr Buzadzic had not established the elements necessary for avoiding liability for the administrative penalties imposed by the Commissioner. His Honour was plainly correct, as is clear when AAT[213] is fairly read and properly understood. This conclusion is supported by the context for AAT[213] provided by the Tribunal’s earlier findings relied upon by the Commissioner at AAT[21], [67]-[69], [74], [78], [84], [86]-[88], [93], [117], [134], [149]-[151], [168], [171]-[173], [202] and [204]-[205].
5. Those additional paragraphs of the Tribunal reasons include findings made as to poor record keeping and unsatisfactory evidence, that were inconsistent with the conditions for relief from liability for administrative penalties being able to be met. For example, the Tribunal found that much of the information entered into the accounting records came from Mr Buzadzic himself, including occasions upon which the person performing the data entry task did not seek or have access to source records, such as bank or credit card statements or invoices, and related findings. Indeed the Tribunal found that in the vast majority of cases, Mr Buzadzic was unable to produce supporting documentation for the accounting entries: AAT[149]-[151]. These and other paragraphs of the Tribunal reasons identified by the Commissioner assists in understanding the references in AAT[213] as being to earlier findings as follows:
6. Mr Buzadzic “*not always telling his bookkeeper and accountant of all amounts deposited into his personal accounts*”;
7. Mr Buzadzic’s “*most significant service provider, Mr Hadded/The Practice, failed to make inquiries that they knew they should have: Mr Hadded admitted his firm had a practice of sending out a questionnaire to its clients to complete but did not send one to Mr Buzadzic because they were of the view that Mr Buzadzic would not respond*”;
8. Mr Buzadzic providing “*no explanation for [this] conduct*”; and
9. the conclusion that “*[i]n these circumstances the Tribunal can be left with no option but leave the pre-existing basis on which penalty has been imposed undisturbed*”.
10. It is readily apparent from a fair reading of the Tribunal’s reasons as a whole, that Mr Buzadzic did not come close to establishing what was necessary for the penalty relief he relied on. That is, that the false or misleading statements relied upon by the Commissioner did not result from him or his agent, as relevant to the various classes of administrative penalties imposed, failing to take reasonable care, recklessness, or intentional disregard as to the operation of taxation laws, giving rise to the imposition of those penalties in the first place.
11. The appeal grounds below, to the extent that they properly raised any question of law, and the corresponding present appeal grounds in this Court, represent an attempt to elevate form over substance. There is no reason to doubt that, taken as a whole, the Tribunal did in fact consider the contentions and provisions that Mr Buzadzic relied upon, and rejected the ultimate proposition that he had established that he was not liable to administrative penalties. The primary judge was correct to reject these appeal grounds before his Honour. It follows that appeal grounds 7(a) and (b) must fail.

## Appeal ground 7(c) (ground 13(c) below) – failure to consider remittal of penalty uplift decision

1. This ground flows from appeal grounds 7(a) and (b), in that Mr Buzadzic asserts that the Tribunal failed to consider whether the Commissioner should remit any penalties payable in whole or in part because, he asserted, at all relevant times he had behaved reasonably and took all steps necessary and expected of any taxpayer to ensure proper compliance with taxation legislation. This ground of appeal is untenable, not least because it does not even refer to the primary judge’s reasoning on this topic, let alone identify and establish error. His Honour said the following (at PJ[157]):

In relation to ground 13(c), this matter (remission of penalty) was raised in Mr Buzadzic’s notice of objection and in subsequent documents in a way that may have given the impression that it related only to the 20% penalty uplift. For example, in the notice of objection, the matter is raised in paragraph 3(E)(vi). That paragraph contends that the Commission should remit “the said penalty”. It follows immediately after a paragraph dealing with the penalty uplift. Similarly, in paragraph 17(F) of Mr Buzadzic’s statement of facts, issues and contentions, the contention is that the Commissioner should have remitted “the said penalty” and this paragraph follows immediately after a paragraph dealing with the penalty uplift. The same is true of paragraph 80(g) of the applicants’ written submissions in the Tribunal proceedings. (See also paragraph 6(h) of the applicants’ written submissions in the Tribunal proceedings.) In light of the way these documents were presented it is understandable that the Tribunal referred to the issue of remission only in the context of the penalty uplift (at [214] of its reasons). In my view, having regard to the way the issue of remission was presented, the Tribunal considered the issue. Accordingly, no error is established.

1. The primary judge’s reasons disclose no error. Mr Buzadzic is bound by the way he conducted his case, including in the way he chose to express his objection which ordinarily constrains what can be advanced on a review before the Tribunal. In any event, the last sentence of AAT[213], namely that in the circumstances the Tribunalwas left “*with no option but leave the pre-existing basis on which penalty has been imposed undisturbed*”, makes it very clear that the Tribunal necessarily considered that remittal was completely out of the question. The other aspects of the Tribunal’s reasons considered in relation to appeal grounds 7(a) and (b) deny any basis for a serious suggestion that Mr Buzadzic could possibly have been regarded by the Tribunal as having behaved reasonably or having taken all steps necessary to ensure proper compliance with the applicable tax laws. It follows that appeal ground 7(c) must fail.

## Appeal ground 8 (grounds 14 & 15 below) – unreasonable findings and conclusions

1. This ground of appeal addresses what may fairly be described as a shopping list of findings made and conclusions reached by the Tribunal which, before the primary judge, Mr Buzadzic contended were erroneous and unreasonable (first aspect) and alternatively for which there was no evidence, or afforded no basis for drawing inferences or were contrary to the evidence (second aspect). His Honour characterised the first aspect as doing no more than taking issue with the Tribunal’s findings or conclusions and did not appear to raise, as required, a question of law. Mr Buzadzic made no serious attempt to identify any error in this conclusion beyond sweeping and generalised assertions that errors of fact can amount to legal errors or even jurisdictional errors. That is undoubtedly so. As the Commissioner points out, an error of fact can be of such significance to amount even to jurisdictional error, citing *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431 at [64] and [70] (Kenny, Griffiths and Mortimer JJ). However, that essential step of demonstrating that the asserted errors relied upon rose to that level was not apparently taken before the primary judge, and certainly was not done by written or oral submissions in this appeal. The first aspect fails due to a complete failure even to attempt to do what was required.
2. The primary judge generously characterised the second aspect, asserting that the impugned findings and conclusions were without supporting evidence, or without any basis for drawing inferences or were contrary to the evidence, as being an assertion of being unreasonable in the sense identified in *SZVFW* at [10]-[11] of lacking an evident and intelligible justification. His Honour was not satisfied that was so for any of the findings or conclusions relied upon by Mr Buzadzic, addressing each and every one of them to explain why each was supported by the what the Tribunal had found or concluded. His Honour found that the evidence before the Tribunal provided a proper basis for the findings that were made. Once again, no serious attempt was made by Mr Buzadzic to demonstrate any error on the part of his Honour.
3. The reasoning of the primary judge is sound, especially given the paucity of assistance his Honour was evidently given by Mr Buzadzic. No error has been meaningfully identified, much less established. It follows that appeal ground 8 must fail.

## Appeal ground 9 (ground 16 below) – denial of procedural fairness

1. This ground of appeal cross-references particular parts of the evidence listed in support of appeal grounds 2 and 3 as non-exhaustive examples, but does not go further than the bald assertion that the evidence as listed and more, was either not properly considered or not considered at all by the Tribunal to an extent which resulted in a failure to afford Mr Buzadzic procedural fairness. The primary judge and now this Court is left to guess how this is said to have taken place, remembering it was not for his Honour or this Court or the Commissioner to counter a bare assertion. The weakness of this ground is best demonstrated by reproducing the entirely of Mr Buzadzic’s written submissions in relation to it, which were not enlarged upon orally:

The appellant contends that the Tribunal failed to afford him procedural fairness in failing to properly consider the evidence tendered by the appellant and/or in failing to give such evidence proper weight.

1. In those circumstances, the primary judge at PJ[167] correctly was unable to be satisfied that the Tribunal had failed to consider any relevant evidence, finding instead that the Tribunal’s reasons demonstrated that it had regard to the evidence that was before it and carefully considered whether that evidence was sufficient to discharge Mr Buzadzic’s burden of proof. The primary judge found that it was open to the Tribunal to conclude that he had not done so. His Honour also correctly observed that, to the extent that Mr Buzadzic was contending that there was a failure to give evidence “*proper weight*”, this was a matter for the Tribunal, such that this was an impermissible attempt at merits review and was therefore beyond the scope of an appeal on a question of law.
2. There is no discernible error on the part of the primary judge. It follows that appeal ground 9 must fail.

## Conclusion

1. As all of the appeal grounds have failed, the appeal must be dismissed with costs.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Bromwich, Abraham and McEvoy. |

Associate:

Dated: 17 April 2024