

Australian Taxation Law

Acknowledgments

Robin Woellner dedicates this book to Ruth, Sally, Helen, Cheryl, and his late father Gil, who sadly passed away during 2010; Stephen Barkoczy to Mei-Ling, Stephen and Johnny; Shirley Murphy to Bill and Marjory; Chris Evans to Kate Collier; and Dale Pinto to 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 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

Preface to the twenty-first edition

This twenty-first edition of *Australian Taxation Law* incorporates major legislative, case law and administrative reforms that have taken place in taxation law up to 1 July 2010, as well as various developments that have occurred since that date. There have been many content changes made throughout the book, to ensure that the book remains the most up to date text available.

As with prior editions, our main aim has been to explain the complex and voluminous taxation laws in clear and simple language. In order to achieve this, we have made greater use of flow-charts and practical examples, to make it easier to understand the application of theory to practical situations. 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 significant treatment of the goods and services tax. There is also an overview of some of the main state taxes, as well as an analysis of the Henry Tax Review's reform recommendations.

We wish to acknowledge the significant contribution by the editing and production staff at CCH, in particular Marcus Lai, Kenny Ng, Aravind Subbiah, Saiful Fatihin, Ngu Ling Ling, Azeem Shah and Jinhong Tang.

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December 2010

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List of Abbreviations

List of Abbreviations

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 |
| AFTS Report | Australia's Future Tax System Report to the Treasurer (Final Report of the Henry Tax Review) |
| 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 |
| SPOR | Shorter period of review (taxpayers) |
| SSAA | <i>Small Superannuation Accounts Act 1995</i> |
| STCT | Small Taxation Claims Tribunal |

List of Abbreviations

| | |
|--------|--|
| 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 |
| VCA | <i>Venture Capital Act 2002</i> |
| VCF | Venture capital franking |
| VCLP | Venture capital limited partnership |
| VCMP | Venture capital management partnership |

Key tax websites

Key tax and tax reform sites

| | |
|--|--|
| Australia's Future Tax System (Henry Tax Review) | taxreview.treasury.gov.au |
| Australian Parliament — Internet Tax Resources | www.aph.gov.au/library/intguide/law/taxlaw.htm |
| Australian Taxation Office | www.ato.gov.au |
| Board of Taxation | www.taxboard.gov.au |
| Business Coalition for Tax Reform | www.bctr.org |
| CCH Australia Ltd | www.cch.com.au |

Federal government

| | |
|--|--|
| AusIndustry | www.ausindustry.gov.au |
| Australian Business Register | www.abr.business.gov.au |
| Australian Competition & Consumer Commission (ACCC) | www.accc.gov.au |
| Australian Government Entry Point | australia.gov.au |
| Australian Prudential Regulation Authority (APRA) | www.apra.gov.au |
| Australian Securities & Investment Commission (ASIC) | www.asic.gov.au |
| Business Entry Point | www.business.gov.au |
| Commonwealth Ombudsman | www.comb.gov.au |
| Department of Finance & Deregulation | www.finance.gov.au |
| Department of Treasury | www.treasury.gov.au |
| Inspector-General of Taxation | www.igt.gov.au |
| Parliament House | www.aph.gov.au |
| Tax Issues Entry System (Ties) | www.ties.gov.au |
| Treasurer | www.treasurer.gov.au |

State and territory revenue offices

| | |
|------------------------------|--|
| Australian Capital Territory | www.revenue.act.gov.au |
| New South Wales | www.osr.nsw.gov.au |
| Northern Territory | www.nt.gov.au/ntt/revenue |
| Queensland | www.osr.qld.gov.au |
| South Australia | www.treasury.sa.gov.au |
| Tasmania | www.treasury.tas.gov.au |
| Victoria | www.sro.vic.gov.au |
| Western Australia | www.dtf.wa.gov.au |

Courts

| | |
|------------------------------------|--|
| ACT Supreme Court | www.courts.act.gov.au/supreme |
| Administrative Appeals Tribunal | www.aat.gov.au |
| Family Court of Australia | www.familycourt.gov.au |
| Federal Court of Australia | www.fedcourt.gov.au |
| High Court of Australia | www.hcourt.gov.au |
| Supreme Court of NSW | www.lawlink.nsw.gov.au/sc |
| Supreme Court of Victoria | www.supremecourt.vic.gov.au |
| Supreme Court of Queensland | www.courts.qld.gov.au |
| Supreme Court of Tasmania | www.supremecourt.tas.gov.au |
| Supreme Court of Western Australia | www.supremecourt.wa.gov.au |

Other useful sites for source materials

| | |
|--|--|
| Australasian Legal Information Institute | www.austlii.edu.au |
| Australian Tax Law Library | www.austlii.edu.au/au/special/tax |
| ComLaw (Commonwealth Law) | www.comlaw.gov.au |
| Worldlii | www.worldlii.org |

Key tax and superannuation associations/organisations

| | |
|--|--|
| Association of Superannuation Funds of Australia (ASFA) | www.superannuation.asn.au |
| Self-Managed Super Fund Professionals' Association of Australia (SPAA) | spaa.asn.au |
| Taxation Institute of Australia | www.taxinstitute.com.au |

Accounting associations/organisations

| | |
|--|--|
| Association of Taxation & Management Accountants | www.atma.com.au |
| CPA Australia | www.cpaaustralia.com.au |
| Institute of Chartered Accountants in Australia | www.icaa.org.au |
| National Institute of Accountants | www.nia.com.au |
| National Tax & Accountants Association | www.ntaa.com.au |

International tax authorities

| | |
|--|--|
| Canada (Canada Revenue Agency) | www.cra-arc.gc.ca |
| China (State Administration of Taxation) | www.chinatax.gov.cn |
| Hong Kong (Inland Revenue Department) | www.ird.gov.hk |
| Malaysia (Inland Revenue Board of Malaysia) | www.hasil.gov.my |
| New Zealand (Inland Revenue) | www.ird.govt.nz |
| Singapore (Inland Revenue Authority of Singapore) | www.iras.gov.sg |
| United Kingdom (HM Revenue & Customs) | www.hmrc.gov.uk |
| United States of America (Internal Revenue Service) | www.irs.gov |
| United States of America (US Department of the Treasury) | www.treasury.gov |