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
MELBOURNE REGISTRY

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

and

STEVEN BENDEL
Respondent

and

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

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Section 109D (The Commissioner's appeal)

Summary

2. **Payment and repayment.** A 'loan' for the purposes of s 109D must be something that involves:

   (a) payment by the private company to the other entity; and

   (b) an obligation for that entity to repay the private company (RS [25], [41]-[42], [45]).

   For these purposes, 'payment' is defined in ss 109C(3) and 109CA(1). The initial payment does not need to be in money (s 109C(3)(c), s 109C(4)) (RS [43]-[44]).

3. **Other provisions are relevant.** The non-payment of a present entitlement by a trustee to a beneficiary is addressed by other provisions in Div 7A:

   (a) s 109F (particularly sub-s (6)) addresses when the deferral of an obligation to pay gives rise to a deemed dividend (RS [52]-[53]); and

   (b) Subdiv EA addresses when a deemed dividend will arise in the context of an unpaid present entitlement (RS [54]-[60]).

4. **Appeal fails on both the law and facts.** The Commissioner's appeal fails both as a matter of construction of s 109D(3) and the application of s 109D (even of his preferred construction) to the facts (RS [21]-[23]).

Application to the facts

5. **No agreement.** There was no agreement for the 2005 Trust to retain, or defer payment of, the amounts set aside for Gleewin Investments (RS [15]-[17], [71]). The trust deed required Gleewin to retain the amounts until called for by Gleewin Investments, with a power to invest in the meantime (RS [62]-[65]). There was no express or implied amendment to those terms. The parties simply allowed the terms to operate. There was no due date for payment and so no deferral (RS [72]).

6. Further, Gleewin did not use the amounts set aside for the general purposes of the 2005 Trust (cf AS [45], [47], Rep [15]); there was no agreement to do that. The assets of the 2005 Trust that increased over the relevant period were the loans to Mr Bendel and unpaid present entitlements to income of other trusts. Those facts are addressed by Subdiv EA, particularly ss 109XA and 109XI.

The proper construction of s 109D(3)

7. **Definition extends ordinary meaning, but is limited by context.** The parties agree that s 109D(3) extends the meaning of 'loan' beyond its ordinary meaning but that paragraphs (a) to (d) of s 109D(3) are not to be given a meaning as wide as they might have in other contexts (eg, *International Litigation Partners* at [28] (**JBA C.15.308**)) (Rep [3]).

8. **Previous authorities.** The authorities referred to by the parties (eg *Radilo* (**JBA D.22.445**) and *Prime Wheat* (**JBA D.27.522**)) considering similar, or identical, words to those in paragraphs (b) and (d) show (at the very least) that those words can, in an appropriate context, require an obligation of repayment; as is the essence of a loan.

9. **Essentiality of obligation of repayment.** Here, ss 109D(1)(b) and (1AA) show that s 109D necessarily contemplates a loan as being something capable of repayment. It would otherwise be impossible to avoid the operation of s 109D. The Commissioner's contention that the word 'repaid' must be read as including 'paid' (AS [35]) shows how the language must be strained to give effect to his construction.

10. **Section 109D(4) is consistent with the obligation of repayment.** The words "anything described in subsection (3)" are necessary because they refer to things that are not loans in the ordinary sense; that is, they do not involve a payment '*by way of loan*'. Nothing in sub-s (4) suggests that a loan can be made without an initial payment capable of repayment (RS [50]; cf AS [34], Rep [4]).

11. **Commissioner's construction conflicts with s 109F.** The deferral of a debt will give rise to a deemed dividend where it satisfies ss 109F(3) or (6) (RS [52]). As to s 109F(6), any deferral that would not cause a reasonable person to conclude that the debt will not be paid does not give rise to a deemed dividend (RS [53]). If the debt was originally incurred in circumstances that did not give rise to a deemed dividend, there is no reason for a deferral that does not trigger s 109F to give rise to such a dividend (RS [69]).

12. **Commissioner's construction conflicts with Subdiv EA.** Subdiv EA defines when activities by a trustee in the context of an unpaid present entitlement gives rise to a deemed dividend (RS [38]-[39]). The Commissioner's construction:

    (a) ***Overlooks s 109T.*** If 'loan' included the non-payment of an unpaid present entitlement, then Subdiv EA (and its predecessor, s 109UB) would have been unnecessary; s 109T would have achieved the same outcome (RS [35]-[36]).

    (b) ***Taxes a different taxpayer in different circumstances*** (RS [56]-[57])**.** The Commissioner's construction is therefore 'repugnant' to Subdiv EA in the sense explained in *Refrigerated Express* at 347 (**JBA D.28.551**) (RS [54]).

    (c) ***Fails to appreciate the significance of the absence of an anti-overlap provision***. There is no anti-overlap provision because, properly construed, there is no overlap between s 109D and Subdiv EA (cf Rep [10]). This may be contrasted with other potential overlaps where an anti-overlap rule is provided.

Section 6-25 (The Notice of Contention)

13. **Same amount.** The amount that the Commissioner seeks to include in the 2005 Trust's assessable income via s 109D is the part of the trust's income for the previous year that was set aside for, but not paid to, Gleewin Investments (RS [75]-[77]). To that extent, it is the 'same amount' (RS [75]).

14. **Absence of different events.** Section 6-25 does not require the amounts to arise from the same events (cf Rep [17]). There is no different event here anyway. The Tribunal found that to be the case at TR [2].

Dated: 14 October 2025

Andrew de Wijn SC	**Paul Jeffreys**	**Tim Graham**