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The Hon. Justice I V Gzell**

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The Taxpayer's Duty Of Disclosure (Paper)

STEP ASIA CONFERENCE
12 – 13 October 2006

FOUR SEASONS HOTEL

HONG KONG

THE TAXPAYER'S DUTY OF DISCLOSURE

Ian V Gzell

Introduction

When I was asked to present this paper my attention was drawn to an article by Dr Terence Dwyer [1] and a response by Tony Molloy QC. [2] Dr Dwyer criticises the OECD campaign against tax havens. He says the OECD accuses offshore jurisdictions that protect privacy of aiding and abetting OECD citizens to commit illegalities. He submits that a failure to disclose overseas interests does not necessarily indicate fraud in lodging a false tax return by an OECD taxpayer. He criticises the implicit assumption that tax evasion is a form of theft. He suggests that tax evasion by mere silence or non-payment is not a form of cheating the Crown, but a form of withholding a contribution agreed to be given to a common fund, more a civil matter of disputed or unpaid contribution, rather than criminal fraud.

Mr Molloy points out that unless it is unarguably clear that a client has divested himself of income and of the power to enjoy it, the taxpayer's duty is to put the Revenue on notice that the correctness of his return rests on something about which the Revenue might well feel the need to think. As the Privy Council said, [3] the taxpayer is duty bound to see to it that the Revenue is informed of all facts relevant to an assessment of tax. [4]

The source of the taxing power

Dr Dwyer is correct, at least so far as Australia is concerned, in his observation that there is no common law of income tax. As early as 1910, Griffith CJ observed that the scheme of our then taxing Acts could only be ascertained from their express provisions because there was no common law of income tax. [5] The late Graham Hill was Australia's foremost taxation judge. He said:

“With respect to those who might have suggested otherwise, it is hard to conceive of some common law of income tax operating outside the terms of the Act itself. The Act is statutory law and must be interpreted no doubt in accordance with its terms and so as to favour the policy that is enshrined in it. But if there is a statutory provision exempting a trustee from paying income tax, such as s 96, that section must be given effect to if the case falls squarely within it.” [6]

As a general proposition, one would have thought it to be true of common law and civil law countries that taxation is a creature of statute.

The source of the duty to disclose

There is no fiduciary relationship between a taxpayer and the Revenue that might ground an equitable obligation to disclose information to the Revenue. The fiduciary office involves a person undertaking to act for, or in the interests of, another. The predominant thrust of equitable supervision has been to prevent such persons from misusing their position to their own advantage. [7] Sir Sidney Rowlatt recognised that there was no equity about a tax. In dealing with the proposition that in a taxing Act clear words are necessary in order to tax the subject, his Lordship said:

“Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown, in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.” [8]

If there is no common law of tax and no equitable obligation of disclosure by a taxpayer, any obligation to disclose must be found in statutory law.

The statutory duty to disclose

Tax statutes or allied administration statutes around the globe contain provisions requiring taxpayers to disclose information to the Revenue. The statement of the duty can be quite simple. For example, taxpayers are often required to make annual or some other periodic returns of income in a statutory form.

In Australia, every person must, if required by the Commissioner by notice published in the Gazette, give to the Commissioner a return for a year of income within the period specified in the notice. [9] The annual Gazette notice specifies the persons required to lodge a return. It also requires the return to be lodged in an approved form. The approved form for individuals is divided into two parts. The first requires the disclosure of the more common forms of gross income and deductions: salary and wages, allowances, eligible terminations payments, government pensions and the like, interest and dividends on the one hand, and work related expenses, interest and dividend deductions, gifts, undeducted purchase price of pensions and annuities, costs of managing tax affairs and tax offsets on the other hand. The supplementary form requires the disclosure of income from partnerships and trusts, personal services income, net income or loss from business, capital gains, foreign source interests and rent. The deduction information includes film industry incentives, undeducted purchase price of a foreign pension or annuity and superannuation contributions.

The main form requires a declaration, amongst other things, that: “all the information I have given on this tax return, including any attachments, is true and correct”, and: “I have shown all my income – including net capital gains – for tax purposes for 2005-06”, and: “I have the necessary receipts and/or other records – or expect to obtain the necessary written evidence within a reasonable time of lodging this tax return – to support my claims for deductions and tax offsets.”

Similar disclosure obligations are prescribed by the statute laws of other countries. For example, for United States federal income tax purposes, when required by regulations prescribed by the Secretary, any person made liable for any tax imposed, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement must include therein the information required by such forms or regulations. [10]

In the United Kingdom a person may be required by a notice given by an officer of the Board to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice and to deliver with the return such accounts, statements and documents relating to information contained in the return as may reasonably be required. [11]

A New Zealand taxpayer must, if required under a tax law, make an assessment and, unless a non-filing taxpayer, correctly determine the amount of tax payable. [12]

In Canada, subject to exceptions, a return of income that is in prescribed form and that contains prescribed information must be filed with the Minister without notice or demand for the return for each taxation year of the taxpayer. [13]

And the list goes on. It tends to contradict one of Dr Dwyer's assertions. He said:

“... an OECD citizen may want secrecy in relation to offshore financial arrangements for the same reason that *Coca-Cola* does not publish its recipe – he does not want business or investment advantage eroded or disturbed. There is nothing dishonest about wanting a quiet life.”

The statute laws of OECD countries do not allow their residents a quiet life free from disclosure of offshore information if that information is necessary to a proper assessment of taxable income. There is a statutory obligation to make annual or other periodic returns to the Revenue containing prescribed information. If the prescribed information includes offshore income or deductions they must be disclosed in the return.

That is a simple enough statement. But its application will often cause problems. What if taxable income has been excluded from the taxpayer or a deduction has been obtained from participation in a promoted scheme and the prescribed information does not require its separate specification? Does one return a lower figure for income and a bulk figure for deductions including the scheme deduction and say nothing, or does one disclose the nature of the scheme? I will return to this conundrum.

The Revenue's powers of inquiry and search

For the protection of the Revenue, statute laws will vest in appropriate officers powers of inquiry and search. When these powers are exercised, taxpayers will be subject to further duties of disclosure.

In discussing this issue I will confine myself to the position in Australia. It would be too cumbersome to do otherwise.

In addition to the annual return, the Australian Commissioner of Taxation may require any person to give a return or a further or fuller return for a year of income or a specified period, whether or not the person has given a return for the same period, or any information, statement or document about the person's financial affairs. [14] In addition, every person whether a taxpayer or not, if required by the Commissioner, shall in the approved form and within the time required by him, furnish any return required by the Commissioner for the purpose of the Act. [15]

Thus the Commissioner has the power to call for further disclosures from any person who might assist the administration of the Revenue laws.

To inform this process of further disclosure, one would expect there to be a statutory obligation to keep records. And so there is. [16] The Commissioner or other authorised officer is entitled to full and free access to all buildings, places, books, documents and other papers for any of the purposes of the Act, and for that purpose to make extracts or copies. [17] The Commissioner may by notice in writing require any person, whether a taxpayer or not, to furnish him with such information as he may require and to attend and give evidence before him or an authorised officer concerning his or any other person's income or assessment and may require him to produce books, documents and other papers in his custody or under his control. The Commissioner may require the information or evidence to be given on oath or affirmation and either verbally or in writing. [18]

One fails to comply with these duties of disclosure at one's peril. There are offences giving rise to penalties of varying levels of severity for failures to comply. The ramifications of a failure to comply are twofold. First, the Commissioner may amend an assessment and impose the general interest charge and penalties. Secondly, the taxpayer may be charged with an offence.

Assessment

Australia has a partial self-assessment system. Companies, including trustees of corporate unit trusts and trustees of public trading trusts and trustees of eligible ADFs, eligible superannuation funds and pooled superannuation trusts [19] are subject to full self-assessment. On the day on which the return is furnished, the Commissioner is taken to have made an assessment of the relevant taxable income or net income and of the tax payable being the respective amounts specified in the return and on that day the return is deemed to be a notice of the deemed assessment, deemed to have been served on the entity on the day on which the Commissioner was deemed to have made the assessment. [20] In the case of these full self-assessment taxpayers, the Commissioner does not issue a notice of assessment.

For individuals, the Commissioner makes an assessment of the taxable income and the tax payable thereon from returns or other information in his possession. [21] He is then obliged to serve notice of the assessment on the taxpayer. [22]

The statute provides that, subject to an exception, when a return of a non full-assessment taxpayer is lodged, the Commissioner may for the purposes of making an assessment accept either in whole or in part a statement in the return of the assessable income derived by the taxpayer and of any allowable

deductions or rebates to which it is claimed that the taxpayer is entitled. [23] Unless the exception is invoked, the Commissioner will almost invariably issue a notice of assessment in accordance with the return of an individual thus accepting a virtual self-assessment system.

Having issued a notice of assessment to a taxpayer other than a full self-assessment taxpayer, or having been deemed to issue an assessment in accordance with a return by a full self-assessment taxpayer, the Commissioner is not bound either by the assessment or the deemed assessment.

The exception arises if a taxpayer includes with a return a document signed on behalf of the taxpayer that raises a question relevant to the liability of the taxpayer on which the taxpayer is not entitled to apply for a private ruling. The Commissioner must give attention to the question. [24]

Under the private ruling system, a person is entitled to apply to the Commissioner to make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply in relation to a specified scheme. [25] A ruling binds the Commissioner if the ruling applies to the taxpayer and the taxpayer relies on the ruling by acting or omitting to act in accordance with the ruling. [26]

The conundrum

Since it is unlikely that any question asked by a taxpayer about excluded income or a tax-effective scheme deduction could not be the subject of a private ruling, the exception to the Commissioner issuing an assessment in conformity with a return is unlikely to apply. The safe course is to seek the private ruling. There is an encouragement under this system to disclose information to the Commissioner to gain the protection of a binding ruling.

Amendment of assessment

The provision enabling the Commissioner to amend an assessment, [27] has had many revisions over the years. In its early manifestation it provided that where a taxpayer had failed to make a full and true disclosure of all material facts necessary to make an assessment and there was an avoidance of tax the Commissioner could issue an amended assessment to increase the tax liability, where the avoidance was due to fraud or evasion, at any time and, in any other case, within six years from the date the tax became due and payable.

For some time now, the power to amend has been limited, typically to four years, except in the case of fraud or evasion in which case the amendment can be made at any time. The present provision allows the Commissioner to amend the assessments of an individual, a company or a trustee that is a simplified tax system taxpayer [28] within two years and any other taxpayer within four years. But if the Commissioner is of the opinion that there has been fraud or evasion, the amendment may be made at any time. And an amendment may be made at any time to give effect to a decision on review or appeal or as a result of an objection made by a taxpayer or pending a review or appeal.

But then there are provisions that extend the Commissioner's power to amend at any time. He has that power to give effect to 39 specified sections or divisions in the 1936 [29] and 27 sections or divisions of the 1997 Act. [30]

In addition, the Commissioner is given power to amend at any time to give effect to Australia's anti-international profit-shifting provisions [31] and to give effect to a provision of a double taxation agreement that attributes to a permanent establishment or to an enterprise the profits it might be expected to derive if it were independent and dealing at arm's length together with giving effect to specified provisions within the Timor Sea treaty. [32]

Audit Programmes

The Commissioner conducts audit of programmes of various kinds. It is as a result of an audit that his power to amend an assessment is likely to arise.

There is no provision in the legislation specifically providing that power but there are the provisions for access and inquisition [33] to which I have referred. The High Court of Australia has held that they may be used randomly in support of the general administration of the Act vested in the Commissioner [34] and the provision of the Act by which income tax at the rates declared by the Parliament is levied and is to be paid in each financial year upon the taxable income derived during that year by any person whether a resident or a non-resident. [35] The High Court held that the powers of access and

inquisition must be exercised for the purpose of the Act and that question is to be considered in the context of the provision levying income tax. [36] It was observed that with the introduction of self-assessment, the process of investigation contemplated by the access and inquisition powers was more likely to arise after assessment than before. [37]

Fraud and evasion

Apart from the power to amend at any time to give effect to the specified provisions of the 1936 Act, the 1997 Act and the specified international treaty provisions, the Commissioner's current power to amend at any time is predicated upon fraud or evasion.

Lord Herschell's definition of fraud has often been cited: [38]

“... fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false ... if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.”

These observations were endorsed by the High Court of Australia in observing that it would have been erroneous to have declined to find fraud merely because the defendant or its solicitor had not first formed a plan to trick the purchasers into buying the unit in question. [39]

So far as evasion is concerned, Sir Owen Dixon said it was unwise to attempt to define the word, but is meant more than avoid and also more than a mere withholding of information or the mere furnishing of misleading information. His Honour went on to say:[40]

“It is probably safe to say that some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible is contemplated. An intention to withhold information lest the commissioner should consider the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion.”

Timing of fraud or evasion

It has been suggested to me that the question whether fraud or evasion is present is to be determined immediately before the Commissioner seeks to exercise his power to amend and that a recalcitrant taxpayer may amend his ways after assessment and after any audit procedure.

I doubt that a Court will look at it in that way. It seems to me that an amended assessment corrects an error in the original assessment or deemed assessment and it is the quality of that error that determines the time within which the Commissioner may amend the assessment. If the absence of disclosure or a misstatement in the return gave rise to the original assessment with the quality of fraud or evasion about it, I think the Commissioner is not bound by a time limit and may amend the assessment at any time.

I think that at least Kirby J of the High Court would not support this notion.

The combination of two provisions of Commonwealth legislation [41] made it an offence to conspire to defraud the Commonwealth. The promoters of a franchised internet service provision scheme were found guilty of conspiring with others to defraud the Commonwealth. [42] Their appeal to the Court of Criminal Appeal of Western Australia failed. [43] An application for a special leave to appeal to the High Court was heard by Gummow, Kirby and Heydon JJ. Early in those proceedings Kirby J said: [44]

“Is not the flaw in your argument that the whole system of self-assessment works upon a premise of honesty and you say the problem only arises later in the step but the later step does not occur in, I would think, 90 or more per cent of cases, probably 95 or 98, and the flaw in your argument is that you can just be as dishonest as you like at the earlier step but it does not really matter because you have not actually been asked to say anything. But the

whole system works on the honesty of taxpayers and citizens.”

Without access to the papers one cannot be categorical about this comment, but it does seem to address the above argument. That argument was not central to the special leave application, however. What was put was that the Crown needed to establish to the jury beyond reasonable doubt that the consequence of the actions of the alleged conspirators was at least to deprive the Commissioner of an arguable case to deny the deductions claimed by those who invested in the scheme and thereby cause the Crown to lose something of value. [45] The application failed on the basis that there was insufficient prospect of success in demonstrating error in the decision of the Court of Criminal Appeal.

The element of dishonesty upon which the Crown relied in those cases was that information provided to prospective investors was calculated not only to deceive them into making the investment, but also to cause them to mislead the Commissioner in claiming deductions. Thus a failure to disclose gave rise to a criminal sanction. The difference between this situation and that which I am asked to discuss is that the failure of disclosure was to prospective investors rather than the Commissioner.

Commission of offences

The other ramification of a failure to disclose information to the Commissioner is that an offence may have been committed. The offence may be prescribed by taxation or allied legislation or by general criminal legislation. It may be dealt with summarily or on indictment.

Taxation administration offences

Taxation administration legislation contains a series of charges and penalties affecting taxpayers. These provisions help to define the content of a taxpayer's duties. If a taxpayer is guilty of an offence for doing or failing to do something, his duty to the Revenue includes refraining from doing the impugned thing or doing the omitted thing.

There is a general interest charge for failure to comply with various provisions. [46] There are also a number of provisions that make a person liable to pay for a failure to notify penalty. [47] Likewise, there are provisions that make a person liable to pay a late reconciliation statement penalty. [48]

Then there are the offences. A person who refuses or fails when and as required under or pursuant to a taxation law to furnish an approved form or any information to the Commissioner or another person, to give information to the Commissioner in the manner in which it is required under a taxation law, to lodge an instrument with the Commissioner or other person for assessment, to cause an instrument to be duly stamped, to notify the Commissioner or another person of a matter or thing, to produce a book, paper, record or other document to the Commissioner or another person, to attend before the Commissioner or another person, to apply for registration or cancellation of registration for GST purposes, or to comply with a requirement under the *Product Grants and Benefits Administration Act* 2000, is guilty of an offence. [49]

A person who when attending before the Commissioner or another person pursuant to a taxation law refuses or fails when and as required to answer a question or to produce a book, paper, record or other document is guilty of an offence. [50]

A person is guilty of an offence if the person makes a statement to a taxation officer and the statement is false or misleading in a material particular. [51] A person is guilty of an offence if the person makes a statement to a taxation officer and omits any matter or thing from the statement and the statement is misleading in a material particular because of the omission. [52] A person is guilty of an offence if the person is required under a taxation law to keep any accounts, accounting records or other records and the person keeps the accounts or records and they do not correctly record and explain the matters, transactions or operations to which they relate. [53] A person is guilty of an offence if required under a taxation law to make a record of any matter, transaction, act or operation and the person makes the record but it does not correctly record the matter, transaction, act or operation. [54]

A person is guilty of an offence if the person makes a statement to a taxation officer, the statement is false or misleading in a material particular and the person is reckless as to whether the statement is false or misleading or omits any matter about which it is misleading in a material particular. [55] A person is guilty of an offence if required to keep any accounts, accounting records or other records, the person keeps the accounts or records, the accounts or records do not correctly record and explain the

matters, transactions, acts or operations to which they relate, and the person is reckless as to whether the accounts or records correctly record and explain the matters, transactions, acts or operations to which they relate. [56]

A person is guilty of an offence if the person keeps any accounts, accounting records or other records in such a way that they do not correctly record and explain the matters, transactions, acts or operations to which they relate, or are illegible indecipherable, incapable of identification or incapable of being used to reproduce information, makes a record of any matter, transaction, act or operation in such a way that it does not correctly record the matter, transaction, act or operation, engages in conduct that results in alteration, defacing, mutilation, falsification, damage, removal, concealing or destruction of any accounts, accounting records or other records, or does or omits to do any other act or thing to any accounts, accounting records or other records with the intention of deceiving or misleading the Commissioner or a particular taxation officer, hindering or obstructing the Commissioner or a particular taxation officer, hindering or obstructing the investigation of a taxation offence, hindering obstructing or defeating the administration execution or enforcement of a taxation law, or defeating the purposes of a taxation law. [57]

A person is also guilty of an offence if the person engages in conduct that results in the falsification or concealing of the identity of or the address or location of a place of residence or business of the person or another person, or does or omits to do any act or thing the doing or omission of which facilitates the falsification or concealment of the identity of or the address or location of a place of residence or business of the person or another with the intention of deceiving or misleading the Commissioner or a particular taxation officer, hindering or obstructing the Commissioner or a particular taxation officer, hindering or obstructing the investigation of a taxation officer, hindering obstructing or defeating the administration execution or enforcement of a taxation law, or defeating the purposes of a taxation law. [58]

There is a hierarchy with respect to the prosecution of taxation offences. An offence that is punishable by imprisonment for a period exceeding 12 months committed by a natural person is an indictable offence. It is a summary offence if the imprisonment is for a period not exceeding 12 months. Prescribed offences committed by a natural person are punishable on summary conviction as are taxation offences committed by a corporation. [59] Civil penalties are not payable if a prosecution is instituted. [60]

General criminal offences

Much of what was in the former *Crimes Act 1914* (Cth) is now contained in the *Criminal Code* (Cth) which is contained in the Schedule to the *Criminal Code Act 1995* (Cth).

A common law offence of cheating the public Revenue is recognised in the United Kingdom. In *R v Dimsey*[61] the appellant, resident in Jersey, provided services including the formation of offshore companies for clients and the administration of such companies for a fee. He set up two companies on behalf of a client to act as intermediaries in the supply of avionics equipment to a company in South Africa in contravention of sanctions then in force in South Africa. He was charged with conspiring with the client and another to cheat the public Revenue by concealing the fact that the client managed and controlled the companies' business in England and that the companies were therefore resident in the United Kingdom and liable to taxation there. He was convicted and his appeal to the House of Lords failed.

Likewise, in *R v Allen*[62] it was alleged against him that he managed and controlled in the United Kingdom the business of property companies which were incorporated in Jersey and administered by Dimsey and he concealed that fact in order to give the false impression that the companies were not resident in the United Kingdom and had failed to disclose profits made by those companies and benefits derived by them. He was convicted on all counts of cheating the public Revenue of income and corporation tax and his appeal to the House of Lords was dismissed at the same time as *Dimsey*.

A prosecution for a common law offence is not open in Australia. The *Criminal Code* (Cth) contains a provision that the only offences against laws of the Commonwealth are those offences created by or under the authority of the *Criminal Code* (Cth) or any other Act. [63]

Under the *Criminal Code* (Cth) a person is guilty of an offence if the person by deception dishonestly obtains a financial advantage from another person and the other person is a Commonwealth entity. [64] It is also an offence if a person gives information to another person knowing that the information is false or misleading or omits any matter or thing without which the information is misleading and the

information is given to a Commonwealth entity or to a person exercising powers or performing functions under a law of the Commonwealth, or the information is given in purported compliance with a law of the Commonwealth. [65]

The charge of conspiracy to defraud is available to the Crown where a failure to disclose a material matter to the Commissioner causes the Commonwealth to receive less by way of tax than that to which it is entitled. Current Commonwealth legislation provides that a person is guilty of an offence if that person conspires with another person with the intention of dishonestly causing a loss to a third person and the third person is a Commonwealth entity. [66]

A feature of this legislation is its extension of geographical limits with respect to offences. A specific extended geographical jurisdiction applies to charges of defrauding the Commonwealth and conspiracy to defraud the Commonwealth. [67] The offences apply whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia. [68] This means that if Messrs Pearce, Tieleman and Wharton had been subject to the current conspiracy to defraud provision and had confined their activities to promoting the scheme to prospective non-resident franchisees while themselves overseas, the indictments would still lie provided, of course, that Messrs Pearce, Tieleman and Wharton returned to Australia or were extradited to Australia.

OECD article 26

This geographical extension of jurisdiction may take advantage of recent changes to international sharing of information to which Dr Dwyer referred.

Article 26 of the OECD model convention with respect to taxes on income and on capital provided that the competent authorities of contracting states should exchange information for carrying out the provisions of the convention or the domestic laws of the contracting states. It required that any information received be treated as secret and disclosed only to authorities concerned with the assessment or collection or enforcement or prosecution of taxes covered by the convention. The article provided that it should not be construed so as to impose the obligation to carry out administrative measures at variance with the laws and administrative practices of the contracting states, to supply information that was not obtainable under the laws or in the normal course of administration of the contracting states, or to supply information which disclosed any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

On 15 July 2005 the article was amended to include the provision that if information was requested by a contracting state in accordance with the article the other contracting state should use its information gathering measures to obtain the requested information, even though that other state might not need such information for its own tax purposes. A specific provision was included providing that a contracting state should not decline to supply information solely because it was held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity, or because it related to ownership interests in a person.

Australia has adopted the amended version of article 26 in its domestic law and now seeks to include the provision in revised or new tax treaties. The *International Tax Agreements Amendment Act (No 1) 2006* [69] received royal assent on 14 September 2006. It amended the *International Tax Agreements Act 1953* to give force in Australia to the new information gathering provisions of article 26 of the OECD model convention. It also gives legislative force in Australia to a protocol amending the tax treaty between Australia and New Zealand. It provides for the omission of the present article 26 and its substitution by an article in the OECD form. Australia may now request New Zealand to exercise its information gathering measures in aid of investigations by the Commissioner regarding taxpayers alleged to be liable to tax or to further tax in Australia.

On 21 June 2006 the Treasurer announced that Australia had signed a new tax treaty with France and on 8 August 2006 that Australia and Norway had signed a new tax treaty. Both contain the new information gathering provisions in article 26 of the OECD model convention.

Secrecy provisions

There are in the domestic laws of Australia a number of provisions that require the Commissioner and his officers to maintain secrecy with respect to information gathered by them. For example, there is a provision that an officer of the Commonwealth or a State shall not either directly or indirectly while he

is, or after he ceases to be, an officer make a record of or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer under the Act. [70]

The *International Tax Agreements Amendment Act (No 1) 2006* has inserted a new provision in the *International Tax Agreement Act 1953* [71] providing that the Commissioner or an officer authorised by the Commissioner may use the information gathering provisions for the purpose of gathering information to be exchanged in accordance with the Commissioner's obligations under an international agreement. The provision also states that the making of a record of and exchanging information in accordance with the Commissioner's obligations under an international agreement is not a breach of a provision of a taxation law that prohibits the Commissioner or an officer from making a record of, or disclosing, information.

On 23 August 2006, the Treasury announced a review of taxation secrecy and disclosure provisions. The discussion paper identified 33 Commonwealth Acts containing secrecy and disclosure provisions, in some cases a number of them. The review proposes to consolidate and standardise the provisions. That process may have ramifications so far as the sharing of information at the domestic level is concerned.

Product rulings

At the domestic level, recent changes have aided the Commissioner's ability to gather tax information. The risks associated with promoting tax effective arrangements, as witness the fate of Messrs Pearce, Tieleman and Wharton, led to increased disclosure to the Revenue in advance of the promotion of a scheme to gain a product ruling in favour of it. The product ruling system is merely a specialisation of the public ruling system confined to the tax consequence of disclosed proposed transactions.

The legislation provides that the Commissioner may make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to entities generally or a class of entities, such entities in relation to a class or schemes and such entities in relation to a particular scheme. [72] A public ruling about a class of arrangement applies to all arrangements in the class whether past, present or future. [73] Like a private ruling, a public ruling binds the Commissioner in relation to a taxpayer if the ruling applied to the taxpayer and the taxpayer relied on the ruling by acting in accordance with it. [74]

The risk that is run by a person promoting a scheme or, for that matter, by a participant, in the absence of a product ruling has led to the Commissioner receiving more disclosures than was the position prior to the introduction of the binding ruling system.

Promoter penalty provisions

And this tendency has been accelerated by new promoter penalty provisions introduced on 6 April 2006. [75] An entity must not engage in conduct that results in that or another entity being a promoter of a tax exploitation scheme. [76] An entity is a promoter if it markets a scheme or otherwise encourages the growth of the scheme or interest in it, it or an associate receives consideration in respect of the marketing or encouragement, and it is reasonable to conclude that it had a substantial role in respect of that marketing or encouragement. [77] A tax exploitation scheme is one it is reasonable to conclude an entity entered into or carried out with the sole or dominant purpose of it or another entity getting a scheme benefit, or it is reasonable to conclude that if an entity entered into or carried out the scheme it would have done so with that sole or dominant purpose, and it is not reasonably arguable that the scheme benefit is available at law, or it is not reasonably arguable that the scheme benefit would be available at law if the scheme were implemented. [78]

There is also an embargo upon an entity engaging in conduct that results in a scheme that has been promoted on the basis of conformity with a product ruling being implemented in a way that is materially different from that described in the product ruling. [79]

If the Federal Court of Australia is satisfied on the application of the Commissioner that an entity has contravened either provision it may order the entity to pay a civil penalty to the Commonwealth. [80] The maximum penalties are 5,000 penalty units for individuals and 25,000 penalty units for bodies corporate or twice the consideration received or receivable by the entity and associates whichever is the greater. [81] Making of a civil penalty order does not prevent subsequent criminal proceedings against a promoter. [82]

Again, these provisions will have the effect of increased disclosure to the Revenue in seeking product

rulings before any promotion of a scheme rather than relying upon the exception that it is reasonably arguable that the scheme benefit is available at law.

There is on the statute books in Australia, the *Crimes (Taxation Offences) Act* 1980. But it turned out to be a damp squib. It applied where a person entered into an arrangement or transaction with the intention of securing that a company or trustee would be unable, or would be likely to be unable, having regard to other debts of the company or trustee to pay various forms of Commonwealth tax. [83] There were aiding and abetting provisions [84] which might have applied to promoters but since the offence was limited to denuding a company or trustee of liquidity, its scope was severely limited. The new provisions are far more extensive.

OECD article 27

We all know that in the *Government of India v Taylor*[85] the House of Lords held that claims on behalf of a foreign state to recover taxes due under its laws were unenforceable in English courts. The OECD has been at pains to reverse the effect of that decision. It has introduced to the model convention a new article 27 providing that the contracting states should lend assistance to each other in the collection of revenue claims in so far as not contrary to the convention or any other instrument to which the contracting states are parties. Article 27(3) overcomes the rule in the *Government of India v Taylor*. It provides:

“When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.”

Where the revenue claim might be subject to measures of conservancy in the requesting state the other state is obliged to take the measures of conservancy in respect of the claim in accordance with the provisions of its laws as if it were a revenue claim of it. There are safeguards in that there is no imposition on a contracting state to carry out administrative measures at variance with the laws and administrative practice of that or of the other contracting state, to carry out measures contrary to public policy, to provide assistance if the other contracting state does not pursue all reasonable measures of collection or conservancy, nor to provide assistance in those cases where the administrative burden is clearly disproportionate to the benefit to be derived by the other contracting state.

Australia has had included an article based on OECD article 27 in the New Zealand protocol and in the new treaties with France and Norway.

It is a further impediment to taxpayers who fail to perform their duty of disclosure and take up residence overseas.

To give legislative effect in Australia to article 27 of the OECD model, Australia has introduced a provision requiring a foreign revenue claim to be made on behalf of the competent authority under an international agreement to be consistent with the provisions of the agreement, to be in approved form, to specify the amount owed by the debtor in Australian currency, and to be accompanied by a declaration by the competent authority stating that the claim fulfils the requirements of the agreement. [86] The Commissioner is required to keep a register called the foreign revenue claims register. [87] If the Commissioner is satisfied that a foreign revenue claim has been made in accordance with the legislation the Commissioner must register the claim by entering particulars of it in the register. [88] When particulars of a foreign revenue claim are entered in the register, the legislation provides that the amount owed by the debtor becomes a pecuniary liability to the Commonwealth by the debtor. It becomes due and payable 30 days after notice of the particulars of the foreign revenue claim is given to the debtor and if that amount remains unpaid after it is due and payable, the debtor is liable to pay general interest charge on the unpaid amount. [89]

Constitutional issues

There may be a problem with this structure. The Australian Commonwealth Parliament is one of limited jurisdiction. The *Commonwealth of Australia Constitution Act* 1900 contains the *Constitution* of the

Commonwealth. It specifies Commonwealth powers. The Commonwealth Parliament has power to make laws for the peace, order and the good government of the Commonwealth with respect to specified matters. [90]

Those matters include laws with respect to taxation. [91] But it is doubtful that this is the law as to taxation. It might have been if the legislation had taken the form of imposing a tax upon a resident equivalent to any tax owed by the resident to a country with which Australia had a tax treaty containing the equivalent of article 27 of the OECD model convention.

The Commonwealth Parliament has power to make laws with respect to external affairs. [92] But it also has power to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect to which the Parliament has power to make laws. [93] That power implies that the Parliament has no power to make laws for the acquisition of property on unjust terms.

There is force in the argument that the provision deeming a foreign revenue claim once entered on the register to be a debt due to the Commonwealth constitutes an acquisition of property used to discharge the debt on unjust terms. If that is so the legislation cannot be saved by calling in aid the power to make laws with respect to external affairs.

Problems of enforcement

There may be some practical difficulty of enforcing the promoter penalty provisions with respect to offshore promotional activity. Suppose a New Zealand company with corporate shareholders resident in a country with which Australia does not have a tax treaty promoting a scheme for which the Commissioner succeeds in obtaining a Federal Court judgment for a civil penalty against the company. The Commissioner requests New Zealand to aid it in recovering the penalty from the New Zealand company. The directors of the company cause it to declare a dividend to its shareholders which denudes it of the capacity to pay the penalty. Article 27 is thwarted and unless Australia can have extradited the individuals who aided and abetted the declaration of the dividend, a prosecution under the *Crimes Taxation Offences Act 1980* or for fraud against the Commonwealth is unavailable.

Conclusion

As one can see there is a plethora of statutory provisions in Australia that define the duty of a taxpayer to disclose information to the Commissioner and there are numerous offences for failure to disclose, some of which may be enforced in a summary way while others constitute indictable offences.

A taxpayer's duty of disclosure is a creature of statute. The content of the duty will depend upon the proper construction of the statutory provision. In the case of a standard form of return, the duty is confined to appropriate answers to the questions raised. But where there is any doubt that a taxpayer has excluded income from derivation by the taxpayer or is entitled to a deduction under what is said to be a tax-effective scheme, the taxpayer will be well advised to seek a binding private ruling. Rare will be the case that the taxpayer is in a position to raise a question upon lodging a return that is not capable of being dealt with by a private ruling.

Legislation seeks to protect the Revenue by providing various powers of inquisition and search. It is with respect to those provisions that the obligation of disclosure will be more widely defined. In Australia it is under these provisions that the Commissioner conducts audits. The duty of disclosure in these circumstances will be breached by a failure to disclose information that renders that which has been disclosed misleading in a material respect.

A failure by a taxpayer to comply with the duty of disclosure can lead to an amended assessment, to penalties, to summary prosecution or to prosecution of an indictable offence.

Domestically, Australia has encouraged the making of disclosures to the Commissioner under its private and public ruling systems. There has been further impetus to disclose information to the Commissioner under the specialised product ruling system. The recent introduction of promoter penalty provisions is likely to augment the extent of such disclosures.

From the international perspective, the OECD model convention has been amended to provide greater exchange of information between treaty partners and to overcome the rule in *Government of India v Taylor* by providing for one treaty partner to recover a tax debt due to the other treaty partner. The manner in which the latter has been given legislative effect in Australia is questionable because it may amount to a law with respect to the acquisition of property not on just terms, overriding the usual font of

legislative power under the external affairs power.

Acknowledgement

I wish to acknowledge the assistance given to me in research for this paper by the New South Wales Supreme Court Equity Division researcher, Sean O'Brien and by my Tipstaff, Sophie Hunt.

Reservation

It should not be assumed that anything I have said will lead me to a decision consistent with this paper if an issue addressed in it is ever raised before me in Court.

27 September 2006

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The Taxpayer's Duty of Disclosure

**STEP ASIA CONFERENCE SPEECH
12 – 13 October 2006**

FOUR SEASONS HOTEL

HONG KONG

THE TAXPAYER'S DUTY OF DISCLOSURE

Ian V Gzell

Ladies and Gentlemen.

Thank you Mr Chairman for your introduction. STEP has a wonderful reputation. I have wondered what it would be like to attend one of your conferences, and I am privileged to have been asked to speak at this one.

Your organisers asked me to speak on this topic because of the issues raised by Dr Terence Dwyer in his article, *Morals, laws, taxes and sovereignty*, and the response from Tony Molloy QC who is one of the delegates present at this conference.

Dr Dwyer adopts a social contract theory to suggest that taxation is merely a contribution agreed to be given to a common fund, and that a failure to do so should be no more than a civil wrong rather than a criminal offence. In this context he questions the need to provide information to fiscal authorities and criticises the OECD initiatives on information exchange between member States.

Mr Molloy raises a voice of caution. The Privy Council on appeal from New Zealand has held, not surprisingly, that a taxpayer is duty bound to see to it that the Revenue is informed of all facts relevant to an assessment of tax.

In olden times the raising of taxes was a royal prerogative. In the late 10th century King Ethelred invented a subtle form of taxation. He commissioned royal mints to produce coins but they were legal tender for a limited period, at the end of which one had to return one's coins to a royal mint and receive new coins. But for every ten pennies that one returned one might only receive 7 new pence and a half penny.

Dr Dwyer was correct in his observation that there is now no common law of income tax. I have cited a passage to this effect from a judgment of the late Graham Hill who was, undoubtedly, Australia's foremost taxation judge.

Nor is there any fiduciary obligation for a taxpayer to disclose information to the Revenue. The key to a fiduciary office is the undertaking by a person to act for, or in the interests of, another. Those activities are subject to equitable supervision to prevent an abuse of position for personal benefit. That is hardly the position of a taxpayer vis-a-vis Revenue authorities.

So, again unsurprisingly, taxation is now a creature of statute, and a taxpayer's duty of disclosure is to be found in the statute books of a country.

In Australia there is a requirement to lodge an annual income tax return. As one would expect, there are similar statutory requirements of disclosure in the statute laws of other countries. But to say that the taxpayer's duty of disclosure is to fill in the details in the return, is too facile a definition of the duty.

What if taxable income has been reduced, or a deduction has been obtained, from participation in a promoted scheme and the prescribed information in the return does not require the disclosure of details of the scheme. Does one return a lower figure for income or a higher figure for deductions and say nothing? Or does one disclose the nature of the scheme? That question is discussed later in the paper.

For the most part, I have confined myself to the position in Australia. The paper would be far too long if it covered a comparative analysis, and my expertise in that regard is limited.

In Australia there are obligations of disclosure by taxpayers additional to the provision of an annual return. In addition, the Commissioner of Taxation has powers of search and inquisition that may give rise to a taxpayer being obliged to provide further information. And there are offences for failure to do, or refrain from doing, certain things that may call for further disclosure by a taxpayer to avoid the commission of the offence. All these matters have to be taken into account in ascertaining the content of the taxpayer's duty of disclosure in a given situation.

The Commissioner may require any person to give a further or better or fuller return or any information, statement or document about the person's financial affairs. So that a person may answer such questions, there is a statutory obligation to keep records. So that the Commissioner may have the benefit of this information, he is entitled to full and free access to all buildings, places, books, documents and other papers for any of the purposes of the Act, and for that purpose he may make extracts or copies. Further, the Commissioner may require any person to furnish him with information and to attend and give evidence concerning his or any other person's income or assessment, and that person may be required to produce books, documents and other papers.

These obligations of taxpayers and powers of the Commissioner enlarge the duty of disclosure. Not only is a taxpayer bound to reveal prescribed information in a tax return. A taxpayer may be called upon to provide original records and other documents and may be called upon to give evidence not only about the taxpayer's financial pursuits, but also about other people's financial affairs.

I said I would not engage in a comparative exercise, but I want to compare the Australian approach of a number of sections spread through 3 Acts of Parliament with that adopted in New Zealand. As part of the *Taxpayer Compliance, Penalties, and Disputes Resolution Bill* that was introduced in March 1996, s 15B was introduced to the *Tax Administration Act 1994* (NZ). While its interpretation may give rise to interesting arguments, it sets out in concise form a taxpayer's obligations. It reads, in part:

"A taxpayer must do the following:

(aa) If required under a tax law, make an assessment:

(a) Unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:

(b) Deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:

(c) Pay tax on time:

(d) Keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws:

(e) Disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose:

(f) To the extent required by the Inland Revenue Acts, co-operate with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws:

(g) Comply with all the other obligations imposed on the taxpayer by the tax laws:"

Australia has a partial self-assessment system. Companies and other entities are subject to full self-assessment. When they furnish a return, the Commissioner is taken to have made an assessment, and the return is deemed to be a notice of the deemed assessment. In the case of individuals, the Commissioner makes an assessment and issues a notice. But he may accept the return and issue a notice of assessment in accordance with it. And he usually does. There is a virtual self-assessment system with respect to individuals.

There is an exception to the Commissioner accepting the details in the return, if a taxpayer raises a question on which the taxpayer is not entitled to apply for a private ruling. The Commissioner must give attention to that question.

Under the private ruling system, a person is entitled to apply for, and the Commissioner is obliged to

make, a written ruling on the way in which, in his view, a relevant provision applies, or would apply, to a specified scheme. The ruling is binding on the Commissioner if it applies to the taxpayer and the taxpayer relies on it.

It is unlikely that any question that an individual taxpayer wishes to raise with his return about a scheme, cannot be the subject of a private ruling. Hence, the avenue of raising a question with a return to avoid the ramifications of entering in the return too low a figure for income, or too high a figure for deductions, is unlikely to be available. The safe way of dealing with the conundrum to which I referred is for the individual to seek a private ruling.

One of the features of the Australian tax system is that it encourages taxpayers and promoters of schemes to disclose information to the Commissioner. The private ruling system is one such mechanism.

The Commissioner is not bound by an assessment or deemed assessment. He has power to amend. The basis for this power has changed over the years. As it currently stands, the Commissioner may amend, usually within four years, except in the case of fraud or evasion, in which case he can amend at any time.

That structure suggests that, except in rare cases, the Commissioner's power of amendment is limited to a four-year period. But there are a series of provisions that give power to amend at any time, in the absence of fraud or evasion. This occurs under some 39 specified sections or divisions in the 1936 Act and 27 sections or divisions in our 1997 Act. And he has power to amend at any time to give effect to certain aspects of offshore arrangements.

There is no provision in our legislation specifically providing power to the Commissioner to conduct audit programmes. The High Court, Australia's highest judicial body, has held that the Commissioner may conduct random audits under the access and inquisition powers to which I have referred, in support of the general administration of the Act.

There is a suggestion that fraud or evasion is to be tested at the time the Commissioner seeks to amend an assessment. Pearce, Tieleman and Wharton were convicted of conspiring to defraud the Commonwealth as the promoters of a franchised Internet service provision scheme. The transcript of the application for special leave to appeal to the High Court from the Court of Criminal Appeal of Western Australia indicates that Justice Kirby would not agree with that proposition. And nor do I. It seems to me that an amended assessment corrects an error in the original assessment or deemed assessment, and it is the quality of that error that determines the time within which the Commissioner may amend the assessment. If the absence of disclosure, or a misstatement, in the return occurs through fraud or evasion, I think the Commissioner is entitled to amend at any time.

An amended assessment is one ramification of a failure by a taxpayer to discharge the duty of disclosure. The other is the possible commission of an offence.

There are offences for failure to furnish information, to produce material, and to attend before the Commissioner. If upon attendance before the Commissioner, one refuses or fails to answer a question, or to produce documents, one is guilty of an offence. If a person makes a statement to a taxation officer, and the statement is false or misleading in a material particular, one is guilty of an offence. And so is a person who omits any matter or thing from the statement that makes the statement misleading in a material particular. The keeping of accounts that do not correctly record transactions, renders a person guilty of an offence. And, likewise, if one makes a record that does not correctly record the transaction. A person is guilty of an offence if in making a statement to a taxation officer which is false or misleading in a material particular, the person is reckless as to whether the statement is false or misleading, or reckless in omitting any matter about which it is misleading in a material particular. Likewise there are offences with respect to reckless keeping of accounts and reckless making of records.

If a person engages in conduct that results in alteration, defacing, mutilation, falsification, damage, removal, concealing or destruction of accounts or records with the intention of deceiving or misleading the Commissioner, or hindering or obstructing the Commissioner, or hindering or obstructing the investigation of a taxation offence, or hindering, obstructing or defeating the administration, execution, or enforcement of a taxation law, or defeating the purposes of a taxation law, an offence is committed.

That provision is of wide application. There is a like offence with respect to falsification or concealing of the identity of, address of, place of residence or business of, a person.

Some of the offences are punishable summarily. Others constitute indictable offences.

There is a common law offence in England and Wales of cheating the public Revenue. A prosecution for a common law offence is not open in Australia because the *Criminal Code* (Cth) contains a provision that the only offences against laws of the Commonwealth are those offences created by or under the authority of the *Criminal Code* (Cth) or any other Act.

So far as a taxpayer's duty of disclosure is concerned, a person is guilty of an offence under the *Criminal Code* (Cth) if the person, by deception, dishonestly obtains a financial advantage from another person and the other person is a Commonwealth entity. It is also an offence if a person gives information to another person, knowing that the information is false or misleading, or omits any matter or thing without which the information is misleading, and the information is given to a Commonwealth entity. There is also a charge of conspiracy to defraud.

A feature of the *Criminal Code* (Cth) is that it has, with respect to each division, a definition of the geographical limits with respect to the offences in that division. The specific extended geographical jurisdiction that applies to charges of defrauding the Commonwealth and of conspiracy to defraud the Commonwealth are that the offences lie, whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not a result of the conduct constituting the alleged offence occurs in Australia. Thus offshore activities are caught under the legislation.

Information gathering by the Commissioner is not confined to Australia. Article 26 of the OECD model convention with respect to taxes on income and on capital provided that the competent authorities of contracting States should exchange information for carrying out the provisions of the convention or the domestic laws of the contracting States. In 2005 the article was amended to include a provision that if information was requested by a contracting State in accordance with the article, the other contracting State should use its information gathering measures to obtain the requested information.

Thus a taxpayer's duty of disclosure extends beyond the fiscal authorities of his country of residence or domicile to the fiscal authorities of States with which his country of residence or domicile has entered into a bilateral agreement that adopts the new provision in article 26.

Australia has done so in its domestic laws and proposes to introduce it in revision of treaties or in new treaties. On 14 September 2006, Australia amended its legislation to give force to the new information gathering provisions. And it gave legislative force to a protocol amending the tax treaty between Australia and New Zealand. It also signed new treaties with France and Norway, each containing the new information gathering provisions.

This trend is not limited to Australia. On 5 September 2006 a new protocol to the China/Mauritius tax treaty, rather surprisingly one would have thought, extended the exchange of information article.

And this trend will continue. The OECD's Project on Harmful Tax Practices 2006 Update made clear that by promoting the implementation of the principles of transparency and effective exchange of information, OECD countries seek to enable each country to retain sovereignty over national tax matters, and to apply, effectively, its own tax laws.

The third meeting of the OECD Forum on Tax Administration on 14 and 15 September 2006 in Korea, produced a Final Seoul Declaration identifying a number of areas that will promote better international co-operation, including:

- sharing, through appropriate legal means, information on the identification of tax schemes and on mitigating strategies being used by different countries;
- reinforcing, and improving the practical implementation of the exchange of information provisions found in bilateral treaties and, where appropriate, developing tax information exchange agreements with offshore financial centres;
- keeping the OECD Transfer Pricing Guidelines up to date and promoting their consistent application and thereby ensuring that there are safeguards in place to avoid the misuse of tax treaties; and
- improving practical co-operation between revenue bodies and other law enforcement agencies

of governments to counter non-compliance.

In an address given by the Australian Commissioner to the American Chamber of Commerce on 26 September 2006, Mr D'Ascenzo said: "Timely information sharing in responding to cross-border tax risks has significantly assisted administrations generally, and Australia particularly, in the care and management of a fair tax system".

Australia has a public ruling system that mirrors the private ruling system. A public ruling applies to entities generally, or to a class or entities, entities in relation to a class of schemes, or to a particular scheme. If it applies to a taxpayer and the taxpayer acts upon it, the public ruling binds the Commissioner. A product ruling is merely a specialisation of this system. It offers protection against the fate suffered by Messrs Pearce, Tieleman and Wharton. Again the strategy is for the Commissioner to receive more information.

Further Australian initiatives that will give rise to an increased incentive to obtain a product ruling, are the new promoter penalty provisions introduced on 6 April 2006. The legislation embargoes promotion of a tax exploitation scheme. It is one carried out with the sole or dominant purpose of creating a scheme benefit, where it is not reasonably arguable that the scheme benefit was available at law. There is also an embargo against the implementation of a scheme inconsistently with a product ruling. A civil penalty may be imposed by the Federal Court of Australia. Many promoters will seek a product ruling rather than rely upon proving that the scheme benefit is, arguably, available at law.

A new article 27 of the OECD model abrogates the rule in the *Government of India v Taylor*. It provides that when a revenue claim of a contracting State is enforceable under the laws of that State, and is owed by a person who, at that time, cannot under the laws of that State prevent its collection, the revenue claim shall, at the request of the competent authority of that State, be accepted for the purposes of collection by the competent authority of the other contracting State. The revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes, as if the revenue claim were a revenue claim of that other State.

Australia has included the new article 27 in the New Zealand protocol and in the new treaties with France and Norway. To give domestic effect to the provisions, Australia has introduced legislation requiring a foreign revenue claim to be made in a specified manner. If the Commissioner is satisfied that it accords with the legislation, details of it are entered on a foreign revenue claims register. When that is done, the legislation provides that the amount owed by the debtor becomes a pecuniary liability to the Commonwealth of Australia.

Unlike most Parliaments, Australia's Commonwealth Parliament is one of limited jurisdiction. When the States agreed to the Commonwealth *Constitution* the new Commonwealth Parliament was given specified powers. It has power to make laws for the peace, order and good government of the Commonwealth with respect only to specified matters. Those matters include laws with respect to taxation. But it is doubtful that this new regime is a law with respect to taxation. It might have been, if the legislation had taken the form of imposing a tax upon a resident equivalent to any tax owed by the resident to a country with which Australia had a tax treaty containing the equivalent of article 27.

The Commonwealth Parliament has power to make laws with respect to external affairs. But it also has power to make laws with respect to the acquisition of property on just terms. That power implies that the Parliament has no power to make laws for the acquisition of property on unjust terms. There is force in the argument that the deeming of a foreign revenue claim to be a debt due to the Commonwealth constitutes an acquisition of property on unjust terms. The clash between the legislation as a law with respect to external affairs or as a law for the acquisition of property on unjust terms may well be resolved in terms of the latter with the consequence that it is struck down as unconstitutional.

In summary, legislation seeks to protect the Revenue by providing it with various powers of inquisition and search that will partially define a taxpayer's duty of disclosure in a given situation. It is under these provisions that audits are conducted. The duty to disclose is breached not only by a false answer but also by a failure to disclose information that renders that which has been disclosed, misleading in a material particular.

The failure to comply with the duty of disclosure can lead to an amended assessment, to penalties, to

summary prosecution or to prosecution on an indictable offence.

Domestically, Australia has encouraged the making of disclosure to the Commissioner under its private and public ruling systems. There has been further impetus to disclose information to the Commissioner under the specialised product ruling system. The recent introduction of promoter penalty provisions is likely to augment the extent of such disclosures.

From the international perspective, the OECD model convention has been amended to provide greater exchange of information between treaty partners and to overcome the rule in the *Government of India v Taylor* by providing for one treaty partner to recover a tax debt due to another treaty partner. The manner in which this initiative has been given legislative effect in Australia is questionable because it may amount to a law with respect to the acquisition of property on unjust terms, overriding the usual font of legislative power with respect to external affairs.

Finally, I should say that it should not be assumed that anything I have said will lead me to a decision consistent with my paper, if an issue addressed in it is ever raised before me in Court.

7 October 2006

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6th States' Taxation Conference Dealing With State Taxes

The Taxation Institute of Australia
National Division
27 July 2006
Hobart

6th states' taxation conference Dealing with State Taxes

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1 Dealing with state tax cases in New South Wales

1.1 The Revenue List

The Courts of the different States and Territories may deal with State Tax cases in different ways. In the Supreme Court of New South Wales, an informal Revenue List has been conducted within the Equity Division. That is soon to be formalised.

What is currently proposed is that any case to which the Commissioner of Taxation or a Second Commissioner of Taxation or a Deputy Commissioner of Taxation, or a Chief Commissioner of State Revenue or a Commissioner of State Revenue, or equivalent office holders in other States or Territories is a party, and any matter in which a Commonwealth Act or a State or Territory Act administered by any of those officers is raised, will be assigned to the Revenue List.

That will include a lot of debt collecting cases that involve the exploration of no new principle of law. It is currently proposed that such cases will be transferred to the Common Law Division or to the Corporations List in the Equity Division.

1.2 Hearing cases

State Tax cases are usually quite short. The taxpayer adduces evidence by way of affidavit and, quite often, the Chief Commissioner of State Revenue does not challenge the taxpayer's evidence or put on additional evidence. Most cases will be concluded in a day. That has its advantages. I am usually able to assign a case a relatively quick trial date by filling up single days assigned to other cases that have settled.

Pre-trial directions are also relatively simple. I require the parties to exchange and deliver to my Associate a detailed outline of argument and list of authorities so that I am in a position to study the issues in question before going on the bench to hear the case. That shortens proceedings.

1.3 The ECM Court

Almost invariably I deal with pre-trial management by opening what is called an ECM Court. That is, a court in respect of which the use of an electronic case management system is authorised. [1]

While the legislation applies to any hearing of proceedings before an ECM Court other than a hearing conducted for the purpose of receiving oral evidence, the present system is a stand alone one that does not allow for access by the public.

The New South Wales Attorney-General's Department is in the process of setting up CourtLink as an integrated multi-jurisdictional court administration system including the provision of web based eServices for the users of courts. The system will include both civil and criminal jurisdictions of the Supreme Court, including the Court of Appeal and the Court of Criminal Appeal, the District Court, Local Courts, Coroner's Court, Children's Court, Chief Industrial Magistrate's Court and Sheriff's Office. When that project is complete, ECM Court proceedings will, unless specifically suppressed, be open to the public. In the meantime the facility is used for non-contentious matters in which it is appropriate to rule that they be determined in the absence of the public.

Where it is appropriate for oral argument to take place, I adjourn the matter from the ECM Court to an open Court. But its use in straightforward pre-trial directions is cost saving. Not only are the parties not required to attend in Court, but also the orders made in the ECM Court can be transmitted electronically to the Registry for the updating of the file. The parties are saved the expense of taking out a formal order and having an articulated clerk wait his or her turn in the Registry to lodge the document.

2 Keeping up to date

How does a judge deal with State Taxes? Well, the answer is, in much the same way as State Tax practitioners and State Revenue officials do. One has to keep up to date with legislative changes and judicial decisions. I note that later today those aspects are to be covered.

If an adviser is retained by a taxpayer or by the Revenue, the adviser not only needs to consider whether the proposal falls within or without the taxing legislation, the adviser also needs to anticipate the arguments likely to be raised by the other side if the matter is to be tested in a Court.

In a sense, the judge's task is an easier one because instead of trying to anticipate the opposition's submissions, the judge has the advantage of submissions on both sides, and in State Tax matters, both the Revenue and the taxpayer tend to brief counsel of calibre, so that the presentation of alternative arguments is well put.

3 Is the concept of beneficial ownership still evolving?

With the increased use of property-holding trust structures, the concept of changes in beneficial ownership become significant when considering transfers of the underlying property. The concept continues to trouble the Courts with the consequence that it will continue to trouble Revenue officials and State Tax advisers alike. It is worthwhile considering a number of cases that highlight the difficulty.

It used to be thought that all the unit holders for the time being in a unit trust had the entire beneficial interest in the underlying assets making up the fund. See, for example, *Aust-Wide Management Ltd v Chief Commissioner of Stamp Duties (NSW)* [2] and *Comptroller of Stamps v Yellowco Five Pty Ltd*[3] and the cases there cited. That position has changed.

3.1 NSW Clayton contract provisions

The now repealed *Stamp Duties Act, 1920* (NSW) contained Clayton contract provisions. If a transaction caused or resulted in a change in beneficial ownership of an estate or interest in land, the parties to the transaction, if not effected or evidenced by an instrument chargeable with *ad valorem* duty, were required to lodge with the Chief Commissioner a statement in respect of the transaction if they would have been liable to pay the *ad valorem* duty had an instrument been executed. [4] The statement was deemed to be an instrument perfecting the transaction and was chargeable with *ad valorem* duty. [5]

There were exceptions to this general structure. A change in beneficial ownership did not include a change occurring as the consequence of the issue or redemption of units in a unit trust scheme. [6] A unit trust scheme was any arrangement for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under a trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever pursuant to that trust. [7]

The *Duties Act 1997* (NSW) does not contain the same exemption. It contains a different one. Duty is charged on a transfer of dutiable property. [8] Dutiable property is defined to include land in New South Wales.[9] It is also defined to include an interest in dutiable property, [10] and therefore in land, except to the extent that it arises as a consequence of the ownership of a unit in a unit trust scheme and is not a land use entitlement. [11] A land use entitlement is an entitlement to occupy land in New South Wales conferred through an ownership of shares in a company or units in a unit trust scheme, or a combination of both together with a lease or licence. [12] The Courts will, no doubt, be called upon to determine precisely what that exemption means.

3.2 ISPT

The provisions of the former New South Wales exemption were crucial to the scheme in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd*. [13] That scheme was developed on the back of a large white envelope which delivered to my hotel room a brief from a Melbourne solicitor who found out that I was holidaying in Melbourne. Changes in beneficial ownership had been devised prior to *ISPT*, but my instructions were to change the legal title as well and, for the future, to avoid for the land-rich provisions.

You will recall that Coles Myer Property Investments Pty Ltd owned two shopping centres in New South Wales. Identical transactions were carried out to acquire each shopping centre. The trust to acquire the Forster shopping centre was called ISPT Coles Myer (Forster) Property Trust (No 1). ISPT Pty Ltd was appointed trustee. The trust deed provided for the appointment of a nominee for the holding of any investment forming part of the trust fund subject to the prior written approval of the unit holders.

Coles Myer Property Investments acquired units in the Forster No1 Trust by a cheque for \$1 in excess

of the agreed purchase price for the Forster shopping centre. ISPT then made a written offer as trustee of the Forster No 1 Trust to purchase the shopping centre for the agreed purchase price. The letter stated that Coles Myer Property Investments could accept the offer orally whereupon the full purchase price would be paid and Coles Myer Property Investments would hold the shopping centre as a nominee under the Forster No 1 Trust so long as it remained the registered proprietor. The offer was accepted and ISPT endorsed the cheque back to Coles Myer Property Investments, which gave change of \$1.

Thereafter, ISPT as trustee of the Industry Superannuation Property Trust and ISPT Custodians Pty Ltd as trustee of the ISPT Coles Myer (Forster) Property Trust No 2 by cheques purchased an equal number of units in the Forster No 1 Trust which together amounted to the number of units held by Coles Myer Property Investments. Its units were then redeemed by endorsement of the two cheques to it. It then resigned as nominee, ISPT appointed ISPT Nominees Pty Ltd as replacement nominee, and an instrument of transfer of the Forster shopping centre from Coles Myer Property Investments to ISPT Nominees was executed and registered.

The *Conveyancing Act 1919* (NSW), s 54A(1) provides, relevantly for present purposes, that no action on a contract for sale of land, or an interest in land, can be brought unless it, or some memorandum or note of it, is in writing. Equity will not, however, allow a statute to be used as a cloak for fraud, [14] so that if a purchaser has unequivocally partly performed the contract, the section will not prevent equitable assistance to the purchaser, even if specific performance is not open.

In addition, the *Conveyancing Act 1919* (NSW), s 23C(1) provides that no interest in land can be created or disposed of except by writing. It also provides, however, [15] that the section does not affect the creation or operation of resulting, implied, or constructive trusts.

The Chief Commissioner argued that the offers and the payment of the purchase prices for the two shopping centres led to changes in beneficial ownership because of the general principle, stated in *Stern v McArthur* [16] that, at that stage, the purchaser is entitled, in equity, to the land and the vendor is a bare trustee, notwithstanding that the contract may not be specifically enforceable in a strict sense. Equity will protect the purchaser.

ISPT argued that equity would not give its aid to ISPT as purchaser, and the principle in *Stern* did not apply because, to create a constructive trust in favour of ISPT as purchaser, or to merge the trust and sub-trust, would have Coles Myer Property Investments holding on a bare trust for itself, and the law did not recognise such a relationship. Equity will not go through the charade of intervening in such circumstances. It will not lend its aid to a futility. [17] There was no reason to override the statute. No constructive trust of the shopping centres arose in ISPT upon completion of the agreements for purchase.

If, contrary to that view, constructive trusts did arise in favour of ISPT as purchaser, ISPT argued that there was still no change in beneficial ownership, at the stage of the contracts of purchase, because Coles Myer Property Investments owned the property before the contracts of purchase and held both the legal interest and the only equitable interest after the contracts had been performed. No change in beneficial ownership occurred, therefore, until the issue of the new units and, subsequently, upon the redemption of the units of Coles Myer Property Investments and both transactions fell within the exemptions for changes in beneficial ownership occurring as a consequence of the issue, and then the redemption, of units in a unit trust scheme.

A majority of the Court of Appeal rejected the Chief Commissioner's submissions. Since, before the transactions in question, Coles Myer Property Investments owned the shopping centres, and after the transactions of purchase it owned the entire beneficial interests, there was no change. Meagher JA put it this way: [18]

“... The legal estate resided in Coles Myer Property Investments both before and after steps (5) and (6). Either s 23C and s 54A of the *Conveyancing Act 1919*, applied to nullify the ordinary effect of those two steps, or they did not. If they did, the beneficial interest remained with Coles Myer Property Investments. If they did not, the beneficial interest also remained in Coles Myer Property Investments, in its capacity as sole unit holder in ISPT. In neither event is there any change of beneficial interest. On this basis the appellant's submission must fail.”

Fitzgerald A-JA noted [19] that the Chief Commissioner did not provide authority to support his proposition that a sole beneficiary of a trust that was entitled to specific performance of a contract to

purchase property derived beneficial ownership of the property through the trustee in the sense that, for an instant, beneficial ownership was vested in the trustee as it passed from vendor to beneficiary. His Honour went on to say:

“The beneficial estate or interest in the Forster Shopping Village which passed to ISPT was the concatenation of rights, enforceable in equity against Coles Myer Property Investments both as vendor and sole unit holder, which ISPT obtained in respect of the property under the contract of sale and purchase and the trust deed with respect to the Forster No 1 Trust. Nothing else passed to ISPT, or to or from Coles Myer Property Investments.”

In his dissenting judgement, Mason P took the view that a change in beneficial ownership occurred when Coles Myer Property Investments became a nominee, in order to perfect the intention of the parties that the entire equitable interest in the Forster shopping centre should be brought into the Forster No 1 Trust. His Honour said: [20]

“Accordingly, I hold that a change in beneficial interest in the land occurred at step (6) when Coles Myer Property Investments received the agreed purchase price and accepted the role as nominee for ISPT. In order to effectuate the intentions of the parties, which was to bring the entire equitable interest in the land into the Forster No 1 Trust, ISPT received the property subject to the equitable obligations of an active sub-trustee. An equitable interest is capable of being made the subject of a (sub) trust, and it is axiomatic that the creation of a trust creates an equitable estate...This was a change in beneficial ownership sufficient to engage s 44(1).”

Mason P dealt with an alternative argument of the Chief Commissioner that ISPT's indemnity rights with respect to trust expenses gave it a beneficial interest in the shopping centres. His Honour observed that if termination of a trust was sought by all beneficiaries in accordance with the rule in *Saunders v Vautier*, [21] the trustee, at that stage, would have a right in the nature of a lien for the recoupment of any trust expenses actually incurred at that point in time, that right being superior, or prior, to that of the beneficiaries to receive the trust assets.

His Honour rejected the alternative argument, however, [22] on the basis that a trustee's right of indemnity arises at the time when a liability is incurred, as it is at that stage that the lien over the trust assets arises. That had not happened. As Fitzgerald A-JA observed, [23] at 659 the Chief Commissioner did not dispute the primary judge's conclusions that no event giving rise to an entitlement under the indemnities had arisen, so that ISPT's indemnity rights had not been activated.

3.3 ISPT (No 2)

As you know, the Chief Commissioner tried again in *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [24] in which he sought to exact duty on the instrument of transfer. It was held exempt under the repealed Act *Stamp Duties Act, 1920 (NSW)*, s 73(2A) as a conveyance made for nominal consideration in consequence of the appointment of a new trustee.

3.4 Buckle

The High Court had visited the question of a trustee's right of indemnity in *Chief Commissioner of Stamp Duties (NSW) v Buckle*. [26] The repealed Act provided that a conveyance of property made without consideration in money or money's worth was to be charged with *ad valorem* duty on the greater of the unencumbered value of the property or the amount or value of all encumbrances subject to which the property was conveyed. [27] In one aspect of its judgment, the High Court considered whether a trustee's indemnity fell within the provision.

It was held that, although a trustee had a beneficial interest in the trust property to the extent of the right of reimbursement or exoneration for the discharge of liabilities incurred in administering a trust, that interest did not encumber the beneficiaries' interests. The Court said [28] that the term “trust assets” may be used to identify those held by a trustee upon the terms of the trust, but, in respect of such assets, there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries. The trustee's right to exoneration or recoupment “takes priority” over the rights in, or in reference to, the assets of beneficiaries or others who stand in that situation. [29]

3.5 CPT

The High Court has recently revisited the indemnity question in *CPT Custodian Pty Ltd v Commissioner of State Revenue*. [30]

This is one of the cases to be discussed in a later session and I will try not to impose too heavily on that discussion.

The Victorian Commissioner of State Revenue assessed land tax against the unit holders in a number of unit trusts that held shopping centres. The taxpayers held 100% of the units in some trusts and less than 100% in others. A curiosity of the case is that the Commissioner chose to assess the unit holders rather than the legal owner of the lands, the trustees. Early in the address of Mr Merralls QC, who appeared for the Commissioner, this exchange took place with the Chief Justice: [31]

“Gleeson CJ: Mr Merralls, if the legal owner is liable to pay land tax, and then if somebody else is made liable, you get an entitlement to deduct the tax paid by the legal owner....

Mr Merralls: Yes.

Gleeson CJ: Why does this dispute matter?

Mr Merralls: Why does it matter?

Gleeson CJ: Yes. Why is not the legal owner always there liable to pay the tax in these cases, for example?

Mr Merralls: The tax ultimately is borne by the beneficial owner, because the legal owner has a right to obtain repayment....

Gleeson CJ: Yes, I am just wondering what difference it makes to the revenue, unless there is an insolvency somewhere.

Mr Merralls: The provisions are primarily for ease of collection, in that it is easier, I think, to target the legal owner in some cases, than the beneficial owners, and probably is....”

The answer lies in amalgamation. If a beneficiary was an owner, all other land of which the beneficiary was owner was subject to tax as well. [32]

The question was whether the unit holders were “owners” of the land under portion of the definition, [33] that included every person entitled to any land for any estate of freehold in possession.

The High Court rejected as dogma the proposition that where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else, because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations that may be called ownership. The Court approved what Griffith CJ had said in *Glenn v Federal Commissioner of Land Tax*: [34]

“The respondent’s argument is based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable.”

Their Honours referred to what Meagher JA had said in *ISPT* in the quotation set out above, that if the provisions of the *Conveyancing Act 1919* (NSW) did not nullify the arrangement, the beneficial interest was in Coles Myer Property Investments, in its capacity as sole unit holder in *ISPT*. Their Honours said that that observation might be at odds with what was said in *Glenn* to the extent that they went beyond construction of the particular New South Wales stamp duty legislation. But they found it unnecessary to pursue that question. Does that statement indicate that if *ISPT* had gone to the High Court, the decision might have been reversed? I think not, for reasons I will develop.

A critical consideration of the Court was the interest held by a unit holder under the trust deed in question. Thus the Court distinguished *Charles v Federal Commissioner of Taxation* [35] in which the High Court held that a unit under the trust deed there in question conferred a proprietary interest in all the property that, for the time being, was subject to the terms of the trust. The deed in that case divided the beneficial interest in the trust fund into units and the trustees were bound to make half yearly distributions to unit holders, in proportion to their respective number of units, of the cash produce that had been received by the trustee.

In *CPT*, by contrast, the fund was vested in the trustee upon trust for the unit holders. Both the trustee and the manager, in which the management of the fund was vested exclusively, were entitled to fees in significant amounts to be paid out of the fund, and also to monthly reimbursements from the fund of their costs, charges and expenses. The beneficial interest in the fund was divided into units each said to confer an equal interest in all property for the time being held by the trustee upon the trust of the deed but excluding that part of the fund credited to a distribution account for distribution to unit holders. But no unit conferred any interest in any particular part of the trust fund, or any investment, and each unit had only such interest in the trust fund as a whole as was conferred on a unit under the provisions of the deed. The unit holders were not entitled to require the transfer of any property comprised in the fund, although it was provided by the deed that, by agreement with the manager, distributions *in specie* might be made upon determination of the fund. A unit holder was not entitled to lodge a caveat claiming an estate or interest in any investment being realty, and unit holders were bound by the terms of the deed as if parties to it. The deed contemplated that all units might be held beneficially by a single unit holder. There was provision for distribution to unit holders of periodic income entitlements and for the realisation of the fund upon its determination and distribution of the proceeds among unit holders. There was a mechanism for the manager to repurchase units for cancellation or resale.

The Court approved the decision of Nettle J at first instance that the entitlements of the unit holders in those terms did not make them an owner for land tax purposes.[36]

As to the argument that a unit holder with 100% of the units was an owner, the High Court pointed out that while the trust deed contemplated that all issued units might be held beneficially by a single unit holder, the trust deed was not drawn to provide a single right of a cumulative nature, and the trusts were drawn in terms conferring individual rights attaching to each unit.

Furthermore, their Honours concluded that the rule in *Saunders v Vautier* [37] did not apply to constitute the single unit holder the owner of the trust fund. Their Honours accepted, as the modern formulation of that rule, the statement in *Thomas on Powers*:[38]

“Under the rule in *Saunders v Vautier*, an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation.”

Their Honours pointed out, [39] that the trust deed before them contained a covenant by the manager to ensure that there were, at all times, sufficient readily realisable assets of the trust available for the trustee to raise the fees to which the manager and the trustee were entitled, such that the unit holders were not the persons in whose favour, alone, the trust property might be applied by the trustee under the deed. Furthermore, the unsatisfied trustee's right of indemnity was expressed as an actual liability in the accounts of the trust, so that until satisfaction of the rights of reimbursement or exoneration, it was impossible to say what the trust fund in question was. [40] And, finally, their Honours said that it was one thing to say that a Court of equity would not enforce a trust for accumulations in which no person had an interest but the legatee, and another to determine for statutory purposes that there is a presently subsisting interest in all of the trust assets at midnight on 31 December immediately preceding the year of assessment, because of what could thereafter be done in exercise of a power of termination of the trust, but at that date had not been done. Their Honours said: [41] “Equity often regards as done that which ought to be done, but not necessarily that which merely could be done.”

3.6 CPT v ISPT

There are a number of reasons why I think the approach of the High Court in *CPT* is not inconsistent with the approach of the Court of Appeal of New South Wales in *ISPT*.

First, while *CPT* was concerned with ownership, *ISPT* was concerned with a change in ownership.

There may be a change in ownership constituted by an interest less than full ownership. One has to

be careful not to uncritically translate statements in one context into the other.

Secondly, in *CPT* there was no ownership, not only because the beneficiaries had no interest in any specific asset in the trust fund, but also because of the specific provisions of the trust deed that gave rights to the trustee and manager, including the rights to substantial remuneration and the rights to reimbursement or exoneration for trust expenses. The lack of an interest in any specific underlying asset would not exclude ownership if the beneficiary or beneficiaries were otherwise entitled to rely upon the principle in *Saunders v Vautier* [42] and terminate the accumulation. Apart from a specific indemnity against all losses, costs, damages or expenses incurred by the trustee in performing any of its duties, or exercising any of its powers, or as a result of the exercise or non-exercise of any discretion in relation to the trust, [43] there were no such rights in *ISPT*.

Thirdly, the trustee's rights did not change in *ISPT*. They remained exactly the same before and after the oral acceptance of the written offer by Coles Myer Property Investments, the payment of the purchase price, and Coles Myer Property Investments' assumption of the role of bare trustee.

Finally, there was no challenge to the finding of the judge at first instance in *ISPT* that the occasion for a call by the trustee on its indemnity had not arisen.

3.7 *Halloran*

And that brings me to another case to be discussed in the update session, *Halloran v Minister Administering National Parks and Wildlife Act 1974*. [44]

A critical difference between *ISPT* and *Halloran* was that in *ISPT*, Coles Myer Property Investments held the full legal title to the land and was the only unit holder in Property Trust (No 1) when *ISPT* made its written offer to purchase the land. In *Halloran*, Sealark only held an equitable interest in the land when Pacinette as trustee offered to purchase that interest in consideration for the allotment of further A class units in the trust.

The High Court held there was a change in beneficial ownership that was not defeated by the *Conveyancing Act 1919* (NSW), s 23C(1) requirement for writing for the transfer of an equitable interest in land, either because of the exception of a constructive trust in s 23C(2) or because to use the statute in the circumstances would constitute it an instrument of fraud. The promise of consideration created the constructive trust or use of the statute as an instrument of fraud, regardless of the form of that consideration. Hence, the promised consideration in the form of an allotment of A class units did not enliven the exception under the *Stamp Duties Act, 1920* (NSW), s 44(2)(d) for a change in beneficial ownership occurring as the consequence of the issue or redemption of units in a unit trust scheme.

The case foundered because, there being a change in beneficial ownership outside the exception in the *Stamp Duties Act, 1920* (NSW), s 44(2)(d), the appellant was denied the right to prove that change and, thereby, its entitlement to compensation for resumption of the land, because s 29(3) provided that no instrument in respect of a transaction to which s 44(1) applied could, except in criminal proceedings, be given in evidence.

3.8 *Halloran v ISPT*

Passing references were made to *ISPT* in the course of the judgment in *Halloran*. The Court referred to the fact that Mason P had described the provisions as an anti-avoidance measure designed to strike at a broad sweep of tax avoidance schemes some of which had been described in the Second Reading Speech. [45] While Mason P dissented in *ISPT*, the statement is non-contentious and is not suggestive of a difference of view about the result in *ISPT*.

The Court pointed out three things about *ISPT*. [46] First, as Barrett J concluded in the second *ISPT* case, [47] the Court of Appeal decision in the earlier case only bound him so far as it concluded that the transaction did not fall within the *Stamp Duties Act, 1920* (NSW), s 44(1) and that there was no majority view on questions respecting formalities for the creation of trusts and the characteristics of sub-trusts. Secondly, *ISPT* involved consideration of unit trust deeds before the decision in *CPT*. Thirdly, the success of the avoidance scheme implemented in *ISPT* depended on a matter of timing. As Mason P pointed out, it was critical to the taxpayer's argument based on s 44(2)(d) that no change in beneficial ownership occurred until the issue of new units and the subsequent redemption of units. Again, while reference is confined to the dissenting judgment in *ISPT*, none of the statements contains

the suggestion that *ISPT* was wrongly decided.

Then there is the reference to the respondent's submission [48] that it was difficult to discern any *ratio decidendi* in the majority reasons in *ISPT*, that there were material differences between *ISPT* and *Halloran*, that the Minister reserved the State's position as to the incidence of stamp duty upon transactions which differed from *ISPT*, and if there had been a direct passage of beneficial ownership from Sealark to Pacinette, the *Stamp Duties Act*, 1920 (NSW), s 29(3) would bar the admission of documentary evidence to prove the transaction in compensation proceedings. Again, that recitation does not contain a threat that *ISPT* might have been decided differently had it been the subject of an appeal to the High Court.

With respect to the circumstance that the use of the bill of exchange was not strictly in accordance with the plan, the Court concluded [49] that it was drawn by Pacinette on Sealark, accepted by Sealark, and payable to Pacinette as trustee, and the bill was indorsed by Pacinette as trustee to Sealark. The Court then mentioned [50] that Mason P properly emphasised in *ISPT* that equity does not work to defeat the lawful intention of parties; its preference of substance to form and its regard for what ought to be done as having been done are indications of the contrary inclination. Again, those observations are non-contentious and do not suggest a preference for the dissenting judgment of Mason P in *ISPT* to that of the majority.

But there is one portion of the judgment that may cast doubt on the efficacy of *ISPT*. The Court said: [51]

“However, it no doubt is true that Sealark would hold all the issued A Class units in the Pacinette Property Trust. Would the fact that Sealark was sole unit holder of those units have the consequence, as the appellants submitted, that the “beneficial ownership” of the equitable interest in the land had not changed because that interest was still to be found, by reason of the issue of the units, in the hands of Sealark? The answer must be that there had been a change. Consistently with the reasoning in *CPT Custodian Pty Ltd v Commissioner of State Revenue* and with the terms of the Pacinette Trust Deed, to which reference has been made earlier in these reasons, Sealark would not have any interest in any particular part of the Trust Fund or in any investment thereof.”

While it is true that the High Court had, in *CPT*, commented on the provision in the trust deed there in question that no unit conferred any interest in any particular part of the trust fund, or any investment, but only such interest in the trust fund as a whole as was conferred on a unit, and a like provision appeared in the trust deed in *ISPT*, [52] that was not, in my view, the basis for the judgment in *CPT*. It turned, as indicated earlier in this paper, upon the gloss placed by the Court upon the modern formulation of the rule in *Saunders v Vautier* [53] because of the interests that had accrued to the manager and trustee for their remuneration and their entitlement to indemnity expressed as an actual liability in the relevant accounts of the trust. If Sealark held no interest in underlying assets of the trust but could otherwise terminate the accumulation, what change in beneficial ownership occurred?

If the *ratio decidendi* of *CPT* is that a trustee's entitlement to reimbursement and exoneration means that there is a change in beneficial ownership, *ISPT* is unaffected because, as already indicated, no occasion had risen to enliven those rights. If, on the other hand, the rationale of *CPT* is as indicated by the majority in *Halloran*, then *ISPT* was doomed if the High Court had considered it after its decision in *CPT*.

3.9 Other beneficial ownership cases

The question when a change in beneficial ownership occurs is not limited to an analysis of State Taxes. It can arise in many contexts. In *Bluebottle UK Ltd & Ors v Deputy Commissioner of Taxation & Anor*, [54] one of the issues I had to consider was when under an equitable assignment of future property the entitlement arose in the assignee. Virgin Blue Holdings Ltd had resolved to pay a dividend on 15 December 2005. On 12 December 2005, the Commissioner of Taxation issued notices under the *Income Tax Assessment Act* 1936 (Cth), s 255 requiring Virgin Blue to pay to him, when required by him, tax said to be due and payable by two non-resident shareholders. The next day, the shareholders executed deeds of assignment of their right, title and interest to receive the dividends to another non-resident to whom s 255 would not apply. On 14 December 2005, the Commissioner notified Virgin Blue that the amounts specified in his notices were required to be paid to him.

One of the arguments raised by the Commissioner was that there was a nanosecond on 15 December 2005 when the legal entitlement to the dividends vested in the two shareholders in order that their assignments could take effect. I formed the view that there was no moment in time at which legal title to the dividends vested in the shareholders free from the equitable interests of the assignee.

I took the view that there are many authorities on equitable assignments of future property that establish that once the property comes into existence, the equitable title to it arises without any further step and *eo instanti* in the assignee, and the assignor holds as bare trustee. [55]

In *Abby National Building Society v Cann*, [56] the House of Lords held that where a purchaser relied on a financial institution loan for completion of his purchase, the transactions of acquiring the legal estate and granting a charge were one indivisible transaction, at least where there had been a prior agreement to grant the charge on the legal estate when obtained. There was no *scintilla temporis* during which the legal estate vested in the purchaser free of the charge and an estoppel affecting the purchaser could be "fed" by the acquisition of the legal estate so as to become binding on, and take priority over the interest of, the chargee.

4 Conclusion

I wish to acknowledge the research work done by my tipstaff, Sophie Hunt. Her assembly and analysis of the cases was of invaluable assistance to me in writing this paper.

If the paper has done anything, it has established that issues relating to beneficial ownership will continue to trouble State Tax advisers, Revenue officials and the Courts.

Lightman J delivered the Withers' annual lecture entitled *The trustees' duty to provide information to beneficiaries* in October 2003. That lecture has nothing to do with my subject, except what Sir Gavin said in conclusion. I adopt his every word:

"I should however add a word of caution to those who hear or read this lecture. A judge who expresses his view of the law without the assistance of counsel's argument is like a mariner who sails dangerous straits without a pilot. He has no such warning as he is accustomed to receiving from that source of shoals or other navigational hazards. Not merely may it be unsafe to rely on what I say without such assistance, but it should not be assumed that, if ever an issue such as is touched on in this lecture comes before me in my judicial capacity, possessed with that assistance even I shall take the same view."

END NOTES

[1] *Electronic Transactions Act 2000*, s 14A, s 14B, s 14C, s 14I; *Electronic Transactions (ECM Courts) Order 2005*, cl 4; *Uniform Civil Procedure Rules 2005*, r 3.9(1); *Civil Procedure Act 2005*, s 71

[2] 92 ATC 4,740 at 4,746-4,747. The decision was reversed on appeal on different grounds: *Aust-Wide Management Ltd v Chief Commissioner of Stamp Duties (NSW)* 96 ATC 4,774

[3] [1993] 2 VR 529 at 532, 535, 542

[4] *Stamp Duties Act, 1920 (NSW)*, s 44A(1)

[5] *Stamp Duties Act, 1920 (NSW)*, s 44A(5)

[6] *Stamp Duties Act, 1920 (NSW)*, s 44(2)(d)

[7] *Stamp Duties Act, 1920 (NSW)*, s 3(3)

[8] *Duties Act 1997 (NSW)*, s 8(1)(a)

[9] *Duties Act 1997 (NSW)*, s 11(1)(a)

- [10] *Duties Act 1997* (NSW), s 11(1)(l)
- [11] *Duties Act 1997* (NSW), s 11(1)(l)(i)
- [12] Dictionary
- [13] (1998) 45 NSWLR 639
- [14] *McBride v Sandland* (1918) 25 CLR 69 at 77-78; *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282
- [15] *Conveyancing Act 1919* (NSW), s 23C(2)
- [16] (1988) 165 CLR 489 at 523
- [17] *Corin v Patton* (1989-1990) 169 CLR 540 at 579
- [18] *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 654
- [19] *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 660
- [20] *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 652
- [21] (1841) 4 Beav 115 (49 ER 282); affirmed at (1841) Cr & Ph 240 (41 ER 482)
- [22] *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 653
- [23] *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 659
- [24] (2003) 59 NSWLR 196
- [25] *Stamp Duties Act, 1920* (NSW), s 73(2A)
- [26] (1998) 192 CLR 226
- [27] *Stamp Duties Act, 1920* (NSW), s 66
- [28] *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 246-247
- [29] *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335
- [30] (2005) 79 ALJR 1724
- [31] *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA Trans 388
- [32] *Land Tax Act 1958* (Vic), s 8(1)
- [33] *Land Tax Act 1958* (Vic), s 3
- [34] (1915) 20 CLR 490 at 497
- [35] (1954) 90 CLR 598

- [36] *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 79 ALJR 1724 at [28], [36]
- [37] (1841) 4 Beav 115 (49 ER 282); affirmed at (1841) Cr & Ph 240 (41 ER 482)
- [38] Sweet & Maxwell, London, 1998, at 176
- [39] *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 79 ALJR 1724 at [49]
- [40] *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 79 ALJR 1724 at [51]
- [41] *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 79 ALJR 1724 at [52]
- [42] (1841) 4 Beav 115 (49 ER 282); affirmed at (1841) Cr & Ph 240 (41 ER 482)
- [43] *ISPT Ltd v Chief Commissioner of Stamp Duties (NSW)* 98 ATC 4,084 at 4,094-4,095
- [44] (2006) 80 ALJR 519
- [45] *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 at [19]
- [46] *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 at [23]
- [47] *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* (2003) 59 NSWLR 196
- [48] *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 at [25]
- [49] *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 at [64]
- [50] *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 at [65]
- [51] *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519 at [75]
- [52] *ISPT Ltd v Chief Commissioner of Stamp Duties (NSW)* 98 ATC 4,084 at 4,087
- [53] (1841) 4 Beav 115 (49 ER 282); affirmed at (1841) Cr & Ph 240 (41 ER 482)
- [54] [2006] NSWSC 706
- [55] *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27, *Norman v Federal Commissioner of Taxation* (1962-1963) 109 CLR 9 at 24-25, *Booth v Federal Commissioner of Taxation* (1987) 164 CLR 159 at 165-166, *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 450
- [56] [1991] AC 56

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The Legacy of Justice Graham Hill

TAXATION INSTITUTE OF AUSTRALIA

SOUTH AUSTRALIAN DIVISION

2006 ANNUAL CONVENTION

THE LEGACY OF JUSTICE GRAHAM HILL

Ian V Gzell

In his too short career as a judge, the late Justice Graham Hill wrote well over 1,000 reported judgments. My former tipstaff, Darren Jenkins, has collated each of them. They cover the range of matters in which the Federal Court has jurisdiction: from immigration - that is a Federal Court judge's lot - to trade practices, intellectual property, bankruptcy, customs and excise, corporations, administrative law, broadcasting, social security and industrial law. And that is not a complete list.

Justice Hill brought the scholarship that characterises all of his works to his judgment writing. His first case involved the question whether things taken from an oil platform after an accident under search warrants should be returned when it was established that the company could not have committed the alleged offences. In the course of his judgment his Honour commented: [1]

“Ever since the great decisions of the eighteenth century *Entick v Carrington* (1765) 2 Wils KB 275; 95 ER 807; *Wilkes* (1763) 2 Wils KB 151; 95 ER 737; and *Huckle v Money* (1763) 2 Wils KB 205; 95 ER 768; and see too *Home v Bentinck* (1820) 2 Brod & B 130; 129 ER 907 the courts have stated in unequivocal terms the sanctity and inviolability of the home and person of a subject from executive interference without proper authority conferred by law. See as to United Kingdom position, Lord Denning in *Ghani v Jones* [1970] 1 QB 693 at 706-709 and also *Crowley v Murphy* (1981) 52 FLR 123 at 140 141, per Lockhart J. The only exception to this principle irrelevant to the present case was, as pointed out by Lockhart J in *Crowley v Murphy*, the issue of a warrant to search a person's home for stolen goods.”

You will be pleased to hear that I do not intend to cover all of Hill J's judgments. Nor do I intend to cover all his tax decisions. They are in excess of 200. I will take you to some of his judgments in my attempt to identify features of his contribution to the development of our tax laws. It was in this field that his Honour's work led to his well-deserved recognition as Australia's foremost tax judge. He was a tax titan as Professor Richard Vann has said. [2]

As you know, the last tax decision his Honour gave was *HP Mercantile Pty Ltd v Commissioner of Taxation*. [3] It involved the question whether input tax credits were available for advice with respect to the acquisition of a financial supply constituted by the acquisition of debts and on debt collecting services. The Court held that none of the charges gave rise to an input tax credit because the acquisition of the services related to making supplies that would be input taxed. [4] But the debt collection services were subject to a reduced input tax credit being a specified acquisition under the regulations. [5]

In *ACP Publishing Pty Ltd v Commissioner of Taxation*, [6] at [2]-[3] Hill J briefly described the characteristics of the Australian GST system. He went much further in *HP Mercantile*. An application for special leave to appeal to the High Court in *HP Mercantile* was filed on 5 August 2005. It has not yet been included in a business list. Whatever the outcome of that application, I venture to suggest that Hill J's analysis will be regarded as the seminal analysis of our GST system. In the course of that analysis, [7] his Honour said:

“The genus of a system of value added taxation, of which the GST is an example, is that

while tax is generally payable at each stage of commercial dealings (supplies) with goods, services or other “things”, there is allowed to an entity which acquires those goods, services or other things as a result of a taxable supply made to it, a credit for the tax borne by that entity by reference to the output tax payable as a result of the taxable supply. That credit, known as an input tax credit, will be available, generally speaking, so long as the acquirer and the supply to it (assuming it was a “taxable supply”) satisfied certain conditions, the most important of which, for present purposes, is that the acquirer make the acquisition in the course of carrying on an enterprise and thus, not as a consumer. The system of input tax credits thus ensures that while GST is a multi-stage tax, there will ordinarily be no cascading of tax. It ensures also that the tax will be payable, by each supplier in a chain, only upon the value added by that supplier.”

Having referred to what he said in *ACP Publishing*, his Honour continued: [8]

“In terms of GST theory, it is generally accepted that there are certain kinds of activities where the basic system of output tax on supplies and input tax credits on acquisitions will not lead to taxation on the value added by each supplier in the chain. The most important example is said to be financial transactions of financial institutions such as, but not confined to, banks, because they constantly borrow and lend and turn over money in a way that amounts, such as interest charged, will not represent the real value added by the financial institutions. Indeed, as the Explanatory Memorandum distributed with the Bill which, as amended, later became the GST Act (the EM) says in Ch 1 at [5.140]: “there is no readily agreed identifiable value for supplies consumed by customers of financial services”. In such a case, it is the margin or imputed margin that is the real economic subject of the supply. There are other examples where this may be the case, one of which is the leasing of, or other dealings with, residential property (not being new residential property).

By way of what may be seen as a compromise for the difficulties of applying the normal system of value added taxation to financial supplies and other difficult cases, value added taxation design has created a form of supply which is referred to in Australia as an input taxed supply but which, in international value added tax parlance, is referred to as an “exempt supply”. An input taxed or exempt supply (and financial supplies made by financial institutions will be the main example) will not, generally speaking, attract output tax, but the entity which makes financial supplies will, likewise, not obtain an input tax credit for the tax payable on acquisitions it makes in the course of its enterprise of making input taxed supplies. This is subject to a unique Australian invention that certain kinds of activities, being, generally speaking, those which might be outsourced by entities making financial supplies and are in aid of making such supplies will, albeit that those activities might be defined as financial supplies, attract a reduced input tax credit of 75% of the credit otherwise available. An example relevant to the present facts is debt collection activities – see reg 70-5.02 (Item 17) of the *A New Tax System (Goods and Services Tax) Regulations 1999* (Cth) (the Regulations).”

That analysis compares favourably with that of Sir Owen Dixon in *Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd* [9] in explaining that sales tax was a tax levied upon one only of the transactions that commonly take place in respect of goods before they reach the consumer after they are imported into or produced in Australia, thereby having no application, in that case, to resales of second hand goods.

Hill J’s explanation of the structure of our GST system in *HP Mercantile* is a powerful piece of jurisprudence, not only for its erudition, but also for its insightfulness and simplicity of expression. It was powerful enough to convince Allsop J (who with Stone J constituted the other members of the Full Court) to change his mind. His Honour said: [10]

“Were it not for the matters with which his Honour deals concerning the statutory scheme and the purpose and context of the legislation, I would be inclined to the view that the acquisition of legal and management services in collecting the debts did not relate to making the relevant supply, being the acquisition of the book of debts. As a matter of textual meaning, it can be said that the acquisitions relate to the debts but not to the acquiring of the debts.”

The decision in *HP Mercantile* demonstrates the significance of context and purpose in the statutory construction process. It used to be thought that such matters were only called in aid when a literal reading of a text gave rise to an ambiguity. But that concept was rejected by the High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd*. [11] The majority of the High Court said:

“It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901*(Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure.... Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy...if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.”

Hill J’s decision in *HP Mercantile* is, clearly, a fine example of the purposive approach to statutory interpretation. It examines context in the sense described by the High Court and looks to the object of the legislation. That approach pervades all his Honour’s judgments.

Davis v Federal Commissioner of Taxation [12] was his Honour’s first tax case. He decided that an assignment of a revenue stream under a sublease was ineffective because it could be brought to an end within seven years and the *Income Tax Assessment Act 1936* (Cth), s 102B thus applied to treat the income as that of the assignor. His Honour went on to conclude, as well, that the then general anti-avoidance provision of s 260 applied.

The effect under either approach was that the ineffectively assigned income was to be included in the assessable income of Mrs Davis as a presently entitled beneficiary under the *Income Tax Assessment Act 1936* (Cth), s 97. This brought his Honour to address the problem of a disparity between net income calculated under s 95, and income for trust law purposes. His Honour explained the proportionate approach: a calculation is made as to the share or proportion of the trust law income to which each beneficiary is presently entitled and that share or proportion of the net income calculated under the statute is included in assessable income. The alternative approach includes in assessable income only that part of net income represented by the proportionate part of trust law income, any excess of net income over trust law income being assessed to the trustee as accumulations under s 99 or s 99A. His Honour sought to adopt a purposive construction of the legislation but was defeated by lack of context. He said: [13]

“It is quite clear that neither interpretation of s 97 produces a desirable result as a matter of tax policy and the scheme of Div 6 calls out for legislative clarification, especially since the insertion into the Act of provisions taxing capital gains as assessable income. On the proportionate view, a taxpayer may be assessed on amounts he neither did nor could receive; on the alternative view a taxpayer could be taxed on less than he received if the share of trust law income exceeded that part of the net income as is represented by trust law income, and the maximum rate of the tax under s 99A would be applicable to the balance. However, the proportionate view does seem to me, as a matter of language, to be the better construction of the section and, in the absence of any authority compelling me to adopt the alternative method, I propose to accept it.”

That view is not accepted by all judges. In *Richardson v Commissioner of Taxation*, [14] Merkel J took the view that while the proportionate approach applies when trust income exceeds net income, in the reverse situation a quantum approach is to be adopted and the deficiency is income to which no beneficiary is presently entitled. Michael Blissenden has written an interesting paper, *A Reflection on the contribution made by the late Justice Graham Hill in relation to the taxation of trust income under Division 6 of ITAA 1936* in which he discusses this issue and the reference to it in *Richard Walter Pty Ltd v Federal Commissioner of Taxation*, [15] *Federal Commissioner of Taxation v Prestige Motors Pty Ltd*, [16] *Force Pty Ltd v Commissioner of Taxation* [17] and *Federal Commissioner of Taxation v Pilnara Pty Ltd*. [18]

The issue has not been finally settled, although there is passing reference to the proportionate approach by the High Court in *Commissioner of Taxation v Prestige Motors Pty Ltd*: [19]

“Where no beneficiary is presently entitled to part of the trust income, the trustee is to be assessed and is liable to pay tax in respect of a proportionate share of the net income corresponding to the share of the trust income to which no beneficiary is presently entitled.”

Hill J delivered 30 judgments under the sales tax legislation. His contribution to that jurisprudence, in itself, deserves accolade.

In *Genex Corporation Pty Ltd v Commonwealth of Australia* [20] his Honour discussed the manufacture of negatives developed from exposed photographic film as being an intermediate stage in the process of manufacturing prints. His Honour’s judgment was upheld by the High Court in *The Commonwealth v Genex Corporation Pty Ltd*. [21] In *Tanu Pty Ltd v Federal Commissioner of Taxation* [22] his Honour dealt with an allocation of a notional wholesale selling price to the negatives from which prints were developed. His Honour’s judgment was again upheld on appeal by a Full Court of the Federal Court, *Tanu Pty Ltd v Federal Commissioner of Taxation*. [23]

Then there was his Honour’s contribution to the meaning of the exemption for goods of a kind ordinarily used for household purposes in *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation*. [24] The phrase “essential character” had been used in the past to categorise such goods. His Honour took the view [25] that the phrase “goods of a kind” entailed the determination of a relevant genus. His Honour returned to confirm this view in *Commissioner of Taxation v Chubb Australia Ltd*. [26]

His Honour also contributed to the development of the law on the reduced sales tax liability on containers for use in marketing take-away beverages or foodstuffs. In *Pepsi Seven-Up Bottlers Perth Pty Ltd v Commissioner of Taxation* [27] his Honour characterised a take-away beverage as one freshly prepared for immediate consumption.

The late Neil Forsyth QC appeared for the taxpayer. He called evidence of the need for soft drink dispensing in take-away establishments. I cross examined all his witnesses, but asked only one question: “Have you ever heard a customer ask for a take-away Pepsi?”

His Honour further contributed to the law on this topic in *Federal Commissioner of Taxation v McDonald’s Australia Ltd*. [28] In a joint judgment with the late Healy J, his Honour concluded that a “Big Mac” was properly described as a take-away foodstuff in ordinary language.

And so the list goes on. In *Pepsico Australia Ltd v Federal Commissioner of Taxation* [29] his Honour grappled with the difficult question of a credit for tax borne on input goods that had a sufficient link with output goods that were not taxable. The taxpayer was registered for sales tax purposes. It manufactured and sold pizzas by retail. Food for human consumption was exempt from tax. [30] It claimed the credit on a dough-mixer. The legislation provided that the input goods had a sufficient link if they had been used in connection with the output goods in carrying out an activity that would have been covered by an exemption [R] Item if the person carrying out the activity had been registered at all relevant times. [31] An exemption [R] Item was one marked [R] in the list of exemption Items. [32] The taxpayer argued that the relevant exemption Item was of goods for use mainly in carrying out a manufacture-related activity carried out by the exemption user in the course of a business. [33] There was an exclusion from this Item of generally-excluded property. [34] Generally-excluded property included property for use mainly for or in connection with the preparation or preservation of food and drink for human consumption, if the preparation or preservation took place in a retail or catering establishment. [35] His Honour analysed the purpose and structure of the legislation and concluded that it was the activity and not the goods that had to fall within the exemption [R] Item. He concluded that the sufficient link requirement should be construed as referring to activities of the kind covered by the exemption [R] Item but not to those activities excluded from it. His Honour was also of the view that there was much to be said for the proposition that the sufficient link provision was limited in its application to persons who were unregistered, as the section proceeded on the basis that the person seeking the credit was not registered but hypothesised, for the purpose of the credit ground, that the person was registered. On that basis the exemption Items and the sufficient link provision produced a coherent result.

The judgment is another fine example of his Honour’s adoption of the purposive approach to statutory construction. And there are many more examples in the other judgments of his Honour on sales tax

issues.

We all know that his Honour was the author of the seminal text, *Stamp Duties New South Wales and Australian Capital Territory*. [36] It became Hill, *Duties Legislation*. [37] What may not be so well known, is that his Honour's keen interest in sales tax produced Hill and Economides, eds, *Australian Sales Tax Law & Practice*. [38] Chapters in the book were written by his Honour and members of the profession who practised in that area.

Hill J's contribution to the interpretation of the capital gains tax provisions is well known. His Honour sat in the first cases to consider the deemed disposal provisions relating to a disposal of an asset that did not previously exist, in the *Income Tax Assessment Act 1936* (Cth), s 160M(6) and the receipt of consideration for some affectation of an asset, in s 160M(7). The cases were, as we know, *Commissioner of Taxation v Cooling* [39] and *Hepples v Commissioner of Taxation*. [40] His Honour's dissenting judgment in *Hepples* was upheld by the High Court in *Hepples v Federal Commissioner of Taxation*. [41]

The same bench of the late Lockhart J and Gummow and Hill JJ constituted the Full Court of the Federal Court in both cases. They were heard one after the other. *Cooling* was heard first. The first day of argument was confined to the question whether the lease incentive payment received by Mr Cooling was income according to ordinary concepts. Towards the end of the day, we started to address the potential operation of the "terrible twins". At the beginning of the second day, Lockhart J said: "Mr Gzell, before we continue with the capital gains tax provisions, my brother Hill has a short question he wishes to ask you". Hill J then spoke about income according to ordinary concepts. It got longer and longer and more and more complicated. I was standing on crutches having had a knee reconstruction following a skiing accident and could not write anything down as the judge continued with the question. When he finished I said: "I agree with what your Honour has said except for points (f) and (m). Everyone laughed including Hill J who asked me if I would please remind him what points (f) and (m) were.

I do not propose to speak further about his Honour's contribution to the jurisprudence with respect to capital gains tax. An interesting article on the subject has been written by Matthew Wallace, Geoffrey Hart and Chris Evans, *Wrestling with the "terrible twins" and other heroic endeavours: the contribution of Mr Justice Hill to jurisprudence in the area of Australia's capital gains tax provisions*.

There is another area of income tax law in which Hill J's contribution to its development is monumental. It is referred to in an excellent paper by Edmonds J, *The contribution of Justice Hill to the development of tax law in Australia*, and in a paper by John Tretola of Adelaide University, *The interpretation of taxation legislation by the courts – a reflection on the views of Justice Hill*. The area is, of course, Part IVA.

When both were at the Bar, Gleeson CJ and Hill J were retained to advise the government on a replacement for s 260 of the *Income Tax Assessment Act 1936* (Cth). Part IVA was the ultimate result.

Hill J had strong views about the proper construction of Part IVA. He expressed them first in *Peabody v Commissioner of Taxation* [42] where he stressed its lack of operation upon commercial transactions.

You will recall that in that case a company was inserted between the trustee of a discretionary trust for Mrs Peabody and the operating company of which the trustee was the majority shareholder. A bank subscribed for redeemable preference shares in the interposed company and it bought out the minority shareholder. The operating company paid a dividend to the interposed company and it paid the preference dividend to the bank. The minority shares were reclassified with little value. The trustee then sold its shares to a float vehicle acquiring 50% of its capital. The remaining 50% was sold to the market. The trustee lent the interposed company sufficient funds to redeem the bank's shares and that debt was ultimately forgiven.

That was in the days before the introduction of the capital gains tax provisions, but profits on sale of property acquired within 12 months of sale were taxable. [43] It was also before equity financing was outlawed. [44]

Having analysed the problem on the basis that if the scheme chosen by the Commissioner included the acquisition of the shares, financing the acquisition and the ultimate floatation of a public company, it was hard to see how an impugned dominant purpose could arise, his Honour concluded: [45]

"Part IVA would seldom, if ever, operate to permit the Commissioner to make a

determination, carrying with it as it does an automatic penalty upon a taxpayer assessed, where the overall transaction is in every way commercial, although containing some element which has been selected to reduce the tax payable. Part IVA is no more applicable to such a case than was its predecessor, s 260.”

In *Hart v Commissioner of Taxation* [46] Hill J, with whom Healy and Conti JJ agreed, concluded that Part IVA did not apply to a split loan scheme under which a loan was divided into two components, one to discharge a mortgage on a home to become an investment vehicle and the other to purchase a new home. Repayments were attributed to the new home purchase, allowing it to be paid off in a relatively short time, while interest on the investment house was capitalised.

Hill J concluded that the dominant purpose of the scheme that included the borrowing of the funds to finance and refinance two pieces of land was the obtaining of the funds for those purposes. His Honour was of the view that the scheme was directed to a commercial end, the borrowing of money for use in financing and refinancing two pieces of land, and fell outside the ambit of Part IVA.

We know that the decision was reversed on appeal, *Federal Commissioner Taxation v Hart*. [47] Whether one had regard to the narrow or wide scheme identified by the Commissioner, the High Court took the view that the dominant purpose was to obtain a tax benefit, being the allowable deduction for the capitalised interest on the investment portion of the loan.

One would not call Hill J timid in expressing his opposition to views with which he did not agree. His criticism of the decision of the High Court in *Hart* in *Macquarie Finance Ltd v Commissioner of Taxation* [48] is trenchant.

That case involved a capital raising of \$400 million by stapled securities comprising notes issued by Macquarie Finance with a face value of \$200 million and preference shares issued by Macquarie Bank fully paid to \$200 million. The shareholders were not entitled to dividends except in specified circumstances. The notes bore interest at a margin above a base rate. The notes and shares were subscribed by Deutsche Bank and ultimately sold to the market. The initial plan was to issue unpaid shares but APRA required Macquarie Bank to maintain a specified level of Tier 1 and Tier 2 capital. As a result, Deutsche subscribed \$200 million for the shares. Under a procurement agreement, Macquarie Bank was to reimburse Deutsche \$200 million as consideration for Deutsche giving a notice requiring, in certain events, that the trustee for the note holders pay principal and interest under the notes to Macquarie Bank and not to the note holders. Macquarie Finance lent the proceeds of the issue to a related company, Macquarie Leasing, at interest equal to the note rate plus a margin. Macquarie Finance received interest of approximately \$28 million from Macquarie Leasing and paid, and claimed a deduction for, approximately \$27 million interest on the notes. The Commissioner denied the deduction.

Hill J found that the \$27 million was not deductible as the payment was of a capital nature. His Honour thought it important not to ignore the composite nature of the stapled security, for to do so would give undue weight to form over substance. His Honour concluded that the payment was not, in a practical business sense, the consideration for the note holders being kept out of the funds advanced by Deutsche and used to subscribe for the notes. That was because the notes were not redeemable at the option of the note holders and they might never obtain repayment of the face value of the notes. His Honour took the view that the \$27 million was not the cost of acquiring or maintaining a loan of ephemeral character but was the cost of a capital raising, being a permanent injection of capital. It was significant to his Honour that no dividend was payable on the preference shares so long as interest was being paid on the notes. The note holders were not creditors of Macquarie Finance and had no right to sue for interest or principal in arrears. And the payments on the notes were dependent upon Macquarie Bank having distributable profits.

In case he was incorrect in his view that the \$27 million was not interest, Hill J went on to consider the potential operation of Part IVA, and it was there that his criticism of the High Court in *Hart* arose.

I call it a criticism because, while his Honour couched his language in terms of an inquiry as to the meaning of Part IVA as perceived by the High Court, his opposition to the views expressed in *Hart* are clearly stated.

Of the joint judgment of the Gleeson CJ and McHugh J, for example, Hill J said this: [49]

“On one view, it may be said that their Honours in the circumstances of the case

regarded the conclusion as to purpose to be a conclusion required to be drawn in regard to the *form* of the borrowing, tested, of course, by reference to the eight relevant matters set out in s 177D(b) one of which includes form itself. That view presents some difficulty. Alternatively, it may be said their Honours adopted a definition of the scheme as not being all the steps taken but what may be described as the wealth optimiser features of the loan package. On the other hand that is not what their Honours said they were doing. Rather, it seems to me that the proper analysis of the judgment is that while the scheme could be defined as being all the steps taken by the parties the conclusion as to purpose had to be addressed by reference to the particular scheme, that is to say all the steps which included the wealth optimiser features. In their Honour's (*sic*) view the only conclusion that could be drawn as to the purpose of the Harts entering into the particular scheme having those particular features was the tax conclusion."

Of the reasons for judgement of Gummow and Hayne JJ, for example, [50] his Honour said:

"After discussing the definition of scheme Gummow and Hayne JJ proceeded to discuss the principle first enunciated in *Spotless* that there was no real dichotomy between what might be described as a "rational commercial decision" and the obtaining of a tax benefit. They noted, as was obvious, that the loan in *Hart* was structured so as to obtain the most desirable taxation result. Their Honours at this point in the judgment discard as irrelevant the fact that the taxpayers in *Hart* wished to obtain finance to purchase a new residence and to refinance the mortgage over their existing residence to enable it to be obtained for use as an investment property. Their Honours make the point, as an apparent explanation why these matters were irrelevant, that s 177D(b) did not permit or require consideration to be given to subjective motives. That is clearly correct, with respect, but leaves open the question why the objective circumstances including the manner in which the scheme was entered into would not have led to the same conclusion anyway. If the facts had been that the taxpayers first were introduced to the borrowing transaction before they had considered the acquisition of a new residence and using the existing residence for income producing purposes, the point made by their Honours would have been more easily understood. My understanding of the facts in *Hart* does not suggest this to be the case."

Hill J quoted what Callinan J had said about the lack of evidence to show that the purchase of the investment property was a good investment, and his statement that while a decision to make an investment and to change residence was irreproachable, the means adopted to achieve those results should, objectively, be concluded to be a scheme for the dominant purpose of enabling the Harts to obtain a tax benefit. Hill J then commented: [51]

"It may be accepted that in *Hart* there was no evidence as to the quality of the investment decision which the taxpayers took. With respect, it is difficult to see why the quality of the investment in the new residence and use of the old residence as an investment property would matter. In any event this was not a matter adverted to in other judgments of the High Court and may be here put to one side. What is, however, significant is that like Gleeson CJ and McHugh J his Honour in his consideration of purpose directed attention ultimately to the form of the scheme."

Hill J concluded that if he was wrong with respect to the non-deductibility of the interest, Part IVA applied. But he arrived at this conclusion reluctantly. He said: [52]

"It follows, therefore, that if, contrary to my view, the "interest" payable on the notes was an allowable deduction to MFL in the year of income, then that deduction constituted a tax benefit which MFL obtained from a scheme to which the provisions of Pt IVA applied and in respect of which the Commissioner was entitled to make a determination under s 177F disallowing to MFL the deduction. I might add that I reach this conclusion with some reluctance. I doubt if the legislature would have regarded the present "scheme" as involving the application of Pt IVA when the Part was enacted in 1981. However, it seems to me that the approach of the High Court in *Hart* requires me to reach the conclusion I have."

His Honour's decision that the \$27 million was not deductible interest was upheld by a majority of a Full Court of the Federal Court in *Macquarie Finance Ltd v Commissioner of Taxation* [53] comprising French and Gyles JJ. With respect to the operation of Part IVA, however, Healy J with whom French J agreed took the view that Part IVA did not apply because a reasonable person would conclude, having regard to the factors in s 177D(b), that the dominant purpose of the parties engaged in the issue of the stapled securities was not to obtain a tax benefit, but rather to obtain for the Macquarie Bank group all of the commercial advantages associated with debt financing whilst at the same time qualifying as Tier 1 capital for capital adequacy purposes.

An application for special leave to appeal to the High Court was rejected by Gleeson CJ and Heydon J on 10 February 2006 [54] on the basis that the characterisation of the relevant outgoing by Hill J and by the majority of the Full Court of the Federal Court involved the application of settled principles to the complex and unusual circumstances of a particular case, such that the case did not raise an issue suitable to the grant of special leave to appeal. No mention was made of Hill J's interpretation of the High Court judgment in *Hart*.

It remains to be seen, therefore, how the High Court will react to Hill J's analysis in *Macquarie Finance* when special leave to appeal to it is granted in some other Part IVA case. Whether the High Court ultimately upholds his Honour's views or not, he has exposed issues with respect to the interpretation of the legislation that call for further comment by our highest appellate court.

Hill J got it wrong slightly more often than he got it right according to the High Court. I have appended a list of his decisions that were considered by the High Court, prepared for me by my current tipstaff, Sophie Hunt.

There were 14 of his judgments considered by the High Court. The appeal from the Full Court decision in *City Link Melbourne v Commissioner of Taxation* [55] was reserved on 1 February 2006.

Hill J was affirmed, or a decision of his on a Full Court was affirmed, 6 times: *Hepples v Federal Commissioner of Taxation*, [56] *Genex Corporation Pty Ltd v Commonwealth*, [57] *Peabody v Federal Commissioner of Taxation*, [58] *Federal Commissioner of Taxation v Energy Resources of Australia Ltd*, [59] *Commissioner of Taxation v Payne*, [60] and *Stone v Commissioner of Taxation*. [61]

On the other hand, he was reversed, or a reversal of his decision by a Full Court was upheld, 7 times: *David Securities Pty Ltd v Commonwealth Bank of Australia*, [62] *Australia & New Zealand Savings Bank Ltd v Federal Commissioner of Taxation*, [63] *Prestige Motors Pty Ltd v Federal Commissioner of Taxation*, [64] *CPH Property Pty Ltd v Commissioner of Taxation*, [65] *Kiwi Brands Pty Ltd v Commissioner of Taxation*, [66] *Hart v Commissioner of Taxation*, [67] and *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)*. [68]

In contrast, I think my decisions have met with the disfavour of the High Court at the rate of 100%.

Justice Graham Hill's exceptional level of scholarship is evident throughout his judgments. They are part of his legacy to his fellow judges, to members of the profession, and to academics involved in the taxation field. They will be referred to often in the years to come for I doubt that any one else will emerge with the gifts he possessed to take his place and divert our attention away from the enormous contribution he made to taxation law jurisprudence in this country.

1 May 2006

List of Hill J's Taxation Cases in the HCA

Chronological List

Case and Date	Hill J's Result in Intermediate Court	Hill J's Result in High Court
1. <i>David Securities Pty Ltd v Commonwealth Bank of Australia</i> 11/05/89 FCA Unreported First Instance	<i>David Securities Pty Ltd v Commonwealth Bank of Australia</i> (1990) 23 FCR 1 Affirmed	<i>David Securities Pty Ltd v Commonwealth Bank of Australia</i> (1992) 175 CLR 353 Reversed (Full Court Reversed)

<p>2. Hepples v Federal Commissioner of Taxation (1990) 22 FCR 1 - 28/06/90</p> <p>Full Court Dissent</p>		<p>Hepples v Federal Commissioner of Taxation (1992) 173 CLR 492</p> <p>Affirmed</p> <p>(Full Court Reversed)</p>
<p>3. Genex Corporation Pty Ltd v Commonwealth (1991) 30 FCR 193 - 11/07/91</p> <p>Full Court</p>		<p>Commonwealth v Genex Corporation Pty Ltd (1992) 176 CLR 277</p> <p>Affirmed</p>
<p>4. Peabody v Federal Commissioner of Taxation (1993) 40 FCR 531 - 08/03/93</p> <p>Full Court</p>		<p>Federal Commissioner of Taxation v Peabody (1994) 181 CLR 359</p> <p>Affirmed</p>
<p>5. Australia & New Zealand Savings Bank Ltd v Federal Commissioner of Taxation (1993) 42 FCR 535 - 10/06/93</p> <p>Full Court</p>		<p>Federal Commissioner of Taxation v Australia & New Zealand Savings Bank Ltd (1994) 181 CLR 466</p> <p>Reversed</p>
<p>6. Prestige Motors Pty Ltd v Federal Commissioner of Taxation (1993) 47 FCR 138 - 03/12/93</p> <p>Full Court</p>		<p>Federal Commissioner of Taxation v Prestige Motors Pty Ltd (1994) 181 CLR 1</p> <p>Reversed</p>
<p>7. Federal Commissioner of Taxation v Energy Resources of Australia Ltd (1994) 54 FCR 25 - 30/11/94</p> <p>Full Court</p>		<p>Commissioner of Taxation v Energy Resources of Australia Ltd (1996) 185 CLR 66</p> <p>Affirmed</p>
<p>8. CPH Property Pty Ltd v Commissioner of Taxation (1998) 88 FCR 21 - 13/10/98</p> <p>First Instance</p>	<p>Commissioner of Taxation v Consolidated Press Holdings Ltd (1999) FCR 524</p> <p>Reversed</p>	<p>Commissioner of Taxation v Consolidated Press Holdings Ltd (2001) 207 CLR 235</p> <p>Reversed</p> <p>(Full Court Affirmed)</p>
<p>9. Kiwi Brands Pty Ltd v Commissioner of Taxation (1998) 90 FCR 64 - 11/12/98</p> <p>Full Court</p>		<p>Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) 201 CLR 520</p> <p>Reversed</p>
<p>10. Commissioner of Taxation v Payne (1999) 90 FCR 435 - 30/03/99</p> <p>Full Court Dissent</p>		<p>Commissioner of Taxation v Payne (2001) 202 CLR 93</p> <p>Affirmed</p> <p>(Full Court Reversed)</p>
<p>11. Hart v Commissioner of Taxation (2002) 121 FCR 206 - 26/07/02</p> <p>Full Court</p>		<p>Federal Commissioner of Taxation v Hart (2004) 217 CLR 216</p> <p>Reversed</p>

12. Stone v Commissioner of Taxation (2002) 196 ALR 221 - 29/11/02 First Instance	Stone v Commissioner of Taxation (2003) 130 FCR 299 Reversed in Part	Commissioner of Taxation v Stone (2005) 79 ALJR 956 Affirmed (Full Court Reversed)
13. Commissioner of Taxation v Linter Textiles Australia Ltd (in liq) (2003) 129 FCR 42 - 14/04/03 Full Court		Federal Commissioner of Taxation v Linter Textiles Australia Ltd (in liq) (2005) 220 CLR 592 Reversed
14. City Link Melbourne v Commissioner of Taxation (2004) 141 FCR 69 - 12/10/04 Full Court		Commissioner of Taxation v Citylink Melbourne Ltd Judgment Reserved 01/02/06

END NOTES

1. *Esso Australia Ltd v Curran* (1989) 39 A Crim R 157 at 162
2. *The Australian Financial Review*, Friday 26 August 2005
3. (2005) 143 FCR 553
4. *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), s 11-15(2)(a)
5. *A New Tax System (Goods and Services Tax) Regulations* 1999 (Cth), reg 70-5.02 (Item 17)
6. (2005) 142 FCR 533 at [2]-[3]
7. at [13]
8. at [16]-[17]
9. (1934) 52 CLR 85 at 89
10. at [88]
11. (1995-1997) 187 CLR 384 at 408
12. (1989) 86 ALR 195
13. at 230-231
14. (1997) 80 FCR 58
15. 95 ATC 4440
16. (1998) 82 FCR 195
17. (1998) 84 FCR 70
18. (1999) 96 FCR 82
19. (1994) 181 CLR 1 at 11
20. (1991) 30 FCR 193
21. (1992) 176 CLR 277
22. (1998) 154 ALR 102
23. (1999) 160 ALR 227
24. (1993) 44 FCR 450
25. at 471
26. (1995) 56 FCR 557 at 568 ff
27. (1995) 62 FCR 289
28. 99 ATC 5293
29. (1997) 147 ALR 497
30. *Sales Tax (Exemptions and Classifications) Act* 1992 (Cth), Sch 1, Item 68(1)(a)
31. *Sales Tax Assessment Act* 1992 (Cth), s 52(b)
32. *Sales Tax (Exemptions and Classifications) Act* 1992 (Cth), Sch 1
33. Item 18(1)(a)
34. Item 18(3)(a)
35. *Sales Tax (Exemptions and Classifications) Act* 1992 (Cth), s 12(3)(a)(i)

36. LBC Information Services, Sydney, 1996
37. Lawbook Co, Sydney, 2001
38. CCH Australia Ltd, Sydney, 1991
39. (1990) 22 FCR 42
40. (1990) 22 FCR 1
41. (1991-1992) 173 CLR 492
42. (1993) 40 FCR 531
43. *Income Tax Assessment Act 1936* (Cth), s 26AAA
44. *Income Tax Assessment Act 1936* (Cth), s 46D
45. at 548-549
46. (2002) 121 FCR 206
47. (2004) 217 CLR 216
48. (2004) 210 ALR 508
49. at [97]
50. at [100]
51. at [106]
52. at [120]
53. (2005) 146 FCR 77
54. [2006] HCA Trans 043
55. (2004) 141 FCR 69
56. (1990) 22FCR 1
57. (1991) 30 FCR 193
58. (1993) 40 FCR 531
59. (1994) 54 FCR 25
60. (1999) 90 FCR 435
61. (2002) 1196 ALR 221
62. FCA, unreported, 11 May 1989
63. (1993) 42 FCR 535
64. (1993) 47 FCR 138
65. (1998) 88 FCR 21
66. (1998) 90 FCR 64
67. (2002) 121 FCR 206
68. (2003) 129 FCR 42

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Swearing-in Ceremony of the Honourable Ian Vitaly Gzell as a Judge of the Supreme Court of New South Wales

IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND JUDGES OF
THE SUPREME COURT

Monday 4 February 2002

1 GZELL J: Chief Justice, I have the honour to announce that I have been appointed a Judge of the Supreme Court. I present to you my Commission.

2 SPIGELMAN CJ: Thank you, Justice Gzell. Please be seated whilst the Commission is read. Principal Registrar, would you please read the Commission.

(Commission read)

Justice Gzell, I ask you to rise and take the oaths of office; first the oath of allegiance and then the judicial oath.

(Oaths of office taken)

3 Principal Registrar, I hand to you the oaths to be placed amongst the Court's archives. Sheriff, I hand to you the Bible so that it may have the customary inscription inserted into it in order that it may then be presented to Justice Gzell as a memento of the occasion.

4 Your Honour, on behalf of all of the Judges of the Court and on my own behalf, I welcome you as a Judge of this Court. Your Honour is returning to a general practice of the law. In recent years, as you will presently hear, you have specialised in revenue law, as has been determined by the inexorable laws of supply and demand. From herein we promise you a more wide and varied diet. I look forward to many years of cooperation and service with you.

5 MR B WALKER SC, PRESIDENT NEW SOUTH WALES BAR ASSOCIATION: May it please the Court. Your Honour comes to this Court after a career as a barrister and as a member of the legal community and, indeed, as a member of the wider community which is exemplary in its service and which is daunting in the combination of high individual achievement and devotion to the common good.

6 Those are indeed broad words of praise and occasions like these have been known from time to time to attract some hyperbole, but in your Honour's case, the barest objective description of the post you have achieved, the jobs you have discharged, and the achievements as a legal scholar, advocate and advisor, makes for once the hyperbole quite absent.

7 Your Honour comes to us from Queensland, something which - it seems to be true of Queenslanders - is never forgotten, either by them or by those around them. You are but one of a distinguished band who have enriched the New South Wales Bar and the Australian Bar by moving from Brisbane to Sydney as your principal place of practice. Indeed, you are one of an extremely distinguished band in our own inner band of that kind. Whether this could be seen as a takeover, an

improvement of the Sydney Bar, or as simply a huge detriment to the Brisbane Bar can be left to others to debate. Suffice it to say it has been our allied advantage to everyone in Sydney, as well as to the Australian Bar generally that your Honour took up practice in Sydney.

8 Of course, one of the things first to note about your Honour's achievements individually as a barrister is to describe your practice as having once been located in Brisbane and later located in Sydney would be quite misleading. For a start, of course, no Brisbane-based barrister who enjoys the sugar circuit was long in Brisbane during that circuit. But much more importantly, your Honour is again an exemplar of the nationalised profession - thank God they still call it private enterprise - but nationalised in the sense that your Honour practised everywhere, and everywhere in your Honour's practice did not mean simply within the Commonwealth of Australia. Your Honour's admissions were often ad hoc, but sufficiently repeated to become an enterprise, on anybody's view of that word, and included Papua New Guinea, Fiji, Singapore, New Zealand, and the Solomon Islands. And in Fiji, continuing the long intercourse between Queensland and those islands with respect to sugar, you were involved in the famous Sugar Industry Inquiry.

9 Your Honour began as a journalist with a great skill in Commercial Law. In so far as the Commonwealth Law Reports are a mark of a barrister's achievements, it can be seen that as early as 1973, when your Honour was admitted only in 1965, your Honour was being led in the High Court - alas with not complete success - by one F G Brennan QC. A mere two years later, still as a junior, just before your appointment as silk in Queensland, you had one against one K A Aiken QC. These are names which, to some in this room, may be mere names of history, albeit glorious, but an indication of your Honour's experience and the depth of your Honour's success.

10 Success at the Revenue Bar for your Honour has been so enormous that it remains the case that the cachet of a Gzell opinion is the cachet enjoyed by only a few persons and only in a few areas of the law in Australia today. Thiel's case in 1990 stands as a memorial to your Honour's determination and skill in winning, finally in the High Court, a case about a most fundamental concept of double taxation treaties to which this country is a party.

11 To praise your Honour as a barrister is to perhaps talk merely of the prerequisite to your Honour's appointment to this Court. Your Honour has done so much else which has been of benefit to the profession and the wider community.

12 Your Honour's service in Queensland to the Queensland Bar Association included high office as Treasurer and Secretary during the sixties and seventies. Your Honour's service to the organised Bar in Brisbane included, of course, that most important element of most organisations, housing, and your Honour was secretary of Barristers' Chambers in Queensland again during the sixties and seventies. But importantly, your Honour brought to bear those skills when you came to Sydney to the great advantage of the New South Wales Bar. Your Honour became, not only a director of the Barristers' Superannuation in New South Wales, but also a director of Counsel's Chambers of which you have now been chairman since 1999.

13 May I speak personally of the great assistance that your Honour has given the Bar Association in matters which concern both Counsel's Chambers and the Bar Association together.

14 Your Honour has been as well a director of the International Dispute Centre, a mark of your Honour's extra-curial interest in the process of dispute resolution and the practice of law.

15 Quite apart from that, in the scholarly part of the law, through the Business Law Section of the Law Council, through the Commercial Law Association, but most particularly through the Taxation Institute of Australia, your Honour has given service of a kind which is really unparalleled in one person. Your Honour has, in all of those fields, reached the highest of positions and led from the front - both in representation and scholarship terms.

16 It seems extraordinary that there is yet another section of community significance to add after this litany, but your Honour has, as your licensure from the Trinity College of London would indicate, an abiding interest in music. Your Honour's service to the community organisation for the financial and moral support of music in this country is extraordinary: the Queensland Philharmonic Orchestra, the Queensland Symphony Orchestra, the National Council of Opera Australia, regional arts organisations, have all been benefited from your Honour's leadership over a sustained period of years

which makes a mere barrister gasp at the idea that you have done chamber work and appeared in leading cases at the same time.

17 Finally, perhaps last but certainly not least, your Honour has never ignored your local surroundings and you have, perhaps not with the greatest success, against the planning might of New South Wales in the form of the State Government, led the residents of the Centennial Park vicinity and it is rumoured that the Astor is about to come in for - I hesitate to say some curry - probably some other form of cuisine is what your Honour has in mind for the Astor.

18 Your Honour, you come to this bench with all the best wishes, admiration and congratulations from the Bar. We are sure you will discharge of this bench your duties with the same flair, with the same diligence, and the same excellence as you have displayed elsewhere.

19 May it please the Court.

20

MS K CULL PRESIDENT LAW SOCIETY OF NEW SOUTH WALES: May it please the Court. On behalf of the solicitors of New South Wales, it is my great pleasure to congratulate your Honour on your appointment as a Judge of the Supreme Court.

21 I adopt all that the President of the Bar Association has said in relation to your Honour's distinguished career during your thirty-six years at the bar and your eminence in the field of International Taxation Law.

22 I too wish to acknowledge your Honour's significant contribution and ongoing commitment as chair and executive member of numerous professional contractual bodies at state, national and international levels.

23 Amongst those solicitors who have instructed you, I am told your Honour is held in the highest regard, not only for your specialised but also your comprehensive general knowledge of the law. I understand your detailed opinions are distinguished by their thoroughness and accompanied by enthusiasm, interest and affability.

24 It is clear your Honour will not only maintain but enhance the intellectual rigour of this bench for the benefit of the members of our community.

25 On behalf of the solicitors of this State, may I again congratulate your Honour and wish you many satisfying years on the bench.

26 May it please the Court.

27 GZELL J: Thank you, Mr Walker and Ms Cull for your very kind remarks. I have really had a charmed life at the bar, both in Queensland initially, and in this State over the last eleven years. I cannot imagine any other profession giving the same rewards and satisfaction as does the law.

28 When I was a student at Queensland University, Walter Campbell QC, as he then was, allowed me and another law student to study in his chambers at night. He had an extensive law library and this privilege was such a wonderful thing for a young, would-be lawyer and typical of the generosity of the man.

29 In my final years as a student, I succeeded the Honourable Hulme J of this Court as associate to the late, the Honourable Sir Charles Wanstall, who later became Chief Justice of Queensland. That experience was invaluable, not only for the direction and nurture from Sir Charles and the exposure to Court procedure, but also for the valuable contacts I thought I had made amongst the solicitors instructing counsel appearing before Sir Charles. My hope was that they would brief me when I went to the Bar. Alas, this was not so. In my first six months at the bar, I earned in guineas and then in dollars the princely sum of \$746.32, significantly less than the associate salary for the previous six months.

30 Walter Campbell was the President of the Queensland Bar Association when I took up chambers and he soon had me appointed as the honorary treasurer, a position which I held for a number of years. Throughout his time on the bench as Chief Justice of Queensland, as Queensland Governor, and in his retirement, the Honourable Sir Walter Campbell has maintained his spirit of friendship and generosity from which I, and others, have continued to benefit.

31 The Honourable Peter Connelly QC was a leading member of the Queensland Bar when I was admitted to practice. He later became a Supreme Court Judge and is currently a Judge of Appeal for Kiribati. In my first brief as his junior, we had an argument about some aspect of the evidence and I can remember saying to Sylvia, my wife, I had ruined my chances of ever working with him again. On the contrary, the next morning the State Crown offered me a retainer as his junior in prospective litigation, and there commenced a long relationship, both professional and social. He presented me with a red bag after a long and difficult case and I later joined the chambers of which he was head. Peter encouraged intellectual toughness. He does not brook fools. He was a significant influence in my development as a barrister. I am fortunate to enjoy his continued friendship.

32 The friendships that one does develop at the Bar are of this lasting type. I am delighted to see in Court this morning the Honourable David Jackson QC. He and I went through Queensland University together and he encouraged me to come to Sydney. There are many present and past members of the Fifth Floor Selborne Chambers in Court this morning. They welcomed me to their floor with open arms, for which I will always be grateful. Many other people have sent me messages of congratulation. I hope I can live up to their expectations of me.

33 I do not have any wise saws to share with you from my practice at the Bar except this. When I went to the Bar it was a gentlemanly profession. It became a gentlemanly and gentlewomanly profession. There was a trust between practitioner and practitioner, and between practitioners and the bench which greatly aided the administration of our legal system. I think it is very important for Bar Associations and Law Societies to work vigilantly to ensure the continued practice of the law under high ethical standards.

34 Mention has been made of my involvement in the arts. The administration of the arts, like other non-profit organisations, relies upon volunteers acting on boards of directors and committees of management. These people are overjoyed to have a lawyer with them because our training tends to enable us to see a logical solution to a problem. The gratitude of fellow workers in these organisations leads to immense personal reward to the lawyer. I would encourage practitioners to become involved in such organisations. If you do however, you must devote considerable care and attention to the task because your fellow directors or committee members will expect you to lead them in the discharge of their duties.

35 It will take me a while to adjust to my new office. I was in my new chambers last week with an IT person connecting up a computer and he said, "Well, Judge, you can't..." and I immediately turned round to find out which Judge he was addressing.

36 As many of you know, my practice in recent times has been highly specialised and has only occasionally taken me to the Supreme Court. I will be relying heavily upon counsel to educate me in the ways of the Equity Division.

37 My family understand the gratitude that I have for them in their support of my career. Sylvia and I are delighted that two of our daughters could be present with us this morning. (At least one of them is here; another is stuck in traffic I am told, but will join us for morning tea, I am sure.)

38 My mother, Lorna, is down from Queensland to be present at this ceremony. She is the most excited of us all. And she will, not before time she might say, now be able to return to her friends and acquaintances in that northern State and say, "My son, the Judge, says..."

39 Thank you, Chief Justice, for welcoming me to your Court. Thank you, Mr Walker, for your remarks and for your remarks, Ms Cull, on behalf of the solicitors.

40 To my former colleagues at the Bar, to the solicitors present, and to you, ladies and gentlemen, thank you for your attendance at this ceremony this morning.

