HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **COMMISSIONER OF TAXATION**
Appellant

and

NATALIE CARTER
First Respondent

ALISHA CARATTI
Second Respondent

NICOLE CARATTI
Third Respondent

APPELLANT'S REPLY

Part I: Certification

1. It is certified that this document is suitable for publication on the internet.

Part II: Submissions

2. The submissions at RS[1] [8]-[28] are directed to establishing the proposition that a disclaimer refutes the presumption in law of assent to a gift. That proposition is not disputed by the Commissioner, and is in fact expressly asserted by the Commissioner at AS[2] [93]. The central issue is not whether a disclaimer refutes the presumption in law of assent. Rather, it is whether a donee beneficiary that was "presently entitled" within the meaning of s 97 retrospectively ceases to have been so entitled by reason of a retrospectively operating disclaimer.

3. The respondents' discussion of *Parsons* and *Stratton* at RS [30]-[32] also misses the mark. The respondents *accept* that those cases establish the Commissioner's point, ie that a disclaimer does not retrospectively extinguish the competence or ability of the donee, prior to disclaimer, to accept a gift. The respondents nevertheless assert that there is a distinction between the competence or ability to accept a gift and the subject matter of the gift itself (and see also RS [81]). The distinction the respondents wish to draw, upon analysis, is the distinction between a right to receive and actual receipt – which is the very distinction that the Commissioner addresses in the AS [43]-[66].

4. The respondents seek to avoid the consequences of accepting almost all of the Commissioner's case by suggesting that a disclaimer is effective to avoid the operation of section 97, not because it means that the beneficiary did not have a present legal right to demand and receive the distribution, but because it prevents the beneficiary having had an interest in the income which is vested in interest and vested in possession: RS [35]-[37]. This argument was not considered below, and is not supported by a notice of contention. In any event, it is misconceived. It depends on a misunderstanding of what it means for an "interest" to be "vested in interest and vested in possession". An interest is vested in interest and possession if there is a non-contingent immediate fixed right of present enjoyment of the interest: *Glenn v Commissioner of Land Tax (Cth)* (1915) 20 CLR 490 at 496 (Griffith CJ), 501 (Isaacs J); *Walsh Bay Developments Pty Ltd v Federal Commissioner of Taxation* (1995) 31 ATR 15 at 27 (Beaumont and Sackville JJ) (Jenkinson J agreeing at 16); *Dwight v FCT* (1992) 37 FCR 178

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1 Respondents' Submissions dated 2 July 2021.
2 Appellant's Submissions dated 4 June 2021.

at 192 (Hill J). What must be vested in interest and possession is not the income of the trust estate itself; it is an *interest* in a share of the income of the trust estate: see ***Harmer*** *v CoT* (1991) 173 CLR 264 at 271; *CoT v* ***Bamford*** (2010) 240 CLR 481 at [8]. At all material times, the respondents had an immediate right presently to enjoy an *interest* in a share of the trust income: they had at least an immediate right presently to require the trustee to convey to them their distributions.

5. The respondents also contend that there was no "right to demand and receive payment of the income" of the trust: RS [38], and cf *Harmer* at 271 and *Bamford* at [8]. This submission depends on a misunderstanding of the gift. The respondents contend that the subject matter of the gift is the beneficiary's "respective entitlements as default beneficiaries" (RS [38]), but the subject matter of the gift is in fact the relevant income the subject of the default distribution (*FCT v Ramsden* (2005) 58 ATR 485 at 495, [42] and 497, [57]). The respondents' ultimate proposition seems to be that there was no right to receive and demand payment of income, as there was only a right to accept (by not disclaiming) the *right* to receive and demand payment of income. That is, the respondents say, they had a right to a right to income, not a right to income. This submission does not reflect reality. The reality is that, at all times until they disclaimed, if the respondents demanded payment of the income, the trustee was obliged to distribute it. That is properly characterised as a right to demand and receive payment of the income.

6. At RS [40]-[45], the respondents submit that s 97 picks up the general law of trusts as it finds it. This submission again misses the point of the Commissioner's case. The Commissioner does not dispute that the taxable facts on which s 97 operates include matters arising from the operation of the general law of trusts on facts. The real issue (as identified at AS [73]-[76] and [96]) is what is the true effect of the relevant principles of the general law of trusts and at what time the taxable facts are to be assessed.

7. At RS [46]-[55], the respondents contend that there is a presumption that, absent contrary intention, revenue laws pick up retrospectively operating legal principles. It is not necessary to decide whether there is a presumption of the kind contended for: even if there were such a presumption, it would not avail the respondents because any retroactive principle would not retroactively extinguish the beneficiary's right until disclaimer to demand the income. And in any event there is a contrary statutory intention for the reasons explained in the AS. Moreover, the cases said to support the presumption are distinguishable and do not support the presumption asserted.

(a) The observations in *Kiwi Brands Pty Ltd v FCT* (1998) 90 FCR 64 at 78-79 were dicta as is clear from the passage at 78E-F. They did not concern s 97 of the ITAA 1936, nor did they concern the effect of a disclaimer but the effect of a ratification.

(b) Justice Hill's decision in *Oates v Commissioner of Taxation* (1990) 27 FCR 289 turned, critically, on the meaning and effect of an "annulment" of a bankruptcy under the *Bankruptcy Act 1966* (Cth): see, in particular, at 301-304. The issues which arise in ascertaining the extent to which a common law doctrine is picked up by a Commonwealth Act are materially different to the issues which arise when ascertaining the relationship between two Commonwealth statutes, a bankruptcy statute and a taxing statute. *Oates* did not concern s 97 of the ITAA 1936 and did not concern the effect of a disclaimer.

(c) Latham CJ's decision in *FCT v* ***Cornell*** (1946) 73 CLR 394 did not concern s 97 of the ITAA 1936. His Honour did not consider the issue of whether a disclaiming beneficiary remains a person who was "presently entitled" to trust income. His Honour referred to *Townson v Tickell*, but does not appear to have been taken to *In re Parsons* (which had been decided a few years before). *Cornell* also pre-dated *Stratton*. Latham CJ considered that the disclaimer made it impossible to hold that a trust *continued* to exist (at 402). What his Honour said at 401ff is dicta in circumstances where his Honour held that no trust was actually created: see at 401.5.

(d) The observations in *FCT v* ***Taylor*** (1929) 42 CLR 80 at 88 and ***Ansett*** *Transport Industries (Operations) Pty Ltd v Comptroller of Stamps* [1985] VR 70 concerned the principles of deeds delivered in escrow. They did not concern s 97 of the ITAA 1936. What was said in *Taylor* was dicta and tentative ("may perhaps be" and "unnecessary to express a decided opinion"). In *Ansett* the Court held that the deed had some legal effect "when it was … delivered" ie before the escrow condition was satisfied: see at 79.7.

(e) *GE Capital Finance Australasia Pty Ltd v FCT* (2011) 219 FCR 420 concerned rectification, not disclaimer, and concerned the time at which a multiple entry consolidated group was created, not s 97. Further, at [119], her Honour referred to authority indicating that if the purpose of a claim was to "achieve a tax advantage", that would be a reason not to order rectification.

(f) *John Mander Pension Trustees Limited v Commissioners for Her Majesty's Revenue and Customs* [2015] 1 WLR 3857 also does not assist the respondents. Again, it did not concern disclaimer or s 97, but the operation of UK legislation. And at [19] Lord Sumption referred with approval to observations in *Morley-Clarke v Jones (Inspector of Taxes)* [1986]

Ch 311 to the effect that "[a] retrospective order cannot, any more than a retrospective agreement, undo the past and convert something that has already happened, and to which legal consequences have already attached, into something which never in fact did happen".

8. The true position is that there is no presumption of the kind asserted. In each case, whether and the extent to which a statute picks up retroactive general law principles is determined by orthodox principles of construction: text, context and purpose and a proper understanding of the general law principle. That task of construction is informed by systemic values, including the fact that "the law is astute to have regard to the prejudice which [retrospective] operation may have on third parties": *Chief Commissioner of State Revenue v* 10 *Smeaton Grange Holdings Pty Ltd* (2017) 106 ATR 151 at [6] (Leeming JA) (Gleeson JA agreeing at [1]).

9. *FCT v* ***Whiting*** (1943) 68 CLR 199 does not stand for the proposition that one does not ask the question posed by section 97 at the end of the relevant revenue year: cf RS [57]. The time at which one asks the question was not in issue in *Whiting*. The Commissioner's point (see AS [74]) is that because one must ask whether there is a *present* entitlement, one must necessarily ask and answer that question at a particular point in time. It can be accepted that the adverb "presently" identifies an aspect of the nature of the entitlement (RS [58]-[60]), but it is an aspect of the entitlement which can change from time to time and thus must be assessed at a point in time. A beneficiary may not be presently entitled at a particular point in time 20 (eg because of the existence of a prior claim of the kind referred to in *Whiting* at 216.2) but presently entitled at a later point (eg because the prior claim has been discharged).

10. It is correct that, in *Union Fidelity Trustee Co of Australia Ltd v FCT* (1969) 119 CLR 177, Barwick CJ was comparing a beneficiary who had received income with a beneficiary who was entitled to income but had not received it. However, it is clear from what his Honour said at 182 and 183 that his Honour considered that the question of whether there was a present entitlement was to be assessed at the close of the relevant taxation year, not (as the respondents' case would have it) at some different time: see also, *Harmer* at 271.8.

11. The submissions at RS [65]-[66] miss the point of the Commissioner's submissions at AS [75]. The point of the Commissioner's submissions is (inter alia) that one must ask whether 30 there is a legal disability or residence at a particular point in time and that time is the end of the revenue year, not the date of the hearing. For example, section 97 does not cease to apply where a beneficiary was a resident at the end of the relevant revenue year, but is not a resident by the time of a hearing. Equally, s 97 does not apply because a person was a minor at the end of the

revenue year, but is not a minor by the time of a hearing. This indicates that the question posed by s 97 must be asked and answered at a particular time, and that time can only be at the end of each revenue year. That a person may be found to have been under a legal disability at a time when no one yet appreciated it is not a response to these points of the Commissioner's: cfRS [66].

12. In *Oates* at 300-301, Hill J *accepted* that it will "normally hold true" that because "the liability of a taxpayer for income tax crystallise[s] on the last day of the year of income … that liability may not be affected by subsequent events". His Honour identified as an exception to that proposition a specific case where a statute stipulated that an agreement was to take effect from an earlier date during the relevant revenue year. That exception does not assist the respondents in this case.

13. The observations in *Metlife Insurance Ltd v Federal Commissioner of Taxation* (2008) 170 FCR 584 at [29] also do not assist the respondents: cf RS [69]. The Court was there concerned with provisions of the revenue laws which retroactively altered a taxpayer's taxable income after the relevant revenue years (see at [23]). That does not assist the respondents here. The various provisions of the revenue laws identified at RS [69]-[79] which expressly provide for retroactive alteration of a taxpayer's income do not assist the respondents. It is of course open to the Parliament expressly to provide that the tax levied by the *Income Tax Act 1986* (Cth) can be varied by subsequent events. But the respondents here do not rely on some express statutory alteration of the tax levied. And none of the provisions referred to by the respondents contemplates that parties can, by their own acts, excise the taxable facts which operated at the end of an income year to avoid a tax liability which arose on the facts as they then existed.

14. The issue is not whether the Tribunal or a Court is entitled to act on the material before it, including material which arose only after the relevant revenue year: cf RS [80]. The issue is whether the Tribunal or the Court is to inquire into whether taxable facts exist at the date of the hearing or at the end of the relevant revenue year.

Dated: 22 July 2021

Neil Williams SC
njwilliams@sixthfloor.com.au
(02) 9235 0156
Sixth Floor Chambers

Michael O'Meara SC
momeara@sixthfloor.com.au
(02) 9221 0669
Sixth Floor Chambers

David Hume
dhume@sixthfloor.com.au
(02) 89152694
Sixth Floor Chambers