

Monthly Tax Update Notes

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December 2007 Table of Contents

1	Income Tax	5
1.1	Politicians, Boards & Statutory Authorities [Nil]	5
1.2	Courts & Tribunals	5
(a)	Courts	5
	(1) *** Can a subsidiary be a charitable institution (C of T v Word Investments Limited)	5
	(2) ** When is a prepayment paid by a third party deductible? (Star City Pty Limited v C of T)	9
	(3) ** Director succeeds in defence against Commissioner's claim (Deputy C of T v Freudenstein)	15
	(4) * Bodgie companies in the building industry (Trimcoll Pty Ltd v Deputy C of T)	16
	(5) [LISTED ONLY] Voidable preferences (Cooper as Official Liquidator of Line 1 Pty Ltd v C of T)	18
(b)	Tribunals	18
	(1) *** Vacant land terms contract and the small business concessions (Karapanagiotidis and C of T)	18
	(2) ** What a mess – the bookkeeper knew him only as Tony? (3-D Scaffolding & Anor and C of T)	21
	(3) ** Parliamentarian provides character evidence (Modini and Tax Agents' Board of Queensland)	24
	(4) * Bodgie companies in the building industry (Trimcoll Pty Ltd v Deputy C of T)	26
	(5) * How late can an objection be lodged? (Francis and C of T)	27
	(6) [LISTED ONLY] Banalasta Natural Oil Joint Venture Project No. 1 (Petersen and Anor and Deputy C of T)	29
	(7) [LISTED ONLY] Northern Rivers Tea Tree Oil Project (Dorn and C of T)	29
1.3	Tax Office Interpretations	30
(a)	Taxation Rulings & Draft Rulings	30
	(1) Income Tax Ruling	30
	(2) Income Tax	30
(b)	Determinations & Draft Determinations	30
	(1) ** TD 2007/30 ~ Goods own use determination	30
	(2) ** TD 2007/D16 ~ Convertible notes where holder exposed to little or no economic risk	31
	(3) ** TD 2007/D19 ~ New Division 7A nasties – for those using a facilities agreement	31
	(4) Taxation Determination Withdrawals	32
(c)	** Class Rulings – New	32
(d)	Class Rulings - Addenda/Withdrawn/Errata	33

(e)	Product Rulings	33
	(1) Product Rulings – New	33
	(2) Product Rulings - Addenda/Withdrawn/Errata	33
(f)	ID's – New	34
	(1) ID'S - Old	34
(g)	Other Tax Office Statements, Addenda, Errata and Withdrawals	34
	(1) ** PS LA 2007/23 ~ When to ask the Tax Office for mediation of a dispute	34
	(2) Decision Impact Statements	35
2	GST	37
2.1	Politicians, Boards & Statutory Authorities [NIL]	37
2.2	Courts & Tribunals [NIL]	37
2.3	Tax Office Interpretations [NIL]	37
(a)	Rulings & Draft Rulings	37
	(1) ** GSTR 2007/D3 ~ GST and bare trusts	37
(b)	Determinations & Draft Determinations	38
	(1) ** GSTD 2007/D4 ~ Representative member of GST group and the GST group credits and liabilities	38
(c)	ID's – New [NIL]	38
(d)	ID's Withdrawn [NIL]	38
(e)	Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]	38
3	FBT	39
3.1	Politicians, Boards & Statutory Authorities [NIL]	39
3.2	Courts & Tribunals	39
	(1) ** Loan repayments – generally not a fringe benefit (Slade Bloodstock v C of T)	39
3.3	Tax Office Interpretations [NIL]	40
(a)	Rulings & Draft Rulings [NIL]	40
(b)	Determinations & Draft Determinations [NIL]	40
(c)	ID's	40
(d)	Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]	40
4	State and Territory Taxes	41
4.1	Politicians, Boards & Statutory Authorities [NIL]	41
4.2	Courts & Tribunals	41
	(1) ** Was land used for yachting activities exempt from land tax? (RSAYS Ltd v C of ST)	41
	(2) ** Was stamp duty payable on a curious transaction? (Trust Company of Australia Ltd v C of SR)	44
	(3) ** Director succeeds in defence against Commissioner's claim (Deputy C of T v Freudenstein)	46
	(4) * Bodgie companies in the building industry (Trimcoll Pty Ltd v Deputy C of T)	47
	(5) ** Was the taxpayer carrying on a rental business? (Seneca Exploration Pty Ltd v C of ST)	48
	(6) * Penalty tax for late lodgement of sale contract (Beamish and C of SR)	51

4.3	Revenue Office Interpretations	53
(a)	New South Wales [NIL]	53
(b)	Northern Territory [NIL]	53
(c)	Queensland [NIL]	53
(d)	South Australia [NIL]	53
(e)	Victoria [NIL]	53
(f)	Western Australia [NIL]	53
5	Superannuation, ETP's & Pensions	55
5.1	Politicians, Boards & Statutory Authorities [NIL]	55
5.2	Courts & Tribunals [NIL]	55
5.3	APRA, ASIC & Tax Office Interpretations	55
(a)	Rulings & Draft Rulings [NIL]	55
(b)	Determinations & Draft Determinations [NIL]	55
(c)	Other Tax Office Releases Other Tax Office Releases	55
(1)	ATO ID's	55
6	Other Imposts, Offsets & Rebates	56
6.1	Politicians, Boards & Statutory Authorities	56
6.2	Courts & Tribunals	56
6.3	APRA, ASIC & Tax Office Interpretations	56
(1)	Excise	56
(2)	Fuel Tax Credits	56
(3)	WET	56
7	Legislation	57
7.1	Australian Parliament	57
(a)	Acts receiving Royal Assent after 25 October 2007	57
(b)	Bills before Parliament as at 25 October 2007	57
7.2	State and Territory Parliaments	57
(a)	Australian Capital Territory	57
(b)	South Australia	57
(c)	Queensland	57
(d)	Tasmania	57
(e)	Victoria	57
(f)	Western Australia	57
8	Appeals to full court of the federal court	58

1 INCOME TAX

1.1 Politicians, Boards & Statutory Authorities [Nil]

1.2 Courts & Tribunals

(a) Courts

(1) *** Can a subsidiary be a charitable institution (C of T v Word Investments Limited)

Source [Month 11-2007-42 ~ C of T v Word Investments Limited \[2007\] FCAFC 171 \(14 November 2007\)](#), Stone, Allsop & Jessup JJ

What was the issue?

Was Word Investments Ltd a "charitable institution" within the meaning of item 1.1 of the table in s 50-5 of the "1997 Act"?

Did Word satisfy the special condition in s 50-50(a) of the 1997 Act which requires that Word "pursues its objectives principally in Australia"?

Was the period from 1 July 2002 properly before the Tribunal?

What was the outcome?

The Court did not accept the Commissioner's argument that the subsidiary of an endorsed charity was not itself a charitable body.

What were the facts?

On 16 March 2002 Word Investments Limited applied for endorsement as a charitable entity under Subdivision 50-B of Div 50 of Part 2-15 of ("the 1997 Act") with effect from 1 July 2000.

Under s 50-110(1) and (2) of the 1997 Act, Word was entitled to be endorsed if it was a "charitable institution" within the meaning of Item 1.1 in the table in s 50-5 and (relevantly for present purposes) if it had "a physical presence in Australia and, to that extent [incurred] its expenditure and [pursued] its objectives principally in Australia" within the meaning of s 50-50(a).

On 13 May 2002, the Commissioner refused Word's application for endorsement, upon the ground that it was not an organisation "instituted to advance or promote charitable purposes".

Word, a company limited by guarantee, was established in 1975 by Wycliffe Bible Translators Australia ("Wycliffe").

Until about the early 1980s, Word raised funds through housing development. After a period of dormancy, from about the late 1980s Word offered financial planning and investment advice and opportunities to persons who wished to support its activities, and were prepared to advance moneys to it at non-commercial rates.

The profits which Word earned on the investment of moneys advanced to it were distributed, mostly, to Wycliffe, with the balance going to other Christian organisations.

In 1996, the Word established a funeral business, called Bethel Funerals, selling its services to customers, deriving revenue, incurring expenses and earning profits.

The profits were applied to the same destinations as the other profits of Word, ie mostly to Wycliffe, but also to other Christian organisations.

In some of the promotional literature of Bethel Funerals which was in evidence, the business described itself as "a not-for-profit organisation, [which distributed] profits generated to selected community ministries and mission work", and as "a unique Christian funeral company supporting the work of missions".

Word conducted Bethel Funerals until 30 June 2002.

On 1 July 2002, Word created a trust to hold and conduct Bethel Funerals, after which Word itself was not beneficially engaged in that business.

Word successfully objected to the Commissioner's disallowance.

The Commissioner unsuccessfully appealed the Tribunal decision and then brought the current appeal to the Full Court.

The decision of the Tribunal

The Tribunal held that, before 1996, because the profits Word were distributed to Wycliffe or, to a very limited extent, to other like organisations, Word was charitable in the sense of being an institution for the advancement of religion. However, as to the period between 1996 and 2002, the Tribunal said:

While it may be said that an underlying purpose of that business was the generation of profits for the ultimate benefit of a religious institution, it is difficult to consider a commercial funeral business as having an objective of the advancement of religion.

With respect to both periods, the Tribunal accepted that Word had a physical presence in Australia and, to that extent, incurred its expenditure and pursued its objectives principally in Australia.

The reasoning of the Trial Judge

The trial Judge:

- ◆ considered first whether Word was a charitable institution prior to 1996 (when it commenced to conduct Bethel Funerals);
- ◆ identified the advancement of the religion as being relevant to the present circumstances.;
- ◆ held that the advancement of religion included missionary work, whether or not the work was conducted within Australia;
- ◆ in considering Word's purposes, held that the starting point was its constitution or articles of association;
- ◆ held that Word's objects as listed in its memorandum did not leave it unclear what its main purpose was;
- ◆ held that Word]was, until the establishment of Bethel Funerals in 1996, a charitable institution;
- ◆ held that, because Word provided funds to Wycliffe in Australia, it incurred its expenditure in Australia within the meaning of s 50-50(a);
- ◆ held that:
 - ~ Word had applied for endorsement from 1 July 2000, and should have been successful in that application;
 - ~ Once endorsed, Word was entitled to remain so until, by way of some subsequent procedure, it was shown that circumstances had sufficiently changed to deny Word that endorsement;
 - ~ was not satisfied that the Tribunal's decision demonstrated an error of law in the way it had dealt with Word's ongoing entitlement to remain endorsed under Subdiv 50-B.

What was the decision? Stone J

- [1] I have had the advantage of reading in draft the reasons of Allsop J, with which I agree...

What was the decision? Allsop J

The first question: whether Word was a "charitable institution"

- [4] The primary judge approached the question as to whether Word was a "charitable institution" within the meaning of item 1.1 of the table in s 50-5 by examining the motive or purpose of Word in the use of the funds at its disposal from the carrying on of its activities. At [37] of his reasons, the primary judge said that "the true question to be asked is the purpose of the making of the profit. If the purpose is commercial then the exclusive purpose of the organisation is not charitable: if the purpose is selfless then it may be". See also [52] of his Honour's reasons, where he said, "whether an organisation is charitable depends in large part on the motivation of the organisation – it is a question about the mental state of the organisation..."
- [5] So, in determining Word's purposes (and whether they were charitable) the question was what Word understood and intended was being done with the funds it made by the profitable activities that it undertook. The primary judge was in no doubt as to the answer to that question: Word understood and intended that the funds it raised would be given to other entities for religious (and charitable) purposes.

- [6] The primary judge found legal error in the approach of the Tribunal in analysing the funeral business activities of Word as inherently commercial. This he said was an incorrect focus on the manner of raising money, when the correct question was the purposes of raising money. If the purpose was charitable, the manner (that is the activity) was irrelevant.
- [7] The first significant question is whether this approach of the primary judge is correct.
- [9] The debate concerned whether Word was a charitable institution.
- [10] The not unimportant point raised in debate on appeal is whether or not a company, having an avowedly charitable purpose in the disposition of all its profits, is to be denied the character of a charitable institution because of the activities by which it gains its profit do not, of themselves, bear the character of charity.
- [14] The relevant task, as stated in the Surgeons' Case, is to assess the true character or nature of the entity by reference to its objects, purposes and activities. It is an integrated, holistic enquiry directed to whether a body of facts and circumstances satisfies a legal category or conception.
- [15] In examining the authorities, one must pay precise attention to the terms of the statute concerned and the precise nature of the enquiry being engaged in. Sometimes, the words "purposes" and "activities" are used almost interchangeably. This is due, sometimes, to the form and limits of the relevant question. For example, some of the cases concern rating statutes that employ the word "use", such as in rating cases which turn on the user of land. Such an inquiry inevitably focuses on an analysis of activity.
- [43] Thus, I would reject the central proposition underpinning the Commissioner's argument. It was not an error by the primary judge to fail to conclude from the activities undertaken by Word, including the conduct of the funeral business, that Word could not be a charitable institution.
- [44] The primary judge accurately set out the task before him at [27] of his reasons:
In determining whether an institution is charitable, it is necessary to consider the institution's essential object, which is itself to be determined by a consideration of the purpose of its formation, its constitution and its activities.
- [45] He then directed himself to the memorandum and activities of association ...
- [47] The primary judge then examined the activities and subjective purposes of the directors of Word. The purposes in practice conformed with the purposes of Word from its memorandum of association: the charitable religious evangelising purposes.
- [48] The activities were investment and the funeral business. For the reasons I have given, I do not consider that the primary judge erred in concluding as he did that Word was a charitable institution... The proper question is one of characterisation of the institution. To that enquiry, the objects activities, the purposes of those concerned and the legal constraint under which the directors were working are all relevant: see the Surgeons' Case [1943] HCA 34; 68 CLR 436. Here, on the proper understanding of the memorandum of association, the purpose of all activities was, and could only be, the religious (and charitable) purposes of Word. The evidence of the subjective motives of the directors conformed with and bolstered those constitutive purposes. On the basis of the authorities to which I have referred, the commercial nature of the activities did not necessarily destroy the capacity of Word to be characterised as a charitable institution.
- [51] These views make it unnecessary to deal with the further point argued on appeal (though not dealt with by the primary judge) that the activities of Word in the conduct of the funeral business were in their nature charitable as an aspect of the burial of the dead contemplated by the Statute of Elizabeth and within Lord Macnaghten's fourth class in Pemsel's Case [1891] UKHL 1; [1891] AC 531: see the Scottish Burial Case [1967] UKHL 3; [1968] AC 138.

The second question: whether the condition in s 50-50(a) of the 1997 Act was satisfied

- [53] Section 50-50(a) requires that Word
- have a physical presence in Australia
 - "to that extent" incur its expenditure and pursue its objectives principally in Australia.
- [54] The only issue is the pursuit of objectives in Australia. The proceeds of Word's activities were given to Wycliffe and other organisations. This was done in Australia. The funds were employed by these other companies or entities otherwise than in Australia, though for purposes of evangelising which were charitable.

- [57] If the Parliament desires the place of expenditure of funds by the donee to be analysed before the donor can fall within the section, it can say so. It has not done so in s 50-50(a).

The third question: whether the period after 1 July 2002 was before the Tribunal

- [58] In the light of the conclusions to which I have come this issue does not arise.
- [59] Word applied for endorsement from 1 July 2000. The Commissioner by s 50-130 was empowered to endorse Word "from a date specified by [him]". He rejected the application. ...
- [60] The primary judge, after ordering that the appeal be dismissed and the cross appeal be allowed, ordered as follows:

The decision of the Administrative Appeals Tribunal dated 27 September 2005 be varied so as to allow in full the objection to the decision by the applicant to refuse to endorse [Word] as exempt from income tax under subdivision 50-B of the Income Tax Assessment Act 1997 from 1 July 2000.

- [61] This order was in accordance with the subject matter for decision that was before the Tribunal.
- [62] The question whether the Tribunal had authority to deal with the position of Word as a company its own right from 1 July 2002 only arises if the primary judge erred in varying the order of the Tribunal. In my view he did not, for the reasons that I have given.

Conclusion

- [65] For the above reason the appeal should be dismissed. The costs of the appeal have been dealt with under the Commissioner's test case programme.

What was the decision Jessup J?

Charitable Institution

- [85] On the issue whether [Word] was a "charitable institution", the [Commissioner]'s first point was that the trial Judge focused upon [Word]'s motive, rather than upon its purpose in the objective sense required by the authorities. However, the only parts of his Honour's reasons where he expressed himself in such terms were where he was dealing not with the question whether [Word] was a charitable institution at all, but rather with the construction of s 50-50(a) of the 1997 Act...
- [86] The [Commissioner]'s next point was that his Honour incorrectly attributed to [Word] the charitable purposes and activities of Wycliffe. Although the [Commissioner] referred to five paragraphs in his Honour's reasons in this regard, only in one of those did his Honour come close to the attribution of which he is accused in the [Commissioner]'s outline. That is the paragraph in which his Honour dealt with the [Commissioner]'s reliance upon Lawlor. Here, it is clear that his Honour was doing no more than pointing out that the question of purpose (and the associated question of activities) needed to be determined as a matter of substance, and that this might, in many complex charities, necessitate looking beyond the confines of a particular corporation towards the operations of a larger group...
- [96] Given the relative paucity of authority on the question with which the court is here concerned, I would not go further than is necessary to decide the present appeal. In particular, I do not say anything about the large question whether a trading company, regardless of the nature of the activities which it undertakes, would necessarily be a charitable institution merely because, as a matter of practice, it distributes all its profits to charities. There are two aspects of the present case which make it unnecessary to address such a large question. The first is that it was not simply the practice – even the institutionalised practice – of [Word] which gave its purposes and activities a charitable dimension. Rather, it was the terms of [Word]'s own memorandum by which its objects were, to the extent that they dealt with substantive rather than adjectival matters, wholly charitable. I agree with the trial Judge that the present was not a case in which there appeared to be any proper basis to doubt that [Word], in its actual activities, confined itself to those objects.
- [97] The second aspect relates to the nature of the commercial enterprise which [Word] did conduct between 2000 and 2002. In part, [Word]'s activities were purely financial ones, by way of the investment of funds advanced to it at less than commercial rates (or for no return at all). In part, the activities consisted of the conduct of Bethel Funerals. There is authority for the proposition that the selfless conduct of cremations should be regarded as charitable (Scottish Burial), but [Word] did not propose, in its submissions on appeal, that the purpose of carrying on a funeral business was necessarily charitable. It did submit that the nature of its business, and the terms in which the business was presented to potential customers, was at least in harmony

with its general religious purposes. I accept that submission, and consider that, seen in the context of the objects of [Word] itself in its memorandum, and of its other activities, the fact that Bethel Funerals was a commercial business operating for reward did not disqualify [Word] from characterisation as a charitable institution.

[98] For the above reasons, I am unable to discern any error in the way in which the trial Judge dealt with the question of law which related to the matter of whether [Word] was a "charitable institution".

The place of the pursuit of [Word]'s objectives

[100] By expressing itself through the metaphor of pursuit, the legislature has not simplified our task of construction of the words in question in s 50-50(a) of the 1997 Act. I consider that the expression "pursues its objectives" effectively means "does the things by which it attempts to realise its objectives". In the present case, everything which [Word] did, it did in Australia. I agree with his Honour that the third requirement in par (a) of s 50-50 connotes a physical – specifically a spatial – nexus. Looked at in this way, there is no error in his Honour's conclusion that the Tribunal made no error of law in finding that [Word] pursued its objectives principally in Australia.

[101] I do not see this as an appropriate occasion to anticipate the kind of avoidance problems that might arise in fact situations not presently before the court. I could not regard his Honour's conclusion as endorsing an attempt to use the provisions of Subdiv 50-B of the 1997 Act as a means of transferring off-shore moneys that should have been, but were not, taxed as income in Australia...

The date of effect of the endorsement

[104] By the time the Tribunal came to give its decision in September 2005, some of the provisions of the 1997 Act to which I have referred had been repealed, by the Tax Laws Amendment (2004 Measures No 1) Act 2004 (Cth). Corresponding, and substantially identical, provisions had been inserted into the Taxation Administration Act 1953 (Cth). Item 45 of Schedule 10 to the 2004 Act referred to a number of provisions of the 1997 Act which were repealed by that schedule, including the provisions with which I am presently concerned, and dealt with the situation when an "act or thing" had been done before the commencement of that item, and was done under, or for the purposes of, a repealed provision. It was provided by item 45(3) that the act or thing had effect as if it had been done under, or for the purposes of, the corresponding provision of the 1953 Act, as amended.

[105] In the circumstances, when the Tribunal decided this matter in September 2005, it was exercising the [Commissioner]'s then administrative power under Subdiv 50-B of the 1997 Act together with the applicable provisions of Subdiv 426-B of Part 5-35 of the 1953 Act. Assuming that the Tribunal granted the application for endorsement (which it did in the present case), it was required by s 426-30 of the 1953 Act to specify a date of effect of that endorsement. That is exactly what the Tribunal did in its decision of 27 September 2005. Thus the trial Judge made no error in declining to find that the Tribunal lacked power to specify 1 July 2002 as the effective date of endorsement of [Word] for the purposes of Subdiv 50-B of the 1997 Act.

[106] Once his Honour determined [Word]'s cross appeal from the Tribunal's decision in the way he did, the propriety of the Tribunal specifying 1 July 2002 as the effective date of endorsement became moot. His Honour decided that the effective date should have been 1 July 2000 and, as appears from the foregoing, I am not persuaded that there was any error in that finding. Having been endorsed, [Word] will remain so until some further action is taken, such as, perhaps, a revocation by the [Commissioner] pursuant to s 426-55 of the 1953 Act. Such issues were not before the Tribunal, and are not before the court.

(2) ** When is a prepayment paid by a third party deductible? (Star City Pty Limited v C of T)

[Source Month 11-2007-43 ~ Star City Pty Limited v C of T \[2007\] FCA 1701 \(9 November 2007\) Gordon J](#)

What was the issue?

There are four issues:

- ◆ whether the Prepayment was an obligation of Star City or, as the Commissioner contended, an obligation of SHCP ("the Contract Issue");
- ◆ whether the Prepayment was an outgoing incurred by Star City in gaining or producing assessable income under s 51(1) of the 1936 Act and / or s 8-1 of the 1997 Act ("the Incurrence Issue")? The answer to the Incurrence Issue depends, to a significant extent, on the answer to the Contract Issue.

- ◆ if the Prepayment was an outgoing incurred in gaining or producing assessable income whether the Prepayment was an outgoing of capital or of a capital nature (the "Capital / Revenue Issue")?
- ◆ if the Prepayment was an outgoing incurred by Star City in gaining or producing assessable income and was not of capital or of a capital nature, did Part IVA of the 1936 Act operate to disallow the deduction ("the Part IVA Issue")?

What was the outcome?

The Court found that the prepayment was incurred by the taxpayer despite the fact that it was paid by the holding company, that the prepayment was on capital account

Does the outcome affect your firm's current practices?

What were the facts?

On 14 December 1994:

- ◆ the New South Wales Casino Control Authority ("CCA") granted a casino licence to Star City Pty Limited.
- ◆ the CCA granted a lease ("the Construction Lease"), containing an agreement to grant a further lease ("the Freehold Lease"), to Sydney Harbour Casino Properties Pty Limited ("SHCP") of Crown land at Pyrmont Bay in Sydney Harbour ("the Premises") for a cumulative term of 99 years.
- ◆ SHCP and Star City entered into an Occupational Licence Agreement – Permanent Site ("the Occupational Licence Agreement") under which SHCP granted Star City the non-exclusive licence to occupy and use the Premises.

The Construction Lease and the Freehold Lease provided that:

- ◆ the rent for the first 12 years of that total term was \$15 million per annum and thereafter \$250,000 per annum.
- ◆ the rent for the first 12 years would be prepaid by a payment of \$120 million within 21 days of the commencement of the Construction Lease ("the Prepayment");

The Construction Lease commenced on 14 December 1994

Each of SHCP and Star City is a wholly owned subsidiary of Sydney Harbour Casino Holdings Pty Ltd ("Holdings").

Holdings made the Prepayment to the CCA on 15 December 1994.

Star City claimed the Prepayment as a deduction under s 51(1) of the ITAA 1936) and / or s 8-1 ITAA 1997 and s 82KZM of the ITAA Act as follows:

Period	Amount of Deduction (\$)
Year ending 30 June 1995	\$6,509,589
Year ending 30 June 1996	\$12,026,287
1 July 1996 to 31 December 1996	\$6,046,002
1 January 1997 to 31 December 1997	\$12,000,000
1 January 1998 to 31 December 1998	\$12,000,000
1 January 1999 to 30 June 2000	\$17,983,562
Year ending 30 June 2000	\$12,000,000
Year ending 30 June 2002	\$12,000,000

What are the contentions?

What was the relevant legislative provision?

What was the decision?

D. TAXATION ISSUES

(1) The Prepayment was an Outgoing incurred by Star City

[71] Section 51(1) of the 1936 Act applied in the income years ending 30 June 1995, 1996 and 1997...

[72] Section 8-1 of the 1997 Act applied to the balance of the income years in dispute...

[73] The differences in language between the two sections are not material...

[75] In relation to the "positive limbs", the Commissioner contended the Prepayment was not deductible on the basis that it was not a loss or outgoing incurred by Star City because:

(1) the Prepayment was made by Holdings from an account held by it with the Bank on 15 December 1994; and

(2) at the time that Holdings made the Prepayment, no enforceable obligation existed between Star City and Holdings with respect to the Prepayment.

These contentions should be rejected.

[76] A taxpayer incurs an outgoing when a liability exists to which the taxpayer is definitively committed and which is able to be identified by reference to a jurisprudential characterisation of relevant obligations: Citylink (High Court) at [122]-[127] and the authorities cited. As the "Contract Issue" analysis at [45] to [70] demonstrates, the Prepayment was a liability which existed and to which Star City was definitively committed. Star City incurred the Prepayment.

[77] There was no dispute that Holdings paid the Prepayment to the CCA on 15 December 1994. However, the fact of payment by Holdings cannot be and is not determinative of the question whether Star City incurred the Prepayment. The question was whether the Prepayment was a liability which existed and to which Star City was definitively committed. It was: the Occupational Licence Agreement recorded Star City's liability. Moreover, Holdings, having paid the Prepayment, recorded an inter-company loan of \$120m between Holdings and Star City which arose by way of:

(1) SHCP's obligation to make the Prepayment under the Construction Lease; and

(2) Star City's obligations to make the Prepayment on behalf of SHCP under the Occupational Licence Agreement.

The source and terms of the 'finance' for the Prepayment are irrelevant. Many transactions are completed on the basis of a payment direct from a financier to a vendor. The fact that Holdings made the Prepayment does not detract from or alter the conclusion that Star City incurred the Prepayment.

[78] The Commissioner also submitted that at the time of the Prepayment, no enforceable obligation existed between Star City and SHCP with respect to the Prepayment. As noted earlier, that contention proceeds from what I hold to be the misconstruction of the terms of the Occupational Licence Agreement. On 15 December 1994, the date of payment of the Prepayment, SHCP was obliged to pay the Prepayment to the CCA under cl 2.1 and Sched 1 of the Construction Lease and Star City was obliged to "pay and be responsible to ensure payment of all rent, outgoings, insurance premiums and payments for services that may be imposed on [SHCP] under the terms of the Construction Lease": cl 5.2 of the Occupational Licence Agreement. Star City's obligation arose on 14 December 1994, the day before the Prepayment: see [68]-[70] above.

[79] The Occupational Licence Agreement recorded the agreement obliging Star City to pay the Prepayment. Star City was "definitively committed" to the outgoing, the Prepayment: Federal Commissioner of Taxation v James Flood Pty Ltd (1953) 88 CLR 492 at 506...

[80] Subject to the next issue, there was no dispute between the parties that, if the Prepayment was an outgoing incurred by Star City in gaining or producing assessable income under s 51(1) of the 1936 Act and / or s 8-1 of the 1997 Act, then a proportion of the Prepayment was allowable as a deduction from the assessable income of Star City for each year of income in the Primary Rental Period in accordance with s 82KZM of the 1936 Act: see [5] above.

(2) The “Capital / Revenue Issue”

[81] In relation to the "negative limb" of s 51(1) of the 1936 Act and / or s 8-1 of the 1997 Act, the Commissioner submitted that even if the Prepayment was an outgoing incurred by Star City in gaining or producing assessable income, the Prepayment was on capital, not revenue, account and therefore not deductible under s 51(1) of the 1936 Act and / or s 8-1 of the 1997 Act. This argument also fails.

[82] The classic test for resolving the distinction between capital and revenue is that stated by Dixon J in *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337 at 363:

"There are, I think, three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment."

See also *Citylink (High Court)* at [147] and *GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 124 at 137.

(a) The Character of the Advantage Sought

[83] An examination of the character of the advantage sought is assisted by asking two questions: (1) what was the Prepayment really paid for? and (2) is what it was really paid for, in truth and in substance, a capital asset?... The advantage must be identified and characterised. The answer to those questions is not assisted by an analysis of the contractual right or rights secured under the contract, as distinct from the activity itself... As Dixon J said in *Hallstroms*, the answer:

"...depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process."

[84] Payments, even recurrent payments, that are the consideration for acquisition of ownership of a capital asset are usually characterised as an affair of capital. However, rent is not an instalment payment in respect of the purchase of a capital asset: each amount of rent is for the use of a capital asset for a particular defined period and is therefore, and for that reason, on revenue account.

[86] This distinction between purchase and use explains why interest and rental outgoings are on revenue account, even though each can be said, in one sense, to secure capital advantages, namely a principal sum for use in a business and possession of a structural asset such as land or a building: see *Cape Flattery Silica Mines Pty Ltd v FCT* (1997) 36 ATR 360 at 373.

[87] The Commissioner contended, however, that the Prepayment:

- (1) formed part of the consideration for the grant of the Casino Licence;
- (2) was made for the purpose of obtaining a lease of the Permanent Casino Site; and / or
- (3) was made in order to obtain the exclusivity of the casino licence in the first 12 years of operation, and was therefore an affair of capital.

[88] The Commissioner put those contentions on two bases: first, by reference to the transaction documents and secondly, by reference to other "contemporaneous" documents. The contentions are rejected on both bases.

Transaction Documents

[89] The Prepayment payable and paid under the Leases formed just one element of the business transaction...

[90] With respect to the first point, it is true the Prepayment was a one-off payment which was refundable only in very limited circumstances. But SHCP took the lease for 99 years and Star City was committed to the operation of the Casino at those Premises for the duration of its licence. Moreover, both cl 2.1(c) of the Construction Lease and cl 2.1(b) of the Freehold Lease provided that the Prepayment was refundable if the Parties mutually agreed to terminate the Lease. Thus the refundable nature of the Prepayment (even though limited) was tied to the Lease, not the Licence.

[94] The fact that the rent was paid by way of a lump sum does not detract from the fact that rent was paid to secure the use of the Premises for the period to which the payment related...

- [95] In short, the Prepayment did not secure any enduring asset: neither Star City nor any other entity acquired the land or the buildings which comprised the Premises: see *South Australian Battery Makers* at 655 (per Gibbs ACJ).
- [96] Instead, the payment secured the use of the Premises for the purposes of generating income from the casino. There was no allegation and could be no allegation that the Prepayment of rent was a sham... Although labels can never be determinative ... the Prepayment was in this case, as it was described – a prepayment of rent.
- [98] Finally, the fact that the Prepayment was made at the same time and to the same entity as the ‘Specified Payment Amount’ does not support the contention that the Prepayment was in the nature of a capital payment. The two amounts were both paid on 15 December 1994. That is not surprising. The transaction settled on that day. The two amounts were paid to the same entity. That also is not surprising. The NSW Government was the ultimate entity granting the Casino Licence (through the CCA) and the landlord of the Premises.
- [99] The Occupational Licence Agreement and the Leases, and if necessary the other Transaction Documents, read as a whole, do not suggest that the Prepayment was in the nature of a capital payment...

Surrounding Circumstances or Background – The “Bid Process”

- [100] In support of the contention that the Prepayment was in the nature of a capital payment, the Commissioner also relied on the "surrounding circumstances" or "background", arguing that the legal agreement pursuant to which the Prepayment was made did not reflect the whole arrangement between the parties...
- [101] The "surrounding circumstances" or "background" relied on by the Commissioner is irrelevant to the proper characterisation of the Prepayment because the advantage sought by the Prepayment is capable of identification and characterisation by reference to the Leases and the Occupational Licence Agreement and, if necessary, the Transaction Documents as a whole: *City Link* (Federal Court) at [44]-[45], approved by *Citylink* (High Court) at [120], [151] and [154].
- [102] Moreover, even if the "surrounding circumstances" or "background" were examined, they do not alter the identification of, or the character of, the advantage sought by the Prepayment...
- [103] In further support of the submission that Prepayment was an affair of capital, the Commissioner also relied on the May 1993 Invitation Document (see Annexure at [1]-[4]), which referred to the possibility of "an up-front capitalised lease prepayment." (Emphasis added.) However, the content of this document does not assist the Commissioner. First, the use of the label "capitalised" is irrelevant; it is the substance of the transaction which governs, not the form.
- [104] Second, from the outset, not only was the need for a lease recognised, but the CCA stipulated that rent was a matter of negotiation to be determined on a "fair" market rent. The possibility of "an up-front capitalised lease payment" was expressly referred to together with the requirement for a net present value ("NPV") calculation to ensure that the rental was a "fair" market rental. That was what ultimately occurred. Moreover, as the Brief expressly provided, what each of the payments was for was identified separately: see Annexure at [6]-[7].
- [105] The Commissioner also submitted that the 22 April 1994 Final Offer (see Annexure at [47]-[49]), which expressed the two payments - the ‘Specified Payment Amount’ and the Prepayment – as forming part of the "Total Cash Offer," supported the view that the Prepayment was not a revenue outgoing but a capital outgoing paid to acquire the Casino Licence. In response, two points should be noted. First, it is not surprising that the Final Offer was expressed in those terms. It was what the CCA required each bidder to do: see Annexure at [33]. Secondly, and no less importantly, the terms of the Final Offer, like the First Offer, provided for the two payments. In each offer, there was the lump sum payment on the grant of the casino licence...
- [106] In support of the contention that the Prepayment was of a capital nature, the Commissioner next sought to rely upon the reference in the 6 May 1994 (see Annexure at [57]) announcement of the Star City Consortium as the preferred bidder for the casino licence. In particular, the Commissioner noted that the total financial offer of \$376 million (which includes the \$256 million Specified Payment Amount and \$120 million Prepayment) was referred to as being for "the casino licence," which it was argued would tend to support the view that the Prepayment was not a revenue outgoing (rent) but was a capital outgoing (ie, part of the consideration for the acquisition of the casino licence). The irrelevancy of the document to the question of characterisation is self evident – it was a press announcement by the CCA designed to inform the general

public of which consortium had been successful and to trumpet the total amount of money expected to follow into the state's coffers. An announcement for public relations purposes does not and cannot alter the legal characterisation of the Prepayment.

[107] The Commissioner next sought to draw support for his characterisation of the Prepayment from the May 1994 government analysis of the bids and Star City's 3 May 1994 letter in response (see Annexure at [52]-[56]). At no time did the Star City Consortium offer to pay, or was it obliged to pay, the Casino Duty - Base Amount...

[108] Given those circumstances, the Commissioner can draw no support for his contention that the Prepayment was an affair of capital from the fact that the amendments required were those outlined...

(b) The Manner in which the Advantage is to be used

[114] Having identified the nature of the advantage, I turn now to parts two and three of Dixon J's three-part capital versus revenue test. The manner in which Star City uses the advantage is occupation of the Premises whilst engaging in the activities which are directed to obtaining the ordinary income of Star City throughout the 'Primary Rental Period'. For each year of that period, the advantage is consumed within Star City's business, so that after that year, no part of that advantage is retained.

(c) The means adopted to obtain the Advantage

[115] Finally, the means adopted to obtain the advantage was both a recurrent outgoing and a lump sum payment. This is not a case of a single lump sum spread over a period of years: rather it is a case where an annual sum is incurred, the payments totalled and then discounted for payment up front. As the CCA stipulated, the amount was a "fair" market rent supported by independent advice: see [93] above.

(d) Consultation

[116] Neither the character of the advantage sought by the Prepayment, the manner in which that advantage was used or the means adopted to obtain that advantage support the Commissioner's contention that the Prepayment had more of the characteristics of a capital payment than of rent. The Prepayment was on revenue account, not capital account, and was deductible under s 51(1) of the 1936 Act and / or s 8-1 of the 1997 Act and s 82KZM of the 1936 Act.

(3) Part IVA Issue

[117] The Commissioner contends that if the Prepayment is deductible under s 51(1) of the 1936 Act (or s 8-1 of the 1997 Act) and s 82KZM of the 1936 Act, those deductions should be denied under Part IVA of the 1936 Act. That contention is also rejected.

(a) Statutory Framework

[118] For Part IVA to apply, it is necessary to identify the tax benefit that has been obtained, or would but for s 177F(1) be obtained, by Star City in connection with a scheme to which Part IVA applies.

[128] Although Star City conceded that each scheme identified by the Commissioner was capable of being a scheme for the purposes of Part IVA, I do not consider either 'scheme' identified by the Commissioner is a scheme within the meaning of s 177A. There is no evidence of an express agreement or arrangement. There is no basis, whether as alleged or at all, to draw an inference as to the existence of the scheme. Each 'scheme' identified by the Commissioner is no more than an incomplete and inaccurate historical record of some of the events which occurred in a period spanning some 9 months; it is at best, a series of disjointed or unconnected steps.

[131] For the Commissioner's identification of each 'scheme' to succeed, the facts must permit the inference to be drawn that there existed and remained throughout the period identified by the Commissioner a scheme to obtain a tax benefit (a proportion of the Prepayment claimed as a deduction in each year of income in accordance with the formula set out in s 82KZM of the 1936 Act) notwithstanding the objective facts and matters set out above. No such inference is open to be drawn.

[133] The question is whether the terms of Part IVA apply to the facts and circumstances of the present case, a case where the 'business transaction' was the Star City Consortium bidding for and being awarded the Casino Licence. From the outset, it comprised a number of necessary and essential components including the Casino Licence, the Construction Lease and the Freehold Lease. Components made necessary and essential by, inter alia, the Casino Control Act and by the fact that the Premises were vested in the Crown. As I have said earlier, for the State parties (the CCA and the Treasury), commercial considerations required payment of as

much money as could be obtained as soon as it could be obtained. For the Consortium, the goal was to be the successful bidder. But there are two considerations that remained consistent from the outset: the Casino would operate on leased land owned by the State and rent would be paid for use of those Premises. To suggest that there was a scheme (either the Wide or Narrow Scheme) is to ignore the objective facts. Neither of the schemes identified by the Commissioner existed as a matter of fact. Moreover, neither of the schemes existed from the outset.

(c) Tax Benefit

- [134] In addition, even if one or more of the schemes was capable of being a scheme for the purposes of Part IVA, Star City did not obtain a tax benefit in relation to it...
- [135] The process of identifying a 'tax benefit' is prescribed by s 177C...
- [144] ... The question posed by s 177C is what might reasonably be expected to have happened if the scheme had not been entered into or carried out?
- [145] The 'only' alternative relied upon by the Commissioner is not something which in the words of s 177C "might reasonably be expected to have happened if the scheme had not been entered into or carried out". Three alternative methods for payment of the rent were suggested by the Star City Consortium. The CCA exercised the right it retained from the outset to elect to receive the payment of rent upfront. The 'only' alternative relied upon by the Commissioner was not one of the alternative methods proposed by the Star City Consortium. Moreover, it was not an alternative that the CCA required. The objective facts do not support the contention that it might reasonably be expected that if the scheme had not been entered into or carried out, Star City would have paid the Casino Duty - Base Amount. The fact that the competing bidder offered to pay the Casino Duty - Base Amount is interesting but irrelevant to the question, determined objectively, what might reasonably be expected if the scheme had not been entered into or carried out.
- [146] The alternative postulate must be reasonable. It must be demonstrated that it was reasonable to expect not only that Star City could have structured the alternative in the manner contended but also that the CCA would have accepted that alternative. Only if both conditions are satisfied, might it reasonably be expected that that other arrangement might have happened. In the present case, neither condition is satisfied. The Star City Consortium did not offer it and, no less importantly, the CCA did not seek it or choose it. Thus, there was no relevant tax benefit under either scheme.

(d) Section 177D(b) factors

- [147] In light of the conclusions about the scheme and the alleged tax benefit, it is unnecessary to consider the s 177D(b) factors separately. As will appear from what I have said in relation to the scheme and the alleged tax benefit, the provisions of Pt IVA are not engaged in this case. The commercial arrangements ultimately made between the Star City Consortium and the NSW State authorities were the result of prolonged and detailed bargaining. Looking back it might be possible to say that the negotiations might have followed a path different from the path that they did. But that does not result in the application of Pt IVA.

Editor

This judgment by Gordon J is well organised, well reasoned and easily read. It even includes a table of contents. Gordon J's organisation and use of readily available word processing features to assist readability is welcome and contrasts well with the decision of the Tribunal in the 3-D case (see below). While one might quibble with the numbering style used with the judgment what Gordon J has produced should become the benchmark for future decisions and not just those lengthy decisions.

We need more well organised decisions. Maybe the judicial training colleges can help us to achieve that outcome.

(3) ** Director succeeds in defence against Commissioner's claim (Deputy C of T v Freudenstein)

Source Month 11-2007-35 ~ Part 3-2(a) - Deputy C of T v Freudenstein [2007] NSWCA 297 (23 October 2007). Spigelman CJ Mason P Giles JA

What was the issue?

Did the director have reasonable grounds to believe the company would make payments in accordance with the instalment agreement?

What was the outcome?

The Commissioner's application for leave to appeal was refused.

What were the facts?

Penta Productions Pty Ltd ("Penta") made an agreement under s 222ALA with the Commissioner under which he agreed to pay the Commissioner \$105,663.03 by the instalments of:

- ◆ \$38,899.75 on 23 December 2002;
- ◆ \$8,589.00 on 31 January 2003; and
- ◆ \$58,174.28 on 28 February 2003.

The first instalment was duly paid.

The remaining instalments were not, and the Commissioner brought proceedings to recover them on the basis that the Director was liable to pay them as a penalty pursuant to s 222AQA of the Act.

The Director successfully invoked the statutory defence in s 222AQD of the Act, which amongst other things by s 222AQD(5) required that he prove that at the time the agreement was made he "had reasonable grounds to expect, and did expect, that the company would comply with the agreement".

The Commissioner applied for leave to appeal from the verdict.

What the Commissioner entitled to leave to appeal?**What was the decision?**

[5] The principal proposed ground of appeal was that there was no evidence or insufficient evidence that the [Director] had reasonable grounds for the expectation. There was certainly evidence of reasonable grounds, and the ground came down to the submission that the evidence did not suffice to discharge the [Director]'s burden of proof. The [Commissioner] contended to the effect that the evidence did not rise above hope that revenue from future trading would enable payment, and that in order for the [Director] to discharge his burden of proof it was necessary for him to have shown as a starting-point Penta's financial position as at 25 November 2002, and then to have shown expected expenses as well as expected revenue, and thus to have established mathematical ability to make the payments required by the agreement.

(4) * Bodgie companies in the building industry (Trimcoll Pty Ltd v Deputy C of T)

Source [Month 11-2007-37 ~ Trimcoll Pty Ltd v Deputy C of T \[2007\] NSWCA 307 \(30 October 2007\)](#), Spigelman CJ Ipp JA Basten JA

What was the issue?

Was the taxpayer required to produce as witnesses persons who had made declarations relied upon by 'the taxpayer'?

What was the outcome?

The Court found that the Commissioner could not require the witnesses to attend, as the matter stood at present, essentially because the Commissioner's paper work was defective.

What were the facts?

Trimcoll Pty Ltd ("Trimcoll") operated in the building and construction industry but failed to deduct amounts as required under s 221YHDA of the ITAA 1936 totalling more than \$3.75 million.

The Commissioner brought proceedings seeking to recover the penalties incurred by Trimcoll. Trimcoll prepared affidavits, attaching invoices and payee declarations referring to certificates permitting payment without deductions to the businesses or companies to which payments were made ("deduction variation certificates").

On 23 May 2005, the Commissioner made a "request" under Part 4.6 of the Evidence Act 1995 (NSW) that Trimcoll call as a witness each of the persons responsible for providing an invoice or payee declaration that referred to a deduction variation certificate providing that the permissible rate of deduction was 0%.

What was the decision Spigelman CJ?

[1] I agree with Basten JA

What was the decision Ipp JA?

[2] I agree with Basten JA.

What was the decision Basten JA?

[3] The events which gave rise to this appeal occurred between 1 June 1994 and 30 September 1999. During that time, Trimcoll Pty Ltd (hereinafter “Trimcoll” or “the defendant”) operated in the building and construction industry. According to the Respondent, a Deputy Commissioner of Taxation (“the Commissioner”), Trimcoll made payments to subcontractors but failed to deduct amounts which the Commissioner contended it was required to deduct pursuant to s 221YHDA of the Income Tax Assessment Act 1936 (Cth), as then in force. As a result of those failures, it incurred penalties totalling more than \$3.75 million, which the Commissioner is seeking to recover by proceedings brought in the Common Law Division.

[5] As will be explained below, the Commissioner’s statement of claim in this matter was terse, to the point of being obscure. On their face, each of the payments made without deductions was made to a company or business which had supplied Trimcoll with an appropriate declaration, the effect of which was to permit payment in full of the sum payable under the contract, without a deduction under the Income Tax Assessment Act. The Commissioner’s allegation appears to have been, adopting a somewhat unhelpful label, that these were “bodgie companies”. By that the Commissioner meant the companies were not companies to which Trimcoll owed moneys under contracts involving the performance of work in the industry. Rather, she contended that the payments were due and payable to third parties who did not enjoy the benefit of a deduction variation certificate entitling them to receive payments without deduction of amounts on account of tax, but who nevertheless obtained the payments made by Trimcoll without deduction.

[15] Trimcoll admitted that it had made prescribed payments during the period in question but denied its failure to deduct amounts from those payments and denied that it was liable to pay penalties. It further asserted in its defence that “each of the payees to which it made prescribed payments had provided the defendant with a completed and signed Prescribed Payments System (PPS) Payee Declaration which varied the prescribed payment deduction to be made to NIL”.

[21] The Commissioner asserted that the companies or businesses which provided the relevant payee declarations to Trimcoll were not in fact those entitled to receive the prescribed payments, nor were they the real recipients of the prescribed payments. If they did in fact receive the prescribed payments, they were merely agents or conduits for third parties, who were contractually entitled to receive the moneys for work performed. Who those third parties were, the Commissioner was unable to say. However, the Commissioner contended that she was entitled to have those persons responsible for creating the certificates called by Trimcoll as witnesses...

Application of principles

[49] Because the case was pleaded under s 221YHDA, the Commissioner must establish that, in relation to each payment, there was no payee declaration which had been made to Trimcoll and was in force when the payment was made...

Conclusions

[69] For reasons noted above, the state of the pleadings in the present matter is unsatisfactory. Trimcoll contended, as it was entitled to do, that if in fact the Commissioner’s case were based upon an allegation of fraud, that allegation should have been expressly pleaded. His Honour’s view that the parties were fully aware of the nature of the Commissioner’s case and that there was no need for further pleading appears to have been based at least in part on the view that relevant averments were made in the statement of claim, so that the onus of demonstrating the existence of genuine contractual arrangements, involving work in the industry, fell upon Trimcoll.

[70] Once that conclusion in relation to onus is rejected, there is no sound reason for rejecting Trimcoll’s claim that the Commissioner bore the onus of establishing the preconditions to the obligation to pay the respective penalties which matters should be appropriately pleaded. If that course had been taken, the evidential onus might have shifted, with consequences for the exercise of the discretion under s 169 of the Evidence Act.

(5) [LISTED ONLY] Voidable preferences (Cooper as Official Liquidator of Line 1 Pty Ltd v C of T)

Source Month 11-2007-30 ~ Cooper as Official Liquidator of Line 1 Pty Ltd (In Liq) (ACN 094 650 361) v C of T [2007] FCA 1626 (24 October 2007), Finn J

What was the issue?

Was the liquidator entitled to have the Commissioner discharge to the company the payments of tax made by the company and alleged by the liquidator to be voidable preferences?

What was the outcome?

The parties, by consent, sought declarations and orders in respect of what were claimed to be voidable transactions within the meaning of s 588FE of the Corporations Act 2001 (Cth).

The judge was satisfied having regard to materials filed, and in particular to the Official Liquidator's report on the insolvency of the company, that the company was insolvent from 1 January 2005 until the company was wound up in January 2006.

THE COURT DECLARED BY CONSENT THAT:

1. The uncommercial transaction payments made by the company to the Commissioner between the period 8 February 2005 to 9 June 2005 were voidable transactions within the meaning of section 588FE of the Corporations Act 2001.
2. The unfair preference payments made by the company to the Commissioner between the period 27 April 2005 and 15 June 2005 were voidable transactions within the meaning of s 588FE of the Corporations Act 2001.

THE COURT ORDERED BY CONSENT THAT:

1. Pursuant to s 588FF of the Corporations Act 2001, the Commissioner pay to the Liquidator the sum of \$68,599.00, inclusive of prejudgment interest and costs.

(b) Tribunals**(1) *** Vacant land terms contract and the small business concessions (Karapanagiotidis and C of T)**

Source Month 11-2007-44 ~ Karapanagiotidis and C of T [2007] AATA 1961 (16 November 2007), Senior Member B.H. Pascoe

What was the issue?

What was the date of purchase of the property which was purchased under a contract of sale?

What amounts could be included in the cost base of the property?

What was the outcome?

The Tribunal found that the property was purchased on 25 November 1989 under a terms contract of sale where the actual transfer or conveyance was made on final settlement of that contract in November 1995.

Does the outcome affect your firm's current practices?

The outcome highlights the need to pay attention to the actual requirements of the legislation, requirements, which might not be readily apparent from a cursory read of a summary of the law such as that provided by summary publications. Each of the cost base provisions and the active assets tests are technical provisions.

What were the facts?

Mr and Mrs Karapanagiotidis jointly purchased a vacant block of land in Avondale Heights (the property) for \$125,000.

The property was sold under contract dated 3 May 2003 with settlement occurring on 3 August 2003 for \$340,000.

The applicants and their tax agent took the view that disposal was on the date of settlement and included a capital gain in each return for the year ended 30 June 2004 of \$7,900 calculated as follows:

Net proceeds of land 5 August 2003	323,564
Less	
Cost of land 1 November 1989	125,000
Interest paid 1990-2002	121,500
Rates	12,188
Legal Costs	1,094 259,782
Capital Gain	63,782
50% discount	31,891
Further 50% Roll over relief	15,945
Taxable gain of each taxpayer	7,900

What was the decision?

- [4] The date of purchase of the property was in issue as a consequence of s 110-25 of the Income Tax Assessment Act 1997 (the Act). This section sets out the five entitlements to be included in the cost base of an asset. Under sub section (2) the first element is the total money paid or payable to acquire the asset. Sub-section (3) includes as the second element the individual costs incurred in acquiring the asset or the costs that relate to a CGT event in relation to the asset. Sub section (4) provides

*The third element is the non-capital costs of ownership of the CGT asset you incurred (but only if you *acquired the asset after 20 August 1991). These costs include:*

- (a) *interest on money you borrowed to acquire the asset; and*
- (b) *costs of maintaining, repairing or insuring it; and*
- (c) *rates or land tax, if the asset is land; and*
- (d) *interest on money you borrowed to refinance the money you borrowed to acquire the asset; and*
- (e) *interest on money you borrowed to finance the capital expenditure you incurred to increase the asset's value.*

...

- [5] In the hearing, Mr Ahmed sought to argue that the date of acquisition was 25 November 1995 being the date on which funds were borrowed from the National Australia Bank to settle the outstanding balance owing on the purchase of the property... It would appear that this argument as to the date of acquisition arose only after the implications of section 110-25(4) were recognised. In correspondence with the [Commissioner] in relation to the objection, Mr Ahmed clearly stated that the date of acquisition was November 1989 and the land had been acquired on vendor finance with interest only payable. In their evidence, both Mr and Mrs Karapanagiotidis clearly recalled purchasing the property at auction on Saturday 25 November 1989. They paid a deposit and recalled visiting the vendor's office quarterly for the next number of years to pay instalments due. The balance of the purchase price was due in November 1995 and a loan of \$84,000 was arranged from the National Australia Bank. While no copy of the actual contract of sale could be located, the [Commissioner] obtained and tendered a copy of a Notice of Disposition of an Interest in Land referring to the particular property, lodged by the vendor and showing the sale price of \$125,000, a deposit of \$18,750 and the date of transfer as 25 November 1989. The Tribunal is left in no doubt that the property was purchased on 25 November 1989 under a terms contract of sale where the actual transfer or conveyance was made on final settlement of that contract in November 1995.
- [6] Section 109-5 of the Act sets out the date of acquisition of a CGT asset within that section Event Number A1 is when the disposal contract is entered into. Event Number B1 covers the circumstances when an agreement is entered into to obtain the use and enjoyment of a CGT asset and states that the date of acquisition is the time when you first obtain the use and enjoyment of the asset. In the circumstances of this case, it seems clear that there was a disposal of the property by the vendor and the disposal contract was entered into on 25 November 1989. Even if it could be said that such a term contract was not a disposal contract, which I am unable to accept, it is clear that use and enjoyment was obtained on that date. Consequently section 110-25(4)

results in an inability to include interest on money borrowed to acquire the property rates or maintenance costs in the cost base of the property acquired prior to 20 August 1991.

- [7] Prior to the hearing, the [Commissioner] was provided with details and acceptable substantiation of the relevant expenditure under section 110-25(2), (3) and (5). This resulted in a recalculation of the capital profit as:

Proceeds of Sale \$340,000
 Cost Base
 Purchase Price \$125,000
 Incidental costs of purchase
 Stamp duty \$3,700
 Registration and other costs \$757
 Conveyance Fees \$450
 Incidental costs of sale
 Commission \$15,697
 Conveyance/legal cost \$736
 Capital costs to increase value \$485 \$146,825
 Capital Gain \$193,175

Subject to the claim for relief under Division 152 of the Act, this calculation results in an assessable capital gain of \$96,587 after the 50 per cent discount under Division 115 and an assessable capital gain to each of the joint owners of \$48,293. It is noted that Mr Ahmed sought to include in the cost base his fee of \$3,500 apparently related to this dispute. On what basis this was sought is unclear but it is clear that it cannot be so included.

- [8] The evidence of Mr and Mrs Karapanagiotidis was that they had no clear plans for the use of the property at the date of purchase. The property was near to where they lived and they considered the purchase to be a good investment. Prior to sale in 2003 the land remained vacant. They said that not long before the sale, they put two storage containers on the land for the purpose of storing archived documents and records from the company which they owned and managed. They had formed the company, Alex Taxis & Broker Pty Ltd on 13 April 1994. The company operates a business of dealing in hire cars and licenses. It was said that by 2003, the company was in need of additional funds to finance the business. This led them to sell the land and pay the net proceeds into the company...
- [10] Division 152 of the Act provides various concessions against capital gains under the general heading of Small business relief... the significant question is whether the property was an active asset. An active asset is defined in section 152-40 as an asset which is used or held ready for use in the course of carrying on a business by the owners, their small business CGT affiliate or an entity connected with them. Here the clear evidence was that the property was left as vacant land during the whole of the period of ownership by Mr and Mrs Karapanagiotidis. There was no evidence of those individuals carrying on business during that period. A business was carried on by the company which they owned and controlled but I cannot accept that the allowance of passively storing old records in two containers placed on the property can be regarded as using the land in the course of carrying on a business. The relevant relief within Division 152 cannot apply. The property was not held for 15 years for the purposes of sub-division 152-B. The sale proceeds were not used in connection with the applicants' retirement for the purposes of sub-division 152-D. It is clear, also, that no replacement asset was acquired for the purposes of sub-division 152-E. In simple terms, Mr and Mrs Karapanagiotidis sold a passive investment in property and used the proceeds to provide additional working capital in a company which they owned. On what basis this was provided is unclear but what is clear is that the small business relief provision of Division 152 of the Act has no application.
- [11] The final issue was the imposition of tax shortfall penalties of 25 per cent of the tax short fall pursuant to Division 284 of Schedule 1 to the Taxation Administration Act 1953 for failure of the applicant or their tax agent to take reasonable care... While it is accepted that an amount was included in each return in 2004, it cannot be accepted that reasonable care was adopted by the applicants' tax agent. If only the timing was wrong in adopting the settlement date rather than the contract date, Mr Ahmed may have had an acceptable

argument. However, the calculation of the gain sought to deduct interest and rates as part of the cost base notwithstanding the initial acceptance of the acquisition date as being prior to August 1991. In addition the amount shown as interest of \$121,500 was clearly well in excess of the actual interest paid and appears more likely to have been total payment to the lender including payment on account of principal. Rates were shown as part of the cost base as 14 year at \$870.54 per annum notwithstanding that, at the hearing, it was denied that rates were paid by the applicants in the first six years from 1989. This \$870.54 was based on one rate notice of October 1990 addressed to Mr and Mrs Karapanagiotidis. A further 50 per cent reduction was claimed as roll over capital gain with no detail or justification provided. In all of these circumstances, I am satisfied that there was a failure to take reasonable care to comply with a taxation law so attracting a penalty of 25 per cent. I am unable to see any justification for remission of this penalty under section 292-20.

Editor:

While the decision appears correct the member's statement, "I cannot accept that the allowance of passively storing old records in two containers placed on the property can be regarded as using the land in the course of carrying on a business" is a dangerous misinterpretation of the requirements of the active asset provisions at that time. The land was, on the evidence recounted in the decision, used or held ready for use by the company in the carrying on of a business. The preferable analysis would have been that the land did not pass the 50% use rule of the "then" active asset test.

(2) **** What a mess – the bookkeeper knew him only as Tony? (3-D Scaffolding & Anor and C of T)**

[*Source Month 11-2007-31 ~ Part 1-2\(b\) - 3-D Scaffolding Pty Ltd and Anor and C of T \[2007\] AATA 1884 \(19 October 2007\), Mr Julian Block, Deputy President*](#)

What was the issue?

Were payments made to MSH for the rental of scaffolding:

- ◆ payments made under a lease such that they were deductible?
- ◆ bogus payments really made for the benefit of the director?

A related issue was whether the alleged recipient of the payments actually exist?

What was the outcome?

The Tribunal disallowed the deductions and found that a deemed dividend had arisen.

Does the outcome affect your firm's current practices?

If the case highlights anything it is the danger for clients who do business without complying with normal commercial arrangements. They will be substantial risk in an audit.

What were the facts?

The Commissioner conducted an audit in relation to 3D and issued amended assessments in respect of the years of income ended 30 June 1998 to 2000 on 9 October 2003 disallowing certain deductions claimed by the Company of which the major part consisted of payments to an allegedly fictitious entity Modular Scaffold Hire Pty Ltd ("MSH").

In the 2001 year 3D was non taxable.

In relation to the 1998 year the original assessment for that year had issued on 9 March 1999.

In order to amend the 1998 assessment the Commissioner formed the opinion that the avoidance of tax was due to fraud or evasion.

The Tribunal made findings of evidence as follows:

- ◆ 3-D was controlled by James Docherty ("Docherty") who was its only director;
- ◆ Docherty and another brother, Charlie, were the shareholders during the relevant years;
- ◆ Prior to the relevant years, 3-D engaged primarily, but not exclusively, in the supply of labour in the building industry, although it did also supply on hire some scaffolding equipment owned by it;

- ◆ From and after the relevant years, it supplied in addition and on hire scaffolding equipment, and which, so the Applicants contend, was hired by 3-D from Mr Tony Borg, to whom payments were made on a regular basis and always in cash;
- ◆ Docherty, Mr Peter Docherty (another brother referred to as “Peter”), his sister Orel, and Montgomery, who during the relevant years, lived (together with her daughter) in Docherty’s home, although there was not, according to their evidence, a de facto relationship between Docherty and Montgomery, gave oral evidence on behalf of the taxpayers,.
- ◆ Charlie Docherty, who during the relevant years was a co-shareholder with Docherty in 3-D, but not a director, did not give oral evidence.

What are the contentions?

The Commissioner concluded that the alleged payments to MSH were in reality payments to Docherty and accordingly assessed him in respect of the years ended 30 June 1998, 1999 and 2000 under Division 7A.

What was the decision?

- [10] Oral evidence was not given by Borg, who during the course of the proceedings took on an almost mythical significance. Docherty’s evidence was that he does not know where Borg is, but at the same time he made almost no attempt to find him. Such attempts as he did make were, according to his own evidence, perfunctory. The position as regards Borg is complicated further by the contradictory evidence as to the legal relationship between MSH or Borg, on the one hand, and (possibly) 3-D or (equally possibly) a trust referable to Docherty or Docherty’s family (the “Trust”), on the other. That legal relationship, while not reduced to writing, was usually described as one of lease and in terms of which MSH or Borg leased scaffolding equipment to 3-D (or perhaps the Trust), and in respect of which the arrangements as to consideration were decidedly unusual. Although the contract, when it was originally entered into, was allegedly one between MSH as lessor and 3-D as lessee, MSH proved (as I have indicated) never to have existed, and I refer in these reasons to Borg as the alleged lessor simply because the evidence for the Applicants was that “rental” was paid to him. To refer on a continuous basis to MSH and Borg in the alternative would be unnecessarily repetitive. (This is so also in relation to 3-D and the Trust). The Applicants did not seek to allege that MSH did in fact exist, or had ever existed. The word “rental” appears in inverted commas because the evidence strongly suggests that the payments in question were not in respect of rental.
- [11] As to whether the relationship was in fact aptly described as a lease is open to considerable doubt. The evidence by Docherty was that the contract in question was entered into on the basis that after “rental” had been paid for a specified period (and the evidence as to the precise period was unclear), the equipment in question would belong to 3-D. If this is so, the contract in question would have been more aptly described as a hire purchase contract and so that deductions, if allowable, would have been restricted to the interest component and thus excluding (in relation to each payment) the capital component. Docherty’s evidence was that the contract with 3-D was entered into on the basis that after “rental” had been paid for a specified period (and the evidence as to the precise period was unclear), the equipment in question would belong to 3-D. If this is so, the contract in question would have been more aptly described as a hire purchase contract and so that deductions, if allowable, would have been restricted to the interest component and thus excluding (in relation to each payment) the capital component. Docherty’s evidence was also that as the date for the commencement of the Goods and Services Tax (“GST”) drew nearer, Borg was anxious to avoid any involvement with GST, and was thus prepared to enter into an arrangement whereby certain capital payments amounting in aggregate to \$75,000 were made by way of “commutation” of any further “rental” obligations.
- [20] Borg did not apparently take any steps to protect the (valuable) property he was making available to 3-D. This is so, notwithstanding evidence before the Tribunal as to the fact that theft in the industry is rife. See in particular appendix C to Jugmans’ report, which is at annexure A to Exhibit R4; see also paragraph 21 of Exhibit R6.
- [21] That Borg should act in this unbusinesslike fashion is all the more surprising in light of the fact that he refused to take cheques in respect of rental, and insisted on cash. His attitude was, according to Docherty, that there were “a few unscrupulous people in the industry” (TS 52). However, Borg did not seek any form of security in respect of these valuable assets.
- [22] According to Exhibit A2 (paragraphs 15 to 16), 3-D was not able to buy its own scaffolding; (see also TS 85-86). The duration of this arrangement was apparently only two and a half years, since in December 2000 (and

as to whether this meant the beginning or the end of December 2000 was never clarified) 3-D (or alternatively the Trust) would own the equipment outright. Assuming payments of \$12,000 per week, the aggregate amount paid would have been somewhat less than \$1,500,000. Payments in some weeks might be, and in fact were, in excess of \$12,000. But a transaction of this nature with a total stranger (for so Borg was), on so indeterminate a basis, is inconceivable.

- [25] Not only was there no written agreement or schedule of equipment, but in addition, there was also no evidence of inspection prior to purchase, or of warranties as to quality, especially given that the equipment was second-hand. None of 3-D's staff inspected the equipment before delivery. Docherty said that Borg delivered one or two truck-loads for "testing" purposes. But why did Docherty not inspect all of the equipment? Peter, in Exhibit A10, said that there was always concern as to quality, because a failure of quality could result in accidents and substantial liabilities in consequence. Docherty said, at paragraph 16 of Exhibit A2, that he formed the view, based on a discussion with Borg, that the scaffolding equipment was worth more than \$1,000,000. But that he formed this view without any inspection of the equipment is itself inconceivable. It must be remembered that Borg and Docherty were not, prior to this transaction, acquainted with each other; the transaction arose from a casual meeting of Borg by Peter (not Docherty) in a pub.
- [33] By the time of the hearing, Orel was able to be more precise. She said that she did not ever see Borg receive any payments, but did see him with Peter in the factory. This was so despite the number of occasions on which he attended at 3-D's premises, and despite the fact that he was 3-D's largest payee. And her description of Borg differed from that given by Montgomery. Montgomery described Borg as being "about 5'7" ... average build, dark curly hair ... [aged] 55/60" while Orel said "medium build. A bit heavy – not too heavy. Darkish hair, about my age".
- [34] Orel was asked why she did not disclose Borg's name when ATO officers first attended at 3-D's premises in October 2002 and February 2003. Orel said that she knew him only as Tony. Orel was in fact 3-D's bookkeeper or accounts clerk, and Borg was 3-D's largest payee.
- [152] •On the evidence before me, and on the basis that there never was a transaction with Borg as alleged, it is clear that Docherty treated 3-D as his own entity. 3-D did exactly as he directed; as I have noted he was its only director. His own evidence as to the fact that it was his Trust which bought the equipment must mean that Docherty did not, in relation to 3-D, need or seek the consent of Charlie, given that it would appear that payments referable to the equipment were made by 3-D, even though it was the Trust which acquired the equipment. There was, as I have said, no evidence whatsoever as to the Trust, and in particular as to the identity of its beneficiaries. Even if some of the cash which figured in this case found its way, somehow or other (perhaps through Docherty), to Charlie or, for that matter, Orel or Peter, they were all associates within section 109C of the Act.
- [153] Put succinctly, the Tribunal finds, as a matter of fact, that Borg did not exist and that Docherty and Borg are one and the same person. Substantial payments were channelled from 3-D to Docherty (for reasons of which the Tribunal is not aware), and this whole elaborate Borg structure was devised so as to ensure that there was an additional benefit in the form of tax deductions to 3-D. 3-D was, as I have said, controlled by Docherty who was its sole director, although he only owned half of its shares. In effect, Docherty treated 3-D as his own and took its money for his own use. I do not accept that it can be suggested that Docherty stole the money from 3-D. He was its controlling mind as its only director, and he plainly considered that he could do what he pleased in relation to 3-D. I do not consider, in other words, and to the extent that this aspect may be relevant (which is doubtful), that there is a relevant misfeasance aspect.
- [154] It is clear that Division 7A of the Act must apply. The [Commissioner] has prepared calculations which indicate that he has, on the figures before him, sought to ensure that the deemed dividends assessed do not exceed the amounts available, and there was no evidence of any kind before the Tribunal that would indicate that the [Commissioner]'s calculations were in any way incorrect.
- [155] Mr Quinn, on the last hearing day (1 June 2007), advised me that the penalty, notwithstanding indications as to a higher percentage in some of the documents before the Tribunal, was confined to 25 percent. The circumstances are such that a penalty of this size was, on the facts, entirely justified and I do not think it proper to disturb it.
- [156] The evidence before the Tribunal indicates that the entire Borg/MSH transaction was concocted, and that all of the siblings and Montgomery were involved in it. The evidence presented by the Applicants was, as I have demonstrated, unsatisfactory in the extreme, and in the case of the siblings and Montgomery not worthy of credit.

(3) ** Parliamentarian provides character evidence (Modini and Tax Agents' Board of Queensland)

Source Month 11-2007-40 ~ Modini and Tax Agents' Board of Queensland [2007] AATA 1921 (2 November 2007), Deputy President P E Hack SC

What was the issue?

Was Ms Modini, an applicant for registration as a tax agent a “fit and proper person” for registration?

What was the outcome?

The Tribunal found that:

- ◆ Ms Modini had completed the relevant hours of work in a five year period but had not completed relevant work;
- ◆ Ms Modini was not a fit and proper person

What were the facts?

Ms Modini applied unsuccessfully for registration as a tax agent.

In October 2006, Ms Modini wrote to the Board and advised that her relevant employment was as follows:

- ◆ 1 July 2001 to 24 November 2001 – Stuart Hunter & Associates
- ◆ 1 July 2002 to 4 January 2003 – Bachmann Robinson
- ◆ 7 May 2005 to 5 July 2005 – Swayne & Hutley.

In February 2007, Ms Modini wrote to the Board and advised that her employment was calculated as follows:

- ◆ Stuart Hunter & Associates : 4.75 months
- ◆ Bachmann Robinson : 6 months
- ◆ Swayne & Hutley : 1.5 months
- ◆ H&R Block: 0.5 months
- ◆ Other tax agent: 1.5 months

The Board declined to register her on the basis that Ms Modini did not meet the qualifications of relevant employment required by the ITA and the Income Tax Regulations 1936 (Cth.).

Ms Modini has a long history of dealings with the Board that were considered by the Tribunal to be relevant to the questions in issue.

What was the decision?

THE ISSUES TO BE DECIDED

[13] The issues to be decided are these:

- (a) does Ms Modini satisfy the requirement of relevant employment;
- (b) is Ms Modini otherwise a fit and proper person.

[17] The Board has a policy of requiring applicants to provide certified evidence of relevant employment in a document called a “Statement of Relevant Employment”. It relies upon the endorsement of that practice by Senior Member Lindsay in Case 5/2004[13]. In that case the Senior Member accepted a submission that,

“insistence upon certification by a registered tax agent of satisfactory completion of relevant employment is appropriate and reasonable”.

I agree. However the requirement of a Statement of Relevant Employment is one of convenience; it is not mandated by the legislation. Where, as here, an applicant has not obtained certification in the form required by the Board it seems to me that I am bound to consider the evidence in whatever form it is provided to determine whether the employment relied upon is sufficient and relevant.

Relevant employment – a quantitative assessment

- [19] It must be said that it is not easy to determine the precise number of hours that Ms Modini worked although, as I have said, the Board's benchmark of 1,680 hours is not an absolute.
- [31] I am satisfied that Ms Modini, in the period of five years prior to her most recent application, was engaged in the equivalent of 12 months of employment. Whether that amounted to relevant employment is the next question to be determined. In reaching this conclusion, I have treated the period of five years as concluding at the date of the application, the course adopted by Deputy President McMahon in *Re Egulian and Tax Agents' Board of New South Wales*[17]. There is a contrary line of authority, exemplified in the decision of Deputy President Forgie in *Re Webb and Tax Agents' Board of Queensland*[18]. Those cases treat the hearing date as the end of the period of five years. Were I to have adopted that latter approach, Ms Modini would have been considerably short of 12 months employment in the preceding five years.
- [35] Ms Modini's evidence demonstrates she has significant experience with the preparation of individual tax returns, and limited experience with the preparation of partnership, company, and trust returns. On her evidence, she lacks substantial involvement in the preparation or examination of income tax objections and could not be said to have given advice on income tax returns or objections except to a minor degree. I am not satisfied that she has had the substantial involvement in income tax matters required. Whilst Ms Modini gave evidence of other employment, e.g. at St Edmunds College and as a consultant, I would not regard that employment as an equivalent to the relevant employment required.
- [37] I am not satisfied on the evidence that Ms Modini has the necessary degree of competence required for registration as a tax agent. There is no question of an onus of proof in proceedings in the Tribunal and, in the discussion that follows, I do not suggest one is imposed upon Ms Modini or, for that matter, the Board. But the present is a case where the competence of Ms Modini is, and always has been, very much in issue. Notwithstanding the Board's[20] submission, it is neither necessary nor desirable for me to consider whether Ms Modini was incompetent. Nevertheless, I am required to be satisfied that she is competent.
- [38] There is a considerable body of material that brings Ms Modini's competence into question...
- [39] There are, no doubt, many cases where the absence of any question of competence permits the Board or the Tribunal to accept that an applicant was competent. This is not such a case. Ms Modini has been employed at a number of firms in the past few years. There is no evidence, using the word in its widest sense, from any employer attesting to the competency of Ms Modini to undertake the work of a tax agent. The totality of the evidence is from Mr Thompson, Ms Modini's local Member of Parliament. He expressed the opinion, in writing, that she was "well qualified to do the work [of a tax agent]"...

A FIT AND PROPER PERSON – OTHERWISE

- [41] In light of my earlier conclusion it is, strictly speaking, unnecessary for me to make findings on this aspect of the matter. However, I propose to deal briefly with the issue against the possibility that my earlier conclusion were to be affected by an error of law.
- [43] In considering the issue of a fit and proper person, it is unwise to attempt to define the matters that may legitimately be considered. Every case must depend upon its own circumstances...
- [44] The Board's case in relation to this issue was put in this way in the Board's final submissions:
"In this matter the applicant has continued a consistent pattern of offering personal, unreasoned and unfounded abuse to those who have differences with her in the work place i.e. members of the respondent and those tax agents who have questioned her competency even in circumstances where she admits that her work for those agents had to be redone."
- [45] The evidence amply supports that proposition. In the course of the hearing, Ms Modini engaged in an almost endless pattern of denigration of those whose views differed from hers. She spoke of being "less than impressed" by the standards of some sole practitioners for whom she had worked. Of one of her employers she said, "people were phoning there all the time complaining about [him]". Of another, she said, "personnel agents in Townsville avoid him". A third "should not have been registered". A former employee of the Board was, "running his own little secret society". Her contempt for tax agents whose qualifications she regarded as being less than hers was manifest throughout the hearing. Her written material referred, for example, to the Board "constantly passing applications from people with no professional qualifications and other incompetent people". She referred to the "gross incompetence" of two members of the Tribunal who had affirmed decisions refusing her earlier applications for registration.

- [46] It is not necessary for me to reach any conclusions about the subject matter of Ms Modini's complaints and I do not suggest, for a moment, that anyone, including members of the Tribunal, is, or should be, immune to criticism. However, whether Ms Modini is right or wrong in her views, her criticisms are irrational, unreasonable, and go far beyond the bounds of what might be regarded as being proper or appropriate. The notion of respectful disagreement is entirely foreign to Ms Modini. No criticism of her is warranted (in her view) and when made it is responded to in an abusive and hectoring manner. That pattern appears frequently in the material in the case.
- [47] Part of the task of a registered tax agent is to deal with officers of the Commissioner of Taxation, often in the context of a disagreement regarding the revenue consequences of a client's transactions or business. A tax agent is not expected to be deferential to officers, but the dealings between officers and tax agents need to be professional, civil, and rational. Ms Modini's evidence satisfies me she is not capable of conducting a professional and reasoned dialogue with an officer (or others) with whom she had a disagreement.

(4) * Bodgie companies in the building industry (Trimcoll Pty Ltd v Deputy C of T)

Source Month 11-2007-37 ~ Trimcoll Pty Ltd v Deputy C of T [2007] NSWCA 307 (30 October 2007), Spigelman CJ Ipp JA Basten JA

What was the issue?

Was the taxpayer required to produce as witnesses persons who had made declarations relied upon by 'the taxpayer'?

What was the outcome?

The Court found that the Commissioner could not require the witnesses to attend, as the matter stood at present, essentially because the Commissioner's paper work was defective.

What were the facts?

Trimcoll Pty Ltd ("Trimcoll") operated in the building and construction industry but failed to deduct amounts as required under s 221YHDA of the ITAA 1936 totalling more than \$3.75 million.

The Commissioner brought proceedings seeking to recover the penalties incurred by Trimcoll. Trimcoll prepared affidavits, attaching invoices and payee declarations referring to certificates permitting payment without deductions to the businesses or companies to which payments were made ("deduction variation certificates").

On 23 May 2005, the Commissioner made a "request" under Part 4.6 of the Evidence Act 1995 (NSW) that Trimcoll call as a witness each of the persons responsible for providing an invoice or payee declaration that referred to a deduction variation certificate providing that the permissible rate of deduction was 0%.

What was the decision Spigelman CJ?

[1] I agree with Basten JA

What was the decision Ipp JA?

[2] I agree with Basten JA.

What was the decision Basten JA?

[3] The events which gave rise to this appeal occurred between 1 June 1994 and 30 September 1999. During that time, Trimcoll Pty Ltd (hereinafter "Trimcoll" or "the defendant") operated in the building and construction industry. According to the Respondent, a Deputy Commissioner of Taxation ("the Commissioner"), Trimcoll made payments to subcontractors but failed to deduct amounts which the Commissioner contended it was required to deduct pursuant to s 221YHDA of the Income Tax Assessment Act 1936 (Cth), as then in force. As a result of those failures, it incurred penalties totalling more than \$3.75 million, which the Commissioner is seeking to recover by proceedings brought in the Common Law Division.

[5] As will be explained below, the Commissioner's statement of claim in this matter was terse, to the point of being obscure. On their face, each of the payments made without deductions was made to a company or business which had supplied Trimcoll with an appropriate declaration, the effect of which was to permit payment in full of the sum payable under the contract, without a deduction under the Income Tax Assessment

Act. The Commissioner's allegation appears to have been, adopting a somewhat unhelpful label, that these were "bodge companies". By that the Commissioner meant the companies were not companies to which Trimcoll owed moneys under contracts involving the performance of work in the industry. Rather, she contended that the payments were due and payable to third parties who did not enjoy the benefit of a deduction variation certificate entitling them to receive payments without deduction of amounts on account of tax, but who nevertheless obtained the payments made by Trimcoll without deduction.

[15] Trimcoll admitted that it had made prescribed payments during the period in question but denied its failure to deduct amounts from those payments and denied that it was liable to pay penalties. It further asserted in its defence that "each of the payees to which it made prescribed payments had provided the defendant with a completed and signed Prescribed Payments System (PPS) Payee Declaration which varied the prescribed payment deduction to be made to NIL".

[21] The Commissioner asserted that the companies or businesses which provided the relevant payee declarations to Trimcoll were not in fact those entitled to receive the prescribed payments, nor were they the real recipients of the prescribed payments. If they did in fact receive the prescribed payments, they were merely agents or conduits for third parties, who were contractually entitled to receive the moneys for work performed. Who those third parties were, the Commissioner was unable to say. However, the Commissioner contended that she was entitled to have those persons responsible for creating the certificates called by Trimcoll as witnesses...

Application of principles

[49] Because the case was pleaded under s 221YHDA, the Commissioner must establish that, in relation to each payment, there was no payee declaration which had been made to Trimcoll and was in force when the payment was made...

Conclusions

[69] For reasons noted above, the state of the pleadings in the present matter is unsatisfactory. Trimcoll contended, as it was entitled to do, that if in fact the Commissioner's case were based upon an allegation of fraud, that allegation should have been expressly pleaded. His Honour's view that the parties were fully aware of the nature of the Commissioner's case and that there was no need for further pleading appears to have been based at least in part on the view that relevant averments were made in the statement of claim, so that the onus of demonstrating the existence of genuine contractual arrangements, involving work in the industry, fell upon Trimcoll.

[70] Once that conclusion in relation to onus is rejected, there is no sound reason for rejecting Trimcoll's claim that the Commissioner bore the onus of establishing the preconditions to the obligation to pay the respective penalties which matters should be appropriately pleaded. If that course had been taken, the evidential onus might have shifted, with consequences for the exercise of the discretion under s 169 of the Evidence Act.

(5) * How late can an objection be lodged? (Francis and C of T)

Source [Month 11-2007-41 ~ Francis and C of T \[2007\] AATA 1927 \(6 November 2007\)](#). Ms Robin Hunt, Senior Member

What was the issue?

Was the taxpayer entitled to an extension of time to lodge an objection?

What was the outcome?

The Tribunal declined to extend the time for lodging an objection.

What were the facts?

The taxpayer sought an extension of time to lodge objection for several years of income. The taxpayer's assessments were made as follows:

Year of Income	Date of Assessment
89-90	7 Nov 91
90-91	14 Apr 92
91-92	6 Feb 95

92-93	6 Feb 95
93-94	11 Mar 96
94-95	11 Mar 96
95-96	14 Mar 97
96-97	11 Sep 98

What was the decision?**Issues**

- [2] The first issue before me was whether the applicant should be granted an extension of time to object to income tax assessments for the financial years 1998/1989, 1989/90 and 1990/1991.
- [3] As to the remaining years, the Commissioner allowed the applicant an extension of time and considered the grounds of objection to the assessments for 1991 to 1997 put by the applicant but concluded that he had not demonstrated that these assessments were excessive. I have therefore considered whether Mr Francis has discharged the onus of proof on respect to these years that the assessments were excessive.

1998/1989, 1989/90 and 1990/1991

- [5] ... At the time of the financial years for which Mr Francis seeks an opportunity to review the refusal decision for an extension of time to object to assessments for 1998/1989, 1989/90 and 1990/91, the Commissioner was able to consider applications for extension of time under the Income Tax Assessment Act 1936.
- [9] ... the objection for every year of income was well outside the time provided. Mr Francis's objection lodged in 2006, for the most recent year, 1996/1997, he made approximately 8 years after the issue of the assessment and all the others he made after an even longer interval. The Commissioner was unable to give the issue date for the 1988/1989 years as records held do not go back so far.
- [11] The Commissioner gave as the reason for the refusal to allow an extension for the years to 1991, was that Mr Francis had failed to meet the request to provide documentation to support his claims for the years 1988 to 1991. Because the Commissioner no longer had any records for the 1988/1989/1990/1991 income years, the reasons for decision explained that the Commissioner was unable to consider the request.
- [14] In the present case, the decision maker has acknowledged that Mr Francis had particular difficulties in lodging objections to the assessments within the usual time. However, Mr Francis, without records to support his contentions, has not been able to establish any evidence supporting his claims that his income should be reduced. In other words, the evidence of the merit of his claims for the 1998/1989, 1989/90 and 1990/91 years was negligible. I have reached the same conclusion as no further or better information is before me. I note that the Full Federal Court pointed out in *Federal Commissioner of Taxation v Brown* [1999] FCA 1198; 99 ATC 4852 that "... the AAT is not precluded from taking into account the apparent strength or weakness of taxpayer's case, when determining whether an extension of time should be granted, ..."
- [16] The Commissioner has pointed out that he would be prejudiced by the re-opening of assessments after such a delay and in the absence of any records. I have already noted the merits of the objection are slim, there being no records in existence concerning the years of income disputed. To prolong this matter any further would prejudice the Commissioner and the general public and produces no unfairness to the applicant as he has given evidence he has no records. In my view, it would not be proper to grant an extension of time in these circumstances.

1991/1992 to 1996/1997 – disputed income

- [18] Despite the delay in making objection, the decision maker allowed Mr Francis's extension of time application for the years of income from 1991/1992 to 1996/1997...
- [19] Mr Francis did not provide records to the Commissioner to substantiate his claims that he did not earn income declared in his returns for the disputed periods. He sought to remove all income declared apart from that received from an employer. Mr Francis explained his delay in attending to the correction of his income tax returns as due to a series of personal and family problems...
- [20] It is not sufficient for the taxpayer to cast doubt on the correctness of income tax assessments...

- [22] Mr Francis gave evidence during the Tribunal hearing that he worked full time for an employer for about 17½ years, from 1975 to 1992. He agreed with the Commissioner's assessments of his income from this source. In later years, while still employed, Mr Francis said he set up a cleaning business and used to work at night for the business. He and his wife formed a company, M A Francis Pty Ltd, which owned the cleaning business. This company also owned a fruit shop which it bought in 1996 for \$170,000. Mr Francis gave further evidence that he obtained the money for the shop through a bank loan secured over the house in which he and his wife lived. Ultimately, both the family businesses failed. Mr Francis gave evidence that he sold the shop for \$65,000, losing \$106,000 of the price he had paid.
- [23] As the purchase price for the shop was raised by way of loan over the house, Mr Francis said that the money attributed in his income tax returns to director's fees, should have been treated as repayments of a loan. Instead, the income tax returns lodged on his behalf showed these amounts as director's fees and Mr Francis admitted that he had signed the returns for the years of income under dispute and had not queried the content of the returns at the time. He gave further evidence that he had taken no action against the accountant who prepared the returns.
- [30] Without any supporting records, it is not possible for me to reach a determination that favours Mr Francis. Not only do I have this difficulty, but I am bound to observe the onus that section 14ZZK of the Taxation Administration Act 1953 puts on the taxpayer. This requires Mr Francis to show that the taxation decision concerned should not have been made or should have been made differently. Mr Francis has not demonstrated either of these propositions.

Conclusion

- [35] I find that Mr Francis should not be granted an extension of time for lodgement an objection to assessments for the years ended 30 June 1989, 1990 and 1991.
- [36] Mr Francis also has failed to discharge the onus of proof of showing that the disputed assessments for the years 1991/1992 to 1996/1997 are excessive. This means he has not established grounds that warrant the removal from assessable income of the allowances, earnings, tips, director's fees, rental income and the like declared but later the subject of his objection to assessments for the 1992, 1993, 1994, 1995, 1996 and 1997 income years.
- [37] I therefore find the objection decision of 11 December 2006 should be affirmed. This means Mr Francis's review has been unsuccessful.

(6) [LISTED ONLY] Banalasta Natural Oil Joint Venture Project No. 1 (Petersen and Anor and Deputy C of T)

[Source Month 11-2007-32 ~ Petersen and Anor and Deputy C of T \[2007\] AATA 1896 \(26 October 2007\)](#). *Mr A Sweidan, Senior Member*

What was the issue?

Were amounts paid for joint venture "participation interests" deductible?

(7) [LISTED ONLY] Northern Rivers Tea Tree Oil Project (Dorn and C of T)

[Source Month 11-2007-33 ~ Dorn and C of T \[2007\] AATA 1919 \(31 October 2007\)](#). *Mr B H Pascoe*

What was the issue?

Were the deductions on the scheme allowable?

What was the outcome?

The tribunal allowed deductions on a cash outlays basis.

1.3 Tax Office Interpretations

(a) Taxation Rulings & Draft Rulings

(1) Income Tax Ruling

IT 251W - Notice of Withdrawal	Deduction for VHF radio-telephone expenditure
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(2) Income Tax

SPR 2007/1	Employment Termination Payments (12 month rule)
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(b) Determinations & Draft Determinations

(1) ** TD 2007/30 ~ Goods own use determination

[Source Month 11-2007-54 ~ TD 2007/30](#)

What issue does the determination consider?

What amounts will the Commissioner accept as estimates of goods taken from trading stock for private use by taxpayers in ##

What was the background to the determination?

The basis for determining values of goods taken from trading stock is derived from the latest Household Expenditure Survey (HES) results issued by the Australian Bureau of Statistics (ABS) adjusted for Consumer Price Index (CPI) movements for each category of items.

Using the HES data, consideration has been given to the fine level expenditure items and which items would be present in the trading stock of the Schedule of Industries. The stock items are generally limited to the HES 'food and non-alcoholic beverage' broad category, except for Licensed Restaurants/Cafes where 'alcoholic beverage' items are included, and Caterer where some 'household equipment' items are included.

The GOU amounts represent amounts that the Commissioner deems acceptable. Where a taxpayer considers the values provided in the schedule do not reflect their particular circumstances, they may elect to maintain suitable records of items taken from trading stock for personal use.

What was the determination?

The Tax Office had determined that the value of goods taken from trading stock for private use in the 2007-2008 income year is:

Type of business	Amount (excluding GST) for adult/child over 16 years \$	Amount (excluding GST) for child 4-16 years \$
Bakery	1,040	520
Butcher	700	350
Restaurant/café (licensed)	3,570	1,425
Restaurant/café (unlicensed)	2,850	1,425
Caterer	3,100	1,550
Delicatessen	2,850	1,425
Fruiterer/greengrocer	750	375

Takeaway food shop	2,700	1,350
Mixed business (includes milk bar, general store and convenience store)	3,400	1,700

(2) **** TD 2007/D16 ~ Convertible notes where holder exposed to little or no economic risk**

[Source Month 11-2007-51 ~ TD 2007/D16](#)

What issue does the determination consider?

Can section 177EA apply to the issue of 'dollar value' convertible notes of the type described in this Taxation Determination?

What was the background to the determination?

Some convertible notes are being issued which rank ahead of the issuer's ordinary or other shares but equally with its other non-secured unsubordinated debt.

What is the relevant legislative provision?

Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain a tax advantage in relation to imputation benefits.

What was the determination?

The Tax Office had determined that:

- ◆ the application of section 177EA depends upon a careful weighing of all the relevant facts and surrounding circumstances of each case;
- ◆ a scheme for the disposition of membership interests is defined broadly in subsection 177EA(14) and specifically includes issuing membership interests in a corporate tax entity;
- ◆ while a particular issue of convertible notes may serve the commercial purpose of raising funds for the use in the issuer's business at a low after-tax cost, the relevant question under section 177EA is whether any person who entered into or carried out the whole or part of the issue of the convertible notes did so for a purpose that was other than an incidental purpose of enabling the holders to obtain imputation benefits;
- ◆ exposure to equity risk is a feature which accompanies the true economic ownership of an entity and hence, for the purposes of the integrity of the imputation system, is relevant in determining a taxpayer's entitlement to imputation benefits.

(3) **** TD 2007/D19 ~ New Division 7A nasties – for those using a facilities agreement**

[Source Month 11-2007-52 ~ TD 2007/D19](#)

What issue does the determination consider?

If a private company makes a loan to a shareholder or associate in an income year and the loan has not been fully repaid, what elements of the loan agreement need to be in writing for the purposes of paragraph 109N(1)(a) of Division 7A

What was the determination?

The Tax Office had determined that the elements of a loan agreement that need to be in writing for the purposes of paragraph 109N(1)(a) of the Income Tax Assessment Act 1936 (ITAA 1936)¹ are:

- ◆ the names of the parties;
- ◆ the loan terms:
 - ~ the amount of the loan; and
 - ~ the date the loan amount is drawn;

- ~ the requirement to repay the loan amount;
- ~ the period of the loan;
- ~ the interest rate payable;
- ◆ that the parties named have agreed to the terms;
- ◆ the date the agreement was in writing, for example the date it was signed or executed;
- ◆ alternatively, the requirement for the loan agreement to be in writing would be sufficiently satisfied if there is written confirmation of the existence of the agreement and the essential elements;
- ◆ for the purposes of section 109N, the requirement for a loan agreement to be in writing will be satisfied if there is:
 - ~ a written loan agreement containing the terms of the loan and it is signed and dated by the parties, or
 - ~ there is written confirmation of the existence of the loan agreement and its essential terms, for example, an exchange of letters, emails, fax, or other means of communication if they are dated and provide written evidence of the terms of the agreement and the parties' acceptance of those terms;
- ◆ an exchange of documentation, such as letters, only amounts to negotiations rather than agreement.
- ◆ if a written loan agreement does not specify the amount drawn down there must be some additional written evidence that a payment or crediting of an amount to the shareholder or associate on a particular date was made under the terms of the written agreement and the additional written evidence must exist before the private company's lodgment day.

Editor:

This determination ensures that it will no longer be sufficient to simply have in place a facilities agreement or an agreement within a constitution.

This requirement cannot be satisfied by the a minute as a minute, although written, is evidence only of an agreement and not an actual agreement.

Practices relying on facilities agreements will need to make significant systemic adjustments to ensure compliance with this requirement.

We do not agree with this interpretation.

(4) Taxation Determination Withdrawals

<p>TD 2004/86W - Notice of Withdrawal</p>	<p>Income tax: if a shareholder borrows from a private company under a clause in the company's constitution setting out the terms on which such loans are to be made, is there a 'written agreement' for the purposes of paragraph 109N(1)(a) of Division 7A of the Income Tax Assessment Act 1936?</p>
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(c) ** Class Rulings – New

Source: <http://law.ato.gov.au/atolaw/index.htm>

CR 2007/96	Income tax: assessable income: football umpires, umpire coaches and umpire trainers: receipts from the Sale Umpires Association Incorporated
CR 2007/97	Income tax: return of capital: Deep Sea Fisheries Limited
CR 2007/98	Income tax: Villa World Limited merger with MFS Diversified Limited
CR 2007/99	Income tax: treatment of payments received by members of the Tobacco Co operative of Victoria Limited for the termination of Grower's Agreements
CR 2007/100	Income tax: scrip for scrip: acquisition of HPAL Limited by Salmat Limited

CR 2007/101	Income tax: treatment of payments received under the Securing our Fishing Future package: • Onshore Business Exit Assistance • Business Advice Assistance
CR 2007/102	Income tax: share buy-back: Foster's Group Limited
CR 2007/103	Income tax: early retirement scheme - Catholic Education, Diocese of Rockhampton
CR 2007/104	Income tax: Sims Group Limited - Employee Long Term Incentive Plan
CR 2007/105	Income tax: early retirement scheme - State Library of Victoria
CR 2007/106	Income tax: early retirement scheme - University of Western Sydney
CR 2007/107	Income tax: scrip for scrip roll-over: acquisition of Alinta Limited by ES & L Pty Limited
CR 2007/108	Income tax: The National Mutual Life Association of Australasia Limited: application of section 26AH of the Income Tax Assessment Act 1936 to Guaranteed Investment Bonds and Personal Investment Bonds

(d) Class Rulings - Addenda/Withdrawn/Errata

(e) Product Rulings

ID2007/195	Government co-contributions: do trust beneficiaries have business income?
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(1) Product Rulings – New

[Source: http://law.ato.gov.au/atolaw/index.htm](http://law.ato.gov.au/atolaw/index.htm)

PR 2007/87	Income tax: Rewards Group Sandalwood Project 2007 (2008 Growers)
PR 2007/88	Income tax: Ginseng Australia Project No. 1 (Late Growers)
PR 2007/89	Income tax: Gunns Plantations Walnut Project No. 2 - Late Growers
PR 2007/90	Income tax: Oak Valley Truffle Project 2007 (post 30 June 2007 Growers)
PR 2007/91	Income tax: deductibility of interest incurred on borrowings in relation to the Macquarie Fusion Funds - November 2007 Offer
PR 2007/92	Income tax: 1996 Timbercorp Eucalypts Project
PR 2007/93	Income tax: tax consequences of investing in the Westpac Protected Equity Loan
PR 2007/94	Income tax: 2008 Grain Co-Production Project
PR 2007/95	Income tax: Margaret River Watershed Premium Wine Project 2007 (Pre 15 March 2008 Growers)

(2) Product Rulings - Addenda/Withdrawn/Errata

PR 2007/12W - Notice of Withdrawal	Income tax: Limestone Coast Vignettes Project - 2007 Mature Vignette Owners (to 30 June 2007)
PR 2007/13W - Notice of Withdrawal	Income tax: Limestone Coast Vignettes Project - 2007 Development Vignette Owners (to 30 June 2007)

PR 2007/52W- Notice of Withdrawal	Income tax: Media Funds Management Pty Limited: Film Fund No. 1 of 2007 - 'Badland'
PR 2007/53W- Notice of Withdrawal	Income tax: Media Funds Management Pty Limited: Film Fund No. 2 of 2007 - 'The Last Stand'

(f) ID's – New

Source: <http://law.ato.gov.au/atolaw/index.htm>

ID2007/194	Employee share scheme: definition of 'fringe benefit'- benefit provided to employees 'generally'
ID2007/196	Foreign exchange losses: loss incurred upon closing forward contract
ID2007/197	Deductions and expenses: cost of shares not yet acquired in a short selling process
ID2007/198	Trading stock: short selling of shares
ID2007/205	Assessability of superannuation contributions made in favour of local government councillors

(l) ID'S - Old**(g) Other Tax Office Statements, Addenda, Errata and Withdrawals****(1) ** PS LA 2007/23 ~ When to ask the Tax Office for mediation of a dispute**

Source [Month 11-2007-65 ~ PS LA 2007/23](#)

What issue does the Practice Statement consider?

To provide instruction to Tax Office staff on what policies and guidelines must be followed when attempting to resolve or limit disputes by means of alternative dispute resolution (“ADR”).

How are Tax Office employees required to act when handling this issue?

Instructions to Tax Office employees in relation to using ADR include the following:

- ◆ officers playing a role in the management of Tax Office disputes particularly those in litigation must consider whether it would be appropriate to participate in some form of ADR to attempt to resolve the dispute;
- ◆ by way of general observation the following are hallmarks of when ADR may be appropriate:
 - ~ there must be issues that are able to be negotiated;
 - ~ the Tax Office has something to give;
 - ~ the taxpayer/other party has something to give;
 - ~ the dispute is capable of being settled within existing settlement policies and practices; and
 - ~ settlement must be preferable to judicial determination;
- ◆ in practice ADR may be appropriate for Tax Office disputes if, for example:
 - ~ the dispute may be able to be resolved by having a wide ranging discussion of the issues on a non-prejudicial basis;
 - ~ a narrowing or clarification of the facts or issues in the dispute is warranted, for example to reduce the scope and cost of subsequent litigation;
 - ~ it is likely to result in a quicker and therefore more cost effective resolution of the dispute or part of the dispute;

- ~ evidentiary difficulties for one or both parties increase the risks of proceeding to hearing;
- ~ complex or unique facts or issues in the dispute make a potentially costly and time-consuming judicial determination of the dispute of little utility to the Commissioner or other taxpayers;
- ~ resolution of the dispute may facilitate a certain and/or an earlier payment of any tax;
- ~ building an improved ongoing relationship between the Tax Office and the other party to the dispute is likely to improve their compliance with their taxation obligations;
- ◆ ADR may not be appropriate where for example:
 - ~ it would be in the public interest to have judicial clarification of the issues in dispute and the dispute is a suitable vehicle to test the issues;
 - ~ resolution can only be achieved by departure from an established 'ATO view' on a technical issue; and
 - ~ the dispute is of a kind where the state of the relationship between the parties is such that any proposed ADR is unlikely to be successful;
- ◆ there is no universally optimal time to refer a dispute to ADR. ADR may not be useful unless there is a realistic prospect of achieving some of the positive outcomes of ADR such as resolving the dispute, narrowing the issues in the dispute, or resolving issues hindering progress of the dispute to trial;
- ◆ when the purpose of referring a dispute to ADR is to attempt to finalise the dispute as a whole, referral at too early a stage may mean there is little likelihood of achieving a resolution of the dispute as the parties may not yet be ready to settle;
- ◆ consideration should be given to ADR options at an early stage in a litigated dispute as ADR processes may assist in limiting costs and achieving a more timely resolution of, or limiting the scope of, proceedings. This consideration should be made at the Instruction SILC (Strategic Internal Litigation Committee⁸) in a dispute in litigation and if ADR at that stage is not appropriate, again at each subsequent SILC as the litigation progresses and whenever requested to do so by the court, tribunal or the other party to the dispute.

(2) Decision Impact Statements

DIS NSD 117 1 of 2004	ABB Australia Pty Ltd & Anor v Commissioner of Taxation
DIS NT2006/3 93	Barakat and Ors and Commissioner of Taxation
DIS 2093/200 5	Deputy Commissioner of Taxation v De Angelis
DIS NT 2005/ 468	Food Supplier and Commissioner of Taxation

2 GST

2.1 Politicians, Boards & Statutory Authorities [NIL]

2.2 Courts & Tribunals [NIL]

2.3 Tax Office Interpretations [NIL]

(a) Rulings & Draft Rulings

(1) ** GSTR 2007/D3 ~ GST and bare trusts

[Source Month 11-2007-53 ~ GSTR 2007/D3](#)

What issue does the ruling consider?

This Ruling explains how the GST Act applies to transfers of property involving bare trusts and similar trusts where the trustee has limited active duties and acts solely at the direction of the beneficiary or beneficiaries.

What was the background to the ruling?

In applying the GST law to the disposal of an asset held on a bare trust, the question arises as to which entity makes the relevant supply - the trust or the beneficiary.

What was the ruling?

The Commissioner's view is that:

- ◆ a bare trust arrangement does not in itself create the relationship of agency between the trustee and beneficiary;
- ◆ an entity acting in its capacity as trustee does not contract as agent for the beneficiary of the trust but as principal;
- ◆ accordingly, transactions involving a bare trust, without more, need to be analysed in a way that does not rely on a finding of agency;
- ◆ there is nothing in the GST Act which requires or implies that legal title to the assets of an enterprise must be held or dealt with by the entity carrying on the enterprise in order for taxable supplies or creditable acquisitions in respect of the assets to be made;
- ◆ in analysing a transaction for GST purposes, regard must be given to the true character of the arrangement in which the transaction arises and all the facts and circumstances surrounding it;
- ◆ while the legal form of a transaction is relevant, support for not unduly focussing on the legal interests in transactions involving land can be found in the *Sterling Guardian*, and *Saga Holidays Limited v. Commissioner of Taxation (Saga Holidays)* and in United Kingdom value added tax cases;
- ◆ the practical business approach to GST as described by Stone J was confirmed by the Full Federal Court in *Saga Holidays*;
- ◆ if legal title to the trust property is transferred from the outgoing trustee to the new trustee, the transfer is not a taxable supply as it is not made in the course of an enterprise carried on by the outgoing trustee in respect of the trust property;
- ◆ if the beneficiary of a bare trust disposes of its beneficial interest in the trust property in favour of an entity whose interest will be held on a bare trust by the same trustee, the disposal by the outgoing beneficiary is a taxable supply if the requirements of section 9-5 are satisfied.

The ruling then proceeds to examine some specific arrangements:

- ◆ acquisition of land;
- ◆ leasing of units to third parties;
- ◆ sales to third parties;
- ◆ transfer of trust property to beneficiary and subsequent sale by beneficiary

(b) Determinations & Draft Determinations**(1) ** GSTD 2007/D4 ~ Representative member of GST group and the GST group credits and liabilities**

[Source Month 11-2007~ GSTD 2-7-D4](#)

What issue does the determination consider?

Is a representative member of a GST group entitled to claim credits or liable to pay GST incurred by a group member prior to joining the GST group?

What was the determination?

The Tax Office has determined that:

- ◆ under subsection 48-40(1) the GST payable on any taxable supplies that a member of a GST group makes is payable by the representative member, not the member that made the supplies;
- ◆ similarly, under subsection 48-45(1) the representative member is entitled to the input tax credit on creditable acquisitions that a member of a GST group makes instead of the member making the acquisition;
- ◆ the member entity, rather than the representative member of the GST group, is liable to pay the GST and is entitled to input tax credits because the GST and input tax credit amounts are attributable to a tax period in which the entity is not a member entity of the GST group.

(c) ID's – New [NIL]**(d) ID's Withdrawn [NIL]****(e) Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]**

3 FBT

3.1 Politicians, Boards & Statutory Authorities [NIL]

3.2 Courts & Tribunals

(1) ** Loan repayments – generally not a fringe benefit (Slade Bloodstock v C of T)

Source Month 11-2007-48 ~ Slade Bloodstock v C of T [2007] FCAFC 173 (23 November 2007), Finn, Kenny and Edmonds JJ

What was the issue?

Were repayments of a loan made to an employer thereby establishing a credit loan account as a liability of the employer, by an employee, a fringe benefit?

What was the outcome?

The Commissioner did not contest the taxpayer's appeal.

What was the decision?

- [2] Prior to the time fixed for the hearing of the appeal, the Court was informed by the parties that they agreed that the appeal should be allowed and that the decision of the Tribunal should be affirmed. The Court was provided with a joint statement by the parties setting out a summary of the background facts leading to the Commissioner issuing to the appellant assessments of fringe benefits tax under the Fringe Benefits Tax Assessment Act 1986 (Cth) ('the FBT Act') for the years ended 31 March 2000, 2001 and 2002, a summary of the proceedings in the Tribunal and before the primary judge and a summary of the reasons why the parties agreed that the appeal should be allowed. A copy of this joint statement is reproduced at [4] below.
- [4] Before detailing the explanation given, it will be helpful to an understanding of these reasons if we set out the terms of the parties' joint statement referred to above:

...

Summary of the facts

...

4. *The Appellant carried on a racehorse syndication business. The Slades provided working capital to the Appellant pursuant to a loan agreement dated 28 April 1999 (the loan agreement) under which the Appellant agreed (in clause 5) to repay any and all amounts owing to the Slades at call and, if directed to do so by the Slades, to make repayments by way of payments to third parties, including but not limited to payments on behalf of the Slades for loans, credit cards, mortgages and school fees.*
5. *During the fringe benefit tax years ended 31 March 2000, 31 March 2001 and 31 March 2002, the Appellant made certain payments to, or at the direction of, the Slades in the form of car benefits, household expenses, meal, entertainment and other private expenses (the subject payments). During those years, the Slades received no payment from the Appellant other than the subject payments.*
6. *The Commissioner assessed the subject payments as liable to fringe benefits tax under the Fringe Benefits Tax Assessment Act 1986 (Cth) (the FBTA Act). Section 136(1) of the FBTA Act defines a "fringe benefit", in relation to an employee, in relation to the employer of the employee, in relation to a year of tax, to mean, relevantly.*
"a benefit ... provided to the employee ... by ... the employer ... in respect of the employment of the employee."
7. *... provided "in respect of" their employment by the Appellant.*

...

This appeal

11. *The Tribunal found that the subject payments were repayments of loans made by the Slades to the Appellant. Heerey J reiterated that finding of fact. The Commissioner now concedes that the repayment of a loan owed by an employer to an employee is not a benefit that is "provided ... in respect of ... employment", at least where under the loan agreement there is a binding obligation to repay that is imposed without reference to the employment of the lender.*
12. *At least in the usual case, a loan repayment will be the product or incident of a creditor/debtor relationship. In the present case, the Appellant owed money as a debtor. Its repayments progressively discharged its indebtedness. The Slades received the payments as creditors. Their*

entitlement to the payments existed independently and irrespective of their position as employees. In the circumstances there was no material or relevant connection between the making of the repayments and the employment of the Slades.

13. *Justice Heerey referred to s 148(1)(a) of the FBT Act and relied upon the fact that the Slades received "no other remuneration" and that there were no other employees of the Appellant. However, the finding of fact was that the subject payments were repayments of a loan. Accordingly, they did not constitute any form of remuneration. More importantly, the Slades' entitlement to the payments arose not because they performed work as employees but because they lent money to the Appellant.*

14. *The words "in respect of" in the definition of "fringe benefit" have been held to require not merely some or a causal relationship, but a sufficient or material relationship between the employee's employment and the benefit provided: see J & G Knowles v Commissioner of Taxation [2000] FCA 196; (2000) 96 FCR 402 at [26]; Starrim v Commissioner of Taxation [2000] FCA 952; (2000) 102 FCR 194 at [52]. In this appeal, for the reasons outlined above, the Appellant contends and the Commissioner concedes that there was not a material relationship between the Slades' employment and the subject payments.*

- [5] At the hearing referred to in [3] above, Senior Counsel for the Commissioner explained that at each stage of the proceedings below, the Commissioner took advice on whether he should appeal or defend an appeal. Following the decision of the Tribunal, he took advice as to whether he should appeal the Tribunal's decision and, in this regard, he was advised that he should...
- [7] Senior Counsel for the Commissioner, during the course of his submissions, suggested that the first occasion on which the Commissioner learnt that the payments in question might be repayments of loans was when the decisions under review were in the Tribunal. This was disputed by Senior Counsel for the appellant by reference to transcript of the cross-examination of Mr Slade in the Tribunal, however, we do not think anything turns on this issue for present purposes.
- [9] The Commissioner's position on the appeal to this Court, namely, that he should agree to the appeal being allowed, is, in our view, undoubtedly correct. In our view, there is real doubt as to whether the repayment of a loan, in whole or in part, is a 'benefit' as defined in subs 136(1) of the FBT Act, as distinct from the discharge, in whole or in part, of a pre-existing right, and it would not seem to be encompassed by the terms of para (c) of the definition. Even if it is, there is also real doubt as to whether it can ever constitute a 'fringe benefit' as defined in the same provision, even with assistance of subs 148(1) of the FBT Act. The reasons which underlie the Commissioner's agreement that the appeal should be allowed are supportive of our view on the 'fringe benefit' issue.
- [10] Finally, we would observe that our views on these issues are consistent with the policy and purpose underlying the fringe benefits tax legislation of which the FBT Act forms an integral part. Fringe benefits tax was only ever intended to tax the provision of benefits where, if the benefit had been provided in cash, there would have been a derivation of income... But it was never intended to apply to a repayment of a loan made by an employee to his employer; such a repayment could never be a derivation of income by the lender/employee.

3.3 Tax Office Interpretations [NIL]

(a) Rulings & Draft Rulings [NIL]

(b) Determinations & Draft Determinations [NIL]

(c) ID's

[Source: http://law.ato.gov.au/atolaw/index.htm](http://law.ato.gov.au/atolaw/index.htm)

ID2007/200	Liability to fringe benefits tax: Commonwealth Statutory Agency
ID2007/208	Property Fringe Benefit: employer contribution to its employees' social club
ID2007/204	Property Fringe Benefit: status of money as a fringe benefit

(d) Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]

4 STATE AND TERRITORY TAXES

4.1 Politicians, Boards & Statutory Authorities **[NIL]**

4.2 Courts & Tribunals

(1) **** Was land used for yachting activities exempt from land tax? (RSAYS Ltd v C of ST)**

Source Month 11-2007-46 ~ RSAYS LTD v C of ST [2007] SASC 398 (13 November 2007), Layton J

What was the issue?

Was land used by a subsidiary of a yacht squadron, RSAYS, predominantly for sailing activities, exempt from land tax?

What was the outcome?

The Court found that the RSAYS was entitled to the exemption from land tax.

What were the facts?

Background facts

In order to determine whether the Land is exempt from land tax by virtue of paragraphs 4(1)(k)(i) or (ii) of the Act and, in particular, whether RSAYS holds the Land wholly or mainly for the purposes specified in the two exemptions, a number of factual matters require determination.

The Land is located at Outer Harbour and comprises of two allotments, lots 110 and 111. Approximately 50 per cent of the Land is contained in Lot 111, which is essentially underwater and largely comprises a marina. Lot 110 is dry land which surrounds the marina.

Circumstances leading to the acquisition of the Land by RSAYS

The Squadron was established on 5 November 1869 and at all relevant times has been incorporated under the Associations Incorporation Act 1985 (SA).

From its inception in 1869 to 1923 the Squadron conducted its activities from land and moorings on the Port River and then from 1924 up until 13 July 2001 it leased the Land from various ministers and instrumentalities of the State of South Australia.

In 2001, in the course of privatising the Port of Outer Harbour, the South Australian Ports Corporation offered to sell the Land to the Squadron which decided to form "RSAYS Ltd" to take up the offer for sale.

By a registered lease commencing on 1 May 2002, RSAYS leased the Land to the Squadron for 399 years.

What was the relevant legislative provision?

Paragraphs 4(1)(k)(i) and (ii) of the Act relevantly provides as follows:

Taxes are imposed on all land in the State, with the following exceptions: ...

land that is owned by—

(i) an association that holds the land wholly or mainly for the purpose of playing cricket, football, tennis, golf or bowling or other athletic sports or exercises; or

an association that holds the land wholly or mainly for the purpose of horse racing, trotting, dog racing, motor racing or other similar contests; or

is declared by the Commissioner to be exempt from land tax on the ground that the whole of the net income (if any) from the land is used in furtherance of the objects of the association and not for securing a pecuniary profit for the association or any of its members;

Exemption 1 – The Land is held wholly or mainly for yachting purposes

Paragraph 4(1)(k)(i) of the Act exempts an association from paying land tax if the land is held wholly or mainly for the purpose of named sports "or other athletic sports or exercises".

What was the decision?

[35] In order to determine whether a particular association is exempt from paying land tax, an inquiry into the following is necessary:

- ◆ first, the whole or main purpose for holding the land;
 - ◆ second, whether such purpose is for named sports or athletic sports or exercises; and
 - ◆ third, if the above two prerequisites are fulfilled, whether the whole of the net income generated from the land is used in the furtherance of the objects of the association.
- [38] ... I conclude that the paragraph requires a decision maker to decide the purpose for which the land is held. The uses which are made of land may assist the decision-making process, but it does not necessarily answer the fundamental question, namely, what is the whole or main purpose for which the land in question is held.
- [39] The paragraph uses the present tense and the question as to whether land is held for the statutory purpose is to be decided at the time of assessment...
- [40] I now turn to consider whether the purpose for which land is held is directed solely to an intermediate purpose or whether a decision maker should have regard to a purpose that is ultimately being served. The paragraph does not refer to "ultimate purpose", however that would not exclude an interpretation which has regard to purposes which may be ultimate or governing purposes, as well as intermediate purposes to attain an ultimate purpose. Both may be relevant in a given case in determining whether the land is being held for the statutory purpose.

Interpretation of “...or other athletic sports or exercises”

- [45] [RSAYS] contends that “yachting” is an athletic sport within the meaning of the exemption. This is not an activity which is expressed in the exemption, and requires consideration as to what is encompassed by the words “or other athletic sports or exercises”.
- [46] The common usage of “athletic” as defined in the Macquarie Dictionary has the following meanings:
- physically active and strong*
 - of, like, or befitting an athlete*
 - iii *of a physical type characterised by long limbs, a large build and well-developed muscles.*
 - iv *of or relating to athletics.*

- [47] The word “athlete” is defined as:
- (usually construed as plural) athletic sports, as running, rowing, boxing etc.*

- [48] The word “athlete” is defined as:
- anyone trained to exercises of physical agility and strength*
one trained for track and field events only.

Application of the interpretation of the exemption in paragraph 4(1)(k)(i) to the facts

- [54] I am therefore satisfied that yachting is an activity which is pursued for exercise or pleasure and which requires some degree of skill or physical prowess. It does not require that the sailing vessels must wholly or mainly be used in competition or races, being the limited interpretation that Mr Wait contended. Bearing in mind the overall social policy of encouraging sporting activities within the community, the exemptions should be given a liberal application such that recreational or leisurely sailing would not be excluded, nor would sailing vessels have to always use their sails for the purposes of propulsion. While not an exhaustive list, some of the activities conducted on a yacht, irrespective of whether it is for leisure or competition, include:
- ◆ the crew moving constantly around the yacht due to irregular and unpredictable waves and wind;
 - ◆ the crew using their weight to ensure that the boat does not keel over excessively;
 - ◆ the crew moving their heads constantly to view the conditions around them and to observe sails for wind movement;
 - ◆ the crew pulling and releasing ropes to ensure the sails are of the right shape and are facing the right direction; and
 - ◆ to maximise yacht speed, the crew must continuously adjust the sails.
- [56] I will now consider whether the first two prerequisites for an exemption have been fulfilled, namely, whether the Land is being held wholly or mainly for the purpose of yachting.

- [57] The Land, prior to its purchase, had been leased by the Squadron and utilised for the objects expressed in its constitution which focussed, as indicated earlier, on “the sport of yachting”... [RSAYS] was formed in order to purchase the Land as means of quarantining the Land from being utilised for any other purpose other than the Squadron’s constitutional objectives as well as [RSAYS]’s constitutional objectives, which mirrored those of the Squadron. As I previously indicated, the exemption is concerned with the purpose for the holding of the Land and not the purpose for the formation of the holder of the Land. In addition, the asset protection purpose which was promulgated by Mr Wait as the purpose for [RSAYS] holding the land, was not an end in itself, but rather an intermediate purpose as a means of achieving a long-term goal of continuing to promote the sport of yachting.
- [58] Therefore, I conclude that the main purpose for [RSAYS] holding the Land at the time of assessment is for “the sport of yachting”, together with other incidental purposes which also focus on “yachting” as this expression is used in the constitution.
- [59] As the term “yachting” as used in the constitution is broader than the athletic sport or exercise of yachting as I have previously discussed, it is necessary to consider whether the purpose for holding the Land is nonetheless mainly still for the purpose of the activity of using vessels under sail.
- [60] Mr Colebatch’s evidence, which I accept, is that some people at the Squadron use the registered 66 powerboats, but most of the powerboats are in the marina or under dry dock for the rest of the year. Further, at the hearing, Mr Colebatch gave evidence that most of the yachting at the Squadron was of a sailing and racing variety, as opposed to power yachting, which he said was of a “lesser athletic pursuit”. I am therefore satisfied that the majority of the activity carried out on the Land relates to the use of sailing vessels and furthering the athletic activity of yachting under sail.

Uses of the Land

- [63] As I previously discussed, the question posed by the exemption provokes a much broader inquiry than the specific uses of the Land, nonetheless, the use made of land may assist a decision-maker as to the purpose for which land is held. On the evidence in the present case the Land has a number of facilities which support various uses, for example:
- ◆ the Squadron hosts private functions and conferences in the club dining room. They take the form of 40 to 50 member functions as well as a dozen non-member functions per year. Although currently running at a loss, these functions make up approximately 25 per cent of the Squadron’s revenue.
 - ◆ the Game Fishing Club of South Australia rents a clubroom on the Land. Members of this club are allowed to use the Squadron’s dining room and bar. The rental income is then applied for the purposes of the Squadron.
 - ◆ Flinders Ports Pty Ltd and the South Australia Fire Brigade rent six berths on the Marina for the purpose of berthing five pilot boats and one fire boat. The income from the rent is applied for the purposes of the Squadron. [RSAYS] submits that the renting of these spaces on the Land is ultimately, as far as the Squadron is concerned, a revenue-making exercise which is then applied to further the purpose of yachting.
 - ◆ The Squadron also hosts community-based events relating to on-water activities as well as training camps.
- [64] These uses of the Land, which may be described as ancillary or incidental, are ultimately, wholly or mainly, directed to the purpose of the sport of yachting. They are not collateral or independent purposes...
- [65] In summary, I am satisfied that the incidental and ancillary uses of the facilities on the Land are mainly for the purpose of yachting and complement the main purpose for which the Land is held by [RSAYS], that is, yachting.

Whether the whole of the income generated from the Land is used in the furtherance of the objects of [RSAYS]

- [66] By virtue of its constitution, [RSAYS] is a not-for-profit body... These provisions in combination with the evidence and the discussion above, satisfies me that the third requirement of the exemption in paragraph 4(1)(k)(i) applies, that is, that the whole of the net income from the Land is used in the furtherance of the objects of [RSAYS] and not for securing a pecuniary profit for [RSAYS] or any of its members.
- [67] I am therefore satisfied that [RSAYS] satisfies the requirements for exemption under paragraph 4(1)(k)(i) of the Act.

Exemption 2 – The Land is wholly or mainly held for yacht racing

[68] At the hearing, [RSAYS] submitted that if the Court reached the conclusion that yachting is an athletic sport or exercise and that the Land is used mainly for that purpose, then there would be no need to consider whether the Land is exempt from land tax pursuant to paragraph 4(1)(k)(ii). I have concluded that the first exemption is satisfied. I note that holding land for yacht “racing” is a narrower concept than holding land for yachting “purposes”.

[69] The evidence before me indicates that the Squadron hosts a number of competitions on the Land. In any given year, 120 races may be held...

[72] Whilst there are strong arguments which could support the application of this exemption, there are some areas which lack clarity. However, it is not necessary for me to decide this issue, and I do not.

(2) ** Was stamp duty payable on a curious transaction? (Trust Company of Australia Ltd v C of SR)

[Source Month 11-2007-47 ~ Trust Company of Australia Ltd v Commissioner of SR \[2007\] VSC 451 \(20 November 2007\).](#)
Mandie J

What was the issue?

Did a complex series of steps result in a change in the beneficial ownership of the dutiable property?

What was the outcome?

The taxpayer’s appeal against the assessment of stamp duty was allowed and the Commissioner’s decision set aside.

What were the facts?

The complete transaction involved a series of steps orchestrated according to legal advice and to a programme principally devised by the solicitors for the entity or entities interested in the purchase of the land, who the client referred to as the Macquarie Goodman interests.

At all relevant times Clayton Business Park Pty Ltd (“CBP”) was and remained the registered proprietor of the land in its capacity as trustee of the Clayton Business Park Trust.

At the outset of the transaction, CBP was the trustee of the Clayton Business Park Trust, a discretionary trust substantially existing for the benefit of members of the Lindsay Fox family.

By a contract of sale in writing dated 13 December 2002, CBP sold the land to TCL for a sum in excess of \$74M and the contract provided that the price should be paid in full on the same day.

TCL purchased the land in its capacity as trustee of the Clayton 3 Trust, which was a unit trust.

However, in this transaction:

- ◆ TCL did not provide an instrument of transfer of the land;
- ◆ when the purchase money was paid, CBP did not deliver to TCL a transfer, or any registrable transfer, of the land sold;
- ◆ CBP did not deliver the Certificate of Title to TCL.

At a later stage in the series of steps taken:

- ◆ CBP resigned as trustee of the Clayton Business Park Trust and the shares in CBP were sold for a nominal sum to TCL;
- ◆ the records of CBP were handed over to the “new controllers” and those records included the Certificate of Title to the land.

Subsequently the Commissioner imposed duty of \$4m in relation to the transaction.

What are the contentions?

Commissioner contended that the transaction was a dutiable transaction under s.7 of the Act as constituting:

- ◆ “a transfer of dutiable property” within the meaning of s.7(1)(a) of the Act; or

- ◆ a “transaction that results in a change in beneficial ownership of dutiable property” within the meaning of s.7(1)(b)(vi) of the Act.

What was the decision?

Was there a transfer of dutiable property, namely, a transfer of an estate in fee simple in the land?

- [19] At first blush, there would appear to have been no “transfer” of an “estate in fee simple” in the land because a contract of sale is not of itself a transfer of such estate, there was no instrument of transfer and the registered proprietor never changed.
- [39] In my opinion, none of the above quoted passages support the proposition that, in the case of a contract for the sale of land, there is any transfer of an equitable fee simple in the land from the vendor to the purchaser. They are consistent with the proposition that, after the payment of the purchase money, the purchaser has an equitable interest in the land which, even if it may be described as an equitable estate in fee simple, is one that has arisen as a result of the transaction but is not an estate or interest that is transferred by the vendor to the purchaser.
- [40] I conclude, for these reasons, that there was no transfer of an estate in fee simple, either legal or equitable, within the meaning of s.10(1)(a)(i) of the Act.

Was there a transaction that resulted in a change of beneficial ownership of dutiable property (such dutiable property being an estate in fee simple in the land)?

- [41] The essence of the appellant’s case on this limb was that there could not be a “change” of beneficial ownership when there were no beneficial owners of an estate in fee simple either at the commencement of the transaction or at its conclusion. At the commencement of the transaction, CBP was a trustee for a discretionary trust and hence was not the beneficial owner of the estate in fee simple. Further, having regard to the terms of the trust, there were no persons that could be identified as beneficial owners of the trust assets, and hence of the estate in fee simple in the land. At the conclusion of the transaction, TCL was entitled to a transfer of the estate in fee simple in its capacity as trustee of a unit trust. Hence TCL was not the beneficial owner of the estate in fee simple and, having regard to the terms of the trust, there were no persons that could be identified as beneficial owners of the assets of the unit trust (let alone beneficial owners of an estate in fee simple in the land)...
- [59] The question is: what is meant by “beneficial ownership” in the Act? Some commentators, writing about the use of the term in tax legislation, have pointed out that “beneficial ownership” is not necessarily the same as holding a “beneficial interest” or having an entitlement to an “equitable interest”. Nevertheless the cases at least support a presumption that when the words “beneficial ownership” are used the legislature has in mind the distinction as described by Lord Diplock in the above quoted passage, that is, a technical reference to an entitlement in equity. I think that the intent and purpose of s. 7(1)(b)(vi) of the Act was to catch transactions in which, although there was no transfer of the estate in fee simple in the land, there was a change in the underlying equitable interests so that, in substance, there was a change of “ownership”. The difficulty is that, by using the term “beneficial ownership”, the section arguably fails to catch transactions in relation to which no “beneficial owner” can be identified and thus arguably fails to catch changes in underlying equitable interests where the beneficiaries, say, of a discretionary trust or of a unit trust, cannot be characterised as beneficial owners of any interest in land held by the trust, or, at least, not as beneficial owners of an estate in fee simple in such land. The Table to s. 8 of the Act makes it clear that it is necessary to identify the person who “obtains” the beneficial ownership of the estate in fee simple.
- [60] The question in the present case comes down to whether TCL can be regarded as the “beneficial owner” because the estate in fee simple, once the purchase money was paid, was held by CBP on a bare trust for TCL and hence, as the cases suggest, “beneficial ownership has passed to the purchaser” – or, on the contrary, that TCL cannot be described as the beneficial owner of an estate in fee simple in the land if regard is had to its status as a trustee. The judicial statements speaking of the passing of beneficial ownership to a purchaser under a contract for sale of land were made in contexts in which the question of trustee capacity did not arise. I also think that Halloran is to be distinguished in the way submitted by the appellant.
- [61] While it may be convenient shorthand to say that, once the purchase money has been paid and the vendor holds as a bare trustee, beneficial ownership has passed, I think that it is offensive to the concept of beneficial ownership to say, in the case of a trustee purchaser, that the trustee has “obtained the beneficial ownership” of an estate in fee simple in the land by paying the purchase money. The trustee holds not for itself but for the

benefit of others. Not without some doubt, I do not think that the language of the statute can be stretched to capture this transaction despite the evident policy underlying the relevant provision.

- [62] For those reasons, I think that the appeal should be allowed and the assessment set aside. There was a further ground of appeal relating to the imposition of penalty tax which does not, in those circumstances, arise. However I should state that in my opinion the Commissioner, in exercising his discretions under s. 30 of the Taxation Administration Act 1997 took into account improper and irrelevant circumstances and I would have remitted this matter to the Commissioner for reconsideration according to law.

(3) **** Director succeeds in defence against Commissioner's claim (Deputy C of T v Freudenstein)**

Source Month 11-2007-35 ~ Part 3-2(a) - Deputy C of T v Freudenstein [2007] NSWCA 297 (23 October 2007). Spigelman CJ Mason P Giles JA

What was the issue?

Did the director have reasonable grounds to believe the company would make payments in accordance with the instalment agreement?

What was the outcome?

The Commissioner's application for leave to appeal was refused.

What were the facts?

Penta Productions Pty Ltd ("Penta") made an agreement under s 222ALA with the Commissioner under which he agreed to pay the Commissioner \$105,663.03 by the instalments of:

- ◆ \$38,899.75 on 23 December 2002;
- ◆ \$8,589.00 on 31 January 2003; and
- ◆ \$58,174.28 on 28 February 2003.

The first instalment was duly paid.

The remaining instalments were not, and the Commissioner brought proceedings to recover them on the basis that the Director was liable to pay them as a penalty pursuant to s 222AQA of the Act.

The Director successfully invoked the statutory defence in s 222AQD of the Act, which amongst other things by s 222AQD(5) required that he prove that at the time the agreement was made he "had reasonable grounds to expect, and did expect, that the company would comply with the agreement".

The Commissioner applied for leave to appeal from the verdict.

What the Commissioner entitled to leave to appeal?

What was the decision?

- [5] The principal proposed ground of appeal was that there was no evidence or insufficient evidence that the [Director] had reasonable grounds for the expectation. There was certainly evidence of reasonable grounds, and the ground came down to the submission that the evidence did not suffice to discharge the [Director]'s burden of proof. The [Commissioner] contended to the effect that the evidence did not rise above hope that revenue from future trading would enable payment, and that in order for the [Director] to discharge his burden of proof it was necessary for him to have shown as a starting-point Penta's financial position as at 25 November 2002, and then to have shown expected expenses as well as expected revenue, and thus to have established mathematically ability to make the payments required by the agreement.

(4) * **Bodgie companies in the building industry (Trimcoll Pty Ltd v Deputy C of T)**

Source [Month 11-2007-37 ~ Trimcoll Pty Ltd v Deputy C of T \[2007\] NSWCA 307 \(30 October 2007\)](#), [Spigelman CJ Ipp JA Basten JA](#)

What was the issue?

Was the taxpayer required to produce as witnesses persons who had made declarations relied upon by ‘the taxpayer’?

What was the outcome?

The Court found that the Commissioner could not require the witnesses to attend, as the matter stood at present, essentially because the Commissioner’s paper work was defective.

What were the facts?

Trimcoll Pty Ltd (“Trimcoll”) operated in the building and construction industry but failed to deduct amounts as required under s 221YHDA of the ITAA 1936 totalling more than \$3.75 million.

The Commissioner brought proceedings seeking to recover the penalties incurred by Trimcoll. Trimcoll prepared affidavits, attaching invoices and payee declarations referring to certificates permitting payment without deductions to the businesses or companies to which payments were made (“deduction variation certificates”).

On 23 May 2005, the Commissioner made a “request” under Part 4.6 of the Evidence Act 1995 (NSW) that Trimcoll call as a witness each of the persons responsible for providing an invoice or payee declaration that referred to a deduction variation certificate providing that the permissible rate of deduction was 0%.

What was the decision Spigelman CJ?

[1] I agree with Basten JA

What was the decision Ipp JA?

[2] I agree with Basten JA.

What was the decision Basten JA?

[3] The events which gave rise to this appeal occurred between 1 June 1994 and 30 September 1999. During that time, Trimcoll Pty Ltd (hereinafter “Trimcoll” or “the defendant”) operated in the building and construction industry. According to the Respondent, a Deputy Commissioner of Taxation (“the Commissioner”), Trimcoll made payments to subcontractors but failed to deduct amounts which the Commissioner contended it was required to deduct pursuant to s 221YHDA of the Income Tax Assessment Act 1936 (Cth), as then in force. As a result of those failures, it incurred penalties totalling more than \$3.75 million, which the Commissioner is seeking to recover by proceedings brought in the Common Law Division.

[5] As will be explained below, the Commissioner’s statement of claim in this matter was terse, to the point of being obscure. On their face, each of the payments made without deductions was made to a company or business which had supplied Trimcoll with an appropriate declaration, the effect of which was to permit payment in full of the sum payable under the contract, without a deduction under the Income Tax Assessment Act. The Commissioner’s allegation appears to have been, adopting a somewhat unhelpful label, that these were “bodgie companies”. By that the Commissioner meant the companies were not companies to which Trimcoll owed moneys under contracts involving the performance of work in the industry. Rather, she contended that the payments were due and payable to third parties who did not enjoy the benefit of a deduction variation certificate entitling them to receive payments without deduction of amounts on account of tax, but who nevertheless obtained the payments made by Trimcoll without deduction.

[15] Trimcoll admitted that it had made prescribed payments during the period in question but denied its failure to deduct amounts from those payments and denied that it was liable to pay penalties. It further asserted in its defence that “each of the payees to which it made prescribed payments had provided the defendant with a completed and signed Prescribed Payments System (PPS) Payee Declaration which varied the prescribed payment deduction to be made to NIL”.

[21] The Commissioner asserted that the companies or businesses which provided the relevant payee declarations to Trimcoll were not in fact those entitled to receive the prescribed payments, nor were they the real

recipients of the prescribed payments. If they did in fact receive the prescribed payments, they were merely agents or conduits for third parties, who were contractually entitled to receive the moneys for work performed. Who those third parties were, the Commissioner was unable to say. However, the Commissioner contended that she was entitled to have those persons responsible for creating the certificates called by Trimcoll as witnesses...

Application of principles

[49] Because the case was pleaded under s 221YHDA, the Commissioner must establish that, in relation to each payment, there was no payee declaration which had been made to Trimcoll and was in force when the payment was made...

Conclusions

[69] For reasons noted above, the state of the pleadings in the present matter is unsatisfactory. Trimcoll contended, as it was entitled to do, that if in fact the Commissioner's case were based upon an allegation of fraud, that allegation should have been expressly pleaded. His Honour's view that the parties were fully aware of the nature of the Commissioner's case and that there was no need for further pleading appears to have been based at least in part on the view that relevant averments were made in the statement of claim, so that the onus of demonstrating the existence of genuine contractual arrangements, involving work in the industry, fell upon Trimcoll.

[70] Once that conclusion in relation to onus is rejected, there is no sound reason for rejecting Trimcoll's claim that the Commissioner bore the onus of establishing the preconditions to the obligation to pay the respective penalties which matters should be appropriately pleaded. If that course had been taken, the evidential onus might have shifted, with consequences for the exercise of the discretion under s 169 of the Evidence Act.

⑤ ** Was the taxpayer carrying on a rental business? (Seneca Exploration Pty Ltd v C of ST)

Source Month 11-2007-38 ~ Seneca Exploration Pty Ltd T/A Dickeson's Amusements v C of ST [2007] SASC 369 (19 October 2007), The Honourable Justice Nyland, The Honourable Justice Bleby and The Honourable Justice Layton

What was the issue?

Was the taxpayer carrying on a rental business for the purposes of the Stamp Duties Act?

What was the outcome?

The Court preferred to analyse the application of the relevant provision by reference to the substance of the transaction rather than by the superficially attractive arguments that rested on the form of the agreement.

Does the outcome affect your firm's current practices?

The decision emphasises the current approach of Appeal Courts – they prefer substance over form. In turn, this approach must be considered at the time lawyers are instructed.

What were the facts?

Dickeson's Amusements ("Seneca"), owned amusement machines with which it operated two businesses.

The second business, and the one relevant to this appeal, involved coin-operated amusement machines. Subject to a standard form written agreement, the taxpayer placed the amusement machines in premises owned by others, such as hoteliers who were then made the machines available to those on the premises to play by inserting appropriate coins into the machine.

During the relevant period:

- ◆ Seneca collected the money deposited into the machines and paid the owner or proprietor of the premises a fee; or
- ◆ the owner or occupier of the premises collected the money, retained the agreed fee, and sent the remaining money to Seneca.

The Commissioner assessed stamp duty owing in relation to this business of \$18,748.43 for the period 1 July 2001 to 31 March 2003. Seneca paid the stamp duty assessed but now claims a refund of that amount.

What was the decision? Nyland J

I agree that the appeal should be dismissed for the reasons expressed by Bleby J.

What was the decision? Bleby J

- [2] ... At the relevant time s 31D of the Act prohibited a person from carrying on a rental business unless the person was registered. Section 31F of the Act required a person carrying on a rental business to lodge a monthly statement in the approved form of the amount received during the previous month in respect of that rental business and to pay duty on that amount as prescribed.
- [3] Although some of the equivalent provisions in ss 31D and 31F of the Act have since changed, the relevant definitions have at all material times remained the same.
- [4] “Rental business” is defined in s 31B of the Act. So far as is relevant the definition provides:
“business” means–
the business of conferring rights to the possession or use of goods under a contractual bailment; ...
- [5] The key to the obligations specified in ss 31D and 31F at the relevant time and at present, and the key to the resolution of this appeal is the definition of “contractual bailee”, also found in s 31B. It is defined as follows:
bailment” means a contract or agreement under which a person who owns, or is entitled to the possession of, goods confers on another a right to possession or use of the goods, and includes a hire-purchase agreement, but does not include a contract or agreement conferring a right to the possession or use of goods, or providing for the sale of goods, incidentally to a lease of, or licence to occupy, or the sale of, land;

The Agreement

- [11] Crucial to the resolution of the appeal is the standard form of agreement used by Seneca (“the Agreement”). [The agreement is set out in full in the decision].

Interpretation of “contractual bailment”

- [13] In order for there to be a contractual bailment as defined in s 31B of the Act, and therefore a rental business in respect of which duty is payable in this case, four elements must be satisfied:
1. There must be a contract or agreement.
 2. There must be a person who owns or is entitled to possession of the amusement machines (“the owner”).
 3. Under the contract or agreement the owner must confer on another a right to possession or use of the machines.
 4. The right to possession or use of the machines under the agreement must not be incidental to a lease of or licence to occupy land.
- [14] The first and second elements are readily satisfied. Seneca is and remains at all times the owner of the machines. Upon installation in a licensor’s premises the machines become the subject of the Agreement set out above. Resolution of the issues in this case depends on whether the third and fourth elements are satisfied.
- [15] In determining whether those conditions are fulfilled the Court will look at the substance rather than the form of the transaction...
- [16] It follows that, in determining whether this Agreement confers on another “a right to possession or use” of the machines, the Court will examine the substance rather than the form of the transaction governed by the Agreement.
- [17] In considering the third element of the definition there are two alternative limbs: the conferral of a right to possession or a right to use of the machines. I will first consider whether the Agreement conferred a right to use of the machines.

Whether the Agreement conferred a right to use of the machines

- [18] A right to the use of goods encompasses a wide range of possible activities and purposes. In particular, the expression is not confined to physical use of the object by the user...

- [19] There will therefore be a variety of ways in which a person, in this case the licensor, may make use of the machines in order to satisfy this limb of the definition. It is also apparent from this judgment that it cannot be said that the machines in this case are not available for use by a licensor merely because they are in fact played only by customers of that licensor. There are other ways in which the licensor may make use of the machines.
- [20] The approach of Windeyer J in the Taubmans Case was endorsed by the Full Court of the High Court in *Max Factor & Co. Inc. v Federal Commissioner of Taxation*.^[7] Sales tax in that case was levied on goods manufactured in the course of carrying on a business that were “applied by the taxpayer to his own use whether for the purpose of that business or for any other purpose”. The company in question carried on the business of manufacturing and selling cosmetics. It gave cosmetics to its employees to use in demonstrations and for their own personal use. It also gave cosmetics to retailers for the purpose of promoting sales and to members of the public for the purpose of increasing or maintaining goodwill. It was argued that “use” of the goods in the relevant provision was confined to the physical use by the taxpayer of the goods. [The High Court comprising Gibbs J, with whom Barwick CJ, McTiernan and Windeyer JJ agreed, rejecting that argument]
- [21] Use of a machine in this case will therefore extend to and include the application of the machine for a purpose, object or end, particularly if there is some advantage to the person who is said to be using the machine.
- [23] The use to which the machine is put by a person need not be exclusive...
- [25] In the present case, the licensors made use of the machines in a variety of ways. They did so by agreeing to have them in their premises, placed in a position where the machines were accessible to patrons, and by allowing patrons to operate the machines by opening the premises to members of the public and encouraging them to make use of the premises. The owners of the premises used the machines for the purpose of generating revenue for themselves by virtue of the profit sharing provisions of the Agreement.^[13]
- [26] The obvious inference is that licensors regarded the machines as a means of entertaining patrons on the premises. Counsel for Seneca conceded that the single judge was entitled to infer, which he did, that the machines were used to encourage patrons to attend the premises and thereby to make use of other facilities provided for use on the premises. The machines were therefore turned to account or applied for the purpose of the licensor, being the purpose of generating income both directly, by the profit sharing arrangement, and indirectly, by attracting patrons to the establishment and encouraging them to remain there.
- [27] It does not matter that patrons of the licensors may also have used the machines. All that is required to satisfy this limb of the definition of “contractual bailment” is that the Agreement confers “a” right, not an exclusive right, to use of the goods.
- [28] In order to succeed on this limb, counsel for Seneca had to resort to an extremely narrow meaning of the noun “use”. That is a meaning which that word in the definition will not bear, either in common usage or on compelling legal authority.
- [29] Accordingly, in my opinion the third element of the definition of “contractual bailment” is fulfilled.

Whether the Agreement conferred a right to possession of the goods

- [30] In view of my conclusion as to the “use” of the machines by licensors, it is not necessary to consider whether the Agreement conferred a right of possession of the machines...
- [31] This limb of the definition will be satisfied if the Agreement confers on another person “a” right to possession. It need not be an absolute right to possession or an exclusive right to possession. Under the Agreement, Seneca had the right to take possession of the machines in the circumstances described in clauses 4, 6 and 9... The fact that the licensor was required, under the Agreement, to make the machines available for use of the general public did not mean that the licensor yielded up possession of the machines to members of the public... The right to possession of the machines was at all times maintained by the licensor, subject only to the conditional exercise by Seneca of its own superior right to possession.
- [32] It follows that the third element of the definition is also satisfied by the conferral on the licensor of a right to possession of the machines.

Whether the right to possession or use of the machines is incidental to a licence to occupy land

- [33] I turn to consider the fourth element of the definition of “contractual bailment”, namely whether the Agreement is excluded from the definition by conferring a right to possession or use of the machine incidental to a licence to occupy land.
- [34] The expression “land” is not defined in the Act...
- [35] ... In form, the Agreement purports to be a licence by the “licensor” to Seneca to occupy the licensor’s premises for the purpose of operating the machines on the premises,[14] and that any right that the licensor may have to possession of the machines is merely incidental to the right of Seneca to occupy the premises. The Agreement is not in the form of a licence by Seneca to the owner of the premises to take possession of and to use Seneca’s machines for the purpose of allowing patrons to operate them.
- [36] The thrust of Seneca’s argument was that the Agreement was in essence a licence to occupy land with an incidental right of possession of the machines by the licensor. The Agreement was therefore excluded from the definition of contractual bailment.
- [37] In my opinion, the argument should be rejected. It relies on the form of the Agreement rather than its substance. As earlier pointed out,[15] it is the substance of the transaction that is relevant.
- [38] The purpose of the statutory exclusion is to exclude from duty those transactions where a person, among other things, grants a lease or licence over land and incidentally also confers on another a right to possession or use of goods. It is clear that the exclusion envisages that the same person will be the grantee of the rights over land and of the rights over goods. The exclusion cannot apply where, as in this case, Seneca, being granted a licence to occupy land (if that is what it is) is not, by the Agreement, granted a right to possession or use of the machines. Seneca already has that right.
- [39] While the form of the Agreement might provide the basis for a superficially attractive argument, it does not reflect the reality of what occurs...
- [41] In my opinion Seneca has failed to bring itself within the exclusion to the definition of “contractual bailment”.

Conclusion

- [43] The Agreement on which Seneca relied constituted a “contractual bailment” as defined in s 31B of the Act, and as Seneca was conducting the business of conferring rights to possession and use of goods under such an Agreement, it was conducting a “rental business” as defined in s 31B. It was therefore required to be registered under s 31D of the Act, to lodge the returns required by s 31F and to pay the duty prescribed by that section. Seneca’s appeal to the single Judge was rightly dismissed. The appeal to this Court should also be dismissed.
- [44] LAYTON J. I agree that the appeal should be dismissed for the reasons given by Bleby J.

(6) * Penalty tax for late lodgement of sale contract (Beamish and C of SR)

[Source Month 11-2007-39 ~ Beamish and C of SR \[2007\] WASAT 274 \(18 October 2007\), Judge J Chaney \(Deputy President\)](#)

What was the issue?

Was a contract a “general conditional contract” because it contained a due diligence provision and subject to a later lodgement date?

Was the Commissioner entitled to impose penalty tax for late lodgement of a contract of sale?

What was the outcome?

The Court found that the contract lacked the objective criteria which would enable it to be characterised as a “general conditional contract” and subject to a later lodgement date.

The Court noted that view the contract was also not a general condition contract it is not an "eligible conditional contract" because, to be an eligible conditional contract, the parties must not have control over the happening of the event upon which completion of the contract is conditional.

Does the outcome affect your firm’s current practices?

The decision emphasises the need to ensure that contracts are lodged in timely fashion.

What were the facts?

On 4 August 2006, the taxpayer entered into a contract to purchase a property comprising a house on a single residential lot located at 132 Victoria Avenue, Dalkeith for a consideration of \$13,875,000 (the contract).

The contract was a standard form contract for the sale of land by offer and acceptance published by the Real Estate Institute of Western Australia (Inc). The contract contained several Special Conditions of which ## relevant for present purposes were special conditions 6, 7 and 8 which read as follows:

The seller agrees to sign all applications for works and/or subdivision that the buyer requests within 14 days of presentation.

The seller agrees to allow connection of services to any part of the lot for the purposes of subdivision at the purchaser's cost.

This offer is subject to due diligence by 30 September 2006.

The contract was lodged for assessment of duty on 2 January 2007.

On 8 January 2007, the Commissioner assessed duty at \$742,950, and imposed a penalty for late lodgement pursuant to s 26 of the Taxation Administration Act 2003 (WA) but remitted all but \$37,147 of the penalty, being 5% of the assessed duty.

The penalty was remitted in accordance with cl 2.3 of Commissioner's Practice TAA 1.2, which provides that, if an instrument is lodged voluntarily, penalty tax will be remitted to 5% of the amount of duty if the instrument is lodged after one calendar month of the required lodgement date, but within four calendar months.

The taxpayer unsuccessfully objected to the assessment on the basis that the contract had been lodged within the requirements of the Act so that no penalty duty should have been imposed because:

- ◆ the contract was both an eligible conditional contract as defined in s 6 of the Stamp Act 1921 (WA) (Stamp Act); and
- ◆ a general conditional contract as defined in s 8(1)(1).

Mr Beamish:

- ◆ undertook various enquiries to ascertain the possibilities for the land from the water and power authorities, the local government, and the Swan River Trust, which was a relevant decision-maker because the land abutted the Swan River;
- ◆ commissioned a valuation to compare the value of the property as a single lot with its potential value following subdivision.

The enquiries took some time, and in September 2006 an extension for completion of the due diligence enquiries was gained until 30 November 2006.

On 30 November 2006, Mrs Beamish wrote to the vendor's real estate representative advising that she was satisfied "with our due diligence on the property" and advising that settlement would proceed.

Mr and Mrs Beamish later elected not to subdivide the property.

What was the decision?

- [7] The issue for determination is whether the contract is a general conditional contract for the purposes of s 8(1)(1).
- [18] The [taxpayer]'s argument does not bear analysis. Had s 8(1)(1) not contained the words "where the results are to be measured against objective criteria set out in the contract", then special condition 8 may have satisfied the requirements of a general conditional contract. However, the Stamp Act clearly requires that there must be objective criteria "set out in the contract." What is required is that a third party could identify whether or not the results of the due diligence enquiries satisfy the condition by reference to the results themselves, not to the purchaser's objective response to the results. In the present case, on the [taxpayer]'s argument, she retained the discretion as to whether or not the condition was satisfied, regardless of the objective outcome of the enquiries.
- [19] The [taxpayer] also argued that the presence of the date by which the enquiries were to be completed also constituted an objective criteria. The date has, however, nothing to do with the measurement of the results of

the making of the enquiries. The existence of the date by which the enquiries were to be complete does not satisfy the requirements of s 8(1)(l).

- [20] The [taxpayer] also relied upon the presence of special conditions 6 and 7 to give some content to special condition 8. She argued that those special conditions could only come into play if a decision to proceed with subdivision had been made, and thus it can be argued that special condition 8 must necessarily relate to satisfaction as to the potential of the land for subdivision. In my view, that argument takes matters no further. Special conditions 6 and 7 say nothing about the criteria which might lead to a decision by the purchaser to proceed with the purchase, or with subdivision. They merely impose obligations on the vendor which might come into play if, presumably as a result of satisfaction with the results of the enquiries made subject to the due diligence, the purchaser decided to proceed with subdivision. They add nothing to the lack of objective criteria by which the results of the enquiries need to be measured.
- [21] It follow that, in my view, the contract clearly fails to meet the requirements of s 8(1)(l) of the Stamp Act, and the contract is not a "general conditional contract".

4.3 Revenue Office Interpretations

- (a) New South Wales [NIL]
- (b) Northern Territory [NIL]
- (c) Queensland [NIL]
- (d) South Australia [NIL]
- (e) Victoria [NIL]
- (f) Western Australia [NIL]

5 SUPERANNUATION, ETP'S & PENSIONS

5.1 Politicians, Boards & Statutory Authorities [NIL]

5.2 Courts & Tribunals [NIL]

5.3 APRA, ASIC & Tax Office Interpretations

(a) Rulings & Draft Rulings [NIL]

(b) Determinations & Draft Determinations [NIL]

(c) Other Tax Office Releases Other Tax Office Releases

Source: <http://law.ato.gov.au/atolaw/index.htm>

(1) ATO ID's

[ID2007/199](#)

Superannuation guarantee: existing employee elections after 30 June 2007

6 OTHER IMPOSTS, OFFSETS & REBATES**6.1 Politicians, Boards & Statutory Authorities****6.2 Courts & Tribunals****6.3 APRA, ASIC & Tax Office Interpretations**

Source: <http://law.ato.gov.au/atolaw/index.htm>

(1) Excise

ID2007/201	Excise: mixing locally produced and imported ethanol
ID2007/202	Excise: beer used in the manufacture of a non-excisable product
ID2007/203	Excise: home consumption - delivered - prepaid entry
ID2007/193	Excise: Licensing conditions - restrictions on production of excisable goods for the protection of the revenue.
ID2007/192	The product of distillation
ID2007/207	Excise: home consumption - delivered - periodic settlement permission

(2) Fuel Tax Credits

ID2007/191	Fuel tax credits: technical dissolution of a family partnership and entitlement to receive early payments
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(3) WET

ID2007/206	Wine Equalisation Tax: notification of intention to make a GST-free supply
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7 LEGISLATION

7.1 Australian Parliament

(a) Acts receiving Royal Assent after 25 October 2007

Nil

(b) Bills before Parliament as at 25 October 2007

Parliament was prorogued for the election so that there are no Bills before Parliament at the present time

7.2 State and Territory Parliaments

Source: Various State and Territory Parliament Websites

*unless otherwise indicated

(a) Australian Capital Territory

www.legislation.act.gov.au

Please Note: Australian Capital Territory only has one house of Parliament

(b) South Australia

www.parliament.sa.gov.au

(c) Queensland

www.parliament.qld.gov.au

(d) Tasmania

www.parliament.tas.gov.au

(e) Victoria

www.dms.dpc.vic.gov.au

(f) Western Australia

www.parliament.wa.gov.au

8 APPEALS TO FULL COURT OF THE FEDERAL COURT

Current to 19 November 2007

Source: http://www.fedcourt.gov.au/ctlists/ctlists_appeals.html

- (1) [Coal Developments \(German Creek\) Pty Limited v Commissioner of Taxation \[2007\] FCA 1324](#)
Topic: Taxation
Filed: QUD296/2007; 12/09/2007
Status: No future listing
- (2) [Commissioner of Taxation v Dixon \(Trustee\) \[2007\] FCA 1079](#)
Topic: Taxation
Filed: QUD251/2007; 16/08/2007
Status: No future listing
- (3) [Commissioner of Taxation v Miniello](#)
Topic: Taxation
Filed: WAD139/2007; 23/07/2007
Status: No future listing
- (4) [Commissioner of Taxation v Slade Bloodstock Pty Ltd \[2007\] FCA 188](#)
Topic: FBT – re payment of a credit loan
Filed: VID206/2007; 14/03/07
Status: No future listing
- (5) [Cumins v Commissioner of Taxation \[2006\] FCA 43](#)
Topic: Bankruptcy
Filed: WAD361/2006; 13/12/2006
Status: Judgment reserved
- (6) [Day v Commissioner of Taxation \[2006\] FCA 655](#)
Topic: Taxation
Filed: NSD1191/2006; 20/06/2006
Status: No future listing
- (7) [IEL Finance Limited v Commissioner of Taxation \[2006\] FCA 267 and FCA 1293](#)
Topic: Taxation
Filed: NSD2053/2006 and NSD2058/2006; 20/10/06
Status: Judgment reserved
- (8) [IEL Finance Limited v Commissioner of Taxation \[2006\] FCA 1293](#)
Topic: Taxation
Filed: NSD2057/2006; 20/10/06
Status: Judgment reserved
- (9) [Lenzo v Commissioner of Taxation \[2007\] FCA 1402](#)
Topic: [Judicial Review](#)
Filed: [WAD 190/2007; 24/09/2007](#)
Status: [Settlement of Index](#)
- (10) [Price Street Professional Centre Pty Ltd v Commissioner of Taxation \(No 2\)\[2006\] FCA 1149](#)
Topic: [Judicial Review](#)
Filed: [QUD 100/2007; 04/04/2007](#)
Status: No future listing
- (11) [Rio Tinto Ltd v Commissioner of Taxation \[2005\] FCA 1336](#)
Topic: Taxation
Filed: VID1205/2005; 29/09/2005
Status: No future listing
- (12) [Spasked Pty Ltd ACN 003 255 847 v Commissioner of Taxation](#)
Topic: Not supplied
Filed: NSD2050/2006; 20/10/2006
Status: Judgment reserved
- (13) [Starr v Commissioner of Taxation of the Commonwealth of Australia \[2007\] FCA 23](#)
Topic: Not supplied
Filed: WAD28/2007; 12/02.2007
Status: Judgement Reserved

Interpretation

In these Tax Update Notes a reference to the:

- ◆ AAT is a reference to the Administrative Appeals Tribunal
- ◆ Administration Act is a reference to the Taxation Administration Act 1953
- ◆ ADJR is a reference to the Administrative Decisions Judicial Review Act
- ◆ ITAA 1936 or the 1936 Act is a reference to the Income Tax Assessment Act 1936
- ◆ ITAA 1997 or the 1997 Act is a reference to the Income Tax Assessment Act 1997
- ◆ ITR is a reference to the Income Tax Regulations
- ◆ FBTA is a reference to the Fringe Benefits Tax Assessment Act (1986)
- ◆ GST Act means is a reference to the A New Tax System (Goods and Services Tax) Act 1999
- ◆ GST Regulations is a reference to the A New Tax System (Goods and Services Tax) Regulations 1999
- ◆ SGAA means Superannuation Guarantee (Administration) Act 1992
- ◆ The SIS Act is a reference to the Superannuation Industry (Supervision) Act
- ◆ Tribunal is a reference to the Administrative Appeals Tribunal
- ◆ The Regulations is a reference to the Income Tax Regulations

Status of ATO Documents

TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.

Status of a draft Taxation Ruling:

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the ATO. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the ATO of its stance on the particular matters covered in the Ruling.

Status of a Class Ruling:

Certain parts of a Class Ruling constitute a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953. CR 2001/1 explains Class Rulings.

Status of a Product Ruling:

The number, subject heading, and the What this Product Ruling is about (including Tax laws, Class of persons and Qualifications sections), Date of effect, Withdrawal, Previous Ruling, Arrangement and Ruling parts of products rulings will generally constitute a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953.

Product Ruling PR 1999/95 explains Product Rulings

Status of an ID and Private Binding Ruling:

ATO IDs are published on ATO law as precedential ATO views for ATO officers. ATO officers must search for, identify and apply relevant ATO IDs in resolving technical interpretative issues (see Law Administration Practice Statement PS LA 2003/3).

Accordingly, an ATO ID must be followed where:

- ◆ there is no material difference between the facts of the arrangement upon which a decision is required and a current ATO ID; and
- ◆ the decision maker considers that the outcome of the issue would be correct if the ATO ID were applied.

The database of ATO IDs serves a different purpose to the Register of Private Binding Rulings. Entries to the Register are made for purposes of integrity and transparency only and do not constitute precedential ATO views. Accordingly, entries on the Register cannot be relied upon as indicative of the ATO view.

Status of a GST Ruling

Generally a GST Ruling is expressed to be a ruling for the purposes of section 37 of the Administration Act.

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*** indicates the item is in the "must read category - will impact on your current practices" (legislation will not receive ***rating unless it has received Royal Assent.)

** indicates the item is in the "should read category".

* indicates the item is in the "read if you have plenty of time" category.

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