HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**
Appellant

and

STEVEN BENDEL
First Respondent

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GLEEWIN INVESTMENTS PTY LTD (ACN 131 785 576)
Second Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. This reply is in a form suitable for publication on the internet.

PART II: REPLY

Section 109D(3)

2. Like the Full Court, the respondents read down s 109D(3) to cover only those situations where there is both an anterior payment by the private company and an "obligation to repay" (FC [2], [93], CAB 90, 112-113; RS [25], [42], [45],[46], [49]).

3. Faced with the difficulty that ss 109D(3)(b) and (d) eschew such limitations of form, RS [24] suggests the Commissioner is "assuming that the words… are used in their broadest possible sense and then excluding all the contextual indications which imply that they have a narrow and more focused meaning". But that is not so. The Commissioner's position is that, "[f]or there to be a provision of credit or financial accommodation, there must be a consensual arrangement under which payment is deferred" (AS [31]; cf. RS [70]). That requirement – derived from prior authority – in fact excludes arrangements that may in other statutory contexts involve financial accommodation, such as guarantees and undrawn credit facilities (cf. RS [47]). It also excludes "cases of overdue payment" that occur without the creditor's consent: cf. RS [53].

4. Both the settled approach to the construction of definitions (AS [22]-[24]), and the statutory context, supports the Commissioner's construction. Under s 109D(4), a "loan" may be made even where nothing has been "paid … by way of loan",[1] with the logical consequence that there can be no obligation to "repay" anything. In that regard RS [50] misunderstands AS [34], which submits only that while a "loan" can involve payment and repayment, it need not take that form. The textual point actually made by AS [34] based on s 109D(4) remains unanswered.

Sections 109C(3), 109E, 109F(6), 109N and 109R, and Subdivision EA

5. In the attempt to justify reading unexpressed limitations and qualifications into the definition in s 109D(3),[2] the respondents raise new arguments about other sections, and in doing so substantially depart from the Full Court's reasoning.

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[1] It is sufficient that "anything described in [s 109D(3)] is done in relation to the entity".

[2] As the respondents implicitly concede they seek to do: RS [42], responding to AS [23].

6. *First*, the respondents now submit that no loan can be made for the purposes of s 109D unless there is a "payment" as defined in s 109C(3) (RS [25], [43]-[47]). Nothing in the text or legislative history of Div 7A indicates that s 109C(3) plays the pivotal role which the respondents ascribe to it. Section 109D(1)(a) applies where a private company "makes a loan" in the manner described in s 109D(3) and (4), not where it "makes a payment". Further, and critically, s 109C(3A) provides that "a loan to an entity is not a payment to the entity", making the categories of "loan" and "payment" mutually exclusive. Accordingly, the respondents' submissions that rely on the absence of a "payment" should be rejected (e.g., RS [42]-[43], [45]-[47], applied at RS [62], [69]).

7. *Secondly*, the respondents suggest that the Commissioner's construction of s 109D(3) causes s 109F(6) to have virtually no practical effect (RS [51]-[53]). In doing so they characterise s 109F(6) as "deal[ing] with the deferral of debts" (RS [53]). That characterisation is erroneous, for s 109F(6) deals only with debts that are permanently (but informally) excused. It does not deal with debts that are temporarily deferred (AS [30]). The Commissioner's construction of s 109D(3) fills that gap, but does not deprive s 109F(6) of effect (which will apply where the "forgiven" debt did not result from a loan, or where a loan did not give rise to a deemed dividend under s 109D (see s 109G(3)).

8. *Thirdly*, the respondents rely on ss 109E, 109N and 109R, which they say "rely on a 'loan' being capable of repayment" (RS [41]). But s 109R simply excludes certain payments from being taken into account, including when "working out … how much of a loan has been repaid for the purposes of sections 109D and 109E". Section 109N(1) and 109E are concerned with loans made under written agreements that contain specified terms. None of the sections address what circumstances might give rise to a "loan" in the first place.

9. *Fourthly*, RS [54]-[57] assert that the Commissioner's construction of s 109D(3) "brings s 109D into conflict with Subdivision EA". However, Subdiv EA cannot justify the limitation which the respondents (like the Full Court) seek to read into s 109D(3). Section 109D, which is one of the three leading provisions in Div 7A (see 109B), is substantially wider than Subdiv EA. The definition of "loan" in s 109D(3) therefore applies in many contexts unrelated to unpaid present

entitlements. That definition must be interpreted consistently across the full range of its operations, subject to any contrary intention. The particular provisions made in Subdiv EA with respect to some (but not all) circumstances involving unpaid present entitlements cannot, in principle, control the interpretation of a central definition provision with application far beyond Subdiv EA.

10. In substance, RS [55]-[57] characterise Subdiv EA as an exclusive code whose operation should not be "undermin[ed]" by s 109D. But that characterisation is not open, in circumstances where there is no provision that disapplies s 109D (either in the ordinary or extended meaning of "loan") with respect to unpaid present entitlements: cf s 109T(3). If that is a lacuna in the legislative scheme, then the remedy lies in an amending Act.[3] The constructional task for a court is not to remedy perceived legislative inattention[4] or to fill "gaps disclosed in legislation".[5]

Sale on deferred payment terms

11. RS [49] disputes that the limitations placed by the respondents on s 109D(3) result in that subsection having little or no work to do (AS [24]). In support, RS [48] proffers a single example: it asserts that a sale of shares with the purchase price not payable for a number of years is "caught by s 109D(3)(c)". It reasons that the transaction "involves both a payment, being the initial transfer of the shares, and a repayment, being the later payment of the purchase price", with s 109C(3)(c) and (4) treating the share transfer as the "payment of an amount" (RS [48]). That submission should be rejected. It is highly artificial to analyse the provision of a thing that is sold (be it shares or other property) as being a "payment" by the seller which the purchaser has an obligation to "repay". In such a transaction the purchaser's obligation is to pay the seller, not to repay them, and for the respondents to contend otherwise illustrates the error of the strained construction they advance. Further, the argument is erroneously premised on the definition of "payment" in s 109C determining whether there is a "loan" within s 109D.

12. Further, even if s 109C were relevant, the submission is misconceived because it

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3 Cf. *Marshall v Watson* (1972) 124 CLR 640 at 649 (Stephen J; Menzies J agreeing at 646).

4 *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575 at [14] (Kiefel CJ and Gageler, Gleeson and Jagot JJ).

5 *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531 at [38] (French CJ, Crennan and Bell JJ).

overlooks the difficulty in establishing the "amount of the loan" (s 109D(1AA) and (2)). The only potentially relevant statutory mechanism is s 109C(4), but it would cause the amount of the payment (and therefore the "loan") to be nil unless the purchase price to be paid for the shares were less than the amount that would have been paid by parties dealing at arm's length (s 109C(4)). RS [48] is therefore incorrect to reason that this example involves an anterior payment that is repaid when the purchase price is eventually paid (the alleged payment and repayment being for quite different amounts). The respondent is, however, correct to concede that this situation involves financial accommodation for the purposes of s 109D.

10 ***Other***

13. *Westpac*[6] harms rather than helps the respondents' case (cf. RS [42]). As explained at AS [22] fn 5, the Court located the "repayment" element not in the relevant definition of "loan" in s 136 of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (which mirrored s 109D(3)), but instead in the terms of s 16(1) (which has no counterpart in s 109D). In doing so, it expressly recognised that the definition did *not* itself require the presence of an obligation to repay.[7]

14. *McKay*[8] does not establish that, for the purposes of s 109D(3), "a 'provision' [of financial accommodation] requires something more than acquiescing in the maintenance or continuation of an existing arrangement or state of affairs"
20 (cf. RS [71] fn 36). The case concerned whether such acquiescence is past consideration. It does not stand for any wider proposition.

The respondents' submissions about the facts

15. RS [2]-[3], [16], [18] suggest that no step was taken or event occurred beyond vesting of the trust entitlements. That is incorrect. The Tribunal made no such finding.[9] The facts as found disclose multiple such steps or events. Gleewin and Gleewin Investments recorded the amounts owing between them (TR [40], [44],

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6 *Westpac Banking Corporation v Commissioner of Taxation* (1996) 70 FCR 52.

7 (1996) 70 FCR 52 at 60G-61A (Lindgren J; Lockhart and Sackville JJ agreeing: at 52G and 68B).

8 *McKay v National Australia Bank Ltd* [1998] 1 VR 173.

9 Whilst the Tribunal defined a "UPE" as a trust entitlement "*in respect of which no step has been taken or event has occurred beyond vesting the entitlement to satisfy that entitlement by payment, set off, or vesting assets in the entitled beneficiary*" (TR [2]), it merely said that the disputed loans and Division 7A dividends had their "origins" or "source" in UPEs: CAB 11 [3] and 20-21 [28].

CAB 26, 28) – Gleewin's admission giving rise to a debtor-creditor relationship (FC [92], [94], CAB 112, 113). Mr Bendel, who controlled Gleewin and Gleewin Investments, caused Gleewin to meet (only) Gleewin Investments' tax liabilities and other expenses from time to time, as opposed to some greater amount (TR [26], [44], CAB 20, 28). In the meantime, Gleewin retained the remaining funds for use for general trust purposes pending payment over to Gleewin Investments (TR [41], [51], [77], CAB 27, 31, 45; and see AS [42]). Those facts disclose more than knowledge and inaction: cf. RS [18]. They disclose a consensual arrangement between Gleewin Investments and Gleewin, and the making of a "loan".[10]

Section 6-25

16. Section 6-25(1) applies where the "same amount" is otherwise assessable twice. In that context, amounts are the "same" if they are identical in nature (but for their tax character).[11] Thus, while s 6-25(1) applies where (say) an amount consisting of a dividend is assessable to a taxpayer as both ordinary and statutory income, it does not apply where two amounts included in assessable income are of a different identity and possess a mere historical connection.

17. In the example at RS [77], the amounts (of interest, etc.) derived in Year 1 are not the same as the amount included in assessable income in Year 2 under s 109D (cf. RS [78]). That is because different events give rise to them. The amount included in assessable income in Year 2 arises because a s 109D(3) loan was made. The two sets of amounts thus possess a different identity, which is reflected in their different quantum. There is a historical connection between them, but they are not the same.

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Stephen Donaghue KC
Solicitor-General of the Commonwealth

Eugene Wheelahan KC
T: (03) 9225 8405
E: efwheelahan@vicbar.com.au

Joel Phillips
T: (03) 9225 8444
E: joel.phillips@vicbar.com.au

[10] They establish that there was a provision of financial accommodation for the purposes of s 109D(3)(b) and involve a "transaction" for the purposes of s 109D(3)(d), within the ordinary meaning of that word: see Macquarie Dictionary, "transaction" n4, and Oxford English Dictionary, "transaction, n." 2 and 3.a.

[11] Macquarie Dictionary, "same" adj1 and adj2. And see the explanatory memorandum which accompanied the Income Tax Assessment Bill 1996 (Cth) p 42.