HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, HAYNE AND CALLINAN JJ

COMMISSIONER OF TAXATION OF
THE COMMONWEALTH OF AUSTRALIA APPELLANT

AND

SARA LEE HOUSEHOLD & BODY CARE
(AUSTRALIA) PTY LTD RESPONDENT

Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd [2000] HCA 35
15 June 2000
M57/1999

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 11 December 1998, and in place thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

R A Brett QC with S J Sharpley for the appellant (instructed by Australian Government Solicitor)

B J Shaw QC with J W De Wijn QC for the respondent (instructed by Arthur Robinson & Hedderwicks)

CATCHWORDS

Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd

Taxation – Capital gains tax – Time of disposal of assets – Original agreement providing for disposal subsequently amended – Whether disposal made under original agreement or amended agreement.

Words and phrases – "under a contract".

Income Tax Assessment Act 1936 (Cth), s 160U

1 GLEESON CJ, GAUDRON, McHUGH AND HAYNE JJ. The issue in this appeal concerns the identification of the year of income in which a capital gain made by the respondent taxpayer was brought to tax by reason of the provisions of Pt IIIA of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). The capital gain resulted from a disposal of assets by the respondent. The change in ownership of the assets occurred during the year ended 30 June 1992. The appellant contends that the assets were disposed of under a contract which was made during the year ended 30 June 1991. The question, which arises out of disallowances of objections against an assessment, and an amended assessment, to income tax, is whether the capital gain was made during the 1991 income year or the 1992 income year. The practical significance of the question for the respondent results from the availability of offsetting losses or deductions in the 1992 income year.

2 The respondent has changed its name a number of times. It appealed to the Federal Court of Australia at a time when it was named Kiwi Brands Pty Ltd. Its appeal failed before North J at first instance[1]. A further appeal to the Full Court of the Federal Court (Hill, Finn and Sundberg JJ) was successful[2]. The Commissioner of Taxation now appeals to this Court from the decision of the Full Court.

The disposal of assets

3 The disposal of assets by the respondent was part of a wider transaction involving two foreign corporations and their subsidiaries in various countries. The respondent, then named Nicholas Kiwi Pty Ltd, was an Australian subsidiary of Sara Lee Corporation, a company incorporated in the USA. Sara Lee Corporation, directly, or through subsidiaries or associates, carried on, in a number of countries, including Australia, the business of manufacturing, marketing and distributing pharmaceutical and health care products. It offered its business for sale by a process of auction. The successful bidder was Roche Holding Ltd ("Roche"), a Swiss corporation which also had subsidiaries in a number of countries. For the purpose of the auction, a draft "Purchase and Sale Agreement" was prepared. Understandably, this was a complicated document, which had to address the circumstances of various businesses in different countries. When Roche emerged as the highest bidder, on 31 May 1991, the purchase and sale agreement was entered into.

4 The parties to the agreement were Sara Lee Corporation and other named companies (including the respondent) which were subsidiaries or affiliates of

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1 *Kiwi Brands Pty Ltd v Federal Commissioner of Taxation* (1997) 148 ALR 605.

2 *Kiwi Brands Pty Ltd v Commissioner of Taxation* (1998) 90 FCR 64.

Sara Lee Corporation (collectively described as the "Sellers"), and Roche (described as the "Buyer"). The agreement was governed by the laws of England.

5 Section 2.2 provided:

> "Subject to the representations and warranties contained herein and upon the terms and conditions hereof, at the Closing, Sellers shall sell to Buyer, and Buyer shall purchase from Sellers, free and clear of all liens, claims, options, charges, security interests, encumbrances and restrictions of any kind … all right, title and interest in, to and under the Assets and the Intangible Rights …".

6 The auction process provided for the purchase and sale agreement to be executed by the successful bidder and then exchanged with Sara Lee Corporation and the other sellers. The respondent was one such seller, as the Australian business was involved in the sale. In preparation for the exchange, a signature page was signed by Mr Patten, a director and the financial controller of the respondent. Mr Patten was acting under instructions from Sara Lee Corporation. He was not authorised by the board of directors of the respondent to sign the agreement. It was contemplated that, in due course, the board of directors of the respondent would ratify his action. This was done on 20 August 1991.

7 The assets being sold by particular sellers were listed in a schedule to the agreement. The agreement also provided for the Buyer to assume, at closing, specified liabilities of certain sellers, including the respondent.

8 There was a schedule to the agreement headed "Allocation of Purchase Price". It contained two columns. The first identified what was being sold by particular sellers, including the respondent. The second stipulated the price agreed to be paid to the particular seller.

9 The agreement provided for completion to occur at a closing meeting, which the parties did not expect to occur earlier than 31 July 1991. It was provided that, on the completion date, the Sellers would transfer to the Buyer and the Buyer would acquire from the Sellers the assets and intangible rights being sold, such transfers and acquisitions to be effected by the delivery of instruments of transfer and assignment, accompanied by board resolutions and other documents appropriate to give effect to the transfers of property and assumptions of liabilities involved.

10 Section 12.3 in Article XII provided:

> "This Agreement shall not be assigned by any party hereto without the prior written consent of the other parties; provided, however, that Buyer may assign any of its rights or obligations hereunder to one or more of its subsidiaries or affiliates without the prior written consent of Sellers; provided further, however, the assignee shall agree to be bound by the terms and conditions of this Agreement and that such assignment shall in no way limit or relieve the assignor of any of the assignor's obligations hereunder. This Agreement shall inure to the benefit of and be binding on and enforceable against the parties hereto and their respective successors and permitted assigns." (original emphasis)

11 The company which acquired the assets transferred by the respondent was Nicholas Products Pty Ltd, a subsidiary of Roche. That company was not in existence on 31 May 1991. It was incorporated on 25 June 1991. Roche did not take up shares in Nicholas Products Pty Ltd until 28 August 1991. By a letter dated 30 August 1991, Roche advised Sara Lee Corporation that it had assigned some of its rights and obligations under the purchase and sale agreement to certain subsidiaries and affiliates, and that they had agreed to be bound by the terms and conditions of the purchase and sale agreement. One such assignment was to Nicholas Products Pty Ltd, in relation to the sale of assets by, and assigned liabilities of, the respondent.

12 There were a number of amendments to the purchase and sale agreement insofar as it related to Australian assets and liabilities. These amendments were the subject of an "Amendment Agreement" executed on 30 August 1991 by Sara Lee Corporation, on its own behalf and on behalf of the other sellers, and Roche. The total purchase price payable under the purchase and sale agreement was originally US$597,681,000. In addition, an amount of US$200,000,000 was payable as consideration for a covenant not to compete. The amendment agreement varied the overall purchase price. The price originally allocated to the assets sold by the respondent was US$61,461,000. By the amendment agreement, the price allocated to those assets was increased by US$1,000,000 to US$62,461,000. The purchase and sale agreement obliged the Buyer to offer employment to fifty-four employees of the respondent. The amendment agreement varied this. The Buyer was obliged to employ only fourteen of the employees and to reimburse the respondent in respect of certain redundancy payments. The price allocation schedule was said to be "amended and restated in its entirety". The price allocated to the Australian assets was altered as above. Nicholas Products Pty Ltd was named as the purchaser of those assets.

13 Section 11 of the amendment agreement provided:

> "Effect on Agreement. This Amendment to Purchase and Sale Agreement shall be deemed an amendment of the Agreement for purposes of Section 12.6 of the Agreement. Except as provided in this Amendment and in any other agreement executed by the parties on or after May 31, 1991, the Agreement remains in full force and effect."

14 There was some argument as to the legal consequences of the amendment agreement. It will be necessary to return to that subject. In that respect, the concluding words of s 11 are significant.

15 On 30 August 1991, completion took place. As part of the closing, a "Deed of Assignment" bearing that date was executed by the respondent, described as "the Seller", and Nicholas Products Pty Ltd, described as "the Buyer". The deed was recited to be made "pursuant to a Purchase and Sale Agreement among Sara Lee Corporation, the other Sellers named therein and [Roche], dated May 31, 1991, as amended (the 'Agreement')".

16 The operative part of the deed was in the following terms:

> "NOW, THEREFORE, in consideration of the sum of US$62,461,000 paid by the Buyer to the Seller pursuant to the terms of the Agreement at or before the execution and delivery hereof (the receipt and sufficiency of which is hereby acknowledged) … the Seller does hereby sell, convey, assign, transfer and deliver to the Buyer, its successors and assigns forever, all of the Seller's right, title and interest in and to the Assets, the Intangible Rights … and the Assigned Contracts, to have and to hold such Assets, Intangible Rights and Assigned Contracts unto the Buyer and its successors and assigns, to and for its or their use forever.
>
> This instrument shall inure to the benefit of the Buyer and its successors and assigns and shall be binding upon the Seller and its successors and assigns, effective immediately upon its delivery to the Buyer.
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> This Deed of Assignment is delivered pursuant to the Agreement and it shall not alter, supercede [sic], augment, abridge or affect any provision of the Agreement. In the event of any conflict between the terms of the Agreement and the terms hereof, the terms of the Agreement shall be controlling."

17 By definition, what was referred to as "the Agreement" was the purchase and sale agreement of 31 May 1991, as amended.

18 Another deed, described as a "Deed of Assumption of Liabilities and Contracts", was executed by the respondent and Nicholas Products Pty Ltd on 30 August 1991. In brief, Nicholas Products Pty Ltd, in accordance with the requirements of the purchase and sale agreement, as amended, and in partial consideration for the sale of the assets and intangible rights, assumed certain obligations and liabilities of the respondent in relation to the intangible rights and the assigned contracts. The deed was also expressed to be entered into pursuant to the purchase and sale agreement of 31 May 1991, as amended.

The legal effect of the transaction

19 There was some disagreement between the parties concerning the legal consequences of certain aspects of the transaction. It is convenient to deal with those matters before turning to the central issue in the case, which involves the application of Pt IIIA of the Act to the facts.

20 First, there is the question of Mr Patten's lack of authority, on or before 31 May 1991, to sign the purchase and sale agreement, and the ratification of his act by resolution of the board of directors of the respondent on 20 August 1991. North J, and the Full Court, applied the general rule that, where a principal ratifies the earlier act of a person acting as agent without authority, the ratification relates back to the date of the unauthorised act, and the principal is bound as if the agent had had authority at the earlier time[3]. They were correct to do so. This is not a case in which the rights of third parties have intervened. Although the principle is sometimes described as operating upon the basis of a fiction, it is a well settled rule of common law, and is part of the background against which the taxation legislation operates. There is no reason to deny its application in the present case.

21 Secondly, there is an issue as to the effect of the amendment agreement of 30 August 1991 upon the purchase and sale agreement of 31 May 1991. The variations to the rights and obligations of the contracting parties made by the amendment agreement were not insubstantial. The purchase price was altered by US$1,000,000. The obligations of Roche in relation to employees of the respondent were significantly modified. Nicholas Products Pty Ltd was

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3 *Bolton Partners v Lambert* (1889) 41 Ch D 295 at 306 per Cotton LJ; *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 247 per Lord Macnaghten; *Davison v Vickery's Motors Ltd (In Liquidation)* (1925) 37 CLR 1 at 19 per Isaacs J, 31 per Higgins J.

identified as the company which was to acquire the Australian assets, although it was not itself a party to the amendment agreement.

22 When the parties to an existing contract enter into a further contract by which they vary the original contract, then, by hypothesis, they have made two contracts. For one reason or another, it may be material to determine whether the effect of the second contract is to bring an end to the first contract and replace it with the second, or whether the effect is to leave the first contract standing, subject to the alteration. For example, something may turn upon the place, or the time, or the form, of the contract, and it may therefore be necessary to decide whether the original contract subsists. In the present case, if the effect of what occurred on 30 August 1991 had been to rescind the agreement of 31 May 1991, then that would go a long way towards providing an answer to the appellant's argument that the assignment which occurred on 30 August was pursuant to the agreement of 31 May, with whatever that entails for the application of Pt IIIA of the Act.

23 In *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd*[4] Taylor J said:

> "It is firmly established by a long line of cases … that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement."

24 That passage was cited with approval by Wilson and Dawson JJ in *Dan v Barclays Australia Ltd*[5]. It accords with principle and with authority[6].

25 It is clear that the parties to the agreements of 31 May and 30 August 1991 did not intend that the agreement of 31 May should be wholly rescinded. That is apparent from a number of the provisions of the 30 August agreement. In particular, it was made clear by s 11 of the 30 August agreement, which has been

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4 (1957) 98 CLR 93 at 144.

5 (1983) 57 ALJR 442 at 448-449; 46 ALR 437 at 448.

6 eg *Morris v Baron and Company* [1918] AC 1; *British and Beningtons, Ld v N W Cachar Tea Co & Ors* [1923] AC 48; *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340.

quoted above. This is hardly surprising. The agreement of 31 May had worldwide operation, and covered many dispositions and acquisitions that were unaffected by the alterations proposed in relation to Australia. It is also to be observed that the deed of assignment executed by the respondent and Nicholas Products Pty Ltd on 30 August 1991 recited that it was entered into pursuant to the agreement of 31 May 1991, as amended. The manifest intention of the parties was not that the agreement of 31 May 1991 should be wholly rescinded and replaced by a new agreement, but that the rights and liabilities under, and the mode of performance of, the agreement, should be varied in certain respects.

26 Thirdly, there was some argument as to the appropriate categorisation of the manner in which the disposal and acquisition of Australian assets occurred. The purchase and sale agreement of 31 May 1991 did not effect a change in ownership, legal or beneficial, of the assets[7]. Indeed, the agreement contemplated that the disposal of the Australian assets might be to a company other than Roche and, in the events that occurred, that turned out to be a company that was not in existence on 31 May. Both the agreement of 31 May, and the amendment agreement of 30 August, contemplated that the assignment of assets, and the assumption of liabilities, involved in the transfer of so much of the Australian business as was to be taken over by Roche or a Roche subsidiary or affiliate, would be effected by separate deeds, to be delivered at closing, as in fact occurred.

27 Nicholas Products Pty Ltd was not a party either to the purchase and sale agreement of 31 May or to the amendment agreement of 30 August. Its agreement to be bound by the terms and conditions of the agreement of 31 May was a necessary condition of the capacity of Roche to assign to it its rights. By reason of the provisions of s 12.3 of the 31 May agreement, Roche itself was not relieved of its obligations by such assignment. In the absence of novation, the reference in s 12.3 to "assignment" of obligations is curious, but the result which the parties intended to achieve is reasonably clear.

28 The change in ownership of the Australian assets occurred on 30 August 1991. That was the date of their acquisition by Nicholas Products Pty Ltd. It was also the date of their disposal by the respondent.

29 Fourthly, it was argued on behalf of the respondent that the disposal could not have occurred under a contract made during the year ended 30 June 1991

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7 cf *Brown v Heffer* (1967) 116 CLR 344 at 349.

because the agreement of 31 May was subject to conditions which were not fulfilled until some time after 30 June 1991.

30 Section 9.1(c) of the purchase and sale agreement stipulated that the obligation of Roche to consummate the transactions contemplated in the agreement was subject to the fulfilment, prior to or at closing, of a number of conditions, which included the receipt of certain governmental approvals. Clearly, these were conditions precedent to performance of the contract. They were not conditions precedent to the formation or existence of the contract[8]. There was a contract in force on 31 May 1991. The central question is whether the disposal which occurred on 30 August 1991 was under that contract.

31 In order to examine that question it is necessary to turn to the relevant legislation.

The legislation

32 The relevant provisions of the Act are in Pt IIIA.

33 Under s 160ZO(1), where a net capital gain accrued to a taxpayer in respect of the year of income, the assessable income of the taxpayer of the year of income includes that net capital gain.

34 By virtue of s 160Z, a capital gain will be deemed to have accrued to a taxpayer during a year of income where an asset has been disposed of during the year of income if the consideration in respect of the disposal exceeds the indexed cost base to the taxpayer in respect of the asset.

35 This case is not concerned with the provisions which affect the calculation of a capital gain, or a net capital gain. It is the provisions as to timing which are material. They are, relevantly, ss 160M and 160U.

36 Section 160M, so far as presently relevant, provides:

> "160M(1) Subject to this Part, where a change has occurred in the ownership of an asset, the change shall be deemed, for the purposes of this Part, to have effected a disposal of the asset by the person who owned it immediately before the change and an acquisition of the asset by the person who owned it immediately after the change.

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8 cf *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 552.

…

160M(2) A reference in subsection (1) to a change in the ownership of an asset is a reference to a change that has occurred in any way, including any of the following ways:

(a) by the execution of an instrument;

(b) by the entering into of a transaction;

(c) by the transmission of the asset by operation of law;

(d) by the delivery of the asset;

(e) by the doing of any other act or thing;

(f) by the occurrence of any event.

…"

37 Both parties to the present appeal argued the case upon the basis that the relevant change in the ownership of assets occurred on 30 August 1991, by the deed of assignment of that date, and that what was effected was a disposal of the assets by the respondent and an acquisition of the assets by Nicholas Products Pty Ltd. The difference between the parties related to the operation of s 160U which, so far as relevant, provides:

"160U(1) Subject to the provisions of this Part other than this section, where an asset has been acquired or disposed of, the time of acquisition or disposal for the purposes of this Part shall be ascertained in accordance with this section.

…

160U(3) Where the asset was acquired or disposed of under a contract, the time of acquisition or disposal shall be taken to have been the time of the making of the contract.

160U(4) Where the asset was acquired or disposed of otherwise than under a contract, the time of acquisition or disposal shall be taken to have been the time when the change in the ownership of the asset that constituted or gave rise to the acquisition or disposal occurred.

…"

38 The present appeal is concerned with the time of disposal of assets. The time of acquisition will be an important matter in relation to the liability of Nicholas Products Pty Ltd to tax in the event of a disposal of the assets, or part of them, by that company, but it is not determinative of this case. It is to be noted that the section refers to "the time of acquisition or disposal", not the time of acquisition and disposal.

39 The appellant argued, and North J held, that the case is governed by s 160U(3), and that the time of the making of the relevant contract was 31 May 1991. The respondent argued, and the Full Court held, that the case is governed by s 160U(3), and that the time of the making of the relevant contract was 30 August 1991. Alternatively, the respondent argued that the case is governed by s 160U(4). On that basis, it is agreed that the relevant time would have been 30 August 1991.

40 The Full Court[9], before coming to the issue to be resolved, made the following observations as to the legislative scheme. There is no reason why the date of disposition and the date of acquisition referred to in s 160U are necessarily the same. The section refers to the time of acquisition or disposal. Other provisions make it clear that disposal and acquisition are not necessarily contemporaneous, and it is not difficult to think of cases where they may be different. In order for there to be a disposal under a contract for the purposes of s 160U(3) it is not necessary that the contract be unconditional or specifically enforceable. What is relevant is the time of the making of the contract, not the time when it became unconditional, or specifically enforceable. Nor is there any reason why an asset cannot be said to be disposed of under a contract even though the transferee of the asset was not a party to the contract.

Application of the legislation

41 Taking into account the later ratification of the signature by Mr Patten, on 31 May 1991 the respondent entered into a contract with Roche by which it was bound to transfer to Roche, on completion of the contract, the assets in question, in consideration for the payment of a sum of money and the assumption of certain obligations. The contract gave Roche the capacity, subject to certain conditions, (including the retention by Roche of its own liability under the contract), to assign its rights to a subsidiary.

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9 *Kiwi Brands Pty Ltd v Commissioner of Taxation* (1998) 90 FCR 64 at 72-74.

42 The words "under a contract", in s 160U(3), direct attention to the source of the obligation which was performed by the transfer of assets which constituted the relevant disposal[10]. From 31 May 1991, until completion on 30 August 1991, there was a contractual obligation upon the respondent to dispose of its assets to Roche, or to an entity of the kind referred to in s 12.3 of the purchase and sale agreement. The content of that obligation did not change. The price was varied, as were certain other terms and conditions of the sale, but the agreement of 31 May 1991 was the source of the obligation which the respondent discharged by performance on 30 August 1991.

43 The Full Court accepted that the respondent's assets were disposed of under a contract. Subject to one argument, which was advanced for the first time in this Court, that conclusion appears inevitable. The transfer of ownership of the assets in question was, as is usual in such commonplace disposals as conveyances of real estate, effected pursuant to a contractual obligation which the respondent had previously undertaken. The transferor was acting in performance of a pre-existing contract. Whether the same was true of the transferee is beside the point.

44 The new argument put by the respondent was to the effect that s 160U(3) can have no application to a case where there is more than one contract to which a disposal is potentially referable, and where there is no compelling reason to relate the disposal to one of those contracts rather than to another. Where s 160U(3) applies, it can only produce one result. The legislation does not countenance the possibility that there can be two different times of disposal. In a case where s 160U(3) cannot produce a single answer to the question as to the time of disposal, then s 160U(4) applies.

45 It is true that s 160U(3) assumes that, in a case to which it applies, there is a single time of disposal which can be established by reference to the contractual background to the change of ownership. Even so, the circumstance that, in a given case, there may be room for doubt about the correct conclusion does not make the task of reaching it impossible. If, in some case, it were impossible to relate a change of ownership to a contract in such a way as to produce a single time of disposal, then it may be necessary to apply s 160U(4). That is not this case. If it were, the practical operation of s 160U(3) would be seriously curtailed.

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10 cf *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249 per Mason CJ, Brennan, Deane and McHugh JJ.

46 The Full Court emphasised that the legislation operates in relation to particular dispositions and on the basis of the consideration in respect of each particular disposition[11]. Their Honours said: "In the present case the disposition is a disposition from the [respondent] to Nicholas Products; the consideration in respect of that disposition is US$62,461,000."[12] That disposition, for that consideration, they held was referable to the amendment agreement. They said[13]:

> "In the context of s 160U(3), the first time that there was a contractual obligation on the part of the [respondent] to transfer assets for a consideration of US$62,461,000 was in August 1991 and as a result of the Amending Agreement. The contract under which the disposition which brought into play the provisions of Part IIIA of the Act occurred was not the contract which was made in May, but the contract which was made in August and was brought into existence by the Amending Agreement. That contract was, in our view, the contract under which the disposition was made."

47 It appears that it was the variation in the consideration effected by the amendment agreement that was seen as being of particular significance. As was noted, Nicholas Products Pty Ltd was not a party to the amendment agreement, and although it was identified in a schedule to that agreement as the purchaser of the assets, that was done pursuant to a right given to Roche by s 12.3 of the agreement of 31 May 1991. Insofar as the identity of the disponee can be related to a contract anterior to the deed of assignment of 30 August 1991, there is less reason to relate it to the contract of 30 August, than to relate it to the contract of 31 May, pursuant to which Roche acted in assigning its rights to Nicholas Products Pty Ltd. Both the deed of assignment and the deed of assumption of liabilities and contracts of 30 August 1991 were expressed to be pursuant to the agreement of 31 May, as amended.

48 There was an additional reason advanced by the respondent in support of the Full Court's conclusion. It was that the assumption of obligations by Nicholas Products Pty Ltd, by the further deed of 30 August 1991, was an important aspect of the acquisition of the respondent's Australian business, and that was only effective by reason of the contractual operation of the deed into

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11 *Kiwi Brands Pty Ltd v Commissioner of Taxation* (1998) 90 FCR 64 at 72-73.

12 *Kiwi Brands Pty Ltd v Commissioner of Taxation* (1998) 90 FCR 64 at 73.

13 *Kiwi Brands Pty Ltd v Commissioner of Taxation* (1998) 90 FCR 64 at 78.

which Nicholas Products Pty Ltd entered on 30 August. However, that assumption of obligations was referable to s 12.3 of the agreement of 31 May, (the concluding words of that provision having continuing importance), and, as was noted, it was said to be pursuant to the agreement of 31 May, as amended.

49 Where there are two or more contracts which affect the rights and obligations of the parties to a disposal of assets, the identification of the contract under which the assets were disposed of, for the purpose of applying s 160U of the Act, requires a judgment as to which of the contracts is properly to be seen as the source of the obligation to effect the disposal. In the present case, that contract is the purchase and sale agreement of 31 May 1991.

Conclusion

50 The appellant's contention is correct. The appeal should be allowed with costs. The orders of the Full Court of the Federal Court should be set aside. In place thereof, it should be ordered that the appeal to that Court be dismissed with costs.

51 CALLINAN J. The question in this case is, upon what date for the purposes of the capital gains tax provisions of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"), did the respondent dispose of assets in Australia? There are only two possibilities, 31 May 1991, the date upon which Sara Lee Household & Body Care (Australia) Pty Ltd and others entered into a written agreement for the sale of various assets ("the businesses") in a number of countries ("the May agreement"), or 30 August 1991, the date upon which Sara Lee executed an agreement to vary the earlier one, ("the variation agreement").

52 It is convenient to refer to the reasons for judgment in the courts below in the context of the facts and the relevant provisions of the agreements.

53 Sara Lee and its subsidiaries carried on various businesses including the making and selling of medical and therapeutic substances and equipment in many countries of the world. There was goodwill associated with the businesses and the brand names controlled by Sara Lee. The Australian subsidiary was Nicholas Kiwi Pty Ltd ("NKA").

54 On 31 May 1991, by the May agreement, Sara Lee agreed to sell the businesses which I have described to Roche Holding Ltd ("Roche") of Switzerland. The named sellers were Sara Lee and twenty-four other corporations including NKA. The property which was to pass included assets of different kinds, for example, goodwill, machinery, intellectual property and shares in various companies. A recital to the May agreement stated that NKA "will be selling the Assets (as defined …) of the Health Care Group". "Health Care Group" was defined to mean, in effect, the business of manufacturing, marketing, selling and distributing products being carried on by NKA on 31 May 1991 or "as it [might] be changed in the ordinary course of business" until completion of the contract. The May agreement also made provision for the assumption by Roche of some of the liabilities of NKA and other subsidiaries of Sara Lee. Section 1.7 referred to the completion date of the contract:

> "The later of (i) July 31, 1991, or (ii) the fifth business day after the date when each of the conditions precedent specified in Sections 9.1 and 9.2 have been fulfilled (or waived by the party entitled to waive that condition)."

Section 2.4 of the May agreement defined the price payable:

> "(a) Amount
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> The purchase price payable by Buyer to Sellers for the Health Care Group shall be 597,681,000 US Dollars, subject to adjustment as provided in Section 2.6.

(b) Allocation

The Purchase Price shall be allocated among the Shares, the Assets and the Intangible Rights in accordance with Schedule 2.4(b) of the Disclosure Schedules."

55 "Assigned Contracts" were defined as contracts relating to the business of the Health Care Group. Section 2.8 of the May agreement required Sara Lee and the subsidiaries to assign and transfer their rights and obligations under these to the purchaser. The relevant contracts were listed in a schedule to the agreement.

56 Section 3.3 of the May agreement obliged the parties to co-operate and to do all such acts as might reasonably be required to give effect to its terms. The sellers were, by section 6.1 of the May agreement, bound to operate the business of the Health Care Group in the ordinary course pending closure.

57 Because the respondent places some store on the change that was made to the arrangements with respect to the employees of NKA I will set out a portion of section 8.1 of the May agreement which is concerned with these.

"As to the employees of Nicholas Kiwi Aus and Nicholas Kiwi Philippines employed in the conduct of the Health Care Business which are listed in Schedule 8.1(a), Buyer undertakes to offer to each of these employees employment at terms and conditions which are substantially comparable to and no less favorable in the aggregate than those currently applied to them by Nicholas Kiwi Aus and Nicholas Kiwi Philippines, as the case may be. Such offer has to be made either on the Completion Date or, in respect of the employees of Nicholas Kiwi Aus, upon termination of the distribution agreement for Australia referred to in Section 10.2, if any."

58 Article IX of the May agreement stated conditions precedent to the performance of the obligations of the parties. I need only refer to those which gave rise to substantive obligations. Section 9.1(c) contained a condition for the benefit of the buyer:

"The obligation of Buyer to consummate the transactions contemplated in this Agreement is subject to the fulfillment, prior to or at the Closing, of each of the following conditions (and or all of which may be waived by Buyer):

…

(c) the receipt of all foreign investment approvals in Australia and France and all antitrust approvals in France and the United Kingdom if required in connection with the transactions contemplated by this Agreement".

59 A like condition precedent to the performance of the obligations of the sellers was contained in section 9.2(c):

> "the receipt of all foreign investment approvals in Australia and France and all antitrust approvals in France and the United Kingdom if required in connection with the transactions contemplated by this Agreement".

60 It is common ground that the conditions precedent were not fulfilled until after 31 July 1991.

61 Provision was made for assignment by section 12.3:

> "This Agreement shall not be assigned by any party hereto without the prior written consent of the other parties; provided, however, that Buyer may assign any of its rights or obligations hereunder to one or more of its subsidiaries or affiliates without the prior written consent of Sellers; provided further, however, the assignee shall agree to be bound by the terms and conditions of this Agreement and that such assignment shall in no way limit or relieve the assignor of any of the assignor's obligations hereunder. This Agreement shall inure to the benefit of and be binding on and enforceable against the parties hereto and their respective successors and permitted assigns."

62 In Sched 2.4(b), "Allocation of Purchase Price", against the name of NKA appears the sum of $61,461,000. The dollars are United States dollars. The total price for the assets the subject of the May agreement was US$597,681,000. But that was not the full amount of the financial liabilities assumed by the purchaser. An acquisition summary of 29 August 1991 refers to a payment of $200,000,000 for a covenant not to compete and other sums on other accounts.

63 On 30 August 1991 the May agreement was amended by the variation agreement. The latter commenced with this paragraph:

> "THIS AMENDMENT is made this 30th day of August, 1991 between SARA LEE CORPORATION, a company organized and existing under the laws of the State of Maryland, United States of America ('SLC'), on behalf of itself and the other Sellers (as defined below), and ROCHE HOLDING LTD, a company organized and existing under the laws of Switzerland ('Buyer'), and amends the Purchase and Sale Agreement, dated May 31, 1991 (the 'Agreement'), among SLC, the other sellers named therein (collectively with SLC, 'Sellers') and Buyer with respect to the sale of the worldwide pharmaceutical and related health care business of SLC. Unless otherwise defined herein, capitalized terms used in this Agreement shall have the respective meanings ascribed to such terms in the Agreement."

64 The only recital was in these terms:

> "WHEREAS, the parties to the Agreement desire to amend, clarify and supplement the provisions of the Agreement."

65 Section 2(b) made different provision for the employees of NKA from those made by section 8.1 of the May agreement. The substance of the changes was that the buyer of the relevant business would not be obliged to make offers of employment to more than fourteen employees, and adjustments would be made between the parties in respect of redundancy payments which might become payable to other employees. Section 2(l) and Sched 6 of the variation agreement identified the employees whose names were to be deleted from Sched 8.1(a) of the May agreement.

66 Section 5(a) effected a reduction (disregarding other financial obligations assumed) in the total purchase price by US$296,000 a percentage of less than 1 per cent and cl 5(b) effected a consequential re-allocation of that total price. The re-allocation and change in price were presumably occasioned by a readjustment of assets between a New Zealand subsidiary and NKA. Sections 10(2) and (3) provided as follows:

> "(a) The recitals to the Agreement are hereby amended in the following manner:
>
> 2. Nicholas Kiwi NZ should be removed as a Seller of Intangible Rights from the second WHEREAS clause of page 5.
>
> 3. Nicholas Kiwi Aus should be added as a Seller of Intangible Rights to the second WHEREAS clause on page 5."

67 Section 11 of the variation agreement affirmed the May agreement. It was as follows:

> "Effect on Agreement. This Amendment to Purchase and Sale Agreement shall be deemed an amendment of the Agreement for purposes of Section 12.6 of the Agreement. Except as provided in this Amendment and in any other agreement executed by the parties on or after May 31, 1991, the Agreement remains in full force and effect."

68 I reproduce that part of the new allocation schedule that is relevant to the case:

ACTS AS CASHIER	**NET ASSETS OF**		**PRICE US$**	**PURCHASER**
Self	Nicholas Kiwi	Australia	62,461,000	Nicholas Products Pty Ltd (new company)

69 Nicholas Products Pty Ltd ("NP") had only been incorporated a few days before the making of the variation agreement. The varied allocation had the effect of increasing the amount receivable by NKA by US$1,000,000.

70 On the date of completion, 30 August 1991, Sara Lee handed to the purchasers a letter which contained the following:

> "In accordance with Section 12.3 of the Agreement, Buyer has assigned its rights and obligations under the Agreement to certain of its subsidiaries and affiliates as set forth in Schedule A hereto (the 'Assignees') and the Assignees have agreed to be bound by the terms and conditions of the Agreement."

71 Among the companies referred to in Sched A under the heading "Buyer" appears NP. Opposite its name under the heading "Seller & Items Purchased" are the words: "*Assets, Assumed Liabilities and Assigned Contracts from Nicholas Kiwi Pty Ltd*".

72 Other documents changed hands on 30 August 1991. One was a Deed of Assignment between the respondent and NP. It stated that:

> "Roche has assigned to the Buyer pursuant to Section 12.3 of the Agreement certain of its rights and obligations under the Agreement."

It then provided:

> "… in consideration of the sum of US$62,461,000 paid by the Buyer to the Seller pursuant to the terms of the Agreement at or before the execution and delivery hereof (the receipt and sufficiency of which is hereby acknowledged), subject to Section 10.6 of the Agreement, the Seller does hereby sell convey, assign, transfer and deliver to the Buyer, its successors and assigns forever, all of the Seller's right, title and interest in and to its Assets, the Intangible Rights … and the Assigned Contracts, to have and to hold such Assets, Intangible Rights and Assigned Contracts unto the Buyer and its successors and assigns, to and for its or their use forever.

> This instrument shall inure to the benefit of the Buyer and its successors and assigns and shall be binding upon the Seller and its successors and assigns, effective immediately upon its delivery to the Buyer.
>
> This deed of Assignment is delivered pursuant to the Agreement and it shall not alter, supersede, augment, abridge or affect any provision of the Agreement. In the event of any conflict between the terms of the Agreement and the terms hereof, the terms of the Agreement shall be controlling."

73 Another document executed by NP and the respondent was a deed of assumption of liabilities. It recited, inter alia, that the appellant had "concurrently herewith sold, conveyed, assigned, transferred and delivered to Roche certain Assets and Intangible Rights …", [and] the Buyer agreed to assume the liabilities as contemplated by the May agreement.

74 Finally a receipt was given to the purchasers by the sellers. It was dated 30 August 1991 and acknowledged that NKA, as a receiving company, had received US$62,461,000.

75 The respondent made a capital gain as a result of the sale of the Australian assets which the appellant brought to assessment in the year of income ending 30 June 1991. The appellant made the assessment upon the basis that on the proper construction of s 160U(3) of the Act, the date of disposal of the Australian assets was the date of the May agreement, 31 May 1991. It was the respondent's contention that the disposal did not occur until the date of the variation agreement.

76 At first instance, the Federal Court (North J) held that the contract under which the disposal of the assets of the Australian businesses was effected, was made, for the purposes of s 160U, on 31 May 1991. His Honour was of the view that the language of the section recognised that the time fixed in accordance with the section might not reflect the time at which the actual transfer of the actual assets occurred[14]. It had also been argued by the respondent that because it was common ground that the signing of the agreement by Mr Patten was not done with the authority of the appellant, the earliest occasion upon which the agreement could be regarded as being completed and enforceable was the date of the ratification of Mr Patten's execution of it by the Board of Directors on 20 August 1991. In rejecting the respondent's submission, North J[15] relied upon

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14 *Kiwi Brands Pty Ltd v Federal Commissioner of Taxation* (1997) 148 ALR 605 at 621.

15 (1997) 148 ALR 605 at 622.

Bolton Partners v Lambert[16] and *Keighley, Maxsted & Co v Durant*[17] and statements by Isaacs J in *Davison v Vickery's Motors Ltd (In Liq)*[18] in which it was held that ratification operated retrospectively to the original date of execution of a contract. Accordingly North J dismissed the appellant's appeals. (There were two appeals because the appellant amended the first assessment and the respondent challenged both the original and the amended assessment.)

77 The respondent appealed to the Full Federal Court (Hill, Finn and Sundberg JJ) who unanimously upheld the appeal[19].

78 The first question which the Full Court considered was whether the Australian assets had been disposed of under a contract. Their Honours held that they had[20]. In answer to the next question that the Full Court posed, whether the disposal had occurred under the May agreement or the variation agreement, the Court said that in the context of s 160U(3), the first time there was a contractual obligation on the part of the appellant to transfer assets for a consideration of US$62,461,000 was in August 1991, and then only as a result of the variation agreement.

79 It is against that decision that the appellant appeals to this Court.

80 It is the appellant's submission that the Full Court erred in two respects: by concluding that the variation agreement gave rise to a new contract; and, by focusing on the question when a particular provision of the agreement(s), that is the provision for the disposition of the Australian assets at the new price, was incorporated into the variation agreement.

81 There was no dispute, and the Full Court held that the variation agreement did not rescind the May agreement. Not only was this holding in accordance with a number of authorities[21] but it was also a reflection of the clear intention of

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16 (1889) 41 Ch D 295.

17 [1901] AC 240.

18 (1925) 37 CLR 1 at 19.

19 *Kiwi Brands Pty Ltd v Commissioner of Taxation* (1998) 90 FCR 64.

20 (1998) 90 FCR 64 at 75.

21 *Morris v Baron & Co* [1918] AC 1; *British and Beningtons Ld v NW Cachar Tea Co* [1923] AC 48; *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340; *BBC v Kelly-Phillips* [1998] 2 All ER 845; *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93; *Dan v Barclays*

(Footnote continues on next page)

the parties as expressed in cl 11 of the variation agreement which I have quoted and which affirmed the May agreement. There may be cases in which what is expressed to be a variation of an earlier agreement, as a matter of construction cannot be so regarded. However, this is not such a case.

82 It is important to place s 160U, which appears in Div 2 of Pt IIIA of the Act in context.

83 This was a transaction expressed in a foreign currency. Section 160K(5) provides that the Australian currency equivalent is to be calculated at the time of disposal of the assets. It should be noted that s 160K(6), a provision for the fixing of the time of the acquisition of an asset, focuses upon the actions or payments of the taxpayer in acquiring the asset and makes no reference to any disposition of it. On the other hand, s 160K(8) and s 160K(9) focus upon, and refer only to the disposition of an asset.

84 Division 2 is headed "Application" and the words "*Part applies in respect of disposals of assets*" appear before s 160L is set out in the Act. All of the sub-sections are concerned with the disposal of assets and not their acquisition.

85 Section 160M(1) provides as follows:

> "Subject to this Part, where a change has occurred in the ownership of an asset, the change shall be deemed, for the purposes of this Part, to have effected a disposal of the asset by the person who owned it immediately before the change and an acquisition of the asset by the person who owned it immediately after the change."

86 It can be seen that the sub-section refers separately to a disposal and an acquisition of an asset, although in terms the section does appear to contemplate one instantaneous change in ownership only.

87 Section 160M(1A) declares that a change in the legal ownership of an asset does not constitute a change in its ownership unless there is also a change in the beneficial ownership of the asset. Beneficial ownership may of course change without a change in legal ownership.

Australia Ltd (1983) 57 ALJR 442; 46 ALR 437; *Permanent Building Society (In Liq) v Wheeler* (1992) 10 WAR 109.

88 It is unnecessary in this case to identify and resolve the extent of any differences between Gibbs CJ and Murphy J on the one hand, in *Legione v Hateley*, and Mason and Deane JJ on the other. The latter had said there[22]:

> "In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance of the contract[23] …
>
> A competing view – one which has much to commend it – is that the purchaser's equitable interest under a contract for sale is commensurate, not with her ability to obtain specific performance in the strict or primary sense, but with her ability to protect her interest under the contract by injunction or otherwise [24]…
>
> However, for the purposes of this case we are prepared to accept the correctness of the statements in *Brown v Heffer*."

89 But there is no doubt that the rights of Roche and its subsidiaries included rights to protect their interests under the May agreement by injunction or otherwise, before 30 June 1991 notwithstanding that the conditions precedent to completion had not by then been satisfied. That this was so follows not only from cl 3.3 of the May agreement, the effect of which I have summarised but also from settled principle which holds that all parties to a contract are under a duty to co-operate in the doing of acts necessary for the performance by the parties of their fundamental obligations under the contract[25].

90 Section 160M(2) evinces an intention to cover all conceivable means of effecting a change in the ownership of an asset. It provides as follows:

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22 (1983) 152 CLR 406 at 446. See also *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 esp at 297.

23 *Brown v Heffer* (1967) 116 CLR 344 at 349.

24 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 546-549; *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84 at 96; *Hoysted v Federal Commissioner of Taxation* (1920) 27 CLR 400 at 423; *Pakenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386 at 396-399; Jordan, *Chapters on Equity*, 6th ed (1945) at 52, n (e).

25 *McKay v Dick* (1881) 6 Cas 251 at 263; *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.

"A reference in subsection (1) to a change in the ownership of an asset is a reference to a change that has occurred in any way, including any of the following ways:

(a) by the execution of an instrument;

(b) by the entering into of a transaction;

(c) by the transmission of the asset by operation of law;

(d) by the delivery of the asset;

(e) by the doing of any other act or other thing;

(f) by the occurrence of any event."

91 Section 160U is the section which is directly concerned with the fixing of the time of a disposal or an acquisition of an asset. Relevantly, it provides as follows:

"(1) Subject to the provisions of this Part other than this section, where an asset has been acquired or disposed of, the time of acquisition or disposal for the purposes of this Part shall be ascertained in accordance with this section.

(2) If the time of acquisition or disposal as ascertained under a subsection of this section is different from the time of acquisition or disposal as ascertained under a subsequent subsection of this section, the time of acquisition or disposal shall be taken to have been the time of acquisition or disposal as ascertained under that subsequent subsection.

(3) Where the asset was acquired or disposed of under a contract, the time of acquisition or disposal shall be taken to have been the time of the making of the contract."

92 It should be noted that the relevant sub-sections refer disjunctively to a disposition or an acquisition of an asset. It may also be noted that s 160U(3) does not speak in terms of a change of ownership in an asset but of the acquiring *or* disposing of an asset *under a contract*.

93 Finally, reference should be made to s 160ZD, sub-s (1) of which I set out:

"Subject to this Part, for the purposes of this Part, the consideration in respect of a disposal of an asset is:

(a) if the taxpayer has received or is entitled to receive an amount or amounts of money as a result of or in respect of the disposal – that amount or the sum of those amounts;

(b) if the taxpayer has received or is entitled to receive property other than money as a result of or in respect of the disposal – the market value of that property at the time of the disposal; or

(c) if the taxpayer has received or is entitled to receive both an amount or amounts of money and property other than money as a result of or in respect of the disposal – the sum of that amount or those amounts and the market value of that property at the time of the disposal."

94 The sub-section, which is concerned with the amount of consideration in respect of a disposal of an asset does not require for its application only that the taxpayer has actually received the consideration but may apply if the taxpayer is *entitled* to receive it.

95 The importance of distinguishing between a variation that operates to rescind an existing contract and substitute a new one and a variation that was intended to amend an existing agreement whilst leaving the existing contract on foot first arose in cases dealing with parol variations of contracts required to be in writing. But as the appellant submits, there is no reason why those cases should not be regarded as being of general application[26].

96 As I have pointed out, the variation agreement affirmed the May agreement. The recital to the former stated that the parties desired only to amend, clarify, and supplement the provisions of the May agreement. In the overall scale of the transaction, however viewed, the changes were not large ones. The intention of the parties was only to amend the May agreement almost all of which was left on foot.

97 On 31 May 1991 on any view the respondent executed an instrument and entered into a transaction as contemplated by pars (a) and (b) respectively of s 160M(2) of the Act.

98 I do not take the language of the Act to require that in all cases and for all purposes there must be a simultaneous, or immediately consecutive disposition and acquisition of an asset. The Act is drawn up in such a way, as the sections to

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26 *Dan v Barclays*; *Broken Hill Pty Co Ltd v Commissioner of Taxation* [1999] FCA 1628; *Travelers Insurance Co v Workmen's Compensation Appeals Board* 434 P 2d 992 (1967); *International Business Lists Inc v American Telephone and Telegraph Co* 147 F 3d 636 (1998).

which I have referred indicate, as to deem an event or sequence of events a disposition and some other event or sequence of events an acquisition.

99 The respondent was bound to do all such acts and things as it reasonably could to carry into effect the May agreement. Its obligation in that regard would have been enforceable at least by mandatory injunction. Its and Roche's obligations (save as to a minor adjustment to the allocation of the sale price) remained unchanged. It had, therefore in my view, disposed of all of the relevant assets under a contract within the meaning of s 160U(3) of the Act.

100 I am also of the opinion that *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* [27] has application to this case. There the plaintiff wished to pursue an action in the Supreme Court of New South Wales. To do so it needed to show that a contract had been concluded between the parties in that State in circumstances in which the original contract had been concluded in Victoria and had been varied by subsequent correspondence originating in New South Wales. Dixon CJ and Fullagar J dealt with the plaintiff's contention that a new contract had been made in New South Wales in this way[28]:

> "But what is the position where a contract is concluded in one place and subsequently varied by agreement in another place? There is only one contract, and one would think it clear that that contract must, if it ever becomes material to inquire where it was made, be regarded as made at the place where it was originally concluded. The variation affects the content of the obligation but not the obligation itself. The place where the parties assumed that obligation, and became bound to one another, is the place where their contract was really made."

101 There is no reason why their Honours' statement of principle should not apply to the date of the making of the contract in this case as well as to the place of the making of a contract.

102 If attention be directed, as I think it should be, to the disposition of the assets rather than their acquisition then it does not matter that the particular transferee did not come into existence until after 31 May 1991. But in any event, that is, in a sense an irrelevant consideration anyway. Section 12.3 of the May agreement, although contemplating the possibility of an assignment of rights or obligations under the agreement to some other legal personality, operated at all times to hold the respondent bound to the terms of the May agreement.

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27 (1957) 98 CLR 93.

28 (1957) 98 CLR 93 at 112.

103 It may be, as I have said, that in some circumstances a variation may have the effect of rescinding an original contract and creating a new one. It is not without relevance however that an absolute principle, that any variation, however minor, should be regarded as creating a fresh agreement, would provide virtually unlimited scope for the manipulation of the date of disposal of assets for the purposes of assessment of capital gains tax.

104 True it may be that the first time that there was a contractual obligation on the part of the respondent to transfer assets for a consideration of US$62,461,000 was in August 1991 as a result of the variation agreement, but at all times there was a clear contractual obligation to transfer them for US$1,000,000 less than that amount by virtue of section 12.3 of the May agreement.

105 In summary therefore, the disposition in this case must be taken to have occurred on the making of the May agreement on the application of the principle preferred in *Tallerman* and by reason of the language of s 160K(5), s 160M(1), (1A) and (2), s 160U(1) and (2) and particularly s 160U(3) of the Act. On that date the respondent executed an agreement and entered into a transaction for the disposal of assets and became entitled (subject to the fulfilment of conditions precedent) to receive consideration which included a component of capital gain. The contract, although subsequently varied (albeit not very significantly in the overall scale of things) was made on 31 May 1991 and the relevant assets were disposed of under it on that date.

106 The respondent filed a notice of contention. For the most part I have dealt with the points that it raised, in discussing the appellant's grounds of appeal. The respondent points out that the variation agreement was an agreement between Roche and Sara Lee acting for various sellers including the respondent and on its own behalf. NP was not a party to this variation. But the variation agreement in no way altered the obligations of the respondent to sell and convey the Australian assets pursuant to section 2.2 and it did not impose any obligations directly upon NP. The obligation to dispose remained unchanged.

107 The Full Court was correct to the extent that it concluded as follows[29]:

> "The Deeds of Assignment and Assumption of liabilities and related documents were but the working out of the contractual obligations of the parties provided for by the terms of the contractual relationship between them. Although the drafting of the Deed of Assignment is far from felicitous using both the expression 'sell' as well as 'assign' it does not sound in contract. It is the assignment for which the contractual obligations themselves provided."

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29 *Kiwi Brands Pty Ltd v Commissioner of Taxation* (1998) 90 FCR 64 at 75.

108 The last matter which needs to be considered is the submission of the respondent that there was no agreement until Mr Patten's execution of the May agreement was ratified by the Board of Directors on 20 August 1991.

109 The Full Court did not need to deal with this argument as their Honours formed the view that the respondent should succeed on its argument that the relevant date was the date of the variation agreement. On this issue North J at first instance was right to apply the statement of Lord Macnaghten in *Keighley, Maxsted & Co v Durant* [30]:

> "And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract."

110 Except to the extent that the Act deems or provides otherwise, doctrines of general contractual law should be taken to apply to contracts when they are mentioned in the Act.

111 I would allow the appeal with costs and order that the respondent pay the appellant's costs in the Federal Court and the Full Federal Court.

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30 [1901] AC 240 at 247. See also *Bolton Partners v Lambert* (1889) 41 Ch D 295 at 307-308 per Cotton LJ; *Davison v Vickery's Motors Ltd (In Liq)* (1925) 37 CLR 1 at 19 per Isaacs J.