THE JOURNAL FOR MEMBERS OF THE TAX INSTITUTE

Taxation in Australia

VOL 54(1) JULY 2019

Privilege or concession: the modern tax adviser's challenge

Donovan Castelyn, Annette Morgan and Dale Pinto, CTA (Life)

The Placer case (2018) from a valuation perspective

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THE TAX INSTITUTE

Contents

Welcome to your new digital 'blue journal', an all new experience and an all new look.

Cover article

20

Privilege or concession: the modern tax adviser's challenge

Donovan Castelyn, Associate Lecturer, Annette Morgan, Lecturer, and Dale Pinto, CTA (Life), Professor of Taxation Law, Curtin University

Feature articles

27

The Placer case (2018) from a valuation perspective

Hung Chu, Director, and Wayne Lonergan, Director, Lonergan Edwards & Associates

31

Difficulties in settling disputes with the Commissioner of Taxation

Christopher Bevan, CTA, Barrister, Eight Wentworth Chambers, Sydney

Insights from the Institute

2 President's Report
3 CEO's Report
4 Tax Counsel's Report

Regular columns

1 Tax News – at a glance
5 Tax News – the details
8 Tax Tips
11 Mid Market Focus
14 Tax Education
19 Member Profile
41 Superannuation
45 Tax Cases
49 Events Calendar
50 Index

Invitation to write

We welcome original contributions that are of interest to tax professionals, lawyers, academics and students.

For details about submitting articles, please see Guidelines for Publication on our website taxinstitute.com.au, or contact deborahpowell@taxinstitute.com.au.

Tax News – at a glance

by TaxCounsel Pty Ltd

June – what happened in tax?

The following points highlight important federal tax developments that occurred during June 2019. A selection of the developments is considered in more detail on page 5 of this Tax News column at the item number indicated.

Penalty interest

The Commissioner has released a final ruling which considers the deductibility of penalty interest and the treatment of penalty interest for CGT and depreciation purposes (TR 2019/2). **See item 1.**

Business continuity: similar business

The Commissioner has issued a final law companion ruling that provides guidance on what the carrying on a similar business means in the context of the recently enacted business continuity test provisions (LCR 2019/1). **See item 2.**

GST property decision tool

The Commissioner has released a GST property decision tool which is designed to assist users to determine the GST implications for property-related transactions. **See item 3.**

TPB decision: stay refused

The AAT has refused an application for a stay of a decision of the Tax Practitioners Board to cancel the registration of a tax agent (*Gould and Tax Practitioners Board* [2019] AATA 1056). **See item 4.**

Individual was a resident

The AAT has affirmed a decision of the Commissioner that an individual taxpayer was a resident of Australia (within the meaning of that term as defined in s 6(1) ITAA36) for tax purposes in the 2013 income year (*Handsley and FCT* [2019] AATA 917). **See item 5.**

Div 7A amalgamated loan: relieving discretion

The AAT has considered the operation of the relieving discretion that the Commissioner has under s 109Q ITAA36 where there has been a failure to make the minimum annual repayment in respect of a Div 7A amalgamated loan (*VCJN and FCT* [2019] AATA 968). **See item 6.**

Derivation of income

The AAT has affirmed an amended assessment of an employee on the total amounts received from her employer during the 2017 income year which were partly in respect of a period of employment at the close of the 2016 income year (*Roszkiewicz and FCT* [2019] AATA 931). **See item 7.**

President's Report

by Tim Neilson, CTA

Getting involved will ensure your voice is heard

President Tim Neilson discusses the importance of active members.

In the February President's Report, I quoted from something that my father wrote to the members of the ICAA (as it then was) in 1981. That 1981 president's message also said:

> "There is no denying that the larger firms have been most generous in making senior people available to serve on councils and committees, but I can say without hesitation that every effort has been made, and will continue to be made, to give full consideration to the interests of members in smaller practices, just as attention will continue to be given to the needs of the growing proportion of our members serving in industry, commerce, government and education."

By the standards of Geelong in the early 1980s, being one of two tax partners in a six-partner accounting practice was hardly operating at "micro" level, but my father had practised at smaller levels earlier, including a stint as a sole practitioner. I have no doubt that he did indeed give consideration to the interests of smaller practitioners, as well as the other groups he mentioned.

And the same applies to The Tax Institute today.

If you don't have a large firm background, don't underestimate the pressures that tax professionals at the big end of town are under, and we are immensely grateful to those from larger firms who contribute so much to the Institute. But we're always on the lookout to make our councils and committees as representative of our overall membership as possible. That requires not only getting involvement from people with different job descriptions and postcodes, but also getting full involvement from members from all geographical areas and demographic groups. Sourcing information from all of our membership is vital to addressing the real needs of all members.

I'll give one example.

In April, our submission to the Review of the Tax Practitioners Board noted (among other things) that the requirements for registration as a registered tax agent are not very accommodating to people who work part-time or who take a long break from their careers. By no means did all submissions address that issue, but we did. It shouldn't be pigeonholed only as a "women's" issue, but there's no doubt that, in reality, a great many women don't have a conventional full-time uninterrupted career path, and input from their perspective was crucial to having that issue put forward to the review.

We know we are not operating perfectly in this regard and we want to get better. We're constantly thinking about how communication is given and obtained from all members, and whether we could make it easier for all members to be part of directing your Institute's activities. For example, we know that traditional regular face-to-face committee meetings aren't suitable for everyone.

But being formally on a committee or council is only one way of getting your voice heard. We conduct member surveys, there are always evaluation surveys at our large events, you can "cold call' a communication to Institute staff, councillors or committee members, and, of course, there's "member feedback" each week in *TaxVine*.

However, if you do want to find out about getting involved on a committee or council, or what the Institute is doing about a particular thing that matters to you, let us know. And there's one thing that may have changed since my father's time — at the Institute, we're glad to receive input from "senior people" but we certainly want advice from members of all brackets of age and experience.

Nor do we want input only from the cities. Ever since Alf Traeger invented the pedal radio, Australians have been using technology to communicate across the continent, but we still suffer to some extent from "the tyranny of distance". The Institute stages fairly few face-to-face events outside the CBDs (with exceptions including, obviously, excellent "destination location" conventions). Although geography imposes some practical limits, our webinars help make our matchless technical content available in the most remote locations. But we're always looking for ways to communicate better.

On the subject of geography, our changed premises in Sydney and Melbourne seem to have achieved the quinella of reducing costs while improving facilities. But the Sydney CBD has a greater concentration of our members in close proximity than anywhere else in the country, so moving away from there wasn't a straightforward decision. We're confident of retaining full engagement in central Sydney, but if we need to get smarter in communicating across Sydney Harbour, that can only help in improving communications between both sides of the Nullarbor, to and from St Vincent Gulf, across the Tweed, the Murray and Bass Strait, and everywhere else.

You'll continue to hear from us. We'd love to hear from you.

PS By the time you read this, it will be old news, but I can't sign off without mention of the Queensland Tax Forum. Every aspect was in accordance with the Institute's excellent traditions, but I want to make special mention of the presenters and panellists. The program had been set in justifiable anticipation of a slew of tax changes from a new government, and new developments concerning Div 7A, s 100A and a number of other things, none of which actually transpired in time. Nevertheless, our speakers put on a smorgasbord of informative and insightful sessions. There's always something to be learned from listening to the very best.

CEO's Report

by Giles Hurst

Progress is impossible without change

CEO Giles Hurst discusses some changes on the horizon.

We have been many making many changes here at The Tax Institute. Last year, we successfully returned The Tax Institute to profitability and this in turn has allowed us a little breathing room to start to innovate and invest in member services in a way that previously we could not. This year, we have launched the all new digital version of the *Taxation in Australia* journal and you will recall we also invested in the establishment of a micro-site for the federal Budget. This month, our Associate, Fellow and Chartered Tax Advisers will also receive the first of ten free Monthly Tax Updates which includes 1 CPD hour per recording. All these changes are helping to pave the way for us to return The Tax Institute to growth as we look to increase our relevance and reach to younger members drawn from increasingly diverse backgrounds.

Our head office in Sydney will shortly move to a new location in North Sydney, and the financial surety we will derive from this will allow The Tax Institute to move forward and operate with great confidence. Investment will consequently be freed up to initiate further improvements to our website, our event-booking tools, online automation and delivery of other services such as Tax Knowledge eXchange.

In due course, we will be extending an invitation to members to visit our new premises and take advantage of our facilities. We will also be able to hold more expansive member events there which will support the development of our younger tax professionals, as well as larger, more formal events in our largest state.

Change isn't always easy, but progress is impossible without change. I appreciate the many comments we have had about how we are looking to reinvigorate our Institute and make it truly fit for purpose in the years ahead.

CPD compliance

Tax is always evolving. It's important to keep up. In fact, it's one of the obligations our members share as tax professionals.

This year, the Tax Practitioners Board began reviewing practitioners to ensure their compliance with continuing professional development. In support of our members' efforts to maintain their compliance, we are implementing an annual program of member audits. If you know you have yet to complete your CPD hours, please take a look at our upcoming CPD events.

Post-election

Last month, I mentioned how active our Tax Policy and Advocacy team had been during the federal Election. Post-election, this hasn't changed.

Immediately after the federal Election, we congratulated the returning government, expressing our eagerness to consult with government on the implementation of its tax agenda, as well as sharing our initial thoughts on the dual corporate tax rate system.

We also pointed out that the returning Coalition Government's low and middle income tax offset increase is set to cause an administrative nightmare, and suggested three possible remedies.

Furthermore, we wrote to the Assistant Treasurer, the Hon. Michael Sukkar, MP, about making improvements to consultation on tax policy and administration of the tax system, together with the Corporate Tax Association, Chartered Accountants Australia and New Zealand, The Law Council, and the Institute of Public Accountants.

We're committed to keeping our members informed of all changes that arise from the Coalition's tax proposals. We've continued to innovate through our content offerings by launching a series of infographics containing visually rich data, with tax tips, charts and statistics to help you navigate the raft of tax changes and to share with your clients.

We're building the right relationships to ensure advocacy work is ongoing. As always, feedback can be provided to the *TaxVine* inbox.

Finally, I would like to mention the outstanding success of the New South Wales and Queensland Tax Forums. Both events enjoyed the highest registrations that they have ever had. We wouldn't have delivered these first-class results without the efforts of our technical and organising committees and volunteer speakers, as well as the dedication of our state teams on the ground.

Our events are going from strength to strength and this is perhaps the single greatest tribute one could pay to an organisation which is built on a voluntary model where peers invest in one another and in the future of a tax system which is vital to our nation's future.

Tax Counsel's Report

by Angie Ananda, FTI

Legal professional privilege under fire?

If there are issues with the administration of LPP, those issues should be dealt with. However, any approach which will undermine or weaken LPP should be resisted.

Legal professional privilege (LPP) has received significant media attention over the last six months. Particularly, as a result of comments made by the Tax Commissioner, Chris Jordan.

Although the Commissioner has indicated that the Australian Taxation Office (ATO) is not concerned with the LPP concept generally, the Commissioner has indicated that there is a concern regarding LPP claims being made over large volumes of documents in what the ATO views as an attempt to conceal contrived tax arrangements.

The recent media coverage has left many practitioners wondering whether LPP is under fire.

To deal with some of the issues and concerns regarding LPP, the ATO has established the NTLG LPP Working Party. In April, the working party released a document entitled "Scope of engagement — agreement consultation" (consultation paper).

In some respects, the consultation paper has left me wondering whether LPP is indeed under fire.

The Tax Institute lodged a detailed submission dated 31 May 2019 in relation to the consultation paper (submission).

Dictating LPP requirements?

The consultation paper sets out what the ATO considers important when making LPP claims. However, it is unclear what the status and nature of the consultation paper is intended to be in terms of ATO guidelines. The ATO needs to make it clear what the purpose and status is intended to be.

It appears that the consultation paper is an attempt to dictate how claims of LPP need to be assessed and made. As outlined in the Institute's submission, the status of the consultation paper should be a "best practice guideline", rather than a binding guideline that prescribes the requirements to claim LPP. This should be specifically stated in the consultation paper.

Targeted approach

It appears that the ATO accepts that the majority of practitioners are legitimately making LPP claims on behalf of their clients. Given this, the approach suggested by the ATO in the consultation paper seems very heavy-handed. As argued in the Institute's submission, the approach should be more targeted.

For a more targeted approach, the ATO needs to give a clear and detailed explanation of its concerns. The Tax Institute has suggested that the ATO should provide guidance with examples setting out its concerns.

Time requirements

The consultation paper states that the ATO expects practitioners to make an assessment of privilege before claiming LPP. This expectation needs to be coupled with a requirement for sufficient time to be provided to actually assess privilege.

As pointed out in the Institute's submission, where a practitioner has insufficient time to locate and adequately assess the relevant documents, the practitioner may legitimately take a cautious approach and make a "provisional" claim for privilege, subject to a full and proper assessment of whether the claim can be maintained. This is a reasonable and appropriate approach provided that the ATO is made aware that the claim is provisional.

The consultation paper should specifically state that the ATO is required to provide sufficient time to assess documents for LPP. It should also be noted in the paper that what is "sufficient" will depend on the circumstances.

Independent review

The consultation paper refers to a "full LPP review". According to the consultation paper, this requires a legal practitioner "being independent of the privilege holder and the adviser" to review the documents and form an opinion about privilege. This requirement for independent review for privilege to be claimed is an inefficient, time-consuming and very costly approach.

The consultation paper should include a positive statement acknowledging that independent review is not a prerequisite for claiming LPP.

Legal professional privilege is a fundamental legal right that is not, and should not be, predicated on an independent review of the relevant documents. There may be a place for independent review. However, this should be limited to those circumstances where the parties are in dispute about a claim.

Conclusion

In conclusion, I think the ATO respects the fundamental importance of LPP. However, I also think that some approaches outlined in the consultation paper could have detrimental effects for practitioners (and their clients).

If there are issues with the administration of LPP, those issues should be dealt with. However, any approach which will undermine or weaken LPP should be resisted.

Tax News – the details

by TaxCounsel Pty Ltd

June – what happened in tax?

The following points highlight important federal tax developments that occurred during June 2019.

The Commissioner's perspective

1. Penalty interest

The Commissioner has released a final ruling which considers the deductibility of penalty interest and the treatment of penalty interest for CGT and depreciation purposes (TR 2019/2).

"Penalty interest" for the purposes of the ruling is an amount payable by a borrower under a loan agreement in consideration for the lender agreeing to an early repayment of the loan. The amount payable is commonly calculated by reference to a number of months of interest payments that would have been received but for the early repayment.

Penalty interest is generally deductible as a general deduction (s 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)) where:

- the borrowings are used for gaining or producing assessable income or in a business carried on for that purpose; and
- it is incurred to rid the taxpayer of a recurring interest liability that would itself have been deductible if incurred.

However, penalty interest is not deductible as a general deduction to the extent that it is a loss or outgoing of capital, or of a capital, private or domestic nature.

In relation to other potential deduction provisions, the ruling concludes that penalty interest:

- is not incurred *for* borrowing money so is not deductible under s 25-25 ITAA97 (borrowing expenses);
- if incurred to discharge a mortgage, is deductible under s 25-30 ITAA97 (expenses of discharging a mortgage) to the extent the loan moneys were used for producing assessable income. Deductibility is not affected by whether the expenditure is capital or revenue in nature;
- incurred in deriving foreign source income may be deductible under s 25-90 ITAA97 (deduction relating to foreign non-assessable non-exempt income) if, among other things, it satisfies the definition of debt deduction in s 820-40(1)(a) ITAA97 because it is calculated by reference to the time value of money;
- that is an incidental cost incurred in relation to a CGT event or to acquire a CGT asset is included in the cost base or reduced cost base of the asset; and
- is not reasonably attributable to a balancing adjustment event occurring to a depreciating asset and so is not included in the asset's cost under s 40-190(2)(b) ITAA97.

Penalty interest may be deductible under the so-called blackhole provisions (s 40-880 ITAA97) if the amount is not otherwise taken into account, or denied a deduction, under another provision. Section 40-880 is a provision of last resort.

Two of the examples given in the ruling are as follows.

Example 1

John can refinance his rental property at a lower interest rate. In order to refinance, John pays out the first loan early. He incurs penalty interest calculated on the basis of one month's interest for each year of the loan period remaining. The advantage sought in practical terms by repaying the first loan early and incurring penalty interest is future interest savings from a lower interest rate. The penalty interest is of a revenue character and deductible as a general deduction.

Alternatively, where refinancing affects the discharge of a mortgage securing the first loan, the penalty interest is deductible under s 25-30.

Example 2

Sally sells her rental property, repays the loan to discharge the mortgage over the property and incurs penalty interest. The penalty interest is a necessary incident of the sale of the property. A payment so connected to the realisation of a capital asset will be on capital account and not deductible as a general deduction. As the penalty interest is not a cost of borrowing incurred in establishing the loan, it is not deductible under s 25-25. It is, however, deductible under s 25-30 as an expense of discharging the mortgage.

2. Business continuity: similar business

The Commissioner has issued a final law companion ruling that provides guidance on what the carrying on a similar business means in the context of the recently enacted business continuity test provisions (LCR 2019/1).

The final ruling replicates the draft (LCR 2017/D6) that was issued when the relevant amending Bill was introduced into parliament on 30 March 2017.

Under the similar business test, companies and listed widely held trusts will be able to utilise tax losses made from carrying on a business against income derived from carrying on a similar business following a change in ownership or control.

The same business test remains and is brought within the concept of the business continuity test, which may also be met by satisfying the similar business test. There are four factors that must be taken into account when applying the similar business test. The law companion ruling points out

that the four factors that must be taken into account require a comparison between the essential characteristics of the business before and after the relevant change in ownership or control. These four factors do not limit consideration of any other matter that may be relevant to the similar business test determination. The weight to be given to each factor will depend on the facts and circumstances of each case. The meaning and effect of the similar business test will, it is thought, give rise to difficulty and it is likely that decided cases will be needed to settle the operation of the test. That is likely to take some time.

3. GST property decision tool

The Commissioner has released a GST property decision tool which is designed to assist users to determine the GST implications for property-related transactions.

The tool includes:

- a series of questions to help determine the GST classification of real property transactions;
- links to additional information;
- information relating to GST at settlement on the sale or purchase of new residential premises or potential residential land; and
- guidance and explanations to work through the tool.

No record any of personal information is made and the user remains anonymous.

The GST tool generates a decision that contains:

- a decision advising if GST is payable on the sale;
- an estimate of the amount of GST payable when applying the margin scheme; and
- a decision advising if you are eligible to claim input tax credits.

There are a number of issues that the tool does not address, including:

- partitioning of land;
- amalgamated land;
- easements, restrictive covenants and options;
- mixed supply;
- dual purpose (where it is intended to rent a property while trying to sell it by actively marketing it for sale); and
- calculating adjustments for changes in creditable purpose (for example, new residential property that was intended for sale being leased to tenants, which is an input taxed supply).

Recent case decisions

4. TPB decision: stay refused

The AAT has refused an application for a stay of a decision of the Tax Practitioners Board (TPB) to cancel the registration of a tax agent (*Gould and Tax Practitioners Board*[1]).

The TPB's decision, which was made on 13 December 2018 and was to take effect from 7 February 2019, was to cancel the agent's registration as a tax agent on the basis of its determination that he was not a fit and proper person for the purposes of s 20-5(1)(a) of the *Tax Agent Services Act 2009* (Cth) (TASA). The agent sought a stay to retain his registration pending the tribunal's determination of his application for review, on condition that he not solicit new clients during that period.

The tribunal referred to, and considered, the six factors that were identified by Downes J in *Re Scott and Australian Securities and Investment Commission*[2] as being relevant to whether a stay in this kind of matter should be granted. These factors were: the applicant's prospects of success on the application for review; the consequences to the applicant if the stay is not granted; the public interest; the consequences to the TPB in carrying out its functions; whether the review would be rendered nugatory if the stay were not granted; and any other relevant matters, including the likely time to the hearing of the review.

The tribunal said that the TPB had acted on highly critical findings against the agent made by Perram J in *Hua Wang Bank Berhad v FCT*.[3] Perram J found that the agent had engaged in a pattern of conduct that was deceitful and dishonest. After considering each of the factors referred to by Downes J, the tribunal said that it was not satisfied that the agent had established a strong case such that it could be said his application for review was more likely to succeed than not. Importantly, there was a significant public interest in refusing the stay.

5. Individual was a resident

The AAT has affirmed a decision of the Commissioner that an individual taxpayer was a resident of Australia (within the meaning of that term as defined in s 6(1) of the *Income Tax Assessment Act 1936* (Cth) (ITAA36)) for tax purposes in the 2013 income year (*Handsley and FCT*[4]).

The tribunal summarised the taxpayer's circumstances as being a man who:

- spent the vast majority of his time during the 2013 income year outside Australia;
- had ended his married relationship with his former wife before the start of the 2013 income year;
- again before the start of the 2013 income year, had begun a relationship with a foreign national who did not live in Australia;
- intended to secure for himself and his partner a permanent dwelling outside of Australia and live there;
- had limited ongoing family and financial connections with Australia; but
- had not established for himself permanent living facilities outside Australia during the 2013 income year.

The tribunal said that, for the taxpayer to succeed, he had to show that he did not reside in Australia *and* either show that he had changed his domicile to a place outside Australia or satisfy the tribunal that he had a permanent place of abode outside Australia.

As to the issue of whether the taxpayer resided in Australia, the tribunal concluded that, in the 2013 income year, he was in a state of transition. While he may not have done enough to constitute having taken up residence in any particular location outside Australia, notionally applying the primary Australian test of residence to places outside Australia, he had done enough to break his residence ties with Australia.

In circumstances where no new place of permanent residence had been taken up and no permanent living arrangements had been established in any place, a conclusion that a new place of domicile had been taken up could not be reached.

On the permanent place of abode issue, the tribunal said that the taxpayer had shifted between a number of countries but did not have a permanent place of abode in any of them. Notwithstanding that the taxpayer might well be regarded as falling within the concept of having permanently or indefinitely terminated Australian residence, he did not fall within the exclusionary permanent place of abode outside Australia test.

6. Div 7A amalgamated loan: relieving discretion

The AAT has considered the operation of the relieving discretion that the Commissioner has under s 109Q ITAA36 where there has been a failure to make the minimum annual repayment in respect of a Div 7A amalgamated loan (*VCJN and FCT*[5]).

Under that section, a Div 7A deemed dividend will not arise if the borrower entity satisfies the Commissioner that:

– the amount in fact paid by the entity was less than the minimum yearly repayment because of circumstances beyond the entity's control; and

– the entity would suffer undue hardship if the private company were taken under s 109E ITAA36 to pay a dividend to the entity at the end of the current year because of the loan.

There are several matters specified in s 109Q(2) that the Commissioner is obliged to have regard to when considering the exercise of the discretion which were examined by the AAT.

What is of some interest is the AAT's consideration of the concept of circumstances beyond the entity's control.

The view of the AAT was that, if a person chooses to put themself into a position where they must meet certain financial obligations and if the operation of inevitable or foreseeable circumstances or the foreseeable financial environment cause the person not to be able to meet those financial obligations, that cannot be considered to be beyond his or her control. That was the taxpayer's situation. He chose to expose himself to the consequences of reasonably foreseeable, in fact predictable, financial circumstances. The consequences that he suffers are therefore within his control. The AAT said that that analysis of the phrase "circumstances beyond the entity's control" was consistent with the mandatory considerations set out in s 109Q(2).

In any event, even if that analysis was not correct, the AAT found that the taxpayer did in fact have the capacity to make the minimum yearly repayment but had, however, prioritised other payments over payment of the minimum yearly repayment. In that sense, the choice not to make the repayment was within the taxpayer's control.

7. Derivation of income

The AAT has affirmed an amended assessment of an employee on the total amounts received from her employer during the 2017 income year which were partly in respect of a period of employment at the close of the 2016 income year (*Roszkiewicz and FCT*[6]).

The tribunal reiterated the principle that, in the case of salary and wages, it is the receipts basis of accounting that is relevant for income tax purposes.

The source of the taxpayer's income in question was from her employment and the income in question was in the form of wages which she did not receive until the 2017 financial year. It could not be said to have "come home" to her until then. The taxpayer's gain was not realisable until the 2017 financial year.

The income tax legislation's focus, when considering an employee's earnings, is on what a taxpayer has received in the financial year, not to which period of time those earnings relate. The tax legislation has been consistently applied by the highest courts in holding that employees are assessed when they receive the payment or the income.

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References

1 [2019] AATA 1056.
2 [2009] AATA 798.
3 [2014] FCA 1392.
4 [2019] AATA 917.
5 [2019] AATA 968.
6 [2019] AATA 931.

Tax Tips

by TaxCounsel Pty Ltd

CGT main residence: adjacent land issues

The operation of the adjacent land rules that apply in the context of the CGT main residence provisions can give rise to difficulties.

Background

While a statutory exemption provided for in rating or taxation legislation for a dwelling or some other building would usually, by implication, include at least a curtilage, for the purposes of the CGT main residence exemption, there are specific provisions that govern the operation of the exemption in relation to what is styled adjacent land (or, in the case of a flat or home unit, an adjacent structure).

The definition of "dwelling" (for the purposes of the CGT main residence provisions) only includes the relevant unit of accommodation and "any land immediately under the unit of accommodation" (s 118-115 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97)). The adjacent land rules are intended to provide the rules that exhaustively determine the status of adjacent land for the purposes of the CGT main residence exemption.

In straightforward situations, the application of these rules does not create any real difficulty. However, problems can arise in relation to their application in particular circumstances.

The statutory rules

The statutory main residence adjacent land rules are provided for in s 118-120 ITAA97. That section provides as follows:

"**118–120 Extension to adjacent land etc.**

Adjacent land

(1) This Subdivision applies to a dwelling's adjacent land (if the same CGT event happens to that land or your ownership interest in it) as if it were a dwelling.

(2) Land adjacent to a dwelling is its ***adjacent land*** to the extent that the land was used primarily for private or domestic purposes in association with the dwelling.

(3) The maximum area of adjacent land covered by the exemption for the CGT event (the ***current event***) is 2 hectares, less the area of the land immediately under the dwelling.

(4) However, if subsection 118-245(2) applied to you for an earlier CGT event that happened in relation to:

(a) other land that was part of the dwelling's adjacent land at the time of the earlier CGT event; or

(b) your ownership interest in that other land at that time;

the maximum area of land covered by the exemption for the current event is the maximum exempt area for the current event and the dwelling.

Adjacent structures

(5) This Subdivision applies to an adjacent structure of a flat or home unit (if the same CGT event happens to that structure or your ownership interest in it) as if it were a dwelling.

(6) A garage, storeroom or other structure associated with a flat or home unit is an ***adjacent structure*** of the flat or home unit to the extent that the structure was used primarily for private or domestic purposes in association with the flat or home unit."

These provisions raise a number of issues, several of which are considered briefly below.

For the purposes of simplicity, this article does not deal with the case of adjacent structures as provided for in subss (5) and (6) above.

There are also provisions that apply where there is a compulsory acquisition of vacant land, but these are also not considered.

As if it were a dwelling

It is important to note that, under the adjacent land provisions, qualifying adjacent land is itself treated (by subs (1)) as being a dwelling in its own right ("as if it were a dwelling"). This, as discussed below, can create difficulties.

Area limitation

In the more usual situation, the maximum area of adjacent land that can be taken into account for the purposes of the CGT main residence exemption is an area of two hectares (which includes the land on which the dwelling is built) (s 118-120(2)).

Same CGT event

The same CGT event requirement (in subs (1)) of the adjacent land rules is reflected in s 118-165 ITAA97, which provides that the CGT main residence exemption does not apply to a CGT event that happens in relation to land to which the exemption can extend (because of the land being adjacent land) if the event does not also happen in relation to the dwelling or the taxpayer's ownership in it. This means, for example, that, where the land on which a dwelling is erected is subdivided and adjacent land is sold off separately, the CGT main residence exemption cannot apply in relation to that sale.

The ATO takes the view that the dwelling and adjacent land must be disposed of to the same purchaser at the same time (TD 1999/68).

Time of acquisition

It is immaterial (for the operation of the adjacent land provision) when the adjacent land was acquired. The adjacent land may have been acquired before, at the same time as or after the dwelling (or the taxpayer's ownership interest in the land on which the dwelling is situated) was acquired (TD 92/171).

"Adjacent"

The ATO view (expressed in TD 1999/68) is that land may be adjacent to the land on which a dwelling is located even if the land is not contiguous to the land on which the dwelling is located. That determination states:

> "'Adjacent is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity would justify the application of the word is entirely a question of circumstances …' (*Mayor of Wellington v. Mayor of Lower Hutt* [1904] AC 773 at 775-776).
>
> The Macquarie Dictionary defines 'adjacent' as 'lying near, close or contiguous; adjoining; neighbouring'.
>
> For the purposes of section 118-120, land is adjacent to your dwelling if it is close to or near your dwelling.
>
> …
>
> The further the distance between the relevant land and the land on which your dwelling is situated the less likely it is that the relevant land is 'adjacent' land in terms of section 118-120. This is so not only because the word 'adjacent' has its limits but also because it is less likely that the land could be used primarily for private or domestic purposes in association with your dwelling."

Private or domestic use

Adjacent land only qualifies for the CGT main residence exemption to the extent that the taxpayer used the adjacent land primarily for private or domestic purposes in association with the dwelling (s 118-120(2)).

The extent to which adjacent land was so used is a question of fact and degree to be determined having regard to all the circumstances of each particular case (TD 2000/15). That determination states that, although this is to be determined at the time when the particular CGT event happens in relation to the dwelling, it is the extent to which the taxpayer used the land primarily for private or domestic purposes in association with the dwelling throughout the taxpayer's ownership period of the adjacent land that is relevant.

Apportionment

The words "to the extent that" clearly contemplate an apportionment if, for some part of the ownership period, the adjacent land either has not been used primarily for private or domestic purposes in association with the dwelling or has only been partly so used. It is pointed out in TD 2000/15 that, when referring to the extent to which "you" used the land for the relevant purposes, the adjacent land provision is not concerned with any use of the land by anyone else.

TD 2000/15 gives the following example:

> "**Example**
>
> John buys a home on 2 hectares of land in October 1993. One hectare of land is used continuously to derive income from agistment for 4 years. For twelve months before John sells the home in October 1998, he ceases to use the land for agistment and uses it privately in association with the dwelling.
>
> John is entitled to disregard 20% of any capital gain or capital loss made in respect of the one hectare of land previously used for agistment purposes. This is the extent to which the land has been used primarily for private or domestic purposes in association with the dwelling during the period of ownership."

Where land area exceeds two hectares

The Commissioner takes the view that, if the land on which a dwelling is situated and the adjacent land exceeds two hectares, the taxpayer can select which part of the adjacent land (up to the two-hectare maximum) is to be taken into account for the purposes of applying the CGT main residence exemption to the adjacent land (TD 1999/67). The determination gives several examples.

Adjacent land in different ownership

It may sometimes occur that the owner(s) of the land that potentially qualifies as being adjacent to a dwelling are not identical to the owners of the land on which the dwelling is situated. For example, assume that Philip and his spouse (Patricia) use a dwelling as their main residence. The following scenarios are possible:

1. Philip and Patricia own the land on which the dwelling is situated but Patricia owns the adjacent land;
2. Philip owns the land on which the dwelling is situated but Patricia owns the adjacent land;
3. Philip owns the land on which the dwelling is situated but Philip and Patricia own the adjacent land; and
4. Philip owns the land on which the dwelling is situated but Philip and Harold own the adjacent land.

It is considered that:

- in item 1 above, Patricia; and
- in items 3 and 4 above, Philip,

would be able to potentially claim the CGT main residence exemption in respect of his or her interest in the adjacent land, depending on the area, and his or her use, of the adjacent land.

The position in relation to item 2 above would seem to be that Patricia would not be able to claim the CGT main residence exemption in relation to the adjacent land. This is because the adjacent land provision refers to the extent that "you" used the adjacent land and "you" is clearly a reference to the person claiming the CGT main residence exemption in respect of a dwelling (or his or her ownership in it).

The requirement that the same CGT event happen in relation to the adjacent land that has happened in relation to the dwelling needs to be particularly kept in mind where the owner(s) of the adjacent land are not identical to the owner(s) of the land on which the dwelling is situated. In such a case, it may be possible for one contract to cover both the land on which the dwelling is situated and the adjacent land. However, if this were not possible and two contracts need to be entered into (with the one purchaser), the contracts should be interdependent with each other; each contract should contain a special condition to the effect that completion of the contract is conditional on simultaneous completion of the other contract.

An interesting issue arises if the facts in the kind of case envisaged by item 2 above (that is, where one taxpayer owns the dwelling and the other owns the adjacent land) are varied. Philip (who owns the dwelling) transfers an ownership interest (say, a one-half interest) to Patricia (who owns the adjacent land) and the dwelling and adjacent land are sold some time later, in circumstances such that the same CGT

event happens to both the dwelling and the adjacent land. The question is whether the CGT main residence exemption would apply in relation to a capital gain or capital loss Patricia makes on the disposal of the adjacent land by reference to the whole period Patricia used the dwelling as her main residence, or whether the exemption would only apply by reference to the period commencing when Patricia acquired an ownership interest in the dwelling.

The answer to this question depends on whether the adjacent land rule, in referring "to the extent that you used the land primarily for private or domestic purposes in association with the dwelling", is only referring to a use while the taxpayer ("you") had an ownership interest in the dwelling. It is submitted that the literal words do not require this. However, it is possible that a court would adopt an approach that would confine the operation of the adjacent land provision to the period the taxpayer had an interest in the relevant dwelling.

Where dwelling deemed to be main residence

Considerable difficulty arises in applying the adjacent land provision of the CGT main residence exemption where a concession applies that treats the dwelling in question as being (contrary to fact) the taxpayer's main residence. These concessions include:

- the absence concession;
- the building, repairing or renovating concession;
- the moving into a dwelling concession;
- the changing main residence concession; and
- the accidental destruction concession.

The difficulty arises because the CGT main residence exemption provisions which operate to treat a dwelling as being the taxpayer's main residence do not contain any provision which would activate the adjacent land provision. The adjacent land provision requires a positive use by the taxpayer ("you") of the adjacent land and, in the absence of actual or deemed relevant use, it is difficult to see how the adjacent land use requirement could be met. If the words of the provision are taken at their face value, this would mean, for example, that where the conditions for the absence concession to apply are met and the concession is chosen, the concession could not operate in relation to the adjacent land.

It is even more difficult to see how there could be any use by the taxpayer ("you") of land adjacent to a dwelling where there is in fact no dwelling on the land at a time when a dwelling is being treated as being on the land. By way of illustration, where a taxpayer acquires vacant land and builds a dwelling on it, s 118-150 ITAA97 permits the taxpayer (subject to certain conditions being met) to choose to treat the dwelling that is built as being his or her main residence from the time he or she acquired his or her ownership interest in the land (subject to the time limitations imposed by s 118-150(4)).

Where this choice is made, the actual dwelling built is taken to have been the taxpayer's main residence during a period while the land was vacant. In such a case, it is difficult to see how it could be said, while the land was vacant, that there was land adjacent to a dwelling, or, if that difficulty can be overcome, that any land was used by the taxpayer in association with the dwelling that is constructed.

It is submitted that the deeming provisions under consideration should, if at all possible, be given a practical operation which would achieve what would seem to be their intended object. For example, in the context of a dwelling on a typical residential block of land, it would be somewhat absurd to treat a choice for the absence concession to apply as having the effect that the dwelling (but not the adjacent land) qualified for the CGT main residence exemption during the period of absence. However, just how the adjacent land provision should be construed and applied is not readily apparent. It is assumed in the ATO document "Destruction or compulsory acquisition of your home" in relation to the accidental destruction concession that the adjacent land provision can apply where there is no actual dwelling on the land, but the constructional difficulties that arise were not adverted to.

Deceased estates

Further problems arise in the context of deceased estates. Where a dwelling was owned by a deceased individual at the date of his or her death, the operation of the CGT main residence deceased estate rules can depend on the use of the dwelling after the deceased's death by a person other than the legal owner.

For instance, the trustee of a deceased estate may be able to claim the benefit of the CGT main residence exemption where the dwelling is the main residence of a person who has a right to occupy the dwelling under the will. In such a case, if the trustee were to dispose of the dwelling, it would be difficult to satisfy the adjacent land provisions having regard to the fact that the entity that would need to satisfy the use of the adjacent land ("you") would be the trustee.

TaxCounsel Pty Ltd

Mid Market Focus

by Peter Bembrick, CTA, HLB Mann Judd

When is a company carrying on a business?

The ATO is taking a broad view of companies that carry on a business for claiming concessions such as the instant asset write-off, including investment activities.

On 5 April 2019, the ATO issued a final tax ruling, TR 2019/1, in which it confirmed the views expressed in the draft 2017 version of the ruling that, for certain purposes, the scope of "carrying on a business" will extend to a company that holds primarily passive assets, such as property, shares or other financial investments, as long as its activities are carried out with a view to making a profit, including simply holding the assets to derive an income stream and for future capital gains.

Carrying on a business in a general sense versus carrying on a particular business

The ATO notes in its ruling that some provisions in the tax legislation deal with companies that carry on business in a general sense, ie without necessarily focusing on the specific business that is carried on, while other provisions deal with whether a company carries on a particular business.

TR 2019/1 is concerned with companies carrying on business in a general sense, and applies to companies incorporated under the *Corporations Act 2001* (Cth), apart from companies limited by guarantee. The ruling does not therefore apply to incorporated or unincorporated associations, partnerships, trusts or individuals.

Key criteria that indicate the carrying on of a business

There is a long line of case law that has addressed the question of when a taxpayer will be regarded as carrying on a business, but it remains a highly subjective issue. Some key criteria include:

- an intention to carry on a business;
- the nature of the company's activities and whether they have a purpose of profit;
- the existence or absence of a profit-making purpose;
- a purpose and prospect of making a profit;
- repetition and regularity of activity;
- organisation of activities in a systematic and business-like manner; and
- size and scale of the company's activities and capital employed.

The ATO discusses each of these factors in the ruling, and some interesting conclusions that it draws that are relevant to the definition of carrying on a business as it applies to the particular tax provisions (discussed further below) include:

- there is generally a presumption that a company was formed, and activities undertaken, with a view to making a profit, unless there are facts that clearly demonstrate otherwise, which would suggest that most companies are carrying on a business for these purposes;
- unlike individuals, partnerships and many trusts, it is much less likely that a company will have been formed and its activities carried out for multiple purposes. Therefore, the absence of a personal, domestic or other purpose (such as asset protection or being in the nature of a hobby) makes it much more likely that a company's activities will be seen to have a commercial, profit-making intention;
- another factor that distinguishes a company from an individual or other entity is its formal structure and the statutory requirements under the *Corporations Act 2001*; and
- a company that is formed with the expectation of receiving income distributions as a beneficiary of a trust would not, at first glance, seem to display the characteristics of one that carries on a business, with no actions taken by the company to derive the income.

The ATO states in the ruling, however, that in most cases, such beneficiaries will invest the distributed funds, either by loaning the funds back to the trust or taking receipt of the distribution and acquiring external investments. It is also likely that there will be repeated distributions by the trust to the company over multiple years, so that the company becomes a more active participant in the trust's affairs. These actions by the company make it more likely that such corporate beneficiaries will generally be regarded as carrying on a business.

Examples of situations that the ATO would view as carrying on a business

The ATO provides a number of useful examples to illustrate the approach that it will take when applying the factors discussed above to particular situations, including the following.

Example 1: inactive company with retained profits

InactiveCo previously carried on a trading business that has ceased operations, and has $400,000 in retained earnings that is represented by funds held in a bank account. In the current year, the company derives interest of $12,000 on these funds and pays its annual ASIC review fee of $254 so that its income exceeds its expenses, a situation that is expected to continue in future years.

In the ATO's view, the company's activities have both a purpose and prospect of profit, and it is therefore carrying on a business.

Example 2: company engaged in preliminary activities invests its available funds

FutureCo has been recently incorporated and is investigating the viability of carrying on a particular business. In the meantime, it has share capital of $300,000 in bank accounts that produces interest income of $9,000. While the company's activities are preliminary in nature and it has not actually commenced the business activity for which it was established, the ATO's view is that the activity of investing its available funds for a profit is sufficient to be carrying on a business.

Example 3: property investment company

InveproCo owns a commercial property which is rented under normal commercial terms to an external party, from which it derives an ongoing profit, and has no other activities.

The ATO's view is that, regardless of whether the company engages a professional property manager to manage the property or alternatively the company's directors perform this role, the profit-making nature of its activities is sufficient for it to be carrying on a business.

Example 4: share investment company

ShareCo holds a portfolio of listed shares worth $400,000, from which it derives a net profit of $20,000 each year through receiving regular dividends from the various investments.

As for example 3, the ATO's view is that these activities represent carrying on a business, regardless of whether the company uses a professional investment manager or simply manages the investment portfolio internally.

Example 5: company leasing boats to an unrelated party

CharterCo owns three passenger boats and, instead of operating its own charter services, it has been forced (due to the loss of its operator's licence) to lease the boats to a third party, an activity that generates a significant profit.

Again, the ATO takes the view that the choice to engage an external management company to manage the leasing activities and maintain the boats or to carry out all of these activities internally would not change the conclusion that the purpose and prospect of profit is sufficient for CharterCo to be regarded as carrying on a business.

Example 6: holding company

HoldCo owns all of the shares in SBE Co, which carries on a profitable trading business. In this example, the ATO discussed two scenarios, one where HoldCo's sole activities are holding the shares in SBE Co and managing the company group, and a second where HoldCo also makes an interest-free loan to SBE Co and owns plant and equipment that is made available for SBE Co to use in its business without any charge.

The ATO's view is that, in both cases, HoldCo carries on a business.

Ability of investment companies to access small business tax concessions

Importantly, the position that the ATO has taken in this ruling opens investment companies up to a wider range of tax concessions than previously thought. While the ATO is still in the process of updating the guidance on its website, informal comments from the ATO have been able to be obtained on each of the points discussed below.

There are two specific situations covered by this ruling:

1. applying the lower company tax rate of 27.5% to a "small business entity" (SBE) for the 2016 and 2017 tax years under s 23 of the *Income Tax Rates Act 1986* (Cth), which affected both the tax paid by the company and the rate at which dividends paid were to be franked; and
2. determining whether a company would meet the definition of SBE under Div 328 of the *Income Tax Assessment 1997* (Cth) (ITAA97), which, as discussed below, is relevant to claiming a range of small business tax concessions not only in the 2016 and 2017 years, but also in subsequent years.

Tax concessions available to SBEs

While there are other tax concessions that can be available to small businesses more broadly, there are four common concessions that, as a result of this tax ruling, should now be available not only to active trading businesses, but also to passive investment companies.

Three of these concessions should be available indefinitely to any investment company that qualifies as an SBE because its annual turnover (when aggregated with related entities) does not exceed $10m.

An immediate deduction for prepaid expenses

An immediate deduction for prepaid expenses applies where the period to which the expense relates is no more than 12 months. By contrast, for larger companies, prepaid expenses must generally be apportioned over the relevant period. For example, an investment company might choose on 30 June 2019 to prepay the fees owing to an external investment manager for the next 12 months, and as a result of this ruling, the payment would now be deductible in full in the 2019 financial year.

An immediate deduction for entity start-up costs

An immediate deduction for entity start-up costs covers capital costs traditionally referred to as "black-hole" expenses, including advisers' fees and ASIC fees relating to incorporating a company or establishing the structure more generally. These costs would not normally be tax deductible, nor would they be included in the cost base of any asset for capital gains tax (CGT) purposes.

While trading businesses that are not SBEs can claim these costs over a five-year period under s 40-880 ITAA97, an SBE is able to claim an immediate tax deduction in the year that the cost is incurred. By bringing investment companies into the definition of "carrying on a business", the tax ruling will also allow them to claim a deduction for start-up costs, something that was thought not previously possible.

Instant asset write-off – SBEs (turnover not exceeding $10m)

As illustrated in Diagram 1, SBEs are able to claim an instant write-off for any fixed assets, such as plant

Diagram 1. Instant asset write-off thresholds timeline

and equipment, costing less than $20,000 that were acquired between 12 May 2015 and 28 January 2019, for acquisitions costing less than $25,000 between 29 January 2019 and 7.30 pm on 2 April 2019, and for acquisitions costing less than $30,000 between that time and 30 June 2020, after which the write-off threshold is due to revert to $1,000.

It is clear that, because an investment company is treated as carrying on a business for this purpose under TR 2019/1, where its aggregated turnover does not exceed $10m, it would qualify as an SBE and for the instant asset write-off. While most investment companies of this scale will probably have little in the way of fixed asset acquisitions, it is still an example of a tax concession that was not thought relevant until the ATO released their ruling.

The fourth concession will be available only up until 30 June 2020, as detailed below.

Instant asset write-off – medium businesses (turnover between $10m and $50m)

This measure was announced in the April 2019 federal Budget and has already been passed into law. As shown in Diagram 1, the instant asset write-off for assets costing less than $30,000 acquired between 7.30 pm on 2 April 2019 and 30 June 2020 has been extended to "medium business" entities with a turnover of between $10m and $50m.

While it was not immediately clear whether the expanded definition of "carrying on a business" under TR 2019/1 would apply to investment companies, informal confirmation has been received from the ATO that this will be the case because the amendment introducing the concession for medium businesses allows the instant asset write-off on the assumption that the turnover threshold had been increased to $50m, ie it effectively treats the company as if it was an SBE when determining whether the medium business concession is available.

See Diagram 1 for a summary of the new timeline of the expanded instant asset write-off and how it applies to both SBEs and medium businesses.

Other small business tax concessions not available to investment entities

Finally, it is worth highlighting that some other small business tax concessions, such as the reduced company tax rate of 27.5% under the current "base rate entity" rules (ie for the 2018 tax year onwards) and the small business CGT concessions, remain unavailable to passive investment companies, but apply only to active trading businesses.

Peter Bembrick, CTA
Tax Partner
HLB Mann Judd Sydney

Tax Education

by Revital Folan

The challenge in the juggle

The Tax Institute's duces reveal their secrets to overcoming the common challenge of juggling study, work and other commitments.

ATL004 CTA2B Advanced Dux Award for study period 1, 2018

Name: Nicola Bird

Position: Manager

Company: William Buck Chartered Accountants and Advisors

State: New South Wales

Can you tell us about your background?

I studied law and started my career in tax 10 years ago at a Big 4 accounting firm in South Africa. In South Africa, I worked on corporate tax advisory matters in the private equity, mining and M&A tax streams. Since moving to Sydney three years ago, I have joined the William Buck tax team, focusing mainly on corporate and international tax matters.

What is the most valuable aspect of studying ATL004 CTA2B Advanced that you have taken away?

I found that the most valuable aspect of the CTA2B Advanced course is the many practical examples and case studies presented in the course. This facilitates a real practical understanding of the content and the issues you come across on a daily basis as a tax adviser.

Have you gained confidence in new areas?

Moving from South Africa to Australia was challenging for me as the tax laws are notably different in both countries. The CTA courses have helped me build confidence by providing me with an understanding of the basics of the Australian tax rules, establishing the foundation of my continuing career in tax in Australia. I enjoyed learning about topics that I have not had much exposure to in my prior roles, including GST and FBT.

Can you tell us about the main reason for undertaking the course?

I wanted to develop my knowledge of Australian tax rules while being able to draw on my prior experience as a tax adviser. I found that the CTA courses provide you with a working knowledge of the rules, while facilitating practical learning. This has allowed me to refine my skills and to take a hands-on and practical approach to issues I come across on a day-to-day basis.

What is your next step with education?

I would like to become a Chartered Tax Adviser; therefore, I intend to complete CTA3 Advisory next year. From here on out, I'm looking forward to continuing to learn and grow, and maybe even a Masters in tax.

ATL001 CTA1 Foundations Dux Award for study period 2, 2018

Name: Ross Heard

Position: Consultant

Company: Cooper Partners

State: Western Australia

Can you tell us about your background?

I began working in tax in January 2017 when I undertook an internship at Cooper Partners. Prior to this, I'd had very little exposure to the world of tax, but quickly fell in love with the firm and the challenging questions I was asked to consider each day. Since graduating from the University of Western Australia in late 2017, I have been working at Cooper Partners full-time as a consultant and am primarily involved in the firm's tax advice team.

How many years of experience do you have?

I have worked at Cooper Partners for just over a year full-time, having worked part-time at the firm for the last nine months of my undergraduate studies.

What is the most valuable aspect of studying ATL001 CTA1 Foundations that you have taken away?

CTA1 Foundations is a fantastic course which allows young professionals, such as myself, to gain a great overview of the Australian taxation system, learning about each of the key areas and how they interact. I found CTA1 Foundations to be a fantastic recap of many of the theories and principals I had learned earlier in my university studies, but with just enough extensions to remain challenging and rewarding. Critically, the CTA1 Foundations course is structured to be practical in nature and a significant amount of the concepts taught can be used by your average tax professional on a daily basis.

Have you gained confidence in new areas?

The CTA1 Foundations course allowed me to develop a far better understanding of the Australian tax system as a whole, rather than the intense focus on particular sections that tends to occur in university studies or the work environment. This holistic understanding has assisted greatly in the tax advice I have been writing, allowing me to consider all of the relevant consequences of the suggestions or assertions I make.

Can you tell us about the main reason for undertaking the course?

My involvement in CTA1 Foundations was thanks to the recommendation and sponsoring of Cooper Partners.

What is your next step with education?

One of the great joys (and challenges) of tax is that the learning never stops! I am currently involved in the Charted Accountants program and intend to undertake CTA2A Advanced and CTA2B Advanced in lieu of the program, with the ultimate goal of obtaining CA and CTA accreditation. Given the legalistic nature of tax advice, I have also decided to study law at the University of Western Australia and am currently in the second year of my studies in their Juris Doctor program. Fortunately for me, the Cooper Partners internal training system is incredibly strong and has me well-equipped to tackle any external programs.

What are some challenges of juggling study and work? Do you have any tips for managing study and work?

Juggling work and my various studies can certainly be challenging, but the incredible support of Cooper Partners has been a great assistance and allowed me to manage so far.

I believe the greatest challenge is finding quality study time and balancing this with everyday life. I firmly believe that all the study in the world is worthless if you're not enjoying life, so it's critical to schedule down time when possible and allow yourself to refresh. For me, that includes catching up with friends at the end of the work week and always watching the Fremantle Dockers game, no matter how busy I am! That said, there are periods where you need to just put your head down and get the job done.

My biggest tip would be to use to-do lists wherever possible. My desks at home and work are covered in lists of all the things I need to do. I believe these aids help you to visualise the week ahead, allowing you to plan and see where your attention needs to be focused. I also try and tie in some reward to the completion of any significant item on the list, whether that be a movie break or a game of golf.

What advice do you have for other tax professionals considering The Tax Institute's subjects?

I would strongly recommend the CTA1 Foundations subject to any person looking to enter the world of tax or refresh their earlier studies. The course is well set out to provide students with a broad-based knowledge of Australian tax and is certainly a great way of developing a base level knowledge of most of the important issues that tax professionals face on a day-to-day basis. I would recommend that prospective students discuss the program with their employer and organise a study plan that works well for both parties and justifies the investment in the course fees.

ATL002 Commercial Law 1 Dux Award for study period 2, 2018

Name: Antonio Marandola

Position: Senior Tax Consultant

Company: Pitcher Partners

State: Victoria

Can you tell us about your background?

I'm actually quite new to the tax profession; up until 2017, I was a senior auditor in Pitcher Partners' Business Advisory and Assurance division. That allowed me to develop and solidify a strong understanding in financial accounting which I have been able to take with me in my new role. I have always been interested in and passionate about tax and — on a broader note — politics. Hence, when the opportunity arose within the firm, I spoke to my then partner about it and they encouraged me to apply. I'm deeply grateful to work for an organisation such as Pitcher Partners, which is so supportive of its staff in allowing them to drive their own career paths.

Fast forward to today: while I have a predominately private tax background, I have begun to develop a particular interest in the managed funds sector, and have become increasingly involved in advising such funds in various aspects of structuring and set up, conducted distribution reviews, assisted in advising on the potential application of the MIT and AMIT regimes and the public trading trust rules. Moreover, I am involved in annual compliance activities such as the preparation of AMIT tax returns, annual investment income reports etc.

How many years of experience do you have?

This is my sixth year at Pitcher Partners, and my second in the tax consulting division.

What is the most valuable aspect of studying ATL002 Commercial Law 1 that you have taken away?

It's one thing to understand the tax law, but it's an entirely different thing to understand its interactions with particular transactions. An understanding of contract law allows you to better understand the nature of the rights or obligations that may be created in a transaction, when they are created and, accordingly, with this knowledge, one can better advise on the potential tax implications of a particular transaction.

Have you gained confidence in new areas?

I gained a huge amount of confidence in contract law in particular. I found that my learnings were directly attributable to client issues I was currently dealing with, particularly around identification of implicit terms in contracts, how unilateral mistakes may impact the enforceability of contracts, issues around conditions precedent etc. More generally, studying this area of law has translated to an improvement in my ability to review and interpret trust deeds and consequently identify relevant issues, which is a big part of the work I do when advising clients in the managed funds sector.

Can you tell us about the main reason for undertaking the course?

I have taken this subject as part of the Graduate Diploma of Applied Tax Law. I believe that the greater one's breadth of knowledge, the better an adviser one can ultimately be.

What is your next step with education?

I would like to complete CTA3 Advisory once I have acquired the requisite years for fellowship. I am also considering

undertaking a Juris Doctor in the near future to further develop my understanding of the law and increase my breadth of knowledge as a tax adviser. A lot of years of study ahead of me for sure! I enjoy the process though; I'm a strong believer in self-education as a means to increase my value both to my employer as well as to my clients.

What are some challenges of juggling study and work? Do you have any tips for managing study and work?

I've actually been juggling a lot of things besides study and work — one of which is getting married to my fiancée Marie in May 2019! It's been quite the undertaking, between renovating our new house, studying, keeping on top of my work, while also planning a wedding and trying to look after my fitness a bit better than I have in the past, but what's worked best for me is focusing on being consistent. Over the summer break, I'd try to knock out at least two to three hours of study a day, and over the course of a week, I was able to get a lot covered while still enjoying myself, as opposed to trying to cram it all in the week before the exam.

What advice do you have for other tax professionals considering the Graduate Diploma of Applied Tax Law program?

I could not recommend the Graduate Diploma of Applied Tax Law program enough, especially as a new entrant to the field. While the learning curve in the tax consulting field is a steep one, I found that the course supported me well in setting down the initial "foundation" of knowledge and ability on which I can now continue to develop myself further to be an ever-improving and more effective adviser to my clients. My best piece of advice to those considering undertaking the Graduate Diploma is to genuinely engage in the course content and relate it to your work where you can — active learning is the best way to get the most value out of the course.

ATL003 CTA2A Advanced Dux Award for study period 2, 2018

Name: Georgiena Ryan

Position: Principal

Company: Regional Business Lawyers

State: New South Wales

Can you tell us about your background?

I am a lawyer who specialises in business law and succession planning within the farming, agribusiness and irrigation sectors. I have worked for several law firms, in regional and rural Queensland and New South Wales, providing advice to family-owned farming businesses, their advisers and associated industries. Having a high level of tax knowledge is essential to provide advice in establishing and restructuring business and transferring business assets from one generation to the next.

I have recently established my own legal and consulting practice in Wagga Wagga, servicing rural NSW and rural Queensland.

How many years of experience do you have?

I have 23 years of experience as a lawyer. I have spent two-thirds of my career in private practice and the other third of my career working as an in-house lawyer, having done a stint with Rabobank Australia Ltd, and more recently with Westchester Group of Australia Ltd.

What is the most valuable aspect of studying ATL003 CTA2A Advanced that you have taken away?

A renewed confidence in tax and a renewed confidence in my own ability to undertake study and complete an exam. The last time I undertook formal study like this was when I did the NSW Law Society Business Law Specialist Accreditation program. I was pregnant with my first child, who is now 13.

Have you gained confidence in new areas?

I have gained new confidence in private practice in the areas in which I work: capital gains tax, the small business CGT concessions, taxation of partnerships and trusts. All are fundamental to the work I do. It gives me the ability to be able to communicate confidently with my client's accountants and financial advisers and work collaboratively with them to solve our client's problems.

Can you tell us about the main reason for undertaking the course?

My most recent role involved working with Westchester (a United States-owned agribusiness portfolio manager) for five years as an in-house lawyer advising on some very large rural land purchases and rural leasing, as well as general company secretarial and risk and compliance. When I took the opportunity to open my own firm, working again with family businesses, I realised that my tax skills needed updating. If I wanted to provide the standard of service to my clients that I desired, I needed to undertake some further study.

What is your next step with education?

I plan to complete the Graduate Diploma of Applied Tax Law program and the CTA qualification over the next two years.

What are some challenges of juggling study and work? Do you have any tips for managing study and work?

Juggling study and work is easy. Juggling study, work, starting a new business from scratch, and running around after two children (one starting high school in Wagga and one at primary school in a small country school where we live 45 minutes from Wagga) — that is another thing altogether! The sensible person would most likely respond to this question by saying that they set aside an hour or two each day and work away methodically at their study in a highly organised fashion. For me, I will be honest. I found that trying to do all that I needed to do during the day and then facing up to an hour or two of study at 10 pm after the kids were in bed very difficult. It was actually easier for me, and this is where working for myself is an advantage, to block out entire days or weekends and do large amounts of study at a time.

As far as tips go, I think you have to be honest about your own working style and lifestyle and arrange your study to

suit that. If you love sticking to deadlines, don't think that you are going to stick to some methodical study plan because that is what everyone else around you is doing, as all you are going to do is to beat yourself up about it when you don't stick to it. Likewise, if you are a methodical planner, make the study plan and stick to it, otherwise you will just create stress and anxiety if you leave it to the last minute. One other little advantage of juggling family and study is that there is nothing like encouraging children to study by having them see their parent study.

What advice do you have for other tax professionals considering The Tax Institute's programs?

It doesn't matter what stage your career is at, further study is always beneficial. The Tax Institute's programs are highly appealing because they are very practical but at the same time, academically rigorous.

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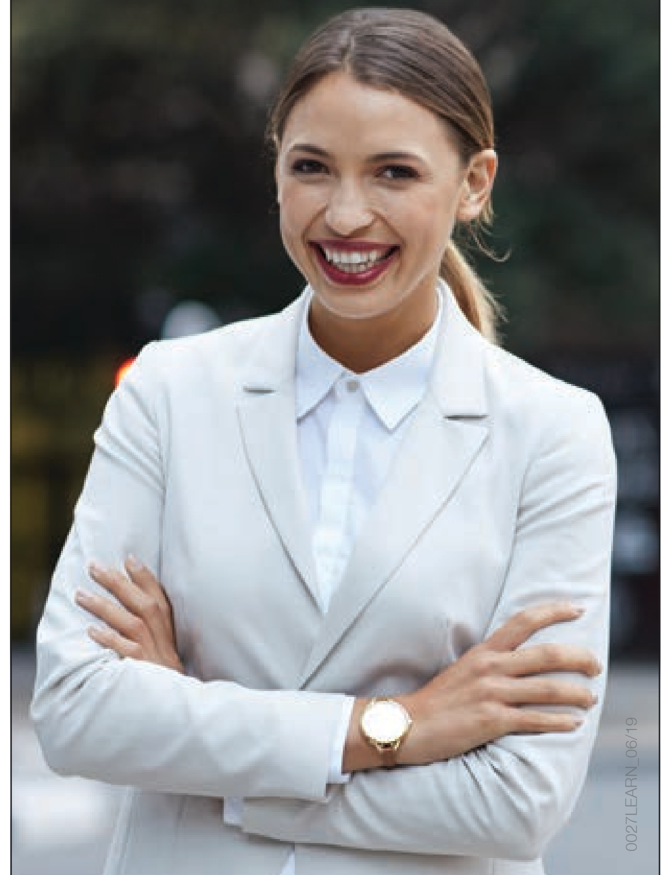

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Member Profile

This month's column features The Tax Institute's 2019 Corporate Tax Adviser of the Year, Joshua Cardwell, CTA, PwC.

Member since

2006

Area of specialty

My area of specialty is the taxation of real estate investment, in particular institutional investment.

Why are you a member of The Tax Institute?

The quality of the Institute's technical information and the diverse events that it runs are second to none. It also provides a forum to meet with other like-minded tax practitioners.

How is your membership beneficial to your practice and clients?

By helping me to be up to date on technical issues and providing a voice for legislative change, I am able to best help my clients. Also by interacting with other advisers and industry participants, it often makes working together on transactions more efficient as relationships have already been formed.

How did you end up in tax?

I started as a cadet from high school at a mid-sized accounting firm and was attracted to the complexity of tax. I began to focus more and more on tax-related issues for our clients and then moved firms to allow me to specialise.

What are the challenges for tax practitioners this year?

The number of factors that must be considered when advising clients is extremely broad and not static. At an Australian level, this is from legislative change, regulator behaviour and community expectations. Globally, the initiatives coming from the OECD are complex and changes in other countries' laws can now impact Australian tax outcomes, for example, via the operation of the hybrid mismatch rules. The increased dependence of tax outcomes on accounting classifications (eg thin cap, TOFA, SGE) also means that tax outcomes can change when accounting standards change.

Some memorable career moments to date

Winning the 2019 Corporate Tax Adviser of the Year award is clearly a highlight. I undertook a secondment to Papua New Guinea earlier in my career which was a wonderful cultural and learning experience. I've also had the opportunity to work on a large number of iconic transactions, each of which are memorable in their own ways.

How do you relax?

I enjoy lots of different types of exercise, spending time with my family, and drinking wine.

Advice to those entering the profession

Don't be afraid — you should always ask the questions you have, propose your ideas, ask to be involved, give your opinion and ask for help. Working within a team is where I have always found the most rewarding experiences, and teams work best with open communication.

What does winning the 2019 Corporate Tax Adviser of the Year award mean to you?

It is a great recognition of the wonderful team that I work with, and reflective of the interesting work that I get to do with clients who trust me to help them navigate the complexities they are faced with in their businesses.

Privilege or concession: the modern tax adviser's challenge

by Donovan Castelyn, Associate Lecturer, Annette Morgan, Lecturer, and Dale Pinto, CTA (Life), Professor of Taxation Law, Curtin University

The gap between legal and non-legal advice, particularly in the context of taxation matters, continues to be truncated through the advent of technological advancements and industrial developments. In the Australian context, a litany of professional advisers and groups are capable of providing taxpayers with tax advice. Broadly, these advisers operate within either the accounting or legal profession and offer similar, if not identical, services. This article explores the relative merits of the privileges or concessions afforded by professional advisers to their clients, and in so doing, advocates for the abrogation of any distinctions in favour of the enactment of a separate statutory tax advice privilege.

Introduction

A litany of professional advisers and groups are capable of providing Australian taxpayers with tax advice.[1] Broadly, these advisers operate within either the accounting or legal profession and offer similar, if not identical, services. Where tax advice is sought from a legal adviser, legal professional privilege (LPP) has been held to protect confidential communications between the lawyer and their client.[2] In contrast, tax advice acquired from an adviser who is not a lawyer does not receive the equivalent statutory or common law protection. In some circumstances, however, the Commissioner of Taxation allows tax advice provided by a professional non-lawyer to remain confidential through a non-binding, discretionary administrative privilege known as the "accountants' concession".[3]

This article argues for the abrogation of the distinction between the accountants' concession and LPP and, in doing so, advocates for the enactment of a statutory tax advice privilege for appropriately accredited non-legal tax advisers. Further, the author recommends that the framework proposed by Wilson-Rogers, Morgan and Pinto in their 2014 article, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", guides the implementation of such a regime.[4]

This article begins by outlining the current situation with respect to privilege over tax advice in Australia and considers the application of LPP in tax disputes. It then examines the distinction between the accountants' concession and LPP, and advocates for the abrogation of the distinction in favour of the enactment of a separate statutory tax advice privilege. The final section of the article makes some concluding observations and comments on the practical limitations associated with the recommendation.

Legal professional privilege

Legal professional privilege — a right enjoyed exclusively by the clients of lawyers — is both a doctrine of the common law and a matter of statute.[5]

Common law privilege will protect confidential communications[6] between a person and their legal adviser — or third parties in limited circumstances (ie accountants, experts or other lawyers)[7] — where the communication was either for the dominant purpose of obtaining legal advice or for use in actual or anticipated litigation.[8] Statutory client legal privilege available under ss 118 to 126 of the *Evidence Act 1995* (Cth) is broadly similar to the common law privilege in some respects, although with some significant differences.[9] Notably, the privileges in the latter provisions apply almost exclusively to proceedings in the Federal Court,[10] and do not apply to the audit and investigative powers of the Commissioner.[11] Accordingly, much of the discussion below concentrates on the common law privilege.

A concise statement of the doctrine was offered by the joint judgement of Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources v FCT* (*Esso*),[12] with their Honours stating that:[13]

> "Legal professional privilege (or client legal privilege) protects the confidentiality of certain communications made in connection with giving or obtaining legal advice [legal advice privilege] or the provision of legal services, including representation in proceedings in a court [litigation privilege]."

The policy rationale of LPP has formed much of the discussion in numerous authoritative Australian cases, including *Baker v Campbell*[14] and *Grant v Downs*.[15] The protection afforded by LPP, in essence, "exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers".[16] As observed by Deane J in *Baker v Campbell*,[17] a person should be entitled to seek and obtain legal advice in the conduct of their affairs — and legal assistance in or for the purposes of the conduct of actual or anticipated litigation — "without the apprehension of being prejudiced by subsequent disclosure of the communication".[18] The application of LPP therefore necessitates a balancing of competing public interests, notably, "the public policy reflected in the privilege itself, and the public policy that, in the administration of justice and investigative procedures, there should be unfettered access to relevant information".[19]

The application (and limitations) of LPP is best illustrated by way of reference to decided case law; hence, this article will now discuss this protection in the context of tax disputes as they exist in Australia.[20]

LPP and tax disputes

Disputes between taxpayers and the federal or state tax authorities are common.[21] These disputes generally arise where a taxpayer's position is challenged by the revenue authority, with the onus then placed on the taxpayer to rebut the assertions of the government.[22]

To ensure that taxpayers comply with income tax laws, the Commissioner is armed with wide audit and investigative powers.[23] These powers enable the Commissioner to access documents, goods or property,[24] or otherwise obtain information,[25] in order to investigate instances of suspected non-compliance.[26]

While communications made for the purpose of giving tax advice do not attract specific protection under either common law or statute,[27] if the adviser is a lawyer and the advice sought came into existence for the dominant purpose of seeking legal advice or assistance (legal advice privilege),[28] or for the dominant purpose of use in existing or reasonably anticipated proceedings (litigation privilege),[29] LPP may consequentially protect the confidentiality of such advice.[30] In this regard, LPP can provide formidable protection against the coercive information-gathering powers of the Commissioner,[31] as well as tax litigation.[2]

> *"The application of LPP therefore necessitates a balancing of competing public interests ..."*

Application of LPP to the Commissioners audit and investigation powers

The Commissioner's audit and investigation powers are contained in ss 353-10 and 353-15 of Sch 1 to the *Taxation Administration Act 1953* (Cth). Section 353-10 contains an "information" and "production" power, while s 353-15 contains an "access" and "inspection" power. Section 353-10 replaced former s 264 of *the Income Tax Assessment Act 1936* (Cth) (ITAA36) and s 353-15 replaced former s 263 ITAA36 in 2015.[32]

The Full Federal Court decision in *FCT v Citibank Ltd*[33] is authority for the position that the doctrine of LPP restricts the Commissioner's powers of access under former s 263. Consequently, any powers that the Commissioner seeks to exercise pursuant to s 353-15 (ie to search or make copies of documents) are subject to the exercise of the privilege.

Further, and despite the adverse outcome for the taxpayer, the Full Federal Court decision in *FCT v Coombes (No. 2)*[34] confirms that LPP may also restrict the production of confidential communications, the subject of a former s 264 notice, but does not attach to mere collateral facts which a client tells their legal adviser, or which the adviser happens to observe in the course of acting for the client, such as the address and identity of a client.

Scope of privilege

Legal professional privilege may be dissected into two equally important and interrelated strands: legal advice privilege (LAP) and litigation privilege (LP). Each will be discussed in brief below.

The test for LAP was recently elaborated on by Yates J in *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd*[35] and later cited with approval by Edmonds J in *12 Years Juice Foods Australia Pty Ltd v FCT*.[36] Having regard to relevant authorities, and the judicial proclamations of Yates J, the following broad observations in respect of the application and limitations of LAP as it relates to tax disputes can be made:

1. LAP will attach to confidential tax communications,[37] where the dominant purpose of those communications is to obtain legal advice or assistance.[38] The relevant purpose of a communication is determined objectively, by reference to all the surrounding circumstances at the point in time when the communication was created;[39]
2. this principle is perhaps best illustrated by way of reference to the landmark decision of the High Court in *Esso*.[2] In this case, the High Court, by majority, held that the dominant purpose test, and not the sole purpose test,[40] applies when determining whether the privilege attaches to a particular communication. Their Honours stated: "if the most that could be said of [a communication] in question was that the purposes for which they came into existence included a purpose of obtaining legal advice or assistance, then privilege would not apply";[41]
3. accordingly, where there are a number of purposes for the creation of a communication, all of equal or similar weight, the communication will not be protected by LAP.[42] Nor does LAP attach to communications lodged with a lawyer simply for the purpose of attracting privilege;[43] and
4. a communication prepared by a third party (eg an accountant) on the instructions, or with the authority, of the client for the dominant purpose of being communicated to a lawyer in order to obtain legal advice for the client may be protected by LAP. This position was confirmed in the Full Federal Court decision of *Pratt Holdings Pty Ltd v FCT*[44] where the court further confirmed that an agency relationship is not necessary for LAP to apply.[45]

In respect of LP, the relevant test is whether the document sought to be protected was created for the dominant purpose of use in existing or reasonably anticipated proceedings.[46] Whether or not litigation is reasonably contemplated is a question of fact to be determined objectively.[47] When determining whether litigation was reasonably anticipated, the subjective views of the parties may be relevant, but are not determinative; the question is assessed by reference to all of the surrounding circumstances.[48]

Notably, communications made for illegal or improper purposes, even if the legal adviser is not aware of those purposes, will not be protected by either LAP or LP.[49] This exception extends to a situation where the relevant illegal or improper purpose was that of a third party, even though

the client and lawyer did not harbour the same improper purpose,[50] as was the position in *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police*.[50] In that case, no privilege attached to communications from a solicitor in relation to tax avoidance schemes as they formed part of the implementation of fraudulent conduct between a lawyer and an ATO officer.

The following section will briefly discuss claims for privilege. References to LPP will include both LAP and LP as discussed above.

Claiming privilege

A claim of LPP must be supported by sufficient evidence, with the party claiming privilege bearing the onus of proving its privilege claim on the basis of that evidence.[51] Beach J commented on this position in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No. 4)*,[52] stating:[53]

> "… the applicants bear the onus of establishing the claims, including each factual element necessary to establish the requisite dominant purpose. In that respect, focused and specific evidence is required in respect of each communication, rather than mere generalised assertion let alone opaque and repetitious verbal formulae. There should be sufficient evidence which proves directly or by inference that the dominant purpose for the communication was for the relevant client to be given or to obtain legal advice. The communication also has to be confidential."

It is important to note that the privilege belongs to the client. However, it is the lawyer's duty to claim.[54] Moreover, a communication will only be privileged while it remains confidential.[55]

As the defence of LPP applies to the Commissioner's audit and investigative powers,[56] the Commissioner (or his delegates) must ensure that occupiers or other custodians of tax communication have an adequate opportunity to claim LPP.[57] However, it has been held that officers of the Commissioner can briefly view a communication for which privilege has been claimed, provided that the communication could reasonably be suspected as having relevance to the investigation and the perusal is done purely to determine whether or not the material might be privileged (a "lawful violation").[58]

Waiver of privilege

While a comprehensive discussion associated with the waiver of privilege is beyond the scope of this article, it is important to note that a person's claim to LPP can be waived.

Waiver may be express or implied. Waiver will be implied where the privilege holder's conduct is inconsistent with the confidentiality which the privilege is intended to protect.[59] In *Krok v FCT*,[60] the court concluded that the partial disclosure of legal advice was inconsistent with the maintenance of the privilege and that the disclosure had been undertaken to achieve some "forensic advantage", contrary to the maintenance of privilege.[61]

Accountants' concession

Professional non-legal tax advisers are not afforded the same protections as their legal counterparts in respect of the confidential tax communications they provide to their clients.[62] Rather, the form of protection provided is a discretionary administrative concession extended by the Commissioner to a limited number of tax advice documents.[63] Termed the "accountants' concession" (concession), the administrative procedures which underscore the application and availability of the concession are provided for in the ATO's "Guidelines to accessing professional accounting advisers' papers" (guidelines).

The policy underlying the concession is in recognition of the volume of tax advice that is provided by non-legal tax advisers, and identifies that non-legal tax advisers and their clients should be able to engage in full and frank discussions regarding their taxation obligations.[64]

To this end, the guidelines restrict, in all but exceptional circumstances,[65] access to certain communications that relate to transactions and other tax-related advice known, respectively, as "restricted source documents" and "non-source documents".

Restricted source documents contain advice created prior to, or contemporaneously with, the transaction entered into by a taxpayer.[66] These are generally documents prepared by non-legal advisers for the purpose of providing tax advice in respect of the structure or ambit of a transaction.[67] Non-source documents include advice provided after a transaction has been completed which do not materially contribute to a tax strategy, or which relate to unimplemented transactions, as well as working papers in a current audit or assurance file.[68]

The utility of the concession has formed the discussion of much judicial and academic commentary. In *One Tel Ltd v DCT*,[69] the court observed that: "the Guidelines … give rise to a legitimate expectation that the Commissioner will conduct himself in the manner he has so carefully set out".[70] Accordingly, the Commissioner now accepts that an affected person has a "legitimate expectation" or is entitled to a reasonable and adequate opportunity to argue that there are no exceptional circumstances.[3]

However, the guidelines, unlike LPP, in no way curtail the coercive information-gathering powers of the Commissioner as they do not have legislative force.[71] Therefore, in abrogating the protections afforded by the concession, it has been held sufficient for the Commissioner or their agent to speculate on the relevance of the information regardless of whether that inference was based on findings of fact supported by logical grounds.[72]

Hence, given the near unfettered discretion of the Commissioner to abrogate the concession,[73] it is commonly asserted that the accountants' concession is inferior to the protection afforded to lawyers under LPP and is fertile for review.[74]

The great divide

Differential treatment of tax professionals in Australia, based on whether or not they are members of the legal profession, is an issue which continues to generate controversy. Proposals to extend the ambit of LPP have, in the past, recommended the introduction of a statutory protection for tax advice and communications provided by non-lawyer advisers from the coercive information-gathering powers of

the Commissioner.[75] However, to date, no legislative reform has occurred.[76]

The clearest explanation for the restriction of LPP to legal practitioners, in recent years, comes from the decision of *R (on the application of Prudential plc) v Special Commissioner of Income Tax*[77] heard in the UK Supreme Court, where their Honours noted the reasons for this position as:[78]

> "(i) the close connection between members of the legal profession and the court, (ii) historical observations and relics (albeit important relics), such as the involvement of the court in disciplinary procedures of solicitors and barristers, (iii) the duties to the court owed by members of their profession, and (iv) the view that solicitors and barristers are in a 'special position', in that they are held by the courts to higher standards than members of other professions."

However, there is a substantial body of literature that considers why privilege should be extended to confidential communications made by non-legal tax advisers.[79] It is with reference to these observations that this article advocates for the abrogation of the distinction in favour of the enactment of a separate statutory tax advice privilege.

Provision of legal advice

Fundamentally, and irrespective of professional designation, both lawyers and non-legal tax advisers provide equivalent legal advice in respect of many areas of taxation law. Notably, this position is given explicit recognition by virtue of s 90-5 of the *Tax Agent Services Act 2009* (Cth), which states:[80]

> "… ***tax agent service*** is any service:
>
> (a) that relates to:
>
> …
>
> (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or…"

Notwithstanding the advocacy services offered by lawyers to taxpayers in relation to litigation, insofar as tax planning and advice are concerned, the services provided by lawyers and non-legal advisers is, in many cases, substantially the same.[81]

Some proponents argue that the role of non-legal tax advisers in the tax system is distinct from that of lawyers and thereby justifies the exclusive grant of LPP to legal advisers. This view was promulgated by the members of the Administrative Appeals Tribunal in the decision of *Sinclair and FCT*.[82] In this case, the role of the non-legal tax adviser was construed as more administrative as members opined that lawyers could more appropriately provide legal advice.[83]

This view has generated considerable controversy and has been rebutted by a great number of commentators.[84] A notable point of contention was argued by Italia, who noted that:[85]

> "Taxation law does not exist in a vacuum; the transactions entered into by taxpayers will necessarily involve other areas of law, especially contract law, property law, and corporations' law. These are all areas of law with which [non-legal tax advisers] are familiar. The line between: giving *tax advice; legal advice* and engaging in *legal practice* is far from clear."

The amalgamation of expertise required in the provision of tax advice supports the abrogation of the distinction between the advice of lawyers and non-legal tax advisers, as well as the argument for the enactment of a separate tax advice privilege. Reform in this way would also align Australia with many comparable jurisdictions that have chosen to adopt this view.[86]

Candour and the court

As articulated by the Law Council of Australia, a lawyer's duty to the court is:[87]

> "… fundamental to the rationale for client legal privilege because it serves to emphasise that the lawyer's duty is first and foremost to protect the administration of justice and to act as an officer of the Court. That duty is an important check and balance in the system. No other profession is subject to the same duties."

In contrast, Lord Neuberger in *Prudential* noted:[88]

> "It is also true that solicitors and barristers owe a formal duty to the court, but (i) that duty only would be relevant in connection with litigation, whereas LAP goes much wider, and (ii) every professional person involved in litigation can fairly be said to have a duty to the court."

It may therefore be argued that this duty alone should not justify lawyers being able to provide privileged advice. Indeed, the courts have stated that LPP is the client's privilege[89] and therefore the dominant reason for the existence of this privilege appears to be so that clients have candour when seeking advice from their advisers.[90] The policy underlying the accountants' concession reflects this rationale but provides a considerably compromised protection.[91] In this way, the argument to remove the distinction is advanced further.

Equivalent penalties and obligations

Australian taxation law holds lawyers and non-legal tax advisers to a largely equivalent professional standard.[92] For example, the promoter penalty regime applies similarly to promoters of tax schemes regardless of professional designation.[93] In this context, it is therefore arguable that, as lawyers and non-legal tax advisers are subject to the same professional standards, taxpayers should benefit from the same protection over the advice that they receive.[94]

Conclusion

The latter part of this article briefly considered arguments for and against abrogation of the distinction between the advice provided by lawyers and non-legal tax advisers. A number of the justifications can be counterbalanced by arguments to the contrary. However, it is the position of this article that, on balance, the justifications for removing the distinction in favour of enacting a statutory privilege are compelling and timely.

The practical design issues that arise when creating a statutory tax advice privilege are numerous.[95] It is, however, the recommendation of this article that the model devised by Wilson-Rogers, Morgan and Pinto (which advocates for an extension of privilege to align lawyers and non-legal tax advisers with respect to tax advice, subject to the non-legal adviser meeting certain pre-requisites and accreditation

requirements (see the Appendix to this article))[96] inform the introduction of such a regime.[96]

It is acknowledged that, in forgoing the distinction and extending privilege to non-legal tax advisers, one public interest — encouraging full and frank disclosure — arguably compromises another, that is, ensuring that the Commissioner has sufficient information to administer and enforce the tax law and, in this way, the abrogation of the distinction may actually reduce compliance with the law.

It is submitted, however, that a formulation of the privilege based on the work of Wilson-Rogers, Morgan and Pinto would ensure that ambit of such a privilege strikes the right balance between legal and non-legal advisers. This approach would recognise the importance of taxpayers having full and frank discussions in relation to their tax affairs with non-legal tax advisers and ensure that an appropriate level of information is still available to the Commissioner and that the privilege is administered correctly.

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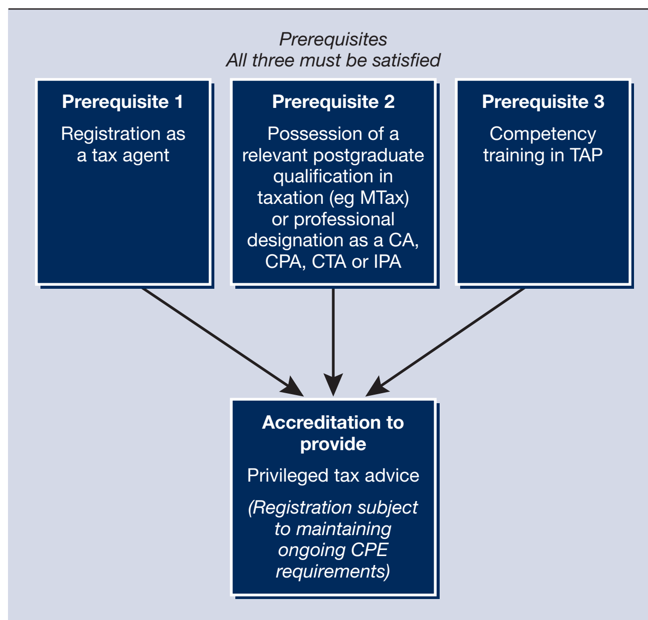
Appendix. Proposed process for the granting of a tax advice privilege to non-lawyer tax advisers[97]



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1 *Tax Agent Services Act 2009* (Cth) (TASA); Sch 1 (Requirements to become a recognised association) and Sch 2 (Eligibility for registration as BAS agent, tax agent or tax (financial) adviser: prescribed requirements) to the *Tax Agent Services Regulations 2009* (Cth).

2 *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49.

3 ATO, “Guidelines to accessing professional accounting advisers’ papers”, 26 March 2018.

4 N Wilson-Rogers, A Morgan and D Pinto, “The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors”, (2014) 29 *Australian Tax Forum* 507.

5 See, generally, R Desiatnik, *Legal professional privilege in Australia*, Prospect Media Pty Ltd, 1999. The privilege is a substantive principle of the common law, and not merely a rule of evidence. See *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J. It protects any communication which would allow a reader to infer the content or substance of a privileged communication. See *AWB Ltd v Cole (No. 5)* [2006] FCA 1234 at [46] per Young J.

6 The privilege attaches to the communication rather than any document containing it. See *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ; Dawson and Toohey JJ dissenting).

7 *Pratt Holdings Pty Ltd v FCT* [2004] FCAFC 122; [2005] FCA 1247; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No. 4)* [2014] FCA 796.

8 That is, where there is a reasonable likelihood that proceedings will be commenced. See *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526 at 538 per Goldberg J.

9 Discussion associated with the distinctions between common law legal professional privilege and statutory client legal privilege is beyond the scope of this work. For a comprehensive assessment of this topic, see K Smark, “Privilege under the Evidence Acts” (1995) *UNSW Law Journal* 95.

10 S 4(1) of the *Evidence Act 1995* (Cth). See also s 79 of the *Judiciary Act 1903* (Cth).

11 Ss 353-10 and 353-15 of the *Taxation Administration Act 1953* (TAA). Compare *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [12] per Edmonds J. See also *Esso Australia Resources Ltd v FCT* 201 CLR 49 at 59-63; *Adamas v O’Connor* 282 ALR 302 at [7].

12 *Esso Australia Resources v FCT* (1999) 201 CLR 49.

13 Ibid at [35]; *Pratt Holdings Pty Ltd v FCT* [2004] FCAFC 122.

14 *Baker v Campbell* [1983] HCA 39.

15 *Grant v Downs* [1976] HCA 63. See also *Waterford v The Commonwealth of Australia* [1987] HCA 25, *Carter v Northmore Hale Davy & Leake* [1995] HCA 33, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.

16 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at [35]. See also *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 685.

17 *Baker v Campbell* (1983) 153 CLR 52 per Deane J.

18 *Baker v Campbell* (1983) 153 CLR 52. Compare *Esso Australia Resources v FCT* (1999) 201 CLR 49 at [35] per Gleeson CJ, Gaudron and Gummow JJ.

19 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at [57] per Gleeson CJ, Gaudron and Gummow JJ. See also *Baker v Campbell* (1983) 153 CLR 52 at 106; *Grant v Downs* (1976) 135 CLR 674.

20 For the purposes of this article, the scope of this discussion is limited to claims for LPP in response to attempts by the Commissioner to exercise his information-gathering powers.

21 T Frost and C Hanson, “Australia”, in S Whitehead (ed), *The tax disputes and litigation review*, Law Business Research, 2015, p 19. See also ATO, “Commissioner of Taxation: annual report 2016-17”, 30 October 2017, p 66; J Leek, “Tax dispute resolution in the modern era”, (2017) 21(2) *The Tax Specialist* 50.

22 Ibid. See also ss 14ZZK(b)(i) and 14ZZO(b)(i) TAA.

23 Div 353, Sch 1 TAA.

24 S 353-15 TAA.

25 S 353-10 TAA.

26 R Woellner, S Barkoczy, S Murphy, C Evans and D Pinto, *Australian taxation law*, Oxford University Press, 27th ed, 2017, paras 29 to 130.

27 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011, p 3.

28 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66; compare *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [13] per Edmonds J.

29 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66; compare *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [14] per Edmonds J. See also *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd* [2015] FCA 282.

30 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011, p 3. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

31 Div 353, Sch 1 TAA; *FCT v Citibank Ltd* (1989) 20 FCR 403.

32 *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth). While the new and old provisions are drafted in slightly different terms, they are intended to operate in essentially the same manner: see paras 2.26 to 2.27 of the explanatory memorandum to the Treasury Legislation Amendment (Repeal Day) Bill 2014 (Cth). The case law dealing with the former provisions therefore generally continues to be relevant for the purposes of the interpretation of the new provisions.

33 (1989) 20 FCR 403.

34 (1999) 92 FCR 240.

35 [2015] FCA 282 at [18].

36 [2015] FCA 741 at [13].

37 Confidentiality is the most important prerequisite since it is that quality that privilege aims to preserve. Private communications between a lawyer and a client are presumed to be confidential, see also s 117 of the *Evidence Act 1995*.

38 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66. Privilege only applies if the legal adviser is admitted to practice — see *Glengallan Investments Pty Ltd v Arthur Andersen* [2001] QCA 115 — and is acting in her or his professional legal capacity. See *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v Commonwealth* (1987) 163 CLR 54.

39 A dominant purpose is to be understood in the sense of "the ruling, prevailing, paramount or most influential purpose". Compare *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd* [2015] FCA 282 at [18]. See also *FCT v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at [30]; *AWB Limited v Cole* (2006) 152 FCR 382 at [105]; *Wingecarribee Shire Council v Lehman Brothers Australia Limited (in liq) (No. 5)* [2011] FCA 245 at [18]; *Barnes v FCT* [2007] FCAFC 88 at [5].

40 As espoused by the majority in the earlier decision of *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ. Barwick CJ expressing a different view in his separate judgment.

41 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65.

42 *AWB Limited v Cole* (2006) 152 FCR 382 at [107]; *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd* [2015] FCA 282 at [18]; *FCT v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at [30].

43 *Baker v Campbell* (1983) 153 CLR 52; *Smorgon v FCT* (1979) 9 ATR 483.

44 [2004] FCAFC 122 per Finn, Merkel and Stone JJ. See also *Quality Publications Australia Pty Ltd v FCT* [2009] FCA 1293. In addition, communications between a client's legal advisers and third parties, with a view to obtaining evidence, may also be covered by legal professional privilege.

45 Where a communication contains both privileged and non-privileged matter, it may be possible, in an appropriate case, to order disclosure of that part of the communication which contains non-privileged matter, while simultaneously retaining the confidentiality of the privileged matter. See *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54 at 66, 87 and 103; *Grofam Pty Limited v Australia and New Zealand Banking Group Limited* (1993) 43 FCR 408 at 414-417.

46 *Esso Australia Resources v FCT* (1999) 201 CLR 49 at 65-66; *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [14].

47 *Grant v Downs* 135 CLR 674 at 682.

48 *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* [2007] FCAFC 147. There must be a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not. See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* 4 VR 332 at [19]. *Ensham Resources Pty Ltd v ALOL Insurance Company Ltd* 209 FCR 1 at [57].

49 *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 35 ATR 130.

50 *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 48 ATR 650.

51 *12 Years Juice Foods Australia Pty Ltd v FCT* [2015] FCA 741 at [14]; Kennedy v Wallace [2004] FCAFC 337.

52 [2014] FCA 796.

53 Ibid at [29].

54 *Citibank Ltd v FCT* (1988) 83 ALR 144.

55 *FCT v Donoghue* [2015] FCAFC 183.

56 See, generally, *Citibank Ltd v FCT* (1988) 83 ALR 144; *JMA Accounting Pty Ltd v Carmody* 2004 ATC 4916.

57 *FCT v Citibank Ltd* (1989) 20 ATR 292.

58 *JMA Accounting Pty Ltd v Carmody* 2004 ATC 4916 at 4920-4924.

59 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487; *Mann v Carnell* (1999) 201 CLR 1 at 13; *FCT v Rio Tinto Ltd* (2006) 63 ATR 79 at 93.

60 [2015] FCA 51.

61 Importantly, compliance with procedural obligations in taxation litigation would not normally result in a waiver of privilege. See *FCT v Rio Tinto Ltd* (2006) 63 ATR 79 at 97; *RCI Pty Ltd v FCT* (2009) 76 ATR 591.

62 *Baker v Campbell* 83 ATC 4606 at 4649 (Dawson J).

63 ATO, "Guidelines to accessing professional accounting advisers' papers", 26 March 2018; *White Industries Australia Ltd v FCT* (2007) 160 FCR 298 at 94 (Lindgren J).

64 The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011, p 11; Australian Law Reform Commission (ALRC), *Privilege in perspective: client legal privilege in federal investigations*, ALRC report 107, 13 February 2008; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8.

65 ATO, "Guidelines to accessing professional accounting advisers' papers", 26 March 2018, 7.1.8. Exceptional circumstances have been broadly construed to include: where the Commissioner believes fraud, tax avoidance, evasion or another illegal tax offence has taken place; and where the Commissioner requires the documents to ascertain material facts necessary to determine the taxation consequences of the transaction because the taxpayer or their records cannot be located.

66 *Deloitte Touche Tohmatsu v DCT* 98 ATC 5192 at 5203-5211. See also ATO, "Guidelines to accessing professional accounting advisers' papers", 26 March 2018; N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507 at 509.

67 Ibid; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability" (2011) 21(1) *Revenue Law Journal* 8 at 5.

68 *Deloitte Touche Tohmatsu v DCT* 98 ATC 5192 at 5205–5206 (Goldberg J); *White Industries Australia Ltd v FCT* 2007 ATC 4441 at 4444 (Lindgren J).

69 *ONE.TEL Ltd v DCT* [2000] FCA 270 (Burchett J); see also *Deloitte Touche Tohmatsu v DCT* 98 ATC 5192 where Goldberg J held that the guidelines constitute a relevant consideration to which ATO officers must have regard.

70 *ONE.TEL Ltd v DCT* [2000] FCA 270 at [37].

71 J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8 at 12; *Deloitte Touche Tohmatsu v DCT* (1998) 40 ATR 435.

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74 N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507 at 509; A Maples and M Blissenden, "The proposed client-accountant tax privilege in Australia: how does it sit with the common law doctrine of legal professional privilege", (2010) 39 *Australian Tax Review* 20.

75 Australian Law Reform Commission, *Privilege in perspective: client legal privilege in federal investigations*, ALRC report 107, 13 February 2008, recommendation 6-6; see also The Hon. Bill Shorten MP, "Privilege in relation to tax advice", discussion paper, Department of Treasury, April 2011.

76 See ALRC*,* "Annual report of the Integrity Commissioner 2011-2012", 25 October 2012, p 56, where Phillip Moss, the Integrity Commissioner, notes that the issue is still under consideration by Treasury. Note also that subsequent annual reports published by the Integrity Commissioner's office make no further mention on the progress of this matter.

77 [2013] UKSC 1, where, by a majority of 5:2, the court refused to extend LPP to accountants. In Australia, the common law position is similar to the UK in that privilege may be claimed for confidential communications made by a lawyer for the dominant purpose of providing legal advice.

78 Ibid at [42]. For a comprehensive assessment of why LLP has historically extended exclusively to communications with lawyers, see: ALRC, *Privilege in perspective: client legal privilege in federal investigations*, ALRC report 107, 13 February 2008; M Italia, "A taxpayer privilege for Australia", PhD thesis, Victoria University, 2015.

79 See, generally, N Wilson-Rogers, A Morgan and D Pinto, "The primacy of client privilege: designing a statutory tax advice privilege for accredited non-lawyer tax advisors", (2014) 29 *Australian Tax Forum* 507; A Maples and M Blissenden, "The proposed client-accountant tax privilege in Australia: how does it sit with the common law doctrine of legal professional privilege", (2010) 39 *Australian Tax Review* 20; J Azzi, "Judicial review of the accountants' concession: a case for improving tax administration and accountability", (2011) 21(1) *Revenue Law Journal* 8; A Maples and R Woellner, "Privilege for accountants' tax advice in Australia – brave new world, or house of straw?", (2010) 25 *Australian Tax Forum* 143; J Dunne, "Legislating the accountants' concession – considering the New Zealand experience", (2011) 46(1) *Taxation in Australia* 727; J Dunne, "Legislating the accountants' concession: considering the UK and US experience", (2011) 46(2) *Taxation in Australia* 43.

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81 *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1 at 14. Notably, the comments of Lord Neuberger acknowledge that the restriction of LPP to lawyers providing taxation advice was incongruent with the modern realities of the provision of taxation advice.

82 [2010] AATA 902.

83 Ibid at [92]. This was also the position taken by the Law Council of Australia. See the Hon. Robert McClelland MP, "Response to the Australian Law Reform Commission report no. 107 – 'Privilege in perspective: client legal privilege and federal investigatory bodies'", Law Council of Australia, 28 March 2008. See further C Wallis, "Accountants cannot give legal advice: what that means for them, their clients and the lawyers", (2011) 45(10) *Taxation in Australia* 601 at 602.

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85 M Italia, "A taxpayer privilege for Australia", PhD thesis, Victoria University, 2015, p 253.

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The Placer case (2018) from a valuation perspective

by Hung Chu, Director, and Wayne Lonergan, Director, Lonergan Edwards & Associates

This article evaluates the landmark High Court decision in *Commissioner of State Revenue v Placer Dome Inc* from a valuation perspective and discusses a conceptual valuation framework which can be used to address several issues regarding the valuation of goodwill raised in the High Court decision. The key components of this conceptual valuation framework include: a distinction between the mere existence of legal goodwill and the materiality of its value; a focus on the going concern basis of valuation; an allowance for the evolutionary changes in the market value of identifiable assets; a recognition of the forward-looking net and active attractive forces which bring in custom as key drivers of goodwill value (rather than backward-looking, gross or passive attractive forces); and a recognition of excess profits/cash flows as a reliable indicator of the existence of material goodwill value. This conceptual valuation framework should be applied in accordance with the specific legal and factual context in which the relevant valuation exercise arises.

Introduction

Commissioner of State Revenue v Placer Dome Inc[1] (*Placer*) is a landmark case because it has replaced *FCT v Murry*[2] (*Murry*) as the most important precedent for judicial thinking on goodwill in Australia. The authority of *Placer* as the leading judicial precedent on goodwill value is further confirmed by the fact that the focal point of *Placer* is, per se, goodwill value, whereas the focal point of *Murry* was not the value of goodwill, but whether or not the disposal of a taxi licence involves the disposal of a business and its goodwill.

In *Placer*, Barrick Gold Corporation (Barrick) acquired all of the issued shares in Placer Dome Inc (Placer Dome) in 2006. At issue was whether or not Barrick was liable to ad valorem stamp duty on the acquisition of shares in Placer Dome. The liability to stamp duty depended on whether or not Placer Dome was a "land rich" landholder within the meaning of Div 3B of Pt IIIBA of the *Stamp Act 1921* (WA) (Stamp Act).

Whether or not Placer Dome was a "land rich" landholder depended on whether or not the land rich ratio calculated at the relevant time exceeded 60%. The numerator of the "land rich" ratio is the market value of all the land to which Placer Dome was entitled regardless of its location, whereas the denominator of the "land rich" ratio is the market value of all the property to which Placer Dome was entitled, other than certain excluded property.

Whether or not the land rich ratio exceeded 60% depended on the relativity between the market value of Placer Dome's land assets (particularly its mining tenements) and the market value of its non-land assets (particularly its goodwill) just prior to its acquisition by Barrick. This market value comparison brought to the fore critical valuation issues regarding the appropriate valuation methodology and/or the conceptual framework to assess and crosscheck the market value of land assets and goodwill.

In *Placer*, a key question before the High Court was whether or not the property of Placer Dome, immediately prior to its acquisition by Barrick, included goodwill with a value of $6.506b as contended by Barrick. This is because, if this assessed market value of goodwill submitted by Barrick was accepted by the High Court, the market value of Placer Dome's land assets was less than 60% of the market value of all of its property, other than certain excluded property, and Placer Dome was not a "land rich" landholder.

The majority of the High Court rejected Barrick's contention and accepted the Commissioner's contention that just prior to the acquisition by Barrick, Placer Dome had no material goodwill value.

Prior rethink of goodwill valuation

Prior to *Placer*, in two technical papers published in the *Australian Tax Review*, the authors developed a conceptual valuation framework to enable a proper understanding and assessment of the market value of goodwill and its interrelationship with other business assets.[3,4] This framework recognised the important distinction between the existence of legal goodwill and the materiality of goodwill value.

The key components of the conceptual valuation framework are to:

– differentiate between the mere existence of legal goodwill and the materiality of its value. It is the latter which is most relevant to the outcome of market value-related tests for tax and duty purposes (eg whether or not the land rich ratio exceeded 60%, as in *Placer*);

– focus on the going concern basis of valuation. This is, first, because the transaction for which the liability to pay tax or duty is assessed typically involves the transfer of shares in a going concern business. Second, the valuation exercise required for tax and duty purposes basically involves the allocation of the ascertainable purchase price paid to the constituent underlying asset classes of the going concern business. The subject of valuation in these cases is not an assemblage of individual standalone assets in isolation of the subject going concern business;

- recognise the extent to which the value-relevant attributes and the market values of other identifiable assets change and evolve over time in assessing the market value of goodwill at a certain point in time. These evolutionary value changes arise from, for example, resolution of risks and favourable events such as re-zoning. These evolutionary changes should be reflected in the market value of the identifiable assets as part of the going concern business. They should not be included in the market value of goodwill. This means that the "value-add" (or "value-subtract" as the case may be) from these evolutionary changes to the market value of the business over time should not be confused with goodwill value. The failure to allow for the evolutionary (positive) changes in the market value of the identifiable assets as part of a going concern business results in the artificial existence of "going concern" goodwill and the overstatement of goodwill value;
- treat goodwill as the attractive force which brings in custom net of the custom brought in by the attractive forces created by other assets currently employed by the subject enterprise. From a valuation perspective, this is consistent with the judicial view of goodwill as property, which is distinct from other assets of the business. That view has been confirmed in both *Murry* and *Placer*;
- recognise that goodwill should represent the ability of the subject enterprise to *actively* draw net custom. In cases where custom is pushed to the business due to attributes entrenched or vested in other assets of the business (eg monopoly or quasi monopoly assets or a commodity product like gold), such *passive* attractive force should not be attributed to goodwill. This reflects the economic approach to goodwill value, under which the market value of goodwill must reflect the ability of the business to generate returns in excess of the fair/normal returns on other assets of the business;
- consider goodwill on a forward-looking basis in that it is only the continued ability of the subject enterprise to actively attract future custom over and above the future custom brought in by other assets employed by the business that should be attributable to goodwill. Again, this reflects the economic approach to goodwill value whereby the market value of goodwill at a given point in time must reflect the *forward*-looking (as opposed to *backward*-looking) ability of the business to generate excess returns; and
- not consider the mere existence of profits/cash flows as a reliable indicator of the materiality of the value of goodwill without examining the sources from which the profits/cash flows are derived. This reflects both the long-established legal separation of goodwill from other assets of the business and the existence of material *excess* profits/cash flows, rather than the mere existence of material *total* profits/cash flows as an indication of the existence of material goodwill. A business may generate material total profits/cash flows, but little or no excess profits/cash flows and hence should have no material goodwill value if the total profits/cash flows are principally derived from identifiable assets of the business, such as a physical monopoly asset, or valuable intellectual property assets, such as patents or trademarks.

The above conceptual valuation framework was subsequently applied to re-evaluate the application of the principles regarding the valuation of goodwill set out in *Murry*.

The re-evaluation highlighted the need to distinguish between the mere existence of legal goodwill and the materiality of goodwill value and avoid the mistake of using the proof of the former to support the latter. This is because the mere existence of legal goodwill does not automatically indicate that the business has material goodwill value.

The re-evaluation also identified two common conceptual errors made by many practitioners in applying the valuation principles set out in *Murry* when assessing the market value of goodwill.

The first flaw is based on the wrong premise that goodwill must always be valued as a residual (a flaw based on "accounting standard thinking"). In the authors' view, now confirmed by the High Court, there is "no one size fits all" answer and the order in which goodwill value should be assessed is ultimately case specific.

> "Placer *emphasised the need to take into account the ability of a business to generate excess or above-average earnings when assessing its goodwill value."*

In practice, the adverse tax and duty consequences of the wrong thinking that goodwill must always be valued as a residual are exacerbated by the failure to:

- correctly value all of the identifiable assets and liabilities of the business, resulting in the valuation errors flowing to the assessed market value of goodwill; and
- rely on a holistic conceptual valuation framework to crosscheck the reasonableness of and identify the valuation errors embedded in the assessed market value of goodwill under the top down residual method of goodwill valuation (ie the method under which the market value of goodwill is assessed by deducting from the ascertainable market value of the total assets the assessed market value of identifiable assets, including tangible assets and identifiable intangible assets).

The second flaw involves the incorrect use of the "all-encompassing" thinking on goodwill when assessing goodwill value for a profitable established business whereby all the incremental benefits or value-add of an established business relative to a new business are attributable to goodwill and reflected in goodwill value. This wrong thinking is closely related to the failure to recognise the evolutionary changes in the market value of identifiable assets (eg physical land assets) as these assets evolve from a mere assemblage of assets on a piecemeal basis at the start of the business to a commercially proven symbiotic collection of physical assets as part of a profitable going concern business.

Evaluation of Placer against the conceptual valuation framework

The key findings of *Placer* supported the authors' conceptual valuation framework in several aspects.

First, "the methodologies used to value goodwill vary between businesses and, further, the methodology adopted to value goodwill is fact specific".[5] That is, goodwill is not dictated to be valued as a residual. In fact, in *Placer*, land assets, not goodwill, were accepted to be valued as the residual.[6]

Second, if goodwill is valued as a residual, the assessed goodwill value or, as in *Placer*, the gap between the assessed market value of the land assets and the purchase price paid must be crosschecked and capable of explanation.[7]

In *Placer*, the majority of the High Court found that the gap or residual goodwill of some $6.506b adopted by Barrick was not supported by any identifiable extra cash flows and thus could not be supported. This is because gold miners produce a basically homogenous product and are price takers, not price makers, and the reputation or capability of the miner, smelter or vendor is irrelevant.[8] This is consistent with the above conceptual valuation framework in that gold miners generally have no *active* attractive forces which bring in custom and should generally have no material goodwill value.

Third, the all-encompassing/added value concept which included in goodwill value every positive advantage, and whatever adds value, including privileges or advantages that differentiate an established business from a business just starting out, was rejected.[9]

This is also consistent with the above conceptual valuation framework which recognises the need to allow for the evolutionary changes in the market value of other assets, such as physical land assets, in assessing the market value of goodwill. In this regard, the majority of the High Court did not accept that the size of Placer Dome's landholdings (which had obviously accumulated over time) added to the company's goodwill.[10]

Fourth, the majority of the High Court confirmed the existence of above-average earnings or "the ability of a business to get more value out of the assets than its competitors" as determinants of its goodwill value.[11] This is consistent with the above conceptual valuation framework which recognises excess returns as the driver of the goodwill value. A normal business without uniqueness or an ability to generate excess returns should have no material goodwill value and vice versa.

Fifth, the majority of the High Court accepted the going concern basis of a valuation under which the market value of land as part of the subject going concern business was compared against the market value of all property (other than excluded property) of that going concern business.[12] This is consistent with the focus of the above conceptual valuation framework on the going concern basis of valuation. The market value of identifiable assets (eg physical land assets and intellectual property assets) as part of a going concern basis should reflect the evolutionary changes in the market value of these assets up to the point of valuation. These evolutionary value increments or decrements inhere in the market value of assets at the point of valuation.

Without recognising the evolutionary changes in the market value of other assets, such as physical land assets or intellectual property (IP) assets, what is characterised as "going concern" value and incorrectly equated to goodwill value is a manifestation of the value which inheres in the market value of these assets. In addition, from a valuation perspective, what is termed "going concern" value is only a result of a not like-with-like comparison between the ascertainable/observable market value of all property on a factual going concern basis and the aggregate value of identifiable assets on a counterfactual liquidation/piecemeal basis. Such comparison should not be determinative of the allocation of the purchase price paid for a going concern business among the market value of the constituent underlying asset classes as part of that going concern business.

The irrelevancy of such comparison in *Placer* is also mentioned by the majority of the High Court.[13]

Sixth, the majority of the High Court did not accept Barrick's justification for the goodwill value of $6.506b based on "sources" which could not generate or add identifiable extra value (or earnings) by attracting custom to Placer Dome's business.[14] This is consistent with the above conceptual valuation framework in that under this framework, the ability of a business to generate excess or above-average earnings determines the materiality of its goodwill value.

A "source" which cannot be shown to contribute to the ability of the business to generate above-average earnings does not indicate existence of material goodwill value.

It is also important to recognise a subtle difference between a "source", which generates above-average earnings and should be reflected in the goodwill value of the business, and other assets of the business (eg physical land assets and IP assets) which are recognised in *Murry* and *Placer* as the sources of goodwill but whose market values are distinct from the market value of goodwill.[15]

Conclusion and further considerations

Placer supported the conceptual framework for goodwill valuation developed much earlier, and summarised in this article, in assessing whether or not the "gap" or residual goodwill yielded by a valuation exercise using the top down residual method of goodwill valuation is capable of explanation.

Importantly, *Placer* emphasised the need to take into account the ability of a business to generate excess or above-average earnings when assessing its goodwill value.

Placer also raised important considerations regarding the treatment of synergies. The majority of the High Court found that, just prior to the acquisition of Placer Dome by Barrick, the synergies arising from that acquisition were not property of Placer Dome because they only arose on or after amalgamation.[16] Because the synergies were not part of Placer Dome's property at the relevant valuation point, they were excluded from the statutory valuation exercise.[16]

It follows that Barrick's allocation of $6.506b (which reflected, inter alia, synergies) to goodwill included a value reflecting the "expectation of future events", which events did not exist prior

to the acquisition date, and hence Barrick's goodwill value of $6.506b included a value which did not inhere in Placer Dome just prior to the acquisition.[17]

The majority of the High Court also made a distinction between the present value of predicted earnings of the business and the purchase price of the business in discussing the methodology to value goodwill of a profitable business.[18] This distinction apparently results from the above exclusion of the synergies (which were included in Barrick's purchase price for Placer Dome) from the value allocated to Placer Dome's goodwill by Barrick out of the purchase price paid.

The application of the valuation principles regarding the treatment of synergies set out in *Placer* in assessing goodwill value poses interesting practical issues. For example, for a business operating in a fragmented industry which has been experiencing a consolidation phase, should the predicted earnings of the business even in the absence of any specific amalgamation proposal already reflect some element of synergies (eg cost savings) arising from the anticipated consolidation activities?

Also, for a business with a talented management team which is well incentivised to remain with the business, should the predicted earnings of the business reflect the synergistic benefits arising from the sound investment decisions the talented management is expected to make?

As the majority of the High Court emphasised, the valuation exercise must be undertaken in the specific legal and factual context in which it arises.[19]

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0592NAT_06/19

Difficulties in settling disputes with the Commissioner of Taxation

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On 30 January 2015, Mr Pintarich paid $839,115.43 under the ATO's original letter dated 8 December 2014, believing that it compromised his disputed taxation debt of $1,156,787.72 by accepting his application for remission of the general interest charge (GIC) assessed to him. Mr Pintarich understood the ATO's letter to be a decision on his GIC remission application because the amount due by 30 January 2015 included all of the assessed primary tax and part of the GIC. The ATO then sent Mr Pintarich a letter demanding the payment of his allegedly outstanding GIC debt of $344,604.90 and formally disallowing his application for remission of GIC. The Federal Court and Full Federal Court dismissed Mr Pintarich's two appeals. This article discusses the difficulties in compromising taxation disputes with the ATO because the doctrine of estoppel does not apply to it, and suggests that the ATO would never have sought recovery of the additional GIC (by changing the meaning of its original letter) or pursued this case in response to the taxpayer's appeals under an independent Advocate-General of Taxation.

Outline of the Pintarich case

On 25 May 2018, the Full Federal Court dismissed an appeal brought by Mr Pintarich, a taxpayer who may go down in history as one of the most hard done by taxpayers in Australia. On 30 January 2015, Mr Pintarich paid $839,115.43, believing it compromised a disputed tax debt for $1,156,787.72, pursuant to a letter by the Deputy Commissioner dated 8 December 2014. At that date, there was a pending application for the remission of general interest charge (GIC) with the ATO. Mr Pintarich and his accountant naturally understood the Deputy Commissioner's letter to be a decision on the remission application, as the amount sought to be paid by 30 January 2015 included all of the primary tax assessed and part of the GIC owing. Following that apparently compromised payment, the ATO sent a letter to Mr Pintarich demanding payment of a debt for outstanding GIC of $344,604.90 and disallowing his application for remission of GIC.

Although the primary judge who heard an application for judicial review of the decision to disallow the remission application adopted an interpretation of the letter dated 8 December 2014 which did not involve it operating as a compromise of the debt or a decision on the remission application, all members of the Full Court interpreted that letter, according to its ordinary meaning, as a compromise of the debt and a decision on the remission application.

However, the officer handling the matter of the ATO and the Deputy Commissioner gave evidence before the primary judge to the effect that, although the letter dated 8 December 2014 may have had that meaning, they did not intend the letter to have that meaning nor intend that the letter would operate as a decision on the remission application. In reliance on that evidence, the majority in the Full Court held that, notwithstanding the ordinary meaning of the letter, there was no decision to compromise the tax debt or to remit GIC in the letter. Kerr J in dissent in the Full Court gave cogent reasoning for why this is an erroneous approach. This article analyses this case as being representative of the great difficulties which many taxpayers face when attempting to negotiate a compromise or to lock-in the compromise of a tax dispute with the ATO, against whom the doctrine of estoppel by conduct does not operate. The article questions whether that approach to estoppel should continue to operate.

It concludes with a suggestion that the ATO would never have sought to change the meaning of its letter, sought the recovery of the additional GIC or pursued this case in response to the application for judicial review under an independent Advocate-General of Taxation.

Introduction

In the course of giving his opinion about the Full Federal Court decision published on 25 May 2018 in *Pintarich v DCT*[1] (*Pintarich*), an opinion published two days after special leave to appeal to the High Court was refused on the papers on 17 October 2018,[2] Bob Deutsch, senior tax counsel at The Tax Institute and deputy president of the Administrative Appeals Tribunal, opened his op-ed piece on this tax case in *TaxVine*[3] with the following sentence:

> "If ever there was a case that should not have been pursued, this was probably it."

The reference to "not have been pursued" means the pursuit of the alleged outstanding GIC by the ATO which was the subject of the application for judicial review in *Pintarich.*

For the reasons addressed in this article, this opinion is entirely valid by any objective criteria and acts as further support for the move to create an independent Advocate-General of Taxation to handle all taxation disputes from the objection stage onwards on behalf of the Commissioner of Taxation and ensure that taxation litigation of this kind is never repeated.[4]

The principal thesis of this article is that, when regard is had to the facts and the procedural history in *Pintarich*, together with the convincing dissenting reasons for judgment of Kerr J in the Full Court, *Pintarich* must stand out as a prime

example of why the conduct of all taxation disputes must be severed from the ATO's jurisdiction and invested in a totally separate statutory agency under the control of a lawyer (and not an accountant) fulfilling the role of an independent Advocate-General of Taxation. The minor thesis is that the inapplicability of the doctrines of estoppel by conduct and estoppel by convention to the ATO (in particular) should be reconsidered by the parliament.

The facts in Pintarich

On 14 November 2014, the ATO assessed Mr Pintarich for income tax for the 2010 to 2013 years, and on 10 November 2014 for the 2014 year. On the latter date, the ATO issued a statement of account for $1,156,787.72 (being primary tax of about $820,000 and GIC of about $335,000, together with further interest accrued to give the total amount assessed).

On 24 November 2014, Mr Pintarich's accountant (Mr Smith) sought remission of all the GIC, which resulted in correspondence with the ATO and telephone negotiations with the ATO, where a Mr Celantano in the ATO's Hobart office handled the matter as delegate for the Tasmanian Deputy Commissioner of Taxation. The parties' accounts differed as to whether an oral arrangement was reached for the remission of the GIC in early December 2014.

On 8 December 2014, the ATO wrote to Mr Pintarich's accountant about a payment arrangement agreed to orally in respect of the tax debt that arose on 14 November 2014 for $1,156,787.72. In that letter, the ATO did the following three things, according to the findings made by the primary judge which were relied on by all three members of the Full Court:

1. the ATO stated that it was prepared to accept a lump sum payment of $839,115.43 if that amount was paid by 30 January 2015;
2. the ATO stated that that (compromised) payout figure was "inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015"; and
3. the ATO stated that a failure to pay the agreed amount by the agreed date would result in legal action (for recovery of the full amount of tax and GIC assessed being taken against Mr Pintarich) without further notice to Mr Pintarich or his accountant ("the December 2014 letter").

In his evidence at first instance before the primary judge, Tracey J (who dismissed Mr Pintarich's appeal), Mr Celantano said that the first two paragraphs of the letter (that is, 1 and 2 above) were errors and did not accord with his conversations with Mr Smith, the accountant acting for Mr Pintarich, before he sent the letter to confirm the agreement reached with Mr Smith. Mr Smith, who also gave evidence, said that the terms of the ATO's letter, first, did indeed accord with his antecedent conversations with Mr Celantano and, second, did accurately record the terms of the oral agreement reached with Mr Celantano regarding the payment of the outstanding tax liability of Mr Pintarich.

Mr Pintarich paid the agreed lump sum of $839,115.43 by the agreed date of 30 January 2015 after obtaining bank finance, in respect of which Mr Pintarich and the bank alike relied on the ATO letter operating as written evidence of a complete compromise of the tax dispute.

Thereafter, the ATO sent letters and statements of account to Mr Pintarich demanding the payment of the allegedly outstanding GIC of $344,604.90 which Messrs Smith and Pintarich, not unreasonably, both understood had been remitted as an aspect of the compromise of the tax dispute in the offer made by the ATO in its letter dated 8 December 2014 and by Mr Pintarich's acceptance of that offer by his conduct in performing the terms of the ATO's offer as to both the amount of the compromised payout figure and due date for payment constituted by his payment of the lump sum of $839,115.43 by the agreed due date of 30 January 2014.

Mr Pintarich sought judicial review of the Deputy Commissioner's decision dated 13 May 2016 to demand payment of the allegedly outstanding GIC amount of $344,604.90 with the balance of the GIC having been remitted ("the May 2016 decision"). The sole ground of review relied on by Mr Pintarich under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) was that the Deputy Commissioner's decision dated 13 May 2016 was ultra vires for the purposes of s 5(1)(c) or (d) ADJR Act. The originating application then sought a number of declarations of right which are of questionable validity and utility in the opinion of the author when assessed in the context of the ADJR Act.

The decision at first instance

Tracey J made relevant findings which are recited in summary format as follows:

1. the only case propounded by Mr Pintarich was that the May 2016 decision (assessing GIC of $344,604.90) was ultra vires because the Deputy Commissioner had, by his December 2014 letter, made a decision, under s 8AAG of the *Taxation Administration Act 1953* (Cth) (TAA), to remit the remaining GIC so that, in May 2016, there was no GIC assessed which was left owing or which was available to remit;[5]
2. a further aspect of this case was that it was not open to the Deputy Commissioner, according to Mr Pintarich, in May 2016, to revoke or vary his earlier decision to remit tax on 8 December 2014 in the December 2014 letter;[5]
3. Mr Pintarich's challenge to the May 2016 decision could only succeed, in the opinion of Tracey J, first, if in fact the alleged "decision" on remission had been made on or about 8 December 2014 and, second, if that decision had rendered the impugned decision of May 2016 "wholly otiose";[6]
4. the principal question arising on the appeal was, in the opinion of Tracey J, whether the Deputy Commissioner had made the alleged decision to accede to Mr Pintarich's application for remission of the remaining GIC under s 8AAG in the Deputy Commissioner's December 2014 letter;[7]
5. unless the alleged decision to remit was made on 8 December 2014 and unless it bore the characteristics of a "reviewable decision" for the purposes of the ADJR Act, Tracey J found that "it is difficult to see how it could have any impact on the [May 2016] decision impugned in this proceeding";[8]

6. in order for a decision to be reviewable under the ADJR Act, it must first be "final or operative and determinative", citing relevant authority;[9]
7. the making of a final and operative decision and its promulgation must be preceded by a process of consideration and evaluation of the relevant facts, citing relevant authority[10];[11]
8. the question of whether the Deputy Commissioner or his delegate, Mr Celantano, made the alleged decision is a question of fact to be determined on the evidence; although the Deputy Commissioner's December 2014 letter may provide evidence that a decision was made, the letter itself is not the decision;[12]
9. in the opinion of Tracey J, the preferable construction of the December 2014 letter was that it did not purport to communicate or record a decision on the application for remission of GIC made by Mr Pintarich;[13]
10. in the opinion of Tracey J, a "strained reading" of the December 2014 letter may support a contention that recorded a decision that the ATO would accept $839,115.43 on or before 30 January 2015 as full and final settlement of Mr Pintarich's tax debts and interest charges owing on that day;[14]
11. however, Tracey J considered that a "more natural reading" of the letter, when taken in context of the antecedent oral negotiations between Messrs Smith, Pintarich and Celantano, "is that this figure [$839,115.43] was made up of the $821,762.75 which was Mr Pintarich's primary debt as at 8 December 2014 together with interest accruing between then and 30 January 2015";[14]
12. Tracey J accepted (either expressly or impliedly) that Mr Celantano, the Deputy Commissioner's delegate, had said to Mr Pintarich on either 4 or 5 December 2014 (that is, a few days before Mr Celantano sent his 8 December 2014 letter) in a telephone conversation that payment in full of the primary tax was required "whilst we consider the remission of general interest charge";[15]
13. Tracey J found that Mr Celantano was seeking, in his 8 December 2014 letter, to record what he (Mr Celantano) understood to be the outcome of those discussions and exchanges with Mr Pintarich during the preceding week;[16]
14. the Second Deputy Commissioner responsible for the issue of the 8 December 2014 letter stated in a subsequent letter that the original 8 December 2014 letter had been "issued in error" and that the 13 May 2016 letter (that is, the impugned GIC decision letter) stated that the "payout figure" in the December 2014 letter "may be construed as misleading" but that, in the opinion of Tracey J, despite these concessions by the ATO against its interest, it did not follow that the December 2014 letter should be so construed;[17]
15. Tracey J concluded, accordingly, that the 8 December 2014 letter did not constitute a reviewable decision to accede to Mr Pintarich's application for remission of GIC then owing by him, dated 24 November 2014, because there was no evidence that the Deputy Commissioner, or any other officer of the ATO, had ever considered or determined the application for remission at the relevant time (8 December 2014), involving an acceptance of the evidence of Mr Celantano to the court that he had made no decision on the application for remission in his opinion, based on a flawed belief in his lack of the necessary authority to do so;[18]
16. although the dealings between Mr Pintarich and the ATO after 8 December 2014 are not determinative of the question whether a reviewable decision was made on that day, Tracey J found that it was clear that all relevant ATO officers considered that Mr Pintarich's application for remission dated 24 November 2014 remained unresolved, at least until 15 May 2015 when a letter was sent formally refusing the application;[19]
17. the ratio of the reasoning of Tracey J (which was emphasised in bold text by the majority in the Full Court in their reasons) was that the making of the decision required a process of deliberation, assessment and/or analysis by Mr Celantano about remitting GIC, that "he did not undertake any of those facets of the decision-making in regard to the application prior to the issuing of the 8 December 2014 letter", that "the letter was not and did not purport to be the communication of a decision relating to the GIC waiver application" and that, "even if it be [so] construed …, the surrounding circumstances did not evidence the making of such a decision by Mr Celantano or any other person";[20] and
18. Tracey J concluded that, because no decision had been made on 8 December 2014 in respect of the remission application made by Mr Pintarich, there was no reason why the May 2016 decision should not operate according to its terms, so that the full amount of GIC assessed in May 2016 was payable.[21]

The decision on appeal in the Full Court

Mr Pintarich appealed the dismissal by Tracey J of his application for judicial review to the Full Court on only two grounds. First, he complained about the primary judge's reliance on the subjective evidence of the ATO officers being determinative as to the question whether a remission decision had been made, rather than by focusing on the available objective evidence on that question. Second, he complained that the primary judge should have found that the 8 December 2014 letter manifested a decision to remit GIC but did not so find.

The majority in the Full Court, Moshinsky and Derrington JJ, affirmed the decision of Tracey J and dismissed the appeal to the Full Court brought by Mr Pintarich. The third member of the Full Court, Kerr J, gave a strident dissent, which is addressed at length in this article.

Interestingly, the majority in the Full Court found that:[22]

> "… there is some force in the taxpayer's position as to the correct construction of the December 2014 letter. However, even if that construction is accepted, we do not consider that the taxpayer has established any error in the primary judge's conclusion, namely, that no decision was made on or about 8 December 2014 [in respect of the application for remission of GIC]."

The second sentence in this inclusionary finding is the point of divergence of the majority, with Kerr J in dissent,

and it is also, with respect to the majority in the Full Court, the principal error in their reasoning, a submission made notwithstanding the refusal of special leave to appeal on the papers as addressed above.

The approach adopted on appeal to the conclusion by Tracey J as to the status of the Deputy Commissioner's letter dated 8 December 2014 underpins the thesis of this article: the need for the creation of an independent Advocate-General of Taxation.

> *"the natural reading of the … letter is … the [ATO] agreed to accept the payment … in full discharge of Mr Pintarich's tax and GIC …"*

Analysis of the majority decision on the Full Court

Critically, for present purposes, the majority in the Full Court found that the natural reading of the December 2014 letter, in the context in which it was written, is that the Deputy Commissioner agreed to accept the payment of the agreed lump sum amount on or before 30 January 2015 in full discharge of Mr Pintarich's primary tax and GIC liabilities as set out in the statement of account dated 10 November 2014 which had been sent to him. The majority gave four reasons for reaching that conclusionary finding. It involves a unanimous aspect of the decision on appeal because Kerr J in dissent came to the same conclusion on this point, despite his dissenting conclusions on the result of the appeal.[23]

Importantly, the majority in the Full Court held that, although the December 2014 letter did not, in its terms, refer to the making of an application for remission of GIC or to the making of a determination of that application (in that letter or elsewhere), it did refer to GIC, stating that the payout figure was "inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015". The majority found that those words in the letter indicate "that the subject matter of the GIC was comprehended by the letter".[24]

Accordingly, notwithstanding the difference of opinion between the majority and Kerr J in the result in the appeal, there was a unanimous finding by the Full Court about the proper interpretation of the December 2014 letter. That unanimous finding (which is a finding on a question of law), together with the reliance that was placed by the majority in the Full Court on other evidence to reach the conclusion that the December 2014 letter did not represent a binding decision on the remission of GIC, lies at the heart of several questions of both law and public policy that are of general importance, for the reasons addressed in this article.

The Full Court's conclusion on the December 2014 letter was reached by focusing on the status of the letter as a "reviewable decision" within the meaning of the ADJR Act, rather than by focusing on the plain ordinary meaning of the language used in the letter without regard to that statute, it is submitted. This proposition is advanced, notwithstanding the rejection by the High Court of the application for special leave to appeal brought by Mr Pintarich against the decision of the Full Court. The corollary of that rejection, that is, the finding of an absence of any question of law of general importance raised by the issues and reasoning of the Full Court, is that the problem presented to all taxpayers in dispute with the ATO finding themselves in the position that Mr Pintarich found himself in (and his case is by no means the first of its kind) is not considered by the High Court to be of sufficient importance to require it to review the reasoning of the majority in the Full Federal Court and ask whether the dissenting reasoning and orders of Kerr J in the Full Federal Court might not be the correct outcome for a taxpayer in Mr Pintarich's position as a matter of taxation law.

The majority in the Full Court, having made the findings addressed above, proceeded to undertake a minute analysis of the negotiations which preceded the sending of the December 2014 letter by the delegate of the Deputy Commissioner. That analysis turned on the ATO seeking payment of the primary tax of $821,762.75 while the position on GIC was reviewed by the delegate of the Deputy Commissioner in response to the remission application.

It is respectfully submitted that the problem with giving these antecedent discussions any real weight at an evidentiary level (noting that the fundamental problems arising from this factual analysis at the higher level of legal principle are addressed later in this article) is that the amount agreed on in the letter for payment by 30 January 2015 was $839,115.43, which included primary tax of $821,762.75 and GIC in a compromised amount of $17,352.71. That amount of GIC was a necessary integer in the amount sought to be paid by 30 January 2015 in the December 2014 letter. It was not an accurate calculation of GIC due at 30 January 2015 but was, on any view of it, a compromise of the amount of GIC otherwise due and payable on that date, assuming there was a conscious decision to remit (in part) GIC due at that date.

The majority in the Full Court found,[25] and with great respect to their Honours correctly, that, if the natural reading of the December 2014 letter was as they had already found as set out earlier in this article, having regard to the natural and ordinary meaning of the language used in the letter when read in the context of the surrounding circumstances, it followed that the letter communicated that a decision had indeed been made to remit all GIC payable as at 30 January 2015, save for the small amount covered by the lump sum payment of $839,115.43, that is to say, save for the nominal amount of $17,352.71, subject to the full amount of the primary tax assessed ($821,762.75) plus that nominal amount of GIC being paid by the specified deadline of 30 January 2015. It is objectively difficult to see why any statutory officer would seek a payment in those circumstances with a specified deadline unless it were indeed a binding compromise of a disputed larger amount of tax and GIC.

This finding by the majority in the Full Court, which is preliminary to its conclusionary findings which gave the letter a different meaning, accords with the conclusionary reasoning of Kerr J in dissent. The point of departure is that Kerr J in dissent reached a conclusion on the meaning of the December 2014 letter in the context of the then pending application for omission of GIC which accorded with his preliminary findings on the ordinary and natural meaning of

the letter, whereas the preliminary and conclusionary findings of the majority on those issues are not only at odds, but are also, it is submitted with respect, irreconcilable.

The majority of the Full Court, having made this preliminary finding, went further and, in doing so, fell into error for a number of reasons, it is submitted with great respect. The majority went on to find that "we do not consider that this resolves the question whether the Commissioner made such a decision [on the remission application]".[25]

The majority also found that "there needs to be both a mental process of reaching a conclusion and an objective manifestation of that conclusion. In the present case … there was no mental process of reaching a conclusion [on the remission application]".[25]

The majority went on to analyse the case law on the requirements for the making of a valid and binding decision by a statutory decision-maker.[26] Their Honours then concluded that "it is not established that a decision was made to remit GIC on about 8 December 2014 [and that] (t)his is the case even if the December 2014 letter is construed in the way contended for by the taxpayer".[27]

The following propositions are advanced in this article as being responsive to this conclusion by the majority when questioning the correctness of the conclusionary reasoning of the majority:

1. when correctly analysed, the applicable case law does not permit the ATO to resile from a decision which is reflected in the plain ordinary meaning of the language used in a letter sent by the ATO communicating that decision to the taxpayer by relying on parol evidence that it (the ATO speaking through the relevant officer who was the author of the letter) intended to decide otherwise than as stated in the letter;
2. even if the case law does permit such a resiling to occur, contrary to proposition 1 above, public policy should preclude the ATO from resiling from the operation of a decision it has communicated in the plain ordinary meaning of its letter to a taxpayer;
3. had this taxation dispute been conducted by a (legally qualified) independent Advocate-General of Taxation, on behalf of the ATO, along the lines of what occurs in other common law jurisdictions,[28] it would never have gone to court because no independent statutory agency of the Commonwealth Government would have sought to resile from the plain ordinary meaning of the 8 December 2014 letter in circumstances where the offer made in it was accepted by performance which was supported by valuable consideration in a timely manner constituting an unequivocal acceptance of that offer in terms of the law of contract and estoppel by conduct;
4. it is submitted, again with the greatest of respect, that the High Court appears to have failed to recognise these errors in the reasoning of the majority in the Full Court in its dismissal on the papers of the application for special leave to appeal by Mr Pintarich; and
5. a possible reason for this failure by the High Court to recognise these errors is that the High Court is today constituted by the same number of justices (seven) as it has been constituted by for the last 79 years (since 1940), during which time there has been a 251% increase in the Australian population (from 7.03 million to 24.6 million) and (one assumes) a similar, if not greater, increase in the litigation that it generates, justifying an increase in the size of the court to enable it to cope with its workload.

These five propositions, which make up the far-reaching thesis of this article, are now developed under their own separate headings, with propositions 1 to 3 above treated as discrete propositions, and propositions 4 and 5 above being treated as a combined topic of discussion.

Existing authority on the identification of a "decision" of Commonwealth statutory officers

The majority in the Full Court in *Pintarich* embraced a statement of principle made by Finn J in *Semunigus v Minister for Immigration*[29] (*Semunigus*) that "the making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act as, in the circumstances, gives finality to the conclusion …".

However, the issue in *Pintarich* was determining whether both of those criteria for decision were present in the 8 December 2014 letter, rather than by treating that letter as merely the second of these criteria for the identification of a "decision" of a Commonwealth statutory officer. One of the authorities analysed by Tracey J at first instance and Kerr J in dissent in the Full Court, which relied on the leading authority on this point (*Guss v DCT*[30]), makes this point eloquently. The majority in the Full Court inexplicably paid no regard to this authority.

Guss concerned the status of a notice issued by Deputy Commissioner of Taxation to a director of a company under s 222APE of the *Income Tax Assessment Act 1936* (Cth). Such a notice gave the director 14 days in which to take steps to terminate a company which was delinquent in remitting group tax from trading in order to escape personal liability for a penalty equivalent to the amount of unremitted group tax. The director sought judicial review under the ADJR Act of the Deputy Commissioner's decision to issue the notice to him.

The question arose (as a threshold question in an application for judicial review in the Full Federal Court on appeal from a single judge) as to whether the decision by the Deputy Commissioner's delegate to issue that notice was a "reviewable decision" within the meaning of the ADJR Act. The majority in the Full Court, Edmonds and Greenwood JJ, found that the decision to issue that notice was not a decision which was reviewable under the ADJR Act while Gyles J, in dissent, found that it was a reviewable decision.

In his reasons in *Guss*, which were the principal reasons of the majority, Greenwood J analysed the case law "engaged in seeking to plot the point on the continuum at which a decision arose",[31] citing as his authority *Ricegrowers Co-operative Mills Ltd v Bannerman and Trade Practices Commission*[32] (*Ricegrowers Co-operative*).

In *Ricegrowers Co-operative*, Northrop J stated[32] (consistently with the statement of principle made by Finn J in *Semunigus* which had been relied on by the majority in

Pintarich as addressed above) that a decision for the purpose of the ADJR Act must reflect the conjunction of thought processes and "some overt act by which the conclusions reached as a result of those thought processes are manifested". Northrop J held that the manifestation may take many different forms including "a written communication of the conclusion to the person affected".

Northrop J went on in *Ricegrowers Co-operative*[32] to make an ultimate finding that the manifestation of the making of the decision in that case was the issue of a notice under s 155 of the *Trade Practices Act 1974* (Cth) to Ricegrowers Co-operative Ltd. His Honour also held[32] that "in my opinion the determination by the chairman [of the Trade Practices Commission] to serve the s. 155 notice on Ricegrowers, carried into effect by the service of that notice, constitutes a decision within the meaning of that word where it appears in s.13(1) of the ADJR Act".

In *Guss*, having cited this statement by Northrop J in *Ricegrowers Co-operative*, Greenwood J made an important finding about the decision under consideration in *Guss* when he said:[33]

> "The point of immediate relevance is that the giving and service of the notice under s. 155 of the *Trade Practices Act 1974* (Cth) [in *Ricegrowers Co–operative*] reflected *both* the determination of the chairman [of the Trade Practices Commission] *and* the overt act of the giving of the notice. In other words, *the giving of the notice, taken as the decision*, was the emanation of a very important evaluation and deliberation of those facts and circumstances which caused the chairman to have 'a reason to believe' that Ricegrowers may have information going to the question whether a contravention of the *Trade Practices Act 1974* (Cth) had occurred which enabled a determination to be made and thus a valid notice to issue. *Although the notice was the expression of the decision, it reflected two essential features. First, an evaluation of the critical statutory matters leading to a determination and the overt act of giving and serving the notice.*" (emphasis added)

Consistently with this well-settled line of authority in Australia on the criteria which apply for determining whether a communication by a statutory officer to a member of the community constitutes conclusive evidence of the making of a decision by that statutory officer as well as the fact of its communication to that member of the community, it is submitted, with great respect to both the majority in the Full Court of the Federal Court and the members of the High Court who determined Mr Pintarich's application for special leave to appeal, that the ATO's letter to Mr Pintarich dated 8 December 2014, on its plain ordinary meaning, is both the manifestation of the making of a decision on the remission application and the fact of its communication to the taxpayer.

That is, adopting the far more eloquent language of Greenwood J in *Guss*, the ATO's letter to Mr Pintarich dated 8 December 2014 "reflected two essential features … an evaluation of the critical statutory matters leading to a determination [of Mr Pintarich's application for the remission of the GIC which had earlier been assessed to him] and the overt act of giving and serving the notice [of that determination of his remission application on him]".

With great respect to Kerr J, this was precisely the approach adopted by his Honour in dissent in the Full Court, and his Honour was, with great respect to him, quite correct in principle to adopt that approach, especially when considered in light of the well-settled line of authority on the determination as to whether a valid and effective decision has indeed been made by a statutory officer analysed in the immediately preceding paragraphs of this article.

The 8 December 2014 letter of the Deputy Commissioner, when properly construed in the context of the relevant surrounding circumstances and when tested against the long line of authority analysed above, was both the start and the finish of characterising it as a valid, effective and binding GIC remission decision, that is to say, binding on the ATO for all purposes and, subject to a right of judicial review, binding on its recipient, Mr Pintarich.

Furthermore, it is submitted that neither the primary judge nor the majority in the Full Court had any basis in principle to place any reliance on the evidence of Mr Celantano and his supervising Deputy Commissioner about what they believed the status of their letter dated 8 December 2014 was or about their regret in drafting that letter in the terms in which they drafted it and sent it to Mr Pintarich.

It is submitted that neither the primary judge nor the majority in the Full Court had any foundation in principle for giving any operative effect to the evidence of Mr Celantano and his supervising Deputy Commissioner about what they believed the status of their letter to be, not merely in the light of the line of authority analysed above, but in the context of the applicable rules of evidence for making an assessment of the meaning of that letter under the relevant objective test for ascertaining its statutory status.

It is hard to see how the ATO can be in any better a position than a private litigant who writes a letter to another party communicating the making of a decision which has legal effect on their relationship, including in a case such as this where that letter has been relied on to the detriment of the recipient of the letter on any objective view of the available evidence.

In this case, both the primary judge and the majority in the Full Court have permitted the ATO to effectively rewrite its own script ex post facto with the benefit of hindsight, thereby placing the ATO in a privileged position not enjoyed by any other category of litigants in Australia.

It is submitted that the approach adopted by the primary judge and the majority in the Full Court in *Pintarich* constitutes a complete inversion of the principles enunciated in *Ricegrowers Co-operative* and *Guss*, and a complete departure from a long judicial history of undertaking an objective characterisation of unambiguous documents generated by parties to litigation without regard to the subjective "benefit of hindsight" opinions their authors invariably have, by permitting the authors of the documents to undertake on their oath ex post facto changes to the intended meaning of their own documents in order to serve their interests in the litigation.

It is submitted that this is an impermissible approach to the interpretation of documents tendered in evidence in litigation, and the fact that the litigation involves the judicial review of administrative decision-making surely cannot alter the principles of interpretation.

It is submitted there is nothing in the jurisprudence on the ADJR Act which supports such an approach by giving the decision-maker whose decision is under review the right to effectively rewrite the decision in order to provide (or strengthen) the grounds for defending its validity.

Public policy considerations for holding statutory officers to their published decisions

It is submitted that a public policy of holding statutory officers to their published decisions is the rationale for the principles enunciated by the Full Courts in *Ricegrowers Co-operative* and *Guss* as discussed above and their principal ancestor, *Australian Broadcasting Tribunal v Bond*.[34]

The reasoning of Mason CJ (Brennan and Deane JJ agreeing with Mason CJ) in *Australian Broadcasting Commission v Bond* appears to have greatly informed the reasoning of Greenwood J in *Guss*. The rationale for that public policy of holding statutory officers to their published decisions is writ large in the facts in *Pintarich*, and it has been trumpeted by Bob Deutsch in *TaxVine* (19 October 2018), as observed at the beginning of this article.

The majority in the Full Court in *Pintarich* made a finding[35] that one of the grounds relied on by Mr Pintarich (writing through his accountant, Mr Smith) was that he (Mr Pintarich) had borrowed from the ANZ Bank to pay the compromised tax/GIC debt of $839,115.43 by the due date of 30 January 2015, and that he had no capacity to borrow any further funds to compromise his taxation dispute with the ATO at that date.

This evidence constituted uncontradicted evidence of detrimental reliance placed on the terms of the 8 December 2014 letter not only by the taxpayer, Mr Pintarich, but also by his bank, the ANZ Bank, which had accepted the risk of lending to Mr Pintarich in the expectation that the amount lent by the bank had satisfied all of his liabilities for outstanding tax at that date.

No other litigant in Australia could conduct itself in the manner the ATO conducted itself in *Pintarich* by being permitted to resile from conduct (with the benefit of hindsight) which had caused significant detrimental reliance to the other party to the litigation, the taxpayer in this case, in order to successfully defend its conduct during the judicial review of its decision.

If indeed the case law on judicial review does permit the ATO to conduct itself in the manner in which it did in *Pintarich,* contrary to the dissenting reasoning and conclusions of Kerr J in the Full Court and contrary to the thesis of this article, it is respectfully submitted that it is high time that the prohibition against the doctrine of estoppel by conduct or by convention applying to Commissioners of Taxation[36] is revisited by parliament if the courts refuse to revisit that prohibition, in the light of the facts and outcome of the appeal in *Pintarich.*

Analysis of the reasoning of Kerr J in dissent in the Full Court in Pintarich

The critical findings made by Kerr J, both in concurrence with the majority and in dissent, can be summarised for the sake of brevity in the light of the factual analysis addressed above.

Kerr J noted that it was "common ground in the Full Court that the primary judge erred as to the correct construction of the first Deputy Commissioner's letter of 8 December 2014".[37] That is, it was an agreed fact on appeal that Tracey J had misconstrued the December 2014 letter which lay at the heart of the appeal.

This observation by Kerr J followed an earlier finding which his Honour made,[38] a critical finding for present purposes, that "I share the majority's conclusion that the natural reading of the first Deputy Commissioner's letter, in the context in which it was written … is that the Deputy Commissioner had agreed to accept payment of the lump sum amount honourable for 30 January 2015 in full discharge of the taxpayer's primary tax and GIC liabilities …".

Subject to one proviso, it was at this point that Kerr J and the majority in the Full Court reached a fork in the road leading to their respective resolutions of the appeal. That fork in the road involves a fundamental question of legal principle, it is submitted.

That proviso is that Kerr J stated[39] that he was in agreement with the majority's conclusion that the primary judge's reliance on the reviewability of decisions under the ADJR Act provide limited, if any, assistance in determining whether the ATO's letter dated 8 December 2014 constituted a binding decision to remit the GIC assessed to Mr Pintarich.

Kerr J helpfully and, with great respect, pointedly identified the fork in the road between his reasoning and that of the majority,[40] and that difference amounts to a pure question of law, it is submitted. This point of difference is that the principles enunciated by Finn J in *Semunigus*, and subsequently affirmed by a Full Court of the Federal Court, the content of which has been addressed earlier in this article, affected the proper interpretation of the December 2014 letter or its status as a valid decision on remission of GIC.[41]

The reasoning of Kerr J for not accepting the applicability to Mr Pintarich's remission application of the principles enunciated in *Semunigus* is on all fours with the thesis of this article. Kerr J was sceptical about the applicability of reasoning concerning the essential elements of a "decision" in the context of ordinary judicial review proceedings to a matter such as an application for remission of GIC. The author of this article takes it a step further and submits, with respect to the members of the Full Court, that there is no reason in legal principle to apply the criteria for finding a reviewable decision for the purposes of the ADJR Act in a tax case concerning an application for remission of penalty tax and GIC.

Kerr J found,[42] adopting his antecedent analysis of the relevant principles,[43] that the body of earlier decisions of the court on distinguishing a decision from a purported decision, in the context of the ADJR Act, do not address the issue arising in *Pintarich*, that is to say, do not address the identification of which features that a decision and a purported decision share in common, because it is the minimum content of what they share in common that is critical in a case concerning an application for remission of penalty tax or interest, such as the disputed remission decision in *Pintarich*.

Equally, Kerr J said[44] that the focus of Finn J in *Semunigus* as to whether the decision-maker was functus officio is of no importance in *Pintarich*. His Honour did not clearly enunciate the reason for this conclusion. The author of this article agrees with that conclusion and suggests that the reason for it can be readily inferred. It involves a circular process of reasoning in a case like *Pintarich*. The reasoning starts with a conclusion about a decision in order to reach a conclusion about a decision. The High Court has cautioned against placing reliance on syllogistic reasoning in the context of statutory interpretation.[45]

Kerr J then went on[46] to analyse the principles enunciated in *Semunigus* and questioned whether they have any continuing application generally. This presumably involved an assumption that *Semunigus* had something relevant to say about the status of the December 2014 letter in *Pintarich*, contrary to his principal conclusion that it did not.

The conclusionary finding of Kerr J[47] was that the legal conception of what constitutes a decision cannot remain static and must comprehend that the technology has altered how decisions are made, so that either some aspects of, or the entirety of, decision-making can occur independently of human input. *Semunigus* makes no allowance for technology.

The ultimate conclusions drawn in *Pintarich* by Kerr J[48] can be conveniently summarised as follows:

1. the Deputy Commissioner's delegate, Mr Celantano, had both actual and, critically for present purposes, ostensible authority to make the GIC remission decision that had been lodged with him by the accountant acting for Mr Pintarich; there appears to have been no dispute about the question of his authority to make the decision in the appeal;
2. Mr Celantano's inputting of data into the ATO's decision template caused the mental processes which he applied to that task to become manifested by an overt act, and that overt act was the creation, signing and communication of the December 2014 letter;
3. the December 2014 letter sent to Mr Pintarich was no less a decision (and of equal importance for present purposes) and no less a purported decision because, by reason of Mr Celantano not checking the text of the letter which he had generated on the ATO's decision-making template, by keying data into his computer, he did not make the decision which he says that he had intended to make when he issued that letter;
4. Kerr J made a positive finding that "it would undermine fundamental principles of administrative law if a decision-maker could renounce as 'not a decision' (and not even a purported decision) something he or she has manifested by an overt act taking the form of a decision simply by asserting there was a distinction between their mental processes and the expression of those mental processes in the overt act", a proposition which, with respect, constituted a special leave question having merit as an important question of law within the meaning of s 35A of the *Judiciary Act 1903* (Cth);
5. Kerr J also said that there is no requirement (that is, no requirement founded in legal principle) that in order to be a valid decision, the overt manifestation of the decision must align with the subjective intention of, or conclusion intended by, the decision-maker, so that it does not cease to be a valid decision for such a reason. This reasoning underpins the conclusionary proposition made in the preceding paragraph;
6. Mr Celantano was in no better position than if he had dictated a letter stating what he intended but signed the 8 December 2014 letter stating something markedly different to that which he had dictated without first checking the letter for accuracy before he signed it; under well-settled principles of both actual and ostensible authority, he was bound by that outward manifestation of what he had decided as recorded in his letter which bore the Deputy Commissioner's signature with Mr Celantano's approval;
7. cut down to its bare bones foundations in legal principle, Kerr J held in dissent that decision-makers in the public service must be held to the same standards of conduct as any other litigant when it comes to the outward signs of them making a decision which has objective legal consequences. The legal consequences of the decision and of its notification flow from its outward manifestation in either hardcopy or electronic format as communicated to a third person or third persons. The outward manifestation of the making of a decision and the terms of the decision is the only reliable evidence which is susceptible to an objective process of contextual interpretation as to the status of that outward manifestation as a decision and as to the terms of that decision; and
8. on the other hand, if one were to adopt the approach of the primary judge and the majority in the Full Court in *Pintarich*, where reliance on subjective evidence by the decision-maker or his or her delegate of a contrary intention to that outward manifestation of his or her decision is permitted to be relied on in construing that outward manifestation as a decision or a purported decision, it is inevitable that that process will lead to uncertainty and unpredictability, not only in the context of judicial review of administrative decisions, but also in the day-to-day conduct of members of the community dealing with the public service who generally place great reliance on the outward manifestation of the decisions and purported decisions of the public service.

First conclusion: the overdue need for an independent Advocate-General of Taxation

For the reasons which follow, it is submitted that Mr Pintarich's experience supports the creation of an independent Advocate-General of Taxation to conduct taxation disputes on behalf of the ATO and determine which disputes should be defended and which should be settled.

It is a self-evident proposition that Mr Pintarich was badly served by the Tasmanian office of the ATO in his dealings with it in respect of his taxation affairs for the 2010 to 2014 years. In good faith, Mr Pintarich, with the assistance of his accountant, compromised the disputed tax debt of $1,156,787.72 in consideration of the prompt payment of

the compromised amount of $839,115.43 by the due date specified by the delegate of the Deputy Commissioner.

That amount represented his entire primary tax liability of $821,762.75 and a compromised payment of the GIC accrued on the primary tax of $17,352.71. That fully performed compromise on the part of Mr Pintarich was made not only with the support of his accountant, but also with the support of his bank which had lent him the money (and at very short notice) to effect that compromise of all of his outstanding taxation liabilities to assist him in the further conduct of his business affairs.

To any reasonable person experienced in commerce, this outcome appears to be a sensible settlement reached on objective commercial terms for both parties, a compromise which at the date of the compromise, 30 January 2015, obviated the need to tie up their respective resources and time in litigating a disputed taxation liability, not to mention freeing up the time and resources of the Federal Court of Australia and four of its judges, whose time is, after all, public time and whose resources are public resources. Events turned out otherwise.

The Deputy Commissioner was permitted by both the primary judge and the majority in the Full Court to resile from an ultimately common interpretation of his 8 December 2014 letter. That interpretation was common among the three appellate judges, whose opinions count in the grand scheme of things, albeit not an interpretation of the fourth judge dealing with the matter at first instance.

Having reached that common interpretation of the 8 December 2014 letter, the majority in the Full Court went on, in the face of a long line of case law to the contrary, and treated a valid decision to remit GST into an administrative nothing, that is to say, a non-decision, notwithstanding the clear terms of that decision and the unequivocal evidence of detrimental reliance placed on it by Mr Pintarich to seal the bargain proposed in the letter, in so far as the letter operated as an offer to compromise what the ATO alleged to be a larger tax liability which remained open until close of business on 30 January 2015.

The outcome of *Pintarich* is wrong not only in the result in the case, but also in its application of legal principle. It creates great uncertainty for taxpayers in the position of Mr Pintarich, their accountants and legal advisers, and the bankers who rely on letters such as the 8 December 2014 letter to provide working capital finance to bank customers who find themselves in dispute with the ATO about the amount of their taxation liabilities.

The outcome of the application for judicial review in *Pintarich* is particularly troublesome for small and medium-sized enterprise taxpayers and self-employed professional taxpayers throughout Australia, because many (indeed most) of them lack the resources to mount litigation of the kind mounted by Mr Pintarich to enforce the benefit of the compromise which, on any objective assessment of the facts of his case, was reached on 30 January 2015.

It is submitted that an independent Advocate-General of Taxation — whether it be a fourth Second Commissioner of Taxation, as proposed by the federal Opposition in its October 2018 taxation policy media release on taxation disputes, or an Advocate-General of Taxation heading up a new statutory agency that is completely independent of the ATO — would not have conducted the response to Mr Pintarich's application for judicial review under the ADJR Act in the manner in which it was conducted by the ATO in *Pintarich*.

Rather, it is submitted that an independent Advocate-General of Taxation would have appreciated the correctness of the approach adopted by Kerr J's dissent and the need to maintain certainty in the making and communication of decisions by the ATO, not only for the sake of the administration of taxation laws in Australia by the ATO in the performance of its statutory duty to administer taxation laws according to law, but also for the sake of the conduct of day-to-day business and day-to-day life of taxpayers who practise a profession in their dealings with the ATO.

The creation of this new independent statutory officer to head up a new statutory agency has recently been embraced by the federal Opposition following three years of support for it by the Inspector-General of Taxation and by various commentators.[49]

An independent Advocate-General of Taxation would give Australian taxpayers the certainty in their taxation affairs which have been proven to be sadly lacking in *Pintarich*.

Second conclusion: the overdue need for a statutory estoppel regime against the ATO

Pintarich also establishes, it is submitted, that it is high time that the parliament gives serious consideration to enacting amendments to the relevant taxing statutes to ensure that, in specified circumstances such as those which Mr Pintarich faced in this case, the common law doctrines of estoppel by conduct and estoppel by convention henceforth apply to the Commissioner of Taxation and the Second Commissioners of Taxation and other officers of the ATO in their dealings with taxpayers concerning the compromise of taxation liabilities and the remission of tax and interest.

A statutory regime for an estoppel (be it an estoppel by conduct or a conventional estoppel based on an assumption of the ATO's position) in those limited categories of cases would ensure that the Deputy Commissioner's letter to Mr Pintarich dated 13 May 2016, purporting to operate as a decision to demand the payment of allegedly outstanding GIC and a decision to disallow the allegedly pending remission application, contrary to the terms in his original letter dated 8 December 2014, would have been set aside on judicial review as repugnant to the ATO's published position in the Deputy Commissioner's letter, a published statement of position by the ATO which had been relied on by the taxpayer to his detriment.

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2 *Pintarich v DCT* [2018] HCASL 322.

3 B Deutsch, "Handling tax disputes", *TaxVine*, issue 40, 19 October 2018.
4 The federal Opposition adopted a policy in late 2018 involving the creation of a fourth Second Commissioner of Taxation to operate independently of the ATO to conduct (some or all) tax disputes on behalf of the ATO.
5 [2018] FCAFC 79 at [120]; [2017] FCA 944 at [40]-[57].
6 [2018] FCAFC 79 at [121]; [2017] FCA 944 at [40].
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28 Such as the United States, Canada and Ireland. See C Bevan, "An independent ATO Appeals Group is long overdue", (2018) 53(2) *Taxation in Australia* 68.
29 *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422 at [19] (affirmed at (2000) 96 FCR 533).
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45 *ICAC v Cunneen* (2015) 256 CLR 1 at [33], citing *Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419.
46 [2018] FCAFC 79 at [36]-[49].
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Superannuation

by Shaun Backhaus and Daniel Butler, CTA, DBA Lawyers

Executors, SMSFs and conflicts of duty

Self-managed superannuation fund trustees/members should revise their estate and succession plans to avoid conflicts. Express wording authorising conflicts and BDBNs can minimise risk.

The recent case of *Gonciarz v Bienias*[1] (*Gonciarz*) continues a line of cases that consider the conflict that arises where a person acts as executor or administrator of a deceased estate while also applying to receive superannuation death benefits in their personal capacity. *Gonciarz* follows the reasoning laid out in *Burgess v Burgess*[2] (*Burgess*).

Broadly, *Gonciarz*, *Burgess* and the cases discussed below revolve around the executor/administrator's duty to collect assets of the deceased on behalf of an estate. As a fiduciary role, an executor/administrator must not, without proper authorisation, allow their personal interests to conflict with their obligations owed to the estate.

These cases are sure to have an increasing impact on death and succession planning in an SMSF context as around 70% of SMSFs are two-member funds (ie around 420,000 out of around 600,000 SMSFs have two members) and, in relation to couples, each spouse typically appoints their spouse as executor of their estate. Accordingly, many surviving spouses may be thrust into a position of potential conflict in relation to their duties as an SMSF trustee/director and as an executor.

These cases are analysed below to provide valuable tips on minimising risks in these type of conflict situations.

McIntosh v McIntosh: administrator was held to be conflicted

McIntosh v McIntosh[3] (*McIntosh*) involved a mother who was appointed as the administrator of her deceased son's estate. While acting in that role, the mother also applied to three of her son's industry/retail superannuation funds to receive his death benefits in her personal capacity, which she received. If these death benefits had instead been paid to the estate, they would have been distributed equally between her and her former husband (as the deceased child's parents) under the laws of intestacy in Queensland as their son died without a will.

After some legal posturing between the mother's and the father's lawyers, the mother filed an application in the Queensland Supreme Court to determine the matter which found:

> "… there was a clear conflict of duty … contrary to her fiduciary duties as administrator. When the mother made application to each of the superannuation funds for the moneys to be paid to her personally rather than to the estate, she was preferring her own interests to her duty as legal personal representative to make an application for the funds to be paid to her as legal personal representative. She was in a situation of conflict which she resolved in favour of her own interests. As such she acted … in breach of her fiduciary duty as administrator of the estate …"

Accordingly, the mother was required to account to the estate for the superannuation benefits she had personally received. Also of note in this case was the fact that the mother was a nominated beneficiary in respect of each of the superannuation funds via non-binding nominations. Had binding death benefit nominations (BDBNs) been in place, no conflict would have arisen.

Brine v Carter: executor was held not to be conflicted

Brine v Carter[4] examined a potential conflict arising in the case of an executor which did not require the executor to account to the estate. Professor Brine had appointed his three children and Ms Carter, his de facto spouse, as the executors of his estate. Professor Brine had two superannuation accounts/pensions in the same industry superannuation fund. As one pension had no residual value and could only be paid to his surviving spouse, the dispute related to the remaining pension, which could be paid to a dependant or the legal personal representative (deceased estate). Professor Brine had completed a non-binding death benefit nomination in favour of his legal personal representative to receive this pension amount.

Ms Carter applied to the superannuation fund trustee to receive the benefits in both accounts in her personal capacity.

Ms Carter had previously represented to the other three executors on multiple occasions that the estate was not an eligible beneficiary of the superannuation benefits. However, after making their own enquiries, the deceased's three children found out that they could claim the death benefit on behalf of the estate and proceeded with this claim.

The superannuation fund trustee then exercised its discretion to pay both pension benefits to Ms Carter and the remaining executors formally disputed this decision. Due to her conflict, Ms Carter recused herself from any discussions or actions relating to the dispute notice issued to the fund trustee by the executors and did not object to it, but remained as an executor. Ms Carter in fact made further submissions to the trustee in her personal capacity claiming the benefits.

After the superannuation fund trustee affirmed its decision and the other dispute resolutions processes provided no further resolution for the three children, the remaining executors applied to the South Australian Supreme Court for

an order that Ms Carter account to the estate for the benefits she obtained. The court found that:

- Ms Carter was in a position of conflict regarding her duties as an executor;
- Ms Carter's appointment as an executor via the deceased's will, while providing some acknowledgment by the deceased of a conflict, was not by itself sufficient to overcome her position of conflict. Rather, a specific conflict authorisation was required;
- as the other executors claimed the superannuation benefits on behalf of the estate and had full knowledge about their rights prior to the superannuation fund trustee's decision, they effectively consented to Ms Carter claiming the benefits in her personal capacity despite her conflict. From that point, Ms Carter did not act in breach of her duty as an executor as there was no connection between her breach and the benefit she received; and
- Ms Carter was not required to account to the estate.

Brine v Carter provides a particular set of facts that resulted in a somewhat incongruous outcome that allowed an executor to apply for and receive death benefits in her personal capacity despite a potential conflict arising. The court noted that had the other executors not been aware of Ms Carter's application, and had they also not made an application on behalf of the estate, Ms Carter would have been liable to account to the estate. This outcome was therefore largely due to the particular facts in this case. In many other factual scenarios, the conflict could easily have resulted in the spouse having to account to the estate.

Burgess v Burgess: sacred trustee obligations

In *Burgess v Burgess*,[2] Mr Burgess died intestate in May 2015 and was survived by his wife and two minor children. A year after his death, Mrs Burgess applied to become administrator of his estate and was appointed on 27 June 2016.

Mr Burgess had superannuation benefits in four large public offer funds and Mrs Burgess made a claim to two of those funds to be paid her deceased husband's death benefits. She applied for and received benefits from one fund prior to her appointment as administrator and applied for and received benefits from another fund after her appointment.

Mr Burgess' estate (including any superannuation paid to the estate) would be split among Mrs Burgess and their two young children. By the time of hearing, one superannuation fund had paid benefits to the estate. The fourth fund had not yet made any payment and Mrs Burgess had not made any application to it. Further, there were no BDBNs in place in relation to any of the funds.

Due to the uncertainties, Mrs Burgess herself made an application to the Western Australian Supreme Court. Ultimately, the court followed the principles in *McIntosh* and found that:

- Mrs Burgess would retain the benefits from the first superannuation fund, as she was not an administrator at the time of application and thus no conflict had arisen in relation to the first fund;
- Mrs Burgess was required to account to the estate for the benefits applied for and received after she was appointed. There was a conflict of interest and as administrator she was bound to claim the benefits on behalf of the estate after she was appointed administrator; and
- Mrs Burgess was bound to claim the remaining superannuation benefits on behalf of the estate.

The court's comments in *Burgess* demonstrate the strict fiduciary obligations placed on an executor or administrator. Martin J explained Mrs Burgess' obligations as follows:[5]

> "In an age of increasing moral ambivalence in western society the rigour of a court of equity must endure. It will not be shaken as regards what is a *sacred obligation of total and uncompromised fidelity required of a trustee*. Here, that required the administrator not just to disclose the existence of the (rival) estate interest when claiming the superannuation moneys in her own right from the fund trustee. It required more. It required her to apply as administrator of the estate for it to receive the funds in any exercise of the fund trustee's discretion." (emphasis added)

Martin J gave the following comments regarding the fiduciary duties of an executor:[6]

> "The interests of a deceased estate require a 'champion' who cannot be seen (even if they are not) to be acting half-heartedly, or with an eye to achieving outcomes other than an outcome that thoroughly advances the interests of the estate — to the exclusion of other claimants."

Martin J made the point that the undesirable outcome in this case might have been avoided had Mr Burgess made a will that explicitly contained a conflict authorisation or if he had signed BDBNs in relation to his superannuation benefits. In lamenting the outcome, Martin J stated:[7]

> "The result is, of course, messy for the family and less clear cut than might otherwise have been desired. However, that is a result of wider trustee integrity policy principles of the law which take effect and prevail. They are of vital importance and are applicable to universal circumstances extending well beyond the present rather regrettable factual situation. The present is a situation, I reiterate, that might have been avoided by the two measures I earlier mentioned."

Thus, express conflict wording in wills, powers of attorney and SMSF deeds can assist in minimising any potential conflicts. Further, a BDBN can remove the SMSF trustee's discretion and can overcome the conflict that may otherwise arise if the surviving spouse decides to pay the superannuation death benefit to themself when they are also the executor of the deceased estate.

Gonciarz v Bienias: clear statement of obligations

The plaintiff, Ms Gonciarz was married to Mr Bienias at the time of his death. The defendants were the deceased's mother and brother. Mr Bienias died intestate and while his estate itself was relatively small, he had an interest in a large public offer superannuation fund where the death benefits to be paid out were relatively large ($541,000). Mr Bienias had not made a BDBN but there was a non-binding nomination in respect of his brother (one of the defendants).

Ms Gonciarz first made a claim to the trustee of the fund to receive the death benefits in her personal capacity on 26 October 2017. As part of this application, she stated that

she had applied for a grant of letters of administration, which were subsequently granted on 18 December 2017.

While the trustee originally indicated it would exercise its discretion in favour of Ms Gonciarz, the deceased's brother objected to that decision, stating that he did not believe that Ms Gonciarz and the deceased were living together at the time of his death. While Ms Gonciarz was aware of the objection, she didn't know who objected or what the grounds of the objection were.

The defendant's solicitors sent an email to the plaintiff providing a copy of *Burgess* and demanding she apply to receive the death benefits on behalf of the estate. The defendant's solicitors said that *Burgess* clarified the position of an administrator with regard to superannuation benefits, that the plaintiff was acting in conflict with her duties to the estate and demanded that she withdraw her personal application made to the trustee.

In September 2018, the plaintiff wrote to the trustee asking that her personal claim be amended to be in her capacity as administrator of the estate. On 2 October 2018, she then asked that this request to amend be withdrawn and that she maintained the claim in her own name. Then, on 25 October 2018, she sent a further claim to the trustee, recording both herself personally and as administrator of the estate as claimants to the death benefits.

On 2 February 2019, the trustee wrote to all parties stating its decision to pay the benefits to the estate. At this time, the plaintiff became aware that the defendant had informed the trustee that he believed Ms Gonciarz and the deceased were not living together at the time of death. The judgment shows that Ms Gonciarz strongly refutes this allegation and that she was deeply hurt by it.

In response, Ms Gonciarz commenced this action seeking a revocation of the grant of letters of administration in order to be discharged from the conflict of interest and be allowed to provide information to the trustee to challenge trustee's decision. She had asked the defendants to agree to this removal and the appointment of an independent solicitor as administrator, to which they did not agree.

Naturally, the court first made the comment that this case once again highlights the importance of making wills and BDBNs in respect of superannuation.

Importantly, Tottle J's statement of the relevant law, based on *McIntosh* and *Burgess*, was that:

> "An incident of the fiduciary duty owed by an administrator of an intestate estate is that the administrator must apply for payment of any superannuation funds that are not the subject of a binding nomination to the intestate's estate."

While similar statements are given in the earlier cases, this is a clearer statement of these obligations — that there is a positive obligation on executors/administrators to apply for death benefits on behalf of the estate. This statement of law raises the issue of whether an administrator is able to determine whether a nomination is binding.

Tottle J did acknowledge the plaintiff was in a position of conflict of interest and was required to subordinate her claim to that of the estate. However, he took into account that "[t]his difficult situation was not of the plaintiff's making".

When considering the animosity and situation, Tottle J found that the court should not compel the plaintiff to continue to act as administrator of the estate and that "to do so would be inimical to the due and proper administration of the estate".

The court exercised its discretion to revoke the grant of letters of administration and appoint a lawyer as administrator of the estate, allowing the plaintiff to make submissions to the trustee of the fund in her own name.

Gonciarz shows that there may be other avenues open to executors/administrators who find themselves in a position of conflict. Importantly, the court in *Gonciarz* was not asked only whether a conflict existed, as it was in *Burgess*, but to exercise a discretion in the best interests of the administration of the estate, which allowed for a very different outcome.

Other important conflict cases

In *Re Narumon Pty Ltd*,[8] the court considered whether attorneys under an enduring power of attorney (EPoA) could validly execute both a BDBN confirmation/extension as well as a new BDBN on behalf of a member. Whether an attorney will have such power will depend on the SMSF governing rules, the EPoA document, the relevant powers of attorney legislation in the applicable state/territory and the federal superannuation legislation.

In *Narumon*, the member (Mr Giles) became incapacitated and his attorneys under an EPoA, his wife (Mrs Giles) and his sister (Mrs Keenan) purported to both extend a prior lapsed BDBN and to execute a new BDBN, both of which provided for death benefits to be paid to them. The EPoA document did not expressly authorise the attorneys to enter into a conflict transaction. The court found that the extension of the prior BDBN was valid since:

- the fund's governing rules allowed the prior BDBN to be confirmed and provided that any power or right of a member could be exercised by an attorney;
- while the EPoA document did not expressly deal with superannuation matters, the meaning of "financial matters" in the relevant (Queensland) legislation was wide enough to cover superannuation; and
- while a "conflict transaction" entered into by an attorney can invalidate a transaction, the confirmation of the prior BDBN was not a conflict transaction. While the BDBN benefited the attorneys, it was found not to amount to a conflict as it simply ensured the continuity of Mr Giles' prior wishes reflected in his prior BDBN.

However, the new BDBN executed by Mrs Giles and Mrs Keenan was found to be a conflict transaction as it provided for a different payment of death benefits which slightly benefited Mrs Giles more than the extended BDBN. Thus, the new BDBN was invalid.

In *Re Marsella; Marsella v Wareham (No. 2)*,[9] the deceased's daughter, who was also a co-trustee, was ordered to repay death benefits back to the fund and was removed as a trustee, along with her co-trustee husband, for being "grotesquely unreasonable" in conflict of her trustee duties and in bad faith. This case explores the high legal standards placed on SMSF trustees and highlights the need for careful attention to SMSF succession planning.

SMSFs

It is important to consider the impact of these cases from an SMSF perspective as it is typical for the spouse of a deceased SMSF member to also be an executor or administrator of that member's estate. In such a situation, a potential and real conflict may arise between the executor/administrator's obligations as trustee of the estate and their desire to receive superannuation death benefits in their personal capacity.

These cases reiterate the importance of planning for death and SMSF succession. In all cases, the conflict difficulties would likely have been avoided had the deceased had a will, an EPoA and an SMSF deed with appropriate express conflict authorisations and/or BDBNs were in place to remove the trustee's discretion as to whom death benefits could be paid.

In any superannuation death benefits matter, advisers and trustees should ensure that applications to receive benefits are not made without first considering, among other things, the possible conflict implications. Moreover, advisers should recommend that their clients proactively implement SMSF succession and death benefit strategies that ensure the surviving spouse is not placed in a position of conflict that could undermine their ability to receive their spouse's death benefits. This might involve special provisions in wills, EPoAs, SMSF deeds, BDBNs, death benefit deeds and other legal documents.

Conclusion

This line of cases illustrates that the courts treat the fiduciary duties of an executor/administrator in a strict and "sacred" manner. Further, the courts will uphold these obligations despite what might be seen as a strict and inflexible approach resulting in an "unfair" outcome. However, as *Gonciarz* shows us, there may be other avenues to be explored where an executor/administrator has acted in conflict.

Self-managed superannuation fund trustees/members should revise their estate and succession plans to avoid conflicts. Express wording authorising conflicts and BDBNs can minimise risk.

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Tax Cases

by Michael Norbury, CTA, Norbury Lawyers

Aggregation and duty

Does the Duties Act require the Commissioner to make a real apportionment when imposing duty on the aggregated dutiable transaction between the dutiable and the non-dutiable?

In *First Master Capital Pty Ltd v Chief Commissioner of State Revenue*,[1] a dispute arose in relation to which assets comprised the dutiable assets in two transactions, how they were to be aggregated, and so the amount of duty charged.

Facts

Two contracts were entered into on 23 August 2017 in relation to the sale of business of a hotel and the land on which the hotel was situated.

The sale of business contract was between Palisade Group Pty Ltd as seller and Palisade Hotel Holdings Pty Ltd as purchaser. The assets sold included "the Equipment Leases, Liquor Licence, Contracts/Credit Applications, Intellectual Property Rights, Intellectual Property Licences, Plant and Equipment, Records, the Transferrable Authorisations, goodwill, fixture [sic] and fittings, and any other assets used in the conduct of the Business in the ordinary course and excludes the Excluded Assets". Stock-in-trade was also included in the assets sold. The contract provided a price of $500,000 for the assets.

The sale of land contract related to two identified parcels of land located at Millers Point in Sydney. The seller was Palisade Group Pty Ltd and the purchaser was First Master Capital Pty Ltd (the taxpayer). The price was $30m. The sale of land contract also contained a special condition relating to the liquor licence: the seller had to ensure that the licence remained in effect until the completion of the sale of the land.[2]

The Chief Commissioner assessed duty at $1,621,895 and $15,991.95, respectively.

The Chief Commissioner:

- accepted that $250,000 of the consideration under the land contract was referable to the value of the liquor licence;
- accepted that the only dutiable property agreed to be transferred under the business contract was certain plant and equipment valued at $293,338; and
- aggregated the dutiable transactions under s 25 of the *Duties Act 1997* (NSW) (DA).[3]

The taxpayer sought to review the two decisions.

Legislation

The following sections of the NSW DA were relevant:

> "**21** (1) The **'dutiable value'** of dutiable property that is subject to a dutiable transaction is the greater of:
>
> (a) the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration), and
>
> (b) the unencumbered value of the dutiable property."
>
> "**25** (1) Dutiable transactions relating to separate items of dutiable property, or separate parts of, or interests in, dutiable property are to be aggregated and treated as a single dutiable transaction if:
>
> (a) they occur within 12 months, and
>
> (ab) the transferor is the same or the transferors are associated persons, and
>
> (b) the transferee is the same or the transferees are associated persons, and
>
> (c) the dutiable transactions together form, evidence, give effect to or arise from what is, substantially, one arrangement relating to all of the items or parts of, or interests in, the dutiable property.
>
> **Note** :
> **'Associated person'** is defined in the Dictionary.
>
> (2) …
>
> (3) The dutiable value of aggregated dutiable property is the sum of the dutiable values of the items or parts of, or the interests in, the dutiable property as at the time at which each dutiable transaction occurs."
>
> "**27** (1) If a dutiable transaction relates to dutiable property and property that is not dutiable property, it is chargeable with duty under this Chapter only to the extent that it relates to dutiable property.
>
> (2) If a dutiable transaction relates to different types of dutiable property for which different rates of duty are chargeable under this Chapter, the dutiable transaction is chargeable with duty under this Chapter as if a separate dutiable transaction had occurred in relation to each such type of dutiable property."

The taxpayer's position

The taxpayer accepted that the Commissioner was entitled under s 25 to aggregate the land contract and the business contract for the purpose of assessing duty. However, according to the taxpayer, the Commissioner was obliged to apply s 27(1) DA.

The aggregated dutiable transactions relate to both dutiable property — the land in the case of the land contract, and plant and equipment in the business contract — and, in view of s 27, they should together bear duty only to the extent that they so relate.

A valuation report obtained by the taxpayer stated:

- the value of the land, without the licence or the business, at or about the time at which the land contract was entered into was $21,250,000; and
- the value of the hotel business (that is to say, excluding the land but including goodwill, plant and equipment and the licence) was at least $9,250,000, of which $9,000,000 was referrable to the goodwill of the business.

In view of the relative values of the land and the business, the Commissioner's assessment of duty on the aggregated land contract and business contract in effect imposed substantial

duty in respect of the sale of goodwill, which was not dutiable property.

This outcome was contrary to the provisions of s 27, which required the Commissioner to make a real apportionment when imposing duty on the aggregated dutiable transactions as between dutiable and non-dutiable property. Duty should, therefore, be calculated on the aggregated transactions having regard to the true value, as determined by reference to the valuation reports, of the land, which was lower than the price provided for in the land contract, and the assets sold under the business contract, which was higher than that provided for under the business contract.[4]

The Chief Commissioner's position

The value of $250,000 attributed by the Chief Commissioner to the licence when assessing duty on the land contract was based on the views of the taxpayer's valuer.

The dutiable value of the dutiable property covered by the land contract (s 21 DA) was the greater of:

- the consideration for the dutiable transaction; and
- the unencumbered value of the dutiable property.

After deducting the allowance of $250,000 attributable to the licence, there was consideration of $29,750,000 for the land, which was greater than the unencumbered value of the land proposed by the valuer. It followed that the dutiable value of the land was, in accordance with the principle set out in s 21, $29,750,000.

The dutiable value of the dutiable property under the business contract was determined by reference to the written down value of that plant and equipment. This was an appropriate basis on which to apportion the consideration under the business contract as between dutiable and non-dutiable property in the absence of alternative evidence.

The transactions provided for under the land contract and the business contract may properly be aggregated by the Commissioner under s 25 since:

- they occurred within 12 months of one another;
- the seller under both contracts is the same;
- the transferees are associated persons for purposes of s 25; and
- the dutiable transactions form, evidence, give effect to or arise from one arrangement relating to all relevant items of dutiable property.

The business contract provided for the sale of (among other property) goodwill, and accordingly, it was the consideration provided for under this agreement which was the consideration for the sale of the goodwill, not the consideration payable under the land contract (or some portion of it).[5]

Decision

The member accepted the Commissioner's decision to aggregate under s 25. On this point, the taxpayer did not disagree.

The member found that the taxpayer's principal objection went to the Commissioner's approach to the relationship between ss 25 and 27. In essence, it was that, if the Commissioner chose to aggregate under s 25 the dutiable transactions under the land contract and the business contract, it followed that s 27 must be applied to the aggregated dutiable transactions as if they were a single composite dutiable transaction, rather than the aggregation of two separate dutiable transactions.[6]

The member found the financial result of that approach would be:

(a) Aggregate consideration	
Land contract	$30,000,000
Business contract	$500,000
Total consideration	$30,500,000
Less	
(b) Adjustment for non-dutiable property	
Licence	$250,000
Goodwill	$9,000,000
Total non-dutiable property	$9,250,000
(c) Dutiable value	**$21,250,000**

Transfer duty of $1,145,690 would have been payable on a dutiable value of $21,250,00 determined in the way proposed by the taxpayer.

The Commissioner calculated duty individually for each of the land contract and the business contract, and aggregated the results of these two calculations. This resulted in a total duty bill of $1,637,586.95.[7]

The member did not accept the taxpayer's submission. The member concluded that, if accepted, it would confer on s 25 a wider scope than the words of the section require, and in doing so, would transform s 25 from a provision which allowed the Commissioner to aggregate dutiable transactions for the purpose of calculating transfer duty at a rate determined by reference to the aggregated dutiable value into one which requires the Commissioner to undertake significant financial reconstruction of the transactions which it so aggregates when calculating transfer duty. The member held that such a transformation was not consistent with the words of the section.[8]

Reasoning

Section 25(3) provided:

> "The dutiable value of aggregated dutiable property is the sum of the dutiable values of the items or parts of, or the interests in, the dutiable property as at the time at which each dutiable transaction occurs."

This required that, when s 25 applied to require the aggregation of two or more dutiable transactions, the dutiable value of the dutiable property which was the subject of the aggregated transactions was simply the sum of the dutiable values of each element of dutiable property in each individual dutiable transaction determined in each case in accordance with the DA at the time at which the relevant underlying dutiable transaction occurred. It did not either require or allow a reassessment of aggregate dutiable value determined by reference to the principles set out in ss 21 and 27; rather, it authorised and required only the aggregation of the underlying dutiable transactions' respective dutiable values, individually determined at the

times required (and in accordance with the principles set out in the DA). What followed was that s 27 was to be applied in relation to each underlying dutiable transaction when calculating its dutiable value, and before their respective dutiable values are aggregated under s 25.[9]

It preserved in all respects but one the independence for duty purposes of each underlying dutiable transaction. The one respect in which it did not do so is that by aggregating multiple transactions, it allowed the scale of duty rates provided for in s 32(1) DA[10] to be applied to the aggregate dutiable values of the underlying dutiable transactions, rather than on a transaction-by-transaction basis to the individual dutiable values of the underlying transactions. The consequence of doing so is to eliminate any potential reduction in the overall duty payable in respect of multiple, but related, dutiable transactions which might result from the adoption of multiple transactions, some of which may individually attract duty at a lower rate than that which would apply if the multiple transactions were but a single one.[11]

The member found High Court support for the principle.

In *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)*,[12] Dixon CJ observed that, when assessing duty in connection with sales and purchases of property made under agreements for sale, it is the consideration expressed in the relevant contract which determines the value by reference to which duty is determined:

> "But here, for their own purposes the parties have given the transaction the form of a sale at a price … would the consideration moving the transfers — the consideration 'upon' which the transfers are made — be anything but the price the parties chose to adopt? After all we are dealing with a transfer on sale?"

In relation to the DA itself, Gleeson CJ and Callinan J, in the High Court in *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd*,[13] reaffirmed the principle. In that same case, the High Court majority (Gummow, Kirby and Hayne JJ) approved,[14] in the context of the DA, an observation by Dixon J (as he then was) in an earlier case, *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)*,[15] that "the word 'consideration' should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts". That is, as his Honour went on to say, "the consideration is rather the money or value passing which moves the conveyance or transfer".

Section 25 required the aggregation of both dutiable values for the purpose of calculating the transfer duty payable in respect of them. Transfer duty calculated at the rates prescribed under s 32 on the aggregate dutiable values for the land contract and the business contract, a sum of $30,293,338, was $1,651,623.59.

The only dutiable property agreed to be sold and purchased under the business contract was the plant and equipment. Section 27 then applied to require the apportionment of the consideration under the business contract as between dutiable and non-dutiable property agreed to be purchased and sold under the business contract. The proportion of the consideration applicable to the plant and equipment, the only relevant dutiable property, was the proportion derived by applying to the total consideration of $500,000 the fraction 293,338/9,543,338 (being a numerator equal to the value of the plant and equipment, and a denominator equal to the aggregate value of all property which was the subject of the business contract, both determined according to the taxpayer's evidence). This result was that the proportion of the consideration under the business contract applicable to the plant and equipment was $15,368.73.[16]

The member found this was less than the unencumbered value of the plant and equipment which had a written-down value of $293,338 at 30 June 2017.[17]

Section 21 applied to establish the dutiable value of the plant and equipment. Since:

- the portion of the consideration under the business contract referrable to the plant and equipment determined pursuant to s 27 is substantially less than the unencumbered value of the plant and equipment determined by reference to the written-down value; and
- s 21(1) says that the dutiable value of dutiable property that is subject to a dutiable transaction is the *greater* of the consideration for the transaction and the unencumbered value of the dutiable property,

it followed that the dutiable value of the plant and equipment is $293,338, being its written-down value, and that transfer duty should be assessed in respect of it accordingly.[18] Section 25 now applied, requiring the aggregation of both dutiable values for the purpose of calculating the transfer duty payable in respect of them.[19]

Conclusion

The member has confirmed that aggregation of separate dutiable transactions involves calculating the duty under the separate transactions and then adding the duty liabilities.

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Morning Tax Club – Parramatta	4/7/2019	1.5
NSW Tax Discussion Group	15/7/2019	1.5
Queensland		
Death … and Taxes Symposium	18/7/2019	12.5
South Australia		
SA Essential Tax: Carrying on a business and non-commercial losses	3/7/2019	1.5
SA Tax Briefing Session	30/7/2019	1.5
Tasmania		
Inspiring Women in Business	25/7/2019	1
Victoria		
Breakfast Club – Melbourne	18/7/2019	1.5
Breakfast Club – Geelong	19/7/2019	1.5
Young Tax Professionals	19/7/2019	1
SME/Private Clients Day	25/7/2019	6
Western Australia		
Family Law Intensive	23/7/2019	6.5

For information on upcoming events, visit taxinstitute.com.au/cpd.

Index

A

Accountants
common law privilege ... 20
Accountants' concession ... 20–24
Adjacent land
CGT main residence exemption ... 8–10
Advocate-General of Taxation
need for ... 34, 35, 38
Aggregated dutiable transactions
sale of hotel and land ... 45–47
Amalgamated loan
Div 7A, relieving discretion ... 7
Amended assessments
derivation of income ... 7
Australian Taxation Office
legal professional privilege ... 4
tax disputes with ... 31–39

B

Binding death benefit obligations
SMSFs ... 41–44
Black-hole expenses
deductions ... 12
penalty interest ... 5
Business continuity test ... 5

C

Capital gains tax
main residence exemption, adjacent land ... 8–10
Carrying on a business
companies claiming concessions ... 11–13
Client legal privilege
professional advisers ... 20–24
Commissioner of Taxation
business continuity test ... 5
disputes, settling ... 31–39
legal professional privilege ... 4, 21
penalty interest ... 5
property decision tool, GST ... 6
relieving discretion, Div 7A amalgamated loan ... 7
Companies
carrying on a business ... 11–13
concessions
– holding companies ... 12
– inactive, with retained profits ... 11
– investing available funds ... 12
– investment companies ... 12
– leasing activities ... 12
– property investment companies ... 12
– share investment companies ... 12
Concessions
companies carrying on a business ... 11–13
Confidentiality — see **Legal professional privilege**
Conflicts of interest
SMSF executors ... 41–44

D

Deceased estates
CGT main residence exemption ... 10
SMSFs, executor conflicts of interest ... 41–44
Deductions
entity start-up costs ... 12
penalty interest ... 5
prepaid expenses ... 12
Derivation of income
amended assessments ... 7
Division 7A
amalgamated loan, relieving discretion ... 7
Domicile
resident of Australia ... 6, 7
Dutiable transactions
aggregation of assets ... 45–47
Dwelling
CGT main residence exemption ... 8, 10

E

Employment
derivation of income ... 7
Enduring power of attorney
SMSFs ... 43, 44
Estate planning — see **Succession and estate planning**
Estoppel by conduct/convention
ATO tax disputes ... 31, 39
Exemptions
CGT main residence, adjacent land ... 8–10

F

Foreign source income
penalty interest ... 5

G

General interest charge
tax dispute re remission ... 31–39
Going concern value
and goodwill ... 29
Goods and services tax
property decision tool ... 6
Goodwill
valuation ... 27–30

H

Holding companies ... 12
Hotel and land sale
aggregated dutiable transactions ... 45–47

I

Inactive companies
with retained profits ... 11
Information gathering
legal professional privilege ... 22, 23
Instant asset write-off
medium businesses ... 13
SBEs ... 12, 13
Intellectual property
and goodwill, valuation ... 29

L

Land contract
aggregated dutiable transactions ... 45–47
Land rich ratio
goodwill valuation ... 27–30
Leasing activities
companies ... 12
Legal advice privilege ... 21
Legal professional privilege
ATO requirements ... 4
claiming ... 22
Commissioner's powers ... 21
professional advisers ... 20
tax disputes ... 21
waiver ... 22
Litigation privilege ... 21
Loan agreements
penalty interest ... 5

M

Main residence exemption
CGT, adjacent land ... 8–10
Market value
goodwill ... 27–30
Medium businesses
instant asset write-off ... 13
Member Profile
Joshua Cardwell ... 19

N

New South Wales
aggregated dutiable transactions ... 45–47

P

Penalty interest
loan agreements ... 5
Permanent place of abode
resident of Australia ... 6, 7
Prepaid expenses
deductions, SBEs ... 12
Privilege — see **Legal professional privilege**
Professional development
Tax Institute members ... 3
Property decision tool
GST ... 6
Property investment companies ... 12
Public interest
legal professional privilege ... 20
tax agent registration, cancellation ... 6
Public policy
statutory officer decisions, reliance on ... 37

R

Relieving discretion
Div 7A amalgamated loan ... 7
Resident of Australia
permanent place of abode ... 6, 7

S

Salary and wages
derivation of income ... 7
Sale of land and business
aggregated dutiable transactions ... 45–47
Same business test ... 5
Self-managed superannuation funds
executor conflicts of interest ... 41–44
Share investment companies ... 12
Small business entities
instant asset write-off ... 12, 13
tax concessions ... 12, 13
Small business tax concessions ... 12
Stay of proceedings
tax agent registration, cancellation ... 6
Succession and estate planning
SMSFs, executor conflicts of interest ... 41–44
Superannuation death benefits
SMSFs, executor conflicts of interest ... 41–44

T

Tax agent service ... 23
Tax agents
provision of legal advice ... 23
registration cancellation ... 6
registration requirements ... 2
Tax concessions
small business entities ... 12, 13
Tax debt
general interest charge ... 31–39
Tax disputes
general interest charge ... 31–39
legal professional privilege ... 21
Tax Practitioners Board ... 2, 6
CPD compliance ... 3
Tax professionals ... 20
accountants' concession ... 22
CPD compliance ... 3
legal professional privilege ... 20
The Tax Institute
2019 Corporate Tax Adviser of the Year Award
– Joshua Cardwell ... 16
ATL003 CTA2A Advanced Dux Award, study period 2, 2018
– Georgiena Ryan ... 16
ATL001 CTA1 Foundations Dux Award, study period 2, 2018
– Ross Heard ... 14
ATL002 Commercial Law 1 Dux Award, study period 2, 2018
– Antonio Marandola ... 15
ATL004 CTA2B Advanced Dux Award, study period 1, 2018
– Nicola Bird ... 14
change at the Institute ... 3
CPD compliance ... 3
members, importance of participation ... 2
professional development ... 3
submission to ATO, legal professional privilege ... 4
Tax Policy & Advocacy team ... 3

V

Valuation
goodwill ... 27–30

Legislation

Administrative Decisions (Judicial Review) Act 1977
s 5(1)(c) ... 32
s 5(1)(d) ... 32
s 13(1) ... 36
Corporations Act 2001 ... 11
Duties Act 1997 (NSW)
s 21 ... 46, 47
s 21(1) ... 45, 47
s 25 ... 45–47
s 25(1) ... 45
s 25(3) ... 46
s 27 ... 45–47
s 27(1) ... 45
s 32 ... 47
s 32(1) ... 47
Evidence Act 1995
s 4(1) ... 24
s 117 ... 25
s 118 to 126 ... 20
Finance Act 2008 (UK)
Sch 36 ... 26
Income Tax Rates Act 1986
s 23 ... 12
Internal Revenue Code 1986 (US)
s 7525 ... 26
ITAA36
Div 7A ... 7
s 6(1) ... 6
s 109E ... 7
s 109Q ... 7
s 109Q(2) ... 7
s 222APE ... 35
s 263 ... 21
s 264 ... 21
ITAA97
Div 328 ... 12
s 8-1 ... 5
s 25-25 ... 5
s 25-30 ... 5
s 25-90 ... 5
s 40-190(2)(b) ... 5
s 40-880 ... 5, 12
s 118-115 ... 8
s 118-120 ... 8, 9
s 118-120(1) ... 8
s 118-120(2) ... 8, 9
s 118-120(5) ... 8
s 118-120(6) ... 8
s 118-150 ... 10
s 118-150(4) ... 10
s 118-165 ... 8
s 820-40(1)(a) ... 5
Judiciary Act 1903
s 35A ... 37
s 79 ... 24
Stamp Act 1921 (WA)
Pt IIIBA
– Div 3B ... 27
Tax Administration Act 1994 (NZ)
s 20B to 20G ... 26
Tax Agent Services Act 2009
Div 30 ... 26
s 20-5(1)(a) ... 6
s 90-5 ... 23, 26

Tax Agent Services Regulations 2009
Sch 1 ... 24
Sch 2 ... 24
Taxation Administration Act 1953
s 8AAG ... 32
s 14ZZK(b)(i) ... 24
s 14ZZO(b)(i) ... 24
Sch 1
– Div 290 ... 26
– Div 353 ... 24, 25
– s 353-10 ... 21
– s 353-15 ... 21
Trade Practices Act 1974
s 155 ... 36
Treasury Legislation Amendment (Repeal Day) Act 2015 ... 25
Treasury Legislation Amendment (Repeal Day) Bill 2014 ... 25

Rulings and other materials

Australian Taxation Office
LCR 2017/D6 ... 5
LCR 2019/1 ... 5
TD 1999/67 ... 9
TD 1999/68 ... 8, 9
TD 2000/15 ... 9
TR 2019/1 ... 11, 13
TR 2019/2 ... 5
Legal Profession Conduct Rules 2010 (WA) ... 26

Cases

12 Years Juice Foods Australia Pty Ltd v FCT [2015] FCA 741 ... 21, 24, 25

A
Adamas v O'Connor 282 ALR 302 ... 24
AGC (Investments) Ltd v FCT (1991) 21 ATR 1379 ... 40
Archibald Howie Pty Ltd v Commr of Stamp Duties (NSW) [2005] HCA 3 ... 47
Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No. 4) [2014] FCA 796 ... 22, 24
Attorney-General (NT) v Kearney (1985) 158 CLR 500 ... 25
Attorney-General (NT) v Maurice (1986) 161 CLR 475 ... 24, 25
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 ... 37
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1998) 81 FCR 526 ... 24
AWB Ltd v Cole (2006) 152 FCR 382 ... 25
AWB Ltd v Cole (No. 5) [2006] FCA 1234 ... 24

B
Baker v Campbell [1983] HCA 39 ... 20, 25, 26
Barnes v FCT [2007] FCAFC 88 ... 25
Bellinz v FCT (1998) 39 ATR 198 ... 40
Brine v Carter [2015] SASC 205 ... 41, 42
Burgess v Burgess [2018] WASC 279 ... 41–43

C
Carter v Northmore Hale Davy & Leake [1995] HCA 33 ... 24
Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd [2005] HCA 3 ... 47
Citibank Ltd; FCT v (1989) 20 ATR 292 ... 21, 25
Clements, Dunne & Bell Pty Ltd v Commr of Australian Federal Police (2001) 48 ATR 650 ... 22, 25
Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 ... 24, 25
Commissioner of State Revenue v Placer Dome Inc [2018] HCA 59 ... 27–30
Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd [2015] FCA 282 ... 21, 25
Coombes (No. 2); FCT v (1999) 92 FCR 240 ... 21

D
Daniels Corporation International Pty Ltd v ACCC [2002] HCA 49 ... 24, 25
Davis Investments Pty Ltd v Commr of Stamp Duties (NSW) (1958) 100 CLR 392 ... 47
Deloitte Touche Tohmatsu v DCT (1998) 40 ATR 435 ... 25
Donoghue; FCT v [2015] FCAFC 183 ... 25

E
Ensham Resources Pty Ltd v AIOI Insurance Company Ltd (2012) 209 FCR 1 ... 25
Esso Australia Resources Ltd v FCT (1999) 201 CLR 49 ... 20, 21, 24, 25

F
First Master Capital Pty Ltd v Chief Commr of State Revenue [2019] NSWCATAD 35 ... 45–47

G
Glengallan Investments Pty Ltd v Arthur Andersen [2001] QCA 115 ... 25
Gonciarz v Bienias [2019] WASC 104 ... 41–44
Gould and Tax Practitioners Board [2019] AATA 1056 ... 6
Grant v Downs [1976] HCA 63 ... 20, 24, 25
Grofam Pty Limited v Australia and New Zealand Banking Group Limited (1993) 43 FCR 408 ... 25
Guss v DCT [2006] FCAFC 88 ... 35–37, 40

H
Handsley and FCT [2019] AATA 917 ... 6
Hua Wang Bank Berhad v FCT [2014] FCA 1392 ... 6

I
ICAC v Cunneen (2015) 256 CLR 1 ... 40

J
JMA Accounting Pty Ltd v Carmody 2004 ATC 4916 ... 25

K
Kennedy v Wallace [2004] FCAFC 337 ... 25
Krok v FCT [2015] FCA 51 ... 22

M
Mann v Carnell (1999) 201 CLR 1 ... 25
Marsella, Re; Marsella v Wareham (No. 2) [2019] VSC 65 ... 43
Mayor of Wellington v Mayor of Lower Hutt [1904] AC 773 ... 9
McIntosh v McIntosh [2014] QSC 99 ... 41, 42
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 78 ALD 224 ... 25
Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority 4 VR 332 ... 25
Murry; FCT v [1998] HCA 42 ... 27–30

N
Narumon Pty Ltd, Re [2018] QSC 185 ... 43

O
ONE.TEL Ltd v DCT [2000] FCA 270 ... 22

P
Pintarich v DCT [2017] FCA 944 ... 31–39
Pintarich v DCT [2018] FCAFC 79 ... 31–39
Pintarich v DCT [2018] HCASL 322 ... 31
Placer Dome case: Commissioner of State Revenue v Placer Dome Inc [2018] HCA 59 ... 27–30
Pratt Holdings Pty Ltd v FCT [2005] FCA 1247 ... 24, 25
Pratt Holdings Pty Ltd v FCT [2004] FCAFC 122 ... 21, 24
Prudential case: R (on the application of Prudential plc) v Special Commr of Income Tax [2013] UKSC 1 ... 23, 26

Q
Quality Publications Australia Pty Ltd v FCT [2009] FCA 1293 ... 25

R
R (on the application of Prudential plc) v Special Commr of Income Tax [2013] UKSC 1 ... 23, 26
RCI Pty Ltd v FCT (2009) 76 ATR 591 ... 25
Ricegrowers Co-operative Mills Ltd v Bannerman and Trade Practices Commission (1981) 38 ALR 535 ... 35, 36
Rio Tinto Ltd; FCT v (2006) 6 3 ATR 79 ... 25
Roszkiewicz and FCT [2019] AATA 931 ... 7

S
Scott, Re and ASIC [2009] AATA 798 ... 6
Semunigus v Minister for Immigration and Multicultural Affairs [1999] FCA 422 ... 35, 37, 38
Semunigus v Minister for Immigration and Multicultural Affairs (2000) 96 FCR 533 ... 35
Shin Kobe Maru v Empire Shipping Co Inc (1994) 181 CLR 404 ... 40
Sinclair and FCT [2010] AATA 902 ... 23
Smorgon v FCT (1979) 9 ATR 483 ... 25
Stewart v FCT [2010] FCA 402 ... 25

V
VCJN and FCT [2019] AATA 968 ... 7
Visy Industries Holdings Pty Ltd v ACCC [2007] FCAFC 147 ... 25

W
Wade; FCT v (1951) 84 CLR 105 ... 40
Waterford v Commonwealth [1987] HCA 25 ... 24, 25
White Industries Australia Ltd v FCT (2007) 160 FCR 298 ... 25
Wingecarribee Shire Council v Lehman Brothers Australia Limited (in liq) (No. 5) [2011] FCA 245 ... 25

Authors

A
Ananda, A
Tax Counsel's Report
– Legal professional privilege under fire? ... 4

B
Backhaus, S
Superannuation
– Executors, SMSFs and conflicts of duty ... 41
Bembrick, P
Mid Market Focus
– When is a company carrying on a business? ... 11
Bevan, C
Difficulties in settling disputes with the Commissioner of Taxation ... 31
Butler, D
Superannuation
– Executors, SMSFs and conflicts of duty ... 41

C
Cardwell, J
Member Profile ... 19
Castelyn, D
Privilege or concession: the modern tax adviser's challenge ... 20
Chu, H
The Placer case (2018) from a valuation perspective ... 27

F
Folan, R
Tax Education
– The challenge in the juggle ... 14

H
Hurst, G
CEO's Report
– Progress is impossible without change ... 3

L
Lonergan, W
The Placer case (2018) from a valuation perspective ... 27

M
Morgan, A
Privilege or concession: the modern tax adviser's challenge ... 20

N
Neilson, T
President's Report
– Getting involved will ensure your voice is heard ... 2
Norbury, M
Tax Cases
– Aggregation and duty ... 45

P
Pinto, D
Privilege or concession: the modern tax adviser's challenge ... 20

T
TaxCounsel Pty Ltd
Tax News – what happened in tax?
– June 2019 ... 5
Tax Tips
– CGT main residence: adjacent land issues ... 8

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Robert Breunig
Neil Brydges, CTA
Robert Campbell, CTA
Adrian Cartland
Tim Clifton
Graeme Cooper, FTI
Henry Davis
Will Fennell
Simon Haines, FTI
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TAXATION *in Australia*®
ISSN 0494-8343

Publishing House
The Tax Institute
ABN 45 008 392 372

50 Miller Street
North Sydney, NSW 2060

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Managing Editor
Deborah Powell

Content Consultant
Cheryl Goh

Graphic Designers
Mei Lam
Nicole Welch

Typesetter
Midland Typesetters, Australia

Advertising
Wayne Flekser 02 8223 0071

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