

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No S652/2007

W.R. CARPENTER HOLDINGS PTY LIMITED APPELLANT

AND

COMMISSIONER OF TAXATION RESPONDENT

Matter No S653/2007

W.R. CARPENTER AUSTRALIA PTY LIMITED APPELLANT

AND

COMMISSIONER OF TAXATION RESPONDENT

W.R. Carpenter Holdings Pty Limited v Commissioner of Taxation

W.R. Carpenter Australia Pty Limited v Commissioner of Taxation

[2008] HCA 33

31 July 2008

S652/2007 & S653/2007

ORDER

1. *In matter S652/2007, the record in this Court be amended to show W.R. Carpenter Holdings Pty Limited alone as appellant.*
2. *In matter S653/2007, the record in this Court be amended to show W.R. Carpenter Australia Pty Limited alone as appellant.*
3. *In each matter, appeal dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

J W Durack SC with J H Momsen and R L Seiden for the appellants (instructed by Becwell Legal Services Pty Limited)

A Robertson SC with J W de Wijn QC and S H Steward for the respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

W.R. Carpenter Holdings Pty Limited v Commissioner of Taxation W.R. Carpenter Australia Pty Limited v Commissioner of Taxation

Income tax – International agreements – Dealings between parties not at "arm's length" – *Income Tax Assessment Act* 1936 (Cth), s 136AD(1) deemed consideration equal to "arm's length consideration" to be received or receivable by taxpayer in certain circumstances if respondent Commissioner determined sub-section should apply – Commissioner determined s 136AD(1) should apply to appellant taxpayers and included "deemed" interest in assessable income – Whether Commissioner obliged to consider fairness and reasonableness to taxpayer and taxpayer purpose or motive when making determination – Relevance of Constitution to statutory construction where tax liability dependent on conclusion of Commissioner respecting particular circumstance or state of affairs.

Income tax – Appeals – Pt IVC of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act") – Appellants appealed to Federal Court under Pt IVC alleging assessments excessive – Proper issues for determination in Pt IVC proceedings where application of s 136AD(1) disputed.

Practice – Particulars – Pt IVC of the Administration Act – Appellants sought particulars of matters taken into account by Commissioner – Proper role of particulars in Pt IVC proceedings – Whether appellants entitled to particulars.

Words and phrases – "arm's length consideration", "excessive", "international agreement", "profit shifting motive", "substantive liability", "tax avoidance purpose".

Income Tax Assessment Act 1936 (Cth), ss 136AC, 136AD, 136AF.
Taxation Administration Act 1953 (Cth), s 14ZZO.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND
KIEFEL JJ. These appeals from the Full Court of the Federal Court of Australia
(Heerey, Stone and Edmonds JJ)¹, dismissing appeals brought by leave from an
interlocutory decision of Lindgren J², were heard together. For the reasons which
follow, we would dismiss the appeals.

The assessments

2 The appellants are related corporations and members of the Griffin Group
of companies ("the Group"). On 29 June 2004, the respondent ("the
Commissioner") issued notices of assessment of income tax to seven members of
the Group in respect of years of income within the period 1986-2002. The issue
of the assessments followed the conduct by the Commissioner of an audit of
members of the Group.

3 There are pending in the Administrative Appeals Tribunal references by
Group members of 42 objection decisions by the Commissioner. The litigation
which has reached the Court arises from objections by the appellants to two other
assessments. Each appellant instituted a proceeding in the Federal Court of
Australia by way of "appeal" pursuant to Pt IVC of the *Taxation Administration
Act* 1953 (Cth) ("the Administration Act"). These appeals are still pending in the
Federal Court.

4 The appellant in the first appeal to this Court ("Holdings") seeks to
establish in its pending appeal to the Federal Court the excessiveness of the
assessment in respect of the year of income ended 30 June 1987. For the
appellant in the second appeal ("Carpenter Australia") the assessment is for the
year of income ended 30 June 1993. Both appellants are incorporated in
Australia and are resident in Australia for the purposes of the *Income Tax
Assessment Act* 1936 (Cth) ("the Act").

5 Section 14ZZO appears in Pt IVC of the Administration Act and provides
that the appellant has the burden of proving that the assessment in question is

1 *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2007)
161 FCR 1.

2 *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2006) 234 ALR 451.

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

2.

"excessive" (par (b)(i)). But, as Gyles J pointed out in *Syngenta Crop Protection Pty Ltd v Federal Commissioner of Taxation*³, in discharging that burden the appellant is not limited to grounds of judicial review for jurisdictional error and in an "appeal" under Pt IVC disputed matters of fact may fall for decision by the Federal Court.

6 The selection of the term "excessive" in a provision which preceded the enactment of s 14ZZO (namely s 190(b) of the Act in its original form) was said by Dixon CJ, McTiernan and Webb JJ in *McAndrew v Federal Commissioner of Taxation*⁴ to be "perhaps not a good choice", but their Honours emphasised that "'excessive' relates to the amount of the substantive liability". The adjective "substantive" is used in this field of discourse to contrast those provisions of the Act which relate to what is characterised as the procedure or mechanism of assessment. An error or slip by the Commissioner in following that procedure or in the operation of that mechanism does not necessarily produce any error in the amount of the substantive liability of the taxpayer, a point made by Brennan J in *Federal Commissioner of Taxation v Dalco*⁵.

7 What is at stake in the Pt IVC appeals by the appellants are the amounts of income tax otherwise due and payable under s 204 of the Act and s 255-5 of the Administration Act as debts due to the Commonwealth and payable to the Commissioner. The phrase "substantive liability" which appears in the case law does not appear in the statutory provisions, but it is to be understood as epexegetical or explanatory of them. It is with this in mind that the issues for determination in the Pt IVC appeals are to be seen.

8 The growing complexity of the federal revenue law is exemplified by provisions of the Act which stipulate, as a criterion for inclusion of a particular item in the taxable income or for allowance of a deduction, a conclusion by the Commissioner respecting a particular circumstance or state of affairs.

3 (2005) 61 ATR 186 at 189, 190-191.

4 (1956) 98 CLR 263 at 271; [1956] HCA 62.

5 (1990) 168 CLR 614 at 623; [1990] HCA 3.

3.

9 In the making of the assessments in issue in this litigation, an essential step in each instance was the determination by the Commissioner that a particular provision of the Act should apply to the taxpayer. Provisions of this nature are to be construed in the light of the decisions in *Giris Pty Ltd v Federal Commissioner of Taxation*⁶, *MacCormick v Federal Commissioner of Taxation*⁷ and *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd*⁸. The validity of the laws under challenge in those cases was upheld. But in reaching that conclusion the Court espoused several general propositions. First, for an impost to satisfy the description of taxation in s 51(ii) of the Constitution it must be possible to distinguish it from an arbitrary exaction. Secondly, it must be possible to point to the criteria by which the Parliament imposes liability to pay the tax; but this does not deny that the incidence of a tax may be made dependent upon the formation of an opinion by the Commissioner. Thirdly, the application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny to the taxpayer "all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case"⁹.

10 References, such as that by Mason and Wilson JJ in the earlier decision of *F J Bloemen Pty Ltd v Federal Commissioner of Taxation*¹⁰, to the protection to the taxpayer afforded by what is now Pt IVC, by enabling the taxpayer to contest, within the framework of the taxpayer's objection, substantive liability to an amount of tax, are strengthened if read with an appreciation of the constitutional underpinning of Pt IVC. But where the formation of an opinion by the Commissioner is a criterion of liability, the area of the authority of the Commissioner is "guided and controlled by the policy and purpose of the

6 (1969) 119 CLR 365; [1969] HCA 5.

7 (1984) 158 CLR 622 at 639-641; [1984] HCA 20.

8 (1985) 158 CLR 678 at 687-688; [1985] HCA 36.

9 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 640-641 per Gibbs CJ, Wilson, Deane and Dawson JJ quoting Kitto J in *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 378-379.

10 (1981) 147 CLR 360 at 375; [1981] HCA 27.

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

4.

enactment"¹¹ and the exercise of that authority is examinable in the way explained by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*¹².

The motions for particulars

11 By motions filed in the Federal Court on 19 May 2006 each appellant sought an order that the Commissioner provide particulars of the matters taken into account in "determinations" made by the Commissioner on 25 June 2004 to the effect that s 136AD(1) of the Act, or alternatively s 136AD(2), should apply to derivation by the appellant of amounts of deemed or imputed interest.

12 The motions were dismissed by Lindgren J on 20 September 2006¹³ and appeals to the Full Court were dismissed on 11 July 2007.

13 Lindgren J considered that while the Federal Court Rules ("the Rules") make no applicable provision for the giving of particulars in Pt IVC proceedings, the Federal Court has an inherent power to order particulars in such cases¹⁴.

14 Speaking at a time when the relevant onus of proof provision was found in s 190(b) of the Act, Jacobs J remarked in *Bailey v Federal Commissioner of Taxation*¹⁵ that:

"A court has inherent power to order particulars. It is far more usual to order particulars of an allegation or claim which the party advancing it bears the burden of proving than particulars of a matter which

11 *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 687 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

12 (1949) 78 CLR 353 at 360; [1949] HCA 26.

13 (2006) 234 ALR 451.

14 (2006) 234 ALR 451 at 459. See, further, as to the implied powers of a federal court *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [25]-[26], 268-269 [104]-[108]; [2000] HCA 17.

15 (1977) 136 CLR 214 at 221; [1977] HCA 11.

5.

may be alleged without undertaking the burden of its proof; but this is so because the latter case is comparatively rare. The present is such a case because of the operation of s 190(b). But rules or practices as to particulars must be sufficiently flexible to allow all parties to an action or matter to meet with necessary evidence and without delay to court processes questions which may be raised at the hearing. Their purpose is to concentrate and define the issues of fact and to prevent surprise and consequent delay."

His Honour then added remarks which bear repetition and invite application in Pt IVC litigation¹⁶:

"At the same time it must be borne in mind that particulars do not constitute a pleading and do not ordinarily define issues of law. They must tend to advance the clear and speedy determination of all the questions which fall to [be] determined. They are not a net in which the ready and comprehensive determination of the ultimate issue can become enmeshed and delayed."

15 Notwithstanding the burden placed by s 14ZZO upon the appellants of establishing in the Federal Court that the assessments were excessive, O 52B r 5 of the Rules had obliged the Commissioner to go first by filing "a statement outlining succinctly the Commissioner's contentions and the facts and issues in the appeal as the Commissioner perceives them" ("the Commissioner's Statement"). Lindgren J observed that this requirement was introduced in part "for a practical reason", namely "that the court should know, at the earliest time practicable, the nature of the real issues in a tax appeal"¹⁷. In accordance with the usual practice in the Federal Court, the appellants subsequently filed their statements of their contentions and of the facts and issues in the appeals ("the Appellants' Statements").

16 What is particularly important, for an understanding of the issues that arose on the motions of the appellants, is the following passage in the reasons of Lindgren J¹⁸:

16 (1977) 136 CLR 214 at 221.

17 (2006) 234 ALR 451 at 459.

18 (2006) 234 ALR 451 at 460.

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

6.

"The question is whether the [C]ommissioner must provide particulars, not of something on which he relies, but with a view to equipping the taxpayers with information on the basis of which they may be able to bring down the determinations and thereby establish that the assessments are excessive. This would be an unusual role for particulars, akin to discovery or interrogatories in relation to an issue raised by the party seeking such procedural aid. (It is asserted by the [C]ommissioner in submissions that the taxpayers have, in substance, already had discovery of the documents that were before the [C]ommissioner, pursuant to the Freedom of Information Act 1982 (Cth).)"

17 The reference by the primary judge to the apparent utilisation by the appellants of particulars for purposes akin to those of discovery or interrogatories should be noted. The question whether this could be an available or proper use of the implied power of the Federal Court to order particulars need not be resolved here. This is because even if discovery or interrogatories had been available to the appellants, those procedures would have been attended with a significant limitation. That limitation (expressed with respect to the administration of interrogatories) was explained by Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ in *Meth v Norbert Steinhardt & Son Ltd*¹⁹. The Court observed:

"The objection that an interrogatory is fishing may be good where it is directed to some state of circumstances which may or may not have occurred and may or may not provide a case which otherwise the party was unable to advance."

The transactions

18 Something now should be said to indicate the general nature of the transactions which are in issue in the Pt IVC appeals against the assessments issued to Holdings and Carpenter Australia. The situation sufficiently appears from the following passage in the reasons of the primary judge²⁰:

19 (1959) 33 ALJR 78 at 81.

20 (2006) 234 ALR 451 at 452.

7.

"In the case of the 1987 assessment, the subject of the [Holdings] proceeding, that transaction has been called the 'CHIL Transaction'. The CHIL transaction was a transaction between [Holdings] and Carpenter Holdings International Ltd (CHIL), a [G]roup company incorporated in Cyprus and a non-resident of Australia. Briefly, [Holdings] sold to CHIL shares in certain companies in the [G]roup. The sale price was approximately \$129m, of which approximately \$79m was to be paid at the end of 15 years, no interest being payable on that sum. The [C]ommissioner assessed [Holdings] on an amount of \$17,897,644 for 'deemed interest' or 'imputed interest' in the year of income ended 30 June 1987 (\$167,290,826 imputed interest over all years) in respect of the CHIL transaction, as a result of the application of Div 13 of [the Act].

The 1993 assessment to [Carpenter Australia] relates to what has been called 'Loan Agreement #13' or 'Loan 13'. Loan Agreement #13 involved the provision by [Carpenter Australia] to a [G]roup company incorporated in the United States of America and a non-resident of Australia, of loans and 'guarantee fees', on which also no interest was charged, and which were written off by [Carpenter Australia] in the 1993 and 1994 years. Under Div 13, the [C]ommissioner assessed [Carpenter Australia] on an amount of \$986,180 for imputed interest in respect of the year of income ended 30 June 1993 (\$4,762,981 imputed interest over all relevant years, being 1989-94)."

Division 13 of Pt III of the Act

19 Division 13 (ss 136AA-136AG) is headed "International agreements and determination of source of certain income" and was introduced by the *Income Tax Assessment Amendment Act 1982* (Cth) ("the 1982 Act").

20 The 1982 Act repealed s 136 which had been in the statute since 1936 and had provided:

"Where any business carried on in Australia—

- (a) is controlled principally by non-residents;
- (b) is carried on by a company a majority of the shares in which is held by or on behalf of non-residents; or

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

8.

- (c) is carried on by a company which holds or on behalf of which other persons hold a majority of the shares in a non-resident company,

and it appears to the Commissioner that the business produces either no taxable income or less than the amount of taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall, notwithstanding any other provision of this Act, be liable to pay income tax on a taxable income of such amount of the total receipts (whether cash or credit) of the business as the Commissioner determines."

21 In 1980 this Court decided in *Federal Commissioner of Taxation v Commonwealth Aluminium Corporation Ltd*²¹ that the circumstance that control at a general meeting of the taxpayer rested with the shareholding of non-resident companies did not mean that they controlled the business of the taxpayer so as to attract the operation of s 136. The new Div 13 fixes not upon questions of corporate control or ownership, but upon an absence of arm's length dealings by parties to an "international agreement".

22 Section 136AC deals as follows with "[i]nternational agreements":

"For the purposes of this Division, an agreement is an international agreement if—

- (a) a non-resident supplied or acquired property under the agreement otherwise than in connection with a business carried on in Australia by the non-resident at or through a permanent establishment of the non-resident in Australia; or
- (b) a resident carrying on a business outside Australia supplied or acquired property under the agreement, being property supplied or acquired in connection with that business."²²

21 (1980) 143 CLR 646; [1980] HCA 28.

22 References to the provisions of Div 13 in these reasons are to the provisions as in force at the relevant income years. An additional category of "international agreement" was added to s 136AC by the *Petroleum (Timor Sea Treaty) (Consequential Amendments) Act* 2003 (Cth). See now s 136AC(c).

9.

23 In certain circumstances and "for all purposes of the application of [the Act] in relation to the taxpayer", s 136AD(1) deems to be the consideration received or receivable by the taxpayer that consideration which is "equal to the arm's length consideration". The "purposes of [the Act]" must include the general assessment provision in s 166. Section 136AD(1) reads:

"Where—

- (a) a taxpayer has supplied property under an international agreement;
- (b) the Commissioner, having regard to any connection between any 2 or more of the parties to the agreement or to any other relevant circumstances, is satisfied that the parties to the agreement, or any 2 or more of those parties, were not dealing at arm's length with each other in relation to the supply;
- (c) consideration was received or receivable by the taxpayer in respect of the supply but the amount of that consideration was less than the arm's length consideration in respect of the supply; and
- (d) *the Commissioner determines that this sub-section should apply in relation to the taxpayer in relation to the supply,*

then, for all purposes of the application of this Act in relation to the taxpayer, consideration equal to the arm's length consideration in respect of the supply shall be deemed to be the consideration received or receivable by the taxpayer in respect of the supply." (emphasis added)

24 Section 136AD(2) is engaged where no consideration (not merely the inadequate consideration identified in par (c) of s 136AD(1)) was received or receivable by the taxpayer. The Commissioner relied in the alternative upon s 136AD(2), but it is sufficient for the purposes of the arguments on these appeals to focus upon the construction of s 136AD(1).

25 It should be added that s 136AD(4) deems the arm's length consideration to be such amount as the Commissioner determines where, for any reason, including the insufficiency of information available to the Commissioner, the ascertainment by the Commissioner of the arm's length consideration is not

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

10.

possible or practicable²³. The phrase "the arm's length consideration" is explained in par (c) of s 136AA(3) in terms which identify what might reasonably be expected to have been received, under an agreement between independent parties dealing at arm's length.

26 It may be accepted that circumstances can arise where s 136AD operates to produce the inclusion of amounts in the assessable income of the relevant taxpayer for a year of income or the disallowance of deductions even in cases where, in the opinion of the Commissioner, "it is fair and reasonable" that the amount not be included or the deduction be allowed in that year of income. In those circumstances, s 136AF may be engaged. Section 136AF(1) empowers the Commissioner to make a determination respecting the whole or part of the sum in question and then requires the taking of such action as the Commissioner considers necessary to give effect to it. Where "at any time" a taxpayer considers that the Commissioner ought to make a determination under s 136AF(1), the taxpayer may request the Commissioner to do so (s 136AF(4)), and to the decision of the Commissioner the taxpayer may object in the manner provided in Pt IVC of the Administration Act (s 136AF(6))²⁴.

27 The provision in s 136AF for the making of consequential adjustments to assessable income and allowable deductions may operate to afford relief against asperities in the application of s 136AD and the two sections should be read together in any examination of the subject matter, scope and purpose of Div 13. Account also should be taken of special provision made elsewhere in the Act for amendment of assessments for the purpose of giving effect to s 136AF. These amendments may be made "at any time" (s 170(10)).

The appellants' submissions

28 The appellants' submissions are to be approached with an appreciation that, in the absence of any determination by the Commissioner under par (d) of

23 There is no live issue in this Court respecting the application made by the Commissioner of s 136AD(4).

24 Prior to the introduction of Pt IVC in 1991, s 136AF(6) and (7) provided for objection and review in accordance with the (then in force) Div 2 of Pt V of the Act.

s 136AD(1), the sub-section has no operation and does not enter into the exercise of the general power of assessment under s 166 of the Act. It may be accepted that, at least, the Commissioner may decline to act because no advantages to the revenue appear to flow from the making of a determination. There is no occasion here to consider whether the Commissioner is constrained from failing to make a determination in other cases or to decide the range of considerations that might lead the Commissioner not to make a determination in a particular case. We are concerned with matters the Commissioner is obliged to take into account.

29 Here the Commissioner did act and made the two determinations in question. The appellants indicate in the Appellants' Statements that they seek particulars "to confirm [their] understanding" of various specified matters which the Commissioner "did not consider" in making the determinations. Several points may be made immediately.

30 First, in a number of respects the appellants are engaging here in fishing in the sense identified in the passage from *Meth* set out earlier in these reasons. The appellants, as suggested by the terms of the Appellants' Statements, are seeking to locate some state of affairs which may provide them with an issue to be pursued in the Pt IVC appeals. Secondly, to a significant degree the appellants appear to be concerned with eliciting the understanding of the Commissioner of factual aspects of the CHIL Transaction and Loan Agreement #13. However, the opinion of the Commissioner respecting these objective matters can be no evidence of the facts, which exist or do not exist irrespective of the attitude of the Commissioner which appears in the Commissioner's Statement²⁵; factual disputes are for resolution by the Federal Court on the hearing of the appeals and the burden will rest upon the appellants who are, after all, closer to the facts than the Commissioner.

31 Thirdly, something should be said respecting the scope of par (d) of s 136AD(1). The words used are:

"the Commissioner determines that this sub-section should apply in relation to the taxpayer in relation to the supply".

25 cf *Jackson v Federal Commissioner of Taxation* (1989) 87 ALR 461 at 471; *Syngenta Crop Protection Pty Ltd v Federal Commissioner of Taxation* (2005) 61 ATR 186 at 191.

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

12.

In oral submissions in this Court, the Commissioner correctly submitted that in the construction of par (d) the use of the term "discretion" was apt to distract from the task of identification of the area of the power conferred upon the Commissioner. There must be sufficient warrant in the text of Div 13, its subject matter, scope and purpose, for action by the Commissioner under par (d) upon a particular consideration²⁶. The particular considerations upon which the appellants rely, fairness and reasonableness to them, and absence of "a tax avoidance purpose" and of "a profit shifting motive", are not warranted in the sense just described. These are not considerations which, in the sense explained in *Avon Downs*²⁷, should have affected the making of the determinations by the Commissioner under par (d). There is no sufficient warrant in the text of Div 13, its subject matter, scope and purpose, to conclude that the Commissioner was obliged to consider any one or more of the three matters relied on by the appellants (fairness and reasonableness to them in the application of the sub-section, absence of "a tax avoidance purpose", and absence of "a profit shifting motive"). It follows that those matters cannot present issues for the appeals and particulars would be otiose.

32 Something more must be said about each of the matters that has been identified: fairness and reasonableness, "tax avoidance purpose" and "profit shifting motive".

33 The appellants are concerned with such matters as the lapse of time between the years of income in question and the taking of action in 2004 on the audit, and the commercial background to the transactions in question. In broad terms, these concerns may be said to be with the fairness and reasonableness to the appellants in the application of s 136AD(1).

34 Whether it is fair and reasonable that the whole or part of an amount should be, or should remain, included in the assessable income of a taxpayer for the year of income, by reason of the application of s 136AD, falls for decision under s 136AF. There the taxpayer may seek a favourable determination "at any time" and the provisions of Pt IVC could then be engaged by the dissatisfied

26 See *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21.

27 (1949) 78 CLR 353 at 360.

taxpayer. These detailed provisions indicate that questions of fairness and reasonableness do not fall for consideration in the making of a determination under par (d) of s 136AD(1) and do not present issues for determination in the present appeals under Pt IVC.

35 There remains the proposition put in the Appellants' Statements that in making a determination under par (d) of s 136AD(1), the Commissioner was obliged to consider whether the transactions had "a tax avoidance purpose" and "a profit shifting motive".

36 The appellants seek to draw some comfort from the circumstance that what became Div 13 was first proposed in Parliament in the second reading speech to the Bill which became the *Income Tax Laws Amendment Act (No 2) 1981* (Cth). That statute inserted Pt IVA (ss 177A-177G) which is headed "Schemes to reduce income tax". It is true that the Treasurer described to the Parliament the proposed Div 13 as a further "anti-avoidance" measure which was "complementary" to Pt IVA²⁸. However, the Treasurer also said on that occasion²⁹:

"There is also the point that, damaging as they are to the Australian revenue, international transfer pricing arrangements may be entered into for a complex mixture of tax and other reasons. The fact, if it is one, that tax saving is not a key purpose of an arrangement or transaction is, however, no reason why we as a nation should not be in a position to counteract any potential losses of Australian tax inherent in it. Other major countries have in recent times acted against the growing use of international arrangements that have a tax avoidance purpose or effect, especially those involving transfer pricing. Methods adopted by tax authorities to reallocate profits on a more appropriate basis than pricing arrangements throw up are usually based on the internationally accepted 'arm's length' principle, and this will form the foundation of our proposed new measures."

28 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 1981 at 2686.

29 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 1981 at 2686.

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

14.

37 With that background in mind, it is unsurprising that the criteria spelled out in pars (a), (b) and (c) of s 136AD(1) do not include any requirement of a profit shifting motive or tax avoidance purpose. To have included such criteria would have burdened the operation of what the Treasurer had identified as the internationally accepted "arm's length" principle which was the foundation of Div 13. Paragraph (d) of s 136AD(1) does not introduce under cover of general words a consideration which would be at odds with the scope and purpose of Div 13.

38 What on the applications for particulars the primary judge called "the real issues" on the Pt IVC appeals³⁰ cannot include the requirement of any investigation or consideration by the Commissioner of these matters of motive and purpose when making the determinations under par (d) of s 136AD(1).

39 The submissions by the appellants should be rejected.

The submission by the Commissioner

40 In oral submissions in this Court the Commissioner appeared to take the position that, given the satisfaction in any case of pars (a), (b) and (c) of s 136AD(1), par (d) would give to the Commissioner limited room to operate. In particular, not only was it the case (as indicated earlier in these reasons) that the Commissioner might decline to make a determination under par (d) where it would be futile to do so because the arithmetical conclusion derived from the operation of pars (a), (b) and (c) indicated that there was no advantage to the revenue in the application of Div 13, but this was the only situation in which no determination might be made; in any other circumstances a determination would be made. (The Commissioner correctly put to one side the vitiation of a determination by extraneous purposes which would amount to jurisdictional error³¹.)

41 That construction of s 136AD(1) would accommodate the proposition in the written submission by the Commissioner that par (d) of that sub-section is a facilitative or machinery provision only and does not supply a criterion of

30 (2006) 234 ALR 451 at 459.

31 *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32.

15.

liability, the satisfaction of which may be challenged in Pt IVC proceedings. On the other hand, the appellants gave a deal of attention in their written submissions to resisting an apprehended argument against them that s 177(1) of the Act³² "protects" a determination made under s 136AD(1)(d) because it is but part of the "due making" of the assessment.

42 The Commissioner's oral argument proceeded on the footing that if, contrary to the construction of s 136AD(1) for which the Commissioner contended, par (d) did supply a criterion of liability, then, in accordance with the constitutional underpinning of the legislation, outlined earlier in these reasons, the matter might be tested in Pt IVC proceedings. But the Commissioner should succeed on the further submission which was made by way of confession and avoidance of any such larger issues. This is that, contrary to the appellants' case, the considerations they rely upon are not necessarily involved in the making of a determination under par (d) of s 136AD(1).

43 In *Commissioner of Taxation v Futuris Corporation Ltd*³³, a case decided on the same day as these appeals, this Court considered some questions about the operation of ss 175 and 177 of the Act. However, the present appeals arise out of a dispute as to the provision of particulars and are resolved without any need to embark upon a consideration of the larger issues mentioned above. It is therefore neither necessary nor desirable to add here anything further respecting ss 175 and 177 of the Act.

32 This reads, as now in force:

"The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under [Pt] IVC of the [Administration Act] on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct."

33 [2008] HCA 32.

Gleeson CJ
Gummow J
Kirby J
Hayne J
Heydon J
Crennan J
Kiefel J

16.

Orders

44 The appeals should be dismissed with costs.

45 As indicated earlier in these reasons, there are pending in the Federal Court two Pt IVC appeals, in one of which the appellant is Holdings and, in the other, Carpenter Australia. In the interlocutory appeals to the Full Court separate orders were made. Two notices of appeal were filed in this Court but each shows Holdings and Carpenter Australia as appellants. The record in this Court should be amended to show Holdings alone as appellant in Matter S652 of 2007 and Carpenter Australia alone as appellant in Matter S653 of 2007.

