

# **Australian Taxation Law**

## Acknowledgments

This book is dedicated to Ruth, Sally, Helen, Cheryl, Gil and Glad; Mei-Ling, Stephen Nicholas and Michael; Bill and Marjory; Kate Collier; and Dudley, Dagmar, Catherine, Joseph and Isaac.



# Australian Taxation Law



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## Foreword to the first edition

If two of the important criteria of a "good" taxation system are simplicity and certainty (¶1-190 and ¶1-195), the Australian taxation system and particularly the *Income Tax Assessment Act 1936* fail the test miserably. The spate of anti-avoidance legislation, a reaction to the excesses of the tax avoidance era of the seventies, and the more recent taxation reform package have brought about legislation of almost unrivalled complexity.

The legislation is in some cases unintelligible: without a commerce or law degree the ordinary taxpayer stands no chance of finding his way through the morass and even with these qualifications his advisers will of necessity have to struggle to make sense of language that is as convoluted as it is confusing. Nor is the task of the taxation officer any easier. Many provisions in the legislation are not applied for the simple reason that no one is able to comprehend them. The need for a work that will operate as a guide to the traveller through these murky waters is painfully apparent.

In 1946, Mr Hannan, in his "Treatise on the Principles of Income Taxation", while advertent to the desirability of enunciating a series of authoritative propositions (on s 51(1)), resignedly accepted the impossibility of such a task. Some 40 years on, the possibility of formulating authoritative principles on any matter relating to tax is even more daunting. The torrent of decisions, judicial and administrative, that has been handed down over that time, together with the outpourings of the legislature, have made the study of taxation almost unmanageable.

The need for a systematic approach to the study of taxation is obvious enough to the student. If the student were to see taxation as involving no more than an endless series of individual instances no overview of the subject would be possible. But it is not only the student who is in need of a systematic approach to the problem. The practitioner who is unaware of the system will have endless difficulty even finding the problem, let alone proceeding to a solution for that problem.

So it is not the student alone who will benefit from the present work. Indeed there are to be found discussed in these pages many of the great taxation issues of the present, without an appreciation of which it would be impossible to predict the outcome of particular factual situations.

By way of example, no issue could be more significant in the judge-made law of income taxation than the issue of the role of purpose in s 51(1) of the Act. The course of authority from *Ure v FC of T* 81 ATC 4100 and *Ilbery v FC of T* 81 ATC 4661 to the more recent cases of *FC of T v Just Jeans Pty Ltd* 87 ATC 4373 and *FC of T v John* 87 ATC 4713 have been a judicial reaction to tax avoidance; yet the boundaries of the doctrine (that purpose is relevant) are far from clear.

Two taxpayers incurring the same outgoings in circumstances identical save for their subjective motives and purposes should be treated in the same way for the purposes of an income tax law. To grant a taxation deduction to the taxpayer who is naive, while denying it to the taxpayer who is sophisticated, would be arbitrary. If an outgoing is

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incurred in circumstances where there is, objectively seen, a connection between the incurring of the outgoing and the activity which is directed towards the production of assessable income, that outgoing should satisfy the tests of deductibility irrespective of either subjective motivation or purpose.

Once it is accepted (as it must presently be) that subjective purpose intrudes to some extent into the issue of deductibility (albeit not necessarily as a test of deductibility), there is opened up the question whether the relevant purpose is the sole purpose, the dominant purpose or some purpose less than the dominant purpose. For the present these issues are best discussed, in *Magna Alloys & Research Pty Ltd v FC of T* 80 ATC 4542, in judgments in which two members of the present High Court, then sitting in the Federal Court, participated.

What, however, has not yet been the subject of discussion is the problem thrown up when a deduction is disallowed on the basis, say, that it was incurred for the sole purpose of obtaining a tax deduction, yet assessable income is in fact derived in the course of the scheme. Is the assessable income to be ignored, or is the result that the deduction only is to be ignored, leaving the taxpayer nevertheless in receipt of the assessable income upon which he is then to be taxed? Further in deduction cases, what role does an anti-avoidance section play?

In the long run, however, it is not the "common law" of taxation that holds the greatest significance. If there is one lesson that must be learned by anyone who wishes to understand taxation it is this: Go back to the Statute and read it!

One of the all time great taxation advisers was once asked a question by a client concerning s 51(1). The adviser had undoubtedly read the section hundreds, perhaps thousands of times. Yet, perhaps to the surprise of his lay client, he opened the Statute, perused the words and tested the issue by reference to the words he read. There is no other alternative.

So it is, that the authors of the present work return the reader to the Statute, offering on the way a helpful summary of its salient features.

Australia has over the years been well served by its taxation literature — the present work continues the tradition.

23 September 1987

Graham Hill, QC

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## Preface to the twentieth edition

This twentieth edition of *Australian Taxation Law* incorporates major legislative, case law and administrative reforms that have taken place in taxation law up to 1 July 2009, as well as various developments that have occurred since that date. Certain chapters have been restructured and there have been many content changes throughout the book.

As always, our main aim has been to explain the complex and voluminous taxation laws in clear and simple language. We have continued to focus on the federal taxation system, with particular emphasis on income tax, capital gains tax, corporate tax, fringe benefits tax and goods and services tax. There is also an overview of some of the main state taxes.

We wish to acknowledge the significant contribution by the editing and production staff at CCH, in particular Marcus Lai, Stephen Blackwell, Sharon Rolfe, Lorraine Kwek, Kenny Ng, Aravind Subbiah, Adrian Ooi, Indira Hari Krishnan, Tan Siew Choo and Jinhong Tang. Robin Woellner would like to thank Charlie Anderson for her research assistance and other help with chapters.

Finally, and most importantly, we must thank our families, whose ongoing support, encouragement and sacrifices make completion of each edition possible.

December 2009

RH Woellner

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## List of Abbreviations

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The following abbreviations are used in the Australian Taxation Law.

AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ABN Act	<i>A New Tax System (Australian Business Number) Act 1999</i>
ABR	Australian Business Register
ADF	Approved deposit fund
ADI	Authorised deposit-taking institution
ADJRA	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFOF	Australian venture capital fund of funds
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ATC	<i>Australian Tax Cases (CCH)</i>
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
AWOTE	Average weekly ordinary time earnings
BAS	Business Activity Statement
BELC	Broad-exemption listed country
CFC	Controlled foreign company
CGT	Capital gains tax
COT	Continuity of ownership test
CPI	Consumer price index
DAC	Departure authorization certificate
DFC of T	Deputy Federal Commissioner of Taxation
DPO	Departure prohibition order
DTA	Double taxation agreement
DVS	Direct value shift
EST	(Australian) Eastern Standard Time
ESVCLP	Early stage venture capital limited partnership
ETP	Employment termination payment
FBT	Fringe benefits tax
FBTAA	<i>Fringe Benefits Tax Assessment Act 1986</i>
FC of T	Federal Commissioner of Taxation
FIF	Foreign investment fund
FIFO	First in first out
FLA	<i>Family Law Act 1975</i>
FLIC	Film licensed investment company
FMD	Farm management deposit
FOIA	<i>Freedom of Information Act 1982</i>
FTC	Foreign tax credit

## List of Abbreviations

FTRA	<i>Financial Transaction Reports Act 1988</i>
GIC	General interest charge
GST	Goods and services tax
GVSR	General value shifting regime
HECS	Higher Education Contribution Scheme
HELP	Higher Education Loan Programme
IED	Income equalization deposit
IRDB	Industry Research and Development Board
ISC	Insurance and Superannuation Commissioner
ITAA36	<i>Income Tax Assessment Act 1936</i>
ITAA97	<i>Income Tax Assessment Act 1997</i>
ITAR	Income Tax Assessment Regulations 1997
ITR	Income Tax Regulations 1936
ITRA	<i>Income Tax Rates Act 1986</i>
ITTPA	<i>Income Tax (Transitional Provisions) Act 1997</i>
IVS	Indirect value shifting
LILO	Last in last out
LPR	Legal personal representative
LTA	<i>Land Tax Act 1956</i>
LTMA	<i>Land Tax Management Act 1956</i>
OSSA	<i>Occupational Superannuation Standards Act 1987</i>
PAYE	Pay-as-you-earn
PAYG	Pay As You Go
PDF	Pooled development fund
PPS	Prescribed payments system
PST	Pooled superannuation trust
R&D	Research and development
RBA	Running balance account
RBL	Reasonable benefit limit
RPS	Reportable payments system
RSA	Retirement savings account
RSAA	<i>Retirement Savings Accounts Act 1997</i>
RSAR	Retirement Savings Accounts Regulations 1997
SBT	Same business test
SCTACA	<i>Superannuation Contributions Tax (Assessment and Collection) Act 1997</i>
SCTIA	<i>Superannuation Contributions Tax Imposition Act 1997</i>
SGAA	<i>Superannuation Guarantee (Administration) Act 1992</i>
SGC	Superannuation guarantee charge
SGCA	<i>Superannuation Guarantee Charge Act 1992</i>
SISA	<i>Superannuation Industry (Supervision) Act 1993</i>
SISR	Superannuation Industry (Supervision) Regulations 1994
SME	Small or medium enterprise

## List of Abbreviations

SPOR	Shorter period of review (taxpayers)
SSAA	<i>Small Superannuation Accounts Act 1995</i>
STCT	Small Taxation Claims Tribunal
STS	Simplified Tax System
TAA	<i>Taxation Administration Act 1953</i>
TFN	Tax file number
TLIP	<i>Tax Law Improvement Project</i>
TPTACA	<i>Termination Payments Tax (Assessment and Collection) Act 1997</i>
UAP	Uniform administrative penalty
VCF	Venture capital franking
VCLP	Venture capital limited partnership
VCMP	Venture capital management partnership

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