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Presentation to

3rd Annual Property Law Conference
New Law, New Opportunity
Tuesday, 14 March 2017
Mercure Hotel Brisbane, Level 2, 85-57 North Quay, Brisbane

LEGISLATION AND CASE LAW UPDATE – STATE TAXES AND CGT

Introduction

"*New law, new opportunities*". I am not sure whether tax is ever considered or should be considered an opportunity, except for tax lawyers. However, this paper is intended to bring you up to date with recent legislative changes and case law, so your client can hopefully make the most of opportunities in property.

In keeping with the tone of the topic for this seminar, we will strive to find the positives in the changes to the law and recent case law, to be discussed today.

New Foreign Acquirer Duty (Duties Act 2001, (Qld))

(a) When and to whom it applies

One positive in this new head of duty under the *Duties Act 2001* (DA) is that it is focused on foreign investors and owners, and therefore it is one of the few taxes that does not increase the tax burden on Australian resident taxpayers.

The imposition of higher rates of tax for non-resident owners of property is not unprecedented in Queensland, as a land tax "*surcharge*", already applies to absentee land owners[1].

The development of the foreign purchaser surcharges, also reflects moves made in some other states[2], as summarised in the table below.

1 Sections 31, 34 and Schedule 2 to the *Land Tax Act 2010* applicable where the owner does not "ordinarily reside" in Australia.
[2] The states and territories other than Qld NSW and Victoria do not yet have an equivalent surcharge.

	Qld	NSW	VIC
Rate	3 %	4%	7% (increase from 3%)
Date effective	1/10/16	21/6/16	1/7/16
Application	on direct and indirect acquisition in specified residential property	on direct and indirect purchase of residential real estate	on direct and indirect acquisition of land-related interest in residential property
Foreign definition	Individual other than an Australian citizen or permanent resident[3]: a corporation incorporated outside Australia or more than 50% controlled or interests held by foreign persons or related persons[4]; a trust if at least 50% of the trust interests are foreign interests[5];	Within meaning of *Foreign Acquisitions and Takeovers Act 1975*	Similar to Qld, except expressly refers to New Zealand citizens with a s 444 Visa.

As can be seen, another positive in the new surcharge, is that the rate in Queensland is lower than the rate applied in other eastern-seaboard States.

The surcharge has been introduced through inclusion of a new chapter 4 in the Duties Act 2001, headed "*Additional foreign acquirer duty*", effective from 1 October 2016[6]. The Explanatory Notes explain its overall intended operation as a "*3% duty surcharge that will apply to direct and indirect acquisitions of specified residential property in Queensland by foreign acquirers*"[7].

The new head of duty is a "*surcharge*" as it only applies as an add-on to existing dutiable transactions on which transfer duty is imposed under Chapter 2 or where a relevant acquisition already results in landholder duty or corporate trustee duty being imposed under Chapter 3[8]. The shorthand term for the duty given in the Act is "*AFAD*"[9].

[3] S.235 DA
[4] S.236 DA
[5] S. 237 DA
[6] *Duties and Other Legislation Amendment Act 2016 No 37.*
[7] *Duties and Other Legislation Amendment Bill 2016 Explanatory Notes* at p.1.
[8] Sections 230, 231(1)DA
[9] Section 230(2) DA

The other important qualification on its application, is that the land or lot involved must be or will be used solely or primarily for residential purposes, on which there is or will be constructed a building for human habitation by a single family unit.[10]

In general, the acquirer is the person liable to transfer duty on a dutiable transaction involving residential property or landholder duty imposed on a relevant acquisition involving AFAD residential land.[11] However it important to bear in mind the possibility of application of the surcharge in the following situations, which may not immediately come to mind when advising a foreign purchaser:

- Where the dutiable transaction is the acquisition of a "*new right*" e.g. an option to purchase, where the dutiable property is AFAD residential land[12];
- Where a person acquires a partnership interest in a partnership that holds directly or indirectly an interest in dutiable property that is AFAD residential land[13].
- On creation of a trust, on termination of a trust, where a person starts to hold dutiable property other than as trustee; on a person making a trust acquisition, or where a trust interest is surrendered[14];

The duty is calculated at the rate of 3% where transfer duty is payable, on the dutiable value of the transaction but only to the extent of the foreign acquirer's interest in the AFAD residential land, new right or interest in the partnership[15]. Similarly for landholder duty and corporate trustee duty, the extent of the foreign acquirer's interest in the relevant acquisition and identification of the AFAD residential land, are key elements that limit the base line value of the transaction to which the 3% is applied[16]. The Commissioner helpfully provided a revenue ruling released on 28 September 2016, regarding application of the duty in respect of foreign corporations and trusts[17].

(b) Enforcement mechanisms

An important element of the legislative scheme is the provision requiring the Commissioner to make a reassessment to impose AFAD on a transaction if within 3 years the acquirer

[10] Section 232 DA
[11] Section 233 and 241 DA.
[12] See s.241(2)(b) and definition of "new right" in the Schedule to the DA.
[13] See s.233(1)(d) and (i) and s.241(2)(c).
[14] See s.233 (1)(e) to (h); s.9(1) and Chapter 2 Part 8;
[15] Section 244 DA
[16] Section 245 and 246 DA
[17] Ruling DA000.14.1: effective 1 October 2016. Available at https://www.treasury.qld.gov.au/taxes-royalties-grants/duties/rulings-pdfs/da000-14.pdf

becomes a foreign corporation, or a trust becomes a foreign trust.[18] There is an obligation on an acquirer to give notice within 28 days on it becoming a foreign corporation or a trust. A failure to give the notice without reasonable excuse, or to give notice containing information the person knows or should reasonably know is false or misleading in a material particular, are offences under the *Taxation Administration Act 2001* (TAA)[19]

In regard to unpaid transfer duty that includes AFAD, the outstanding liability for both the transfer duty and the AFAD is a first charge on the interest of the foreign acquirer, but also for example, each partner where a partnership holds AFAD residential land, or the trustee of the trust in which the trust acquisition is made[20]. Accordingly the charge appears to affect interests other than those of the foreign acquirer himself or itself. The charge has priority over other interests, other than a charge for transfer duty imposed elsewhere in the Act[21], and applies for both registered and unregistered interests[22]. Ultimately the Commissioner has power to apply to the Supreme Court for an order to sell the land[23].

There is some protection for non-foreign co-owners of the land, in that if the land is sold under such an order, the amount paid to the Commissioner becomes a debt payable by the foreign acquirer or liable entity to the other co-owners.[24] There is also a general provision for recovery of the amount paid by a person liable to pay the transfer duty who is not a foreign acquirer, as a debt to the extent of the AFAD amount, including interest and penalties.[25]

(c) Transitional and administrative provisions

The new Chapter 4 applies to relevant transactions where the liability for transfer duty, landholder duty or corporate trustee duty arises on or after 1 October 2016[26]. Care may need to be taken therefore, where pre 1 October 2016 agreements exist, but post 1 October 2016 transactions occur e.g. an agreement for sale or option agreement may have been entered into prior to 1 October 2016, but the transfer occurs after that date.

There is also a new lodgement requirement i.e. an "*acquirer*" under a relevant transaction on which AFAD is imposed, must lodge a statement in the approved form within 30 days of the

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[18] Section 246A DA
[19] Section 120 and 122 TAA
[20] Section 246B DA
[21] Section 246B (3) and s.156P DA
[22] Section 246B (4)
[23] Section 246C – 246F
[24] Section 246G.
[25] Section 256I.
[26] Section 662 DA

date of the transaction.[27] The same offence provisions apply for failure to provide such a statement or providing one that is false or misleading, as referred to earlier.

(d) Exemptions / Ex gratia relief

By media release dated 16 September 2016, the Treasurer, The Honourable Curtis Pitt advised of specific exemptions for projects that received "*significant development*" status. Such exemptions are not in the legislation itself, but are granted by means of ex gratia relief. A significant development is one that is considered will deliver "*significant economic benefits*" in a region, and consideration is given to companies with a head office in Australia, significant staff presence, or when "*foreign companies primarily contract for Australian services and materials through Australian contractors*". It would appear that this ex gratia relief was granted as a result of lobbying by the Property Council of Australia[28].

A Public Ruling DA000.15.1 also now clarifies the prerequisites of the exemption:

- The foreign entity must
  - be "*Australian-based*";
  - satisfy foreign investment review board requirements
  - meet "*regulatory requirements*", (which appears to be largely determined having regard to ASIC and ASX information).
- The development must be "*significant*" i.e. over 50 residential lots or otherwise significant contribution to the region having regard to various factors (the regional significance test), with the latter test not being applicable in "*metropolitan areas*".
- Consideration is given to whether or not the land is in a "*priority development area*" declared under the *Economic Development Act 2012* or a declared coordinated project by the Coordinator General.
- Consideration is given to the whether or not the foreign entity primarily employs or contracts for services and materials in Australia i.e. 50% of the value paid by the entity for goods and services is paid to Australian contractors and suppliers.

The mechanism used for the application process is to submit a statutory declaration. Self-assessment is not available where ex gratia relief is sought.[29]

[27] Section 246H: Form OSR – D2.2 a "dutiable transaction statement" appears to be the applicable form. Note that a Form 25 is also required to be attached to the usual Form 24 lodged with the transfer under the *Land Title Act 1994* and *Foreign Ownership of Land Register Act 1988*.
[28] Media statement Treasurer, C Pitt, 16 September 2016.
[29] Public Ruling DA000.15.1 paragraph 9.

Recent other Amendments to State Tax Laws

There were two amending Acts passed in 2016 which contained substantive amendments to state tax laws affecting property. No relevant bills are currently before the house in this parliamentary session as at the time of writing of this paper.

(1) Duties and Other Legislation Amendment Act 2016: No 37 of 2016 (DOLA)

This amending legislation was introduced in order to implement 2016-17 budget measures.[30]

(a) DA amendment.

The DOLA amended the DA, as previously outlined in regard to the introduction of the foreign acquirer duty, but also to extend an existing transfer duty concession for interfamilial transfers of family primary production businesses. In particular, from 1 July 2016 it removed the requirement that the transfer be by way of gift.

(b) First Home Owner Grant Act 2000 (FHOG Act) amendment

The DOLA also increased the FHOG grant from $15,000 to $20,000 for eligible transactions between 1 July 2016 and 30 June 2017[31]. The amendment also included anti-avoidance provisions such that where the Commissioner is satisfied the contract forms part of a scheme to circumvent limitations on or requirements for the grant, the transaction is not eligible. The Commissioner must presume the existence of a scheme if the contract replaces a contract made before 1 July 2016.

(2) Revenue and Other Legislation Amendment Act 2016: No 64 of 2016 (ROLA)

This is the more general annual tidy up amendment act for state revenue laws. The more substantive of these amendments are briefly outlined below:

(a) DA Amendments.

The Commissioner has moved promptly to reinstate its preferred position in regard to the operation of the home concession, where a property is purchased subject to an existing lease. There are occupancy requirements in the DA regarding the home concession, that the purchaser must occupy the property as their principal place of residence within 12 months of the date the acquirer is entitled to possession of the land, and must not dispose of

[30] Explanatory notes: *Duties and Other Legislation Amendment Bill 2016*
[31] Section 25D of the FHOG Act

it before occupying it, or within 12 months of acquiring it. The Commissioner had a long-standing practice of considering that a disposal occurred on the purchase of a property subject to a pre-existing lease, so that eligibility for the concession was lost, unless the tenant vacated on termination of the lease or within six months, whichever was the earlier under other specific provisions in section 154[32].

In *Commissioner of State Revenue v Di Sipio & Anor*[33] the Court of Appeal found that the words in section 154(2) of the DA "*leases or otherwise grants exclusive possession*" should be given their ordinary meaning and did not encompass where a transferee took a property subject to an existing lease. Further, Burns J also noted that section 154 only applied where there had been a subsequent noncompliance with the occupancy requirements, and a lease already in existence at the date of the transfer did not fall within its ambit.[34] The amendment to address this in the ROLA is to omit and replace section 154(2) so that it now expressly provides for circumstances where a property is acquired "*subject to a lease*"[35], as well as where a new or extended lease is granted. This amendment has effect for liability for transfer duty arising on or after commencement on 9 December 2016.

Other amendments to the Act relate to inserting provisions to reflect existing administrative arrangements regarding application of exemptions for overseas student health cover and temporary visa holder health cover, backdated to 14 October 2014[36].

The statute now also recognises an administrative arrangement whereby a statutory vesting in relation to a corporate reconstruction was treated as exempt from transfer duty and landholder duty, backdated to 30 November 2015[37].

(b) Land Tax Act 2010 (LTA)

Section 30 of the LTA provides for a discount, subject to certain conditions, where land is held for subdivision. The amendment made by ROLA is to insert a new section 30(1)(g) effective from 4 October 2014, which requires that there be at least 6 parcels of land being held for sale. It is noted that the Explanatory Notes refer to this amendment as being about clarifying that the larger parcel from which the other parcels of land have been subdivided,

[32] *Explanatory notes, Revenue and Other Legislation Amendment Bill 2016* at page 4.
[33] [2015] QCA 198
[34] [34] Ibid at [30] to [32] per Burns J; See also Paper delivered by the writer to the 2nd Annual Property Law Conference on 8 March 2016 at p 8 for further discussion of the case.
[35] Section 154(2)(c).
[36] Amendments were made to section 375
[37] See new section 404(b) DA.

need not be just one larger parcel.[38] However, it is a little unclear how this is achieved by the amendment.

A further amendment clarifies that for the home exemption, where the owner is transitioning from and old to a new home, the new home must be an established home, not vacant land.[39]

(c) Taxation Administration Act 2001 (TAA)

The TAA is an important Act which provides a framework for various state revenue laws. There are various amendments made by the ROLA in order to provide particularly for electronic payment and lodgement systems, and when receipt will be taken to have occurred[40].

The TAA has also been amended to recognise costs ordered by QCAT, as well as costs ordered by a Court as a "*tax law liability*" for the purposes of payment arrangements, application of refunds, application of payments made and writing off debts.[41]

Case law relating to State tax issues

There have not been many "*exciting*" state revenue cases in the past year. All of those selected for this paper relate to machinery or enforcement provisions, which are relevant to most state taxes.

(a) Queensland

(i) *Perryman v The Commissioner of State Revenue*[42]

This case concerned a person living in Indonesia, who sought to file an application for review of a decision made by the Commissioner disallowing his objection to a land tax assessment. Section 69 of the TAA provides that a taxpayer may within 60 days of notice being given of the Commissioner's decision, apply, "*as provided under the QCAT Act, to QCAT for a review of the commissioner's decision*"[43]. Mr Perryman was provided a copy of the decision by email (as permitted under s.149 of the TAA), and sought to file his application with the Tribunal by emailing it to the Tribunal at 8.20 pm on the 60th day. However, the Tribunal registry did not process the application and stamp it until some 11 days subsequently. The Tribunal also on that day posted back to Mr Perryman the sealed

[38] Explanatory notes at page 1 and 5.
[39] See new s42B(1)(b).
[40] See amendments made to s.40(2) and s.144(2) and to the Taxation Administration Regulation 2012, s.6A
[41] See amendment to "tax law liability" definition in Schedule 2.
[42] [2016] QCAT 26
[43] Section 68(2)(b) TAA

copies for his records and to permit service of the Commissioner, and asked that he pay the application fee.

Section 69(3) of the TAA provides that QCAT cannot extend the period for filing of the application. The Tribunal found that the words in section 69(2)(a), "*as provided under the QCAT Act*" required reference back to the manner in which the QCAT Act requires applications to be filed. Under rule 24 of the *Queensland Civil and Administrative Tribunal Rules 2009 (Qld)* (QCAT Rules), only applications for which a fee is not payable, can be filed by email. Otherwise the application must be filed in person, by post or by fax. Also rule 31(1) provides that a document is filed when the registrar records the document and stamps its seal upon it, and section 38(2) provides that the Tribunal must not take any action on an application until the fee is paid. The Tribunal found that his application was not filed in the registry until it was recorded and stamped i.e. some 11 days after the 60 day deadline, and accordingly under s.69(2) and in accordance with earlier decisions, the Tribunal had no jurisdiction to entertain the application.

It is noted in this case, that the QCAT registry acted somewhat inconsistently with the provisions of the QCAT rules cited in the case i.e. it should not have taken the action of stamping it until the fee was paid. It is also somewhat incongruous that the Commissioner may give notice of her decision on objection by email, but an applicant cannot always file his or her application for review of the decision by email. It illustrates that perhaps rule 24 of the QCAT Rules should be reviewed to accord with the manner in which most business is now transacted i.e. to provide for electronic or email filing.

However, be that as it may, the case is a reminder of the need to:

- ensure that the application to QCAT for review (or the Supreme Court, for appeal), is filed in sufficient time to obtain the stamping of the registry prior to the 60 day cut off i.e. preferably in person;
- ensure that any application fee is paid at the time of lodgement.

(ii) *Commissioner of State Revenue v Can Barz Pty Ltd & Anor*[44] (*Can Barz*)

This is one of the few cases lost by the Commissioner in recent years. It has resulted in the recognition of an important limitation on the power of the Commissioner to garnishee payments due to be paid to a taxpayer by a third party, where such payments are being paid to the taxpayer in its capacity as trustee.

[44] [2016] QCA 323

Section 50 of the TAA applies where under a tax law, a debt is payable by a taxpayer, and the Commissioner "*reasonably believes*" a person (the garnishee) holds or may receive an amount for or on account of the taxpayer, or is liable or may become liable to pay an amount to the taxpayer or has authority to pay an amount to the taxpayer[45]. The Commissioner is expressly permitted under section 50(2) to form a reasonable belief that this is so, even though the taxpayer's entitlement may be subject to unfulfilled conditions.

Can Barz Pty Ltd held a Bulimba property on trust for Ms Bird and Mr Scott, as trustees of a superannuation fund, of which Ms Bird and Mr Scott were the original members (and the trust deed permitted other members). The corporate vehicle of Can Barz was used to purchase the property as a consequence of the limitations on trustees of superannuation funds borrowing monies for the purposes of acquiring an investment property.[46].

Ms Bird and Mr Scott had outstanding payroll tax liabilities to the Commissioner. After Can Barz contracted to sell the Bulimba property, but before settlement, the Commissioner issued garnishee notices to the real estate agents, the purchaser involved and Can Barz. The notices to the third parties identified the taxpayer as "*Can Barz ATF Declaration Custody Trust for the Mewcastle Superannuation Fund*" and the notice to Can Barz, identified the taxpayer as Ms Bird and Mr Scott as trustees of the superannuation fund. The balance of the proceeds of sale were destined to be paid to Can Barz, which was then obliged to pay the moneys to Ms Bird and Mr Scott as trustees for the superannuation fund.

At first instance, the argument by the garnishees and taxpayers was that section 50 would not authorise the Commissioner to issue a notice to a garnishee in respect of moneys which in the circumstances of the case, the Commissioner knew the taxpayer was only entitled to receive non-beneficially. This argument was supported by reference to decisions of the Federal Court in respect of garnishee provisions in the *Taxation Administration Act 1953* (Cth)[47]. Having regard to these decisions, Bond J construed the phrase "*liable to pay an amount to the taxpayer*" in section 50 as:

> "*encompassing only circumstances in which the right to payment from the garnishee was legally and beneficially held by the taxpayer and the taxpayer was free to use the right in the taxpayer's own interest*".[48]

In the appeal proceedings, the Commissioner sought to argue, having regard to the requirement only that the Commissioner have a "*reasonable belief*", and the phrase "*is liable*

[45] S.50(1) TAA
[46] *Superannuation Industry (Supervision) Act 1993* (Cth); *Can Barz* at [3]
[47] See *Can Barz* at [9] – [11]
[48] *Can Barz Pty Ltd & Anor v Commissioner of State Revenue* [2016] QSC 59 at [39]

to pay", that it was unnecessary or "*impermissible*" to inquire into the nature of the taxpayer's entitlement i.e. only the liability between the garnishee and the taxpayer was relevant.[49]. It was also argued that the analogous Federal Court decisions relied upon at first instance, should be read as being relevant only where there had been a prior disposition of an interest in the moneys e.g. by equitable assignment or charge, but not where the moneys were subject to a trust.[50]

The Court of Appeal rejected both of these arguments. Philippides J found that the garnishee process was a creature of statute, and that the rule against abrogation of common law doctrines applied unless the words of the statute expressly or necessarily required to the contrary[51]. As the Appellant's argument would result in reading the statute so as to override the general equitable principles as to interests in property, and there were no "*clear and unambiguous words*" to indicate that this was the intention, the argument should be rejected.[52] Her Honour was also apparently not persuaded to read down the effect of the decisions on the analogous Commonwealth provisions.[53]

Philip McMurdo JA (with whom Morrison J agreed), approached the issue by tracing the history of garnishee orders and procedures for the attachment of debts, and noted the disinclination of the Courts to allow garnishee procedures to be used to affect trust property.[54] His Honour also reviewed various decisions on analogous provisions of the Commonwealth tax legislation, and found that the Courts have consistently applied limitations on provisions as to attachment of debts where interests of third parties in the moneys are affected[55]. His Honour found that in effect s.50 was not materially different from the Commonwealth provisions[56].

> "*the purpose of the remedy in s 50 is to assist in the recovery of unpaid tax by providing recourse to money to which the taxpayer is entitled and which could be lawfully applied in payment of the tax if it were in the taxpayer's hands. The purpose of the statute is not to permit the recovery of tax by recourse to money which belongs to someone other than the taxpayer or which, for some other reason, could not be lawfully applied by the taxpayer in the payment of his or her own tax debt.*"[57]

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[49] *Can Barz* (CA decision) at [14]
[50] Ibid at [15] per Philippides JA;
[51] Ibid at [16]
[52] Ibid at [18] to [22]
[53] Ibid at [24] to [25]
[54] Ibid per Philip McMurdo JA at [65] - [67]
[55] Ibid at [68] – [76]
[56] S.218 *Income Tax Assessment Act 1936* (Cth) and s 260-5 of Sch 1 to the *Taxation Administration Act 1953* (Cth) as referred to in *Can Barz at* [80]
[57] *Can Barz* at [81]

The moneys in the hands of Ms Bird and Mr Scott could not be seized in the enforcement of a judgment against them for unpaid tax, and they could not choose to pay those moneys to the Commissioner as it would contravene s.62 of the *Superannuation Industry (Supervision) Act 1993* (Cth). Accordingly, the moneys in the taxpayer's hands would not be available in any lawful way for payment of their tax debt, and similarly were not accessible through the s 50 process from third parties.

The result was that the finding by Bond J at first instance that the notices issued under s 50 were invalid, was confirmed. The moneys paid to the Commissioner in compliance with the notices were therefore required to be paid to Can Barz.

As at the date of this paper, there has been no indication that any amendment is proposed to section 50 to address the decision in this matter. Indeed, it would seem that such a course of action may not be consistent with the approach taken by the Commonwealth, and would give rise to hurdles in regard to such an amendment being a breach of fundamental legislative principles in that it would seek to override the common law.

(b) High Court

***Commissioner of State Revenue v ACN 005 057 349 Pty Ltd*[58]**

Under section 90AA(2) of the Land Tax Act 1958 (Vic) (LTA Vic) a refund for overpaid tax must be sought within 3 years. In Queensland similar provisions (although not in same terms), are contained in Part 4 Division 2 TAA, except that the period of time after which a refund is not be made by the Commissioner, is 5 years.

In this case, land tax was incorrectly assessed to be payable over a period of 12 years, i.e. the same land was subject to land tax twice. The error was discovered by a revenue officer, and advised to the taxpayer. A refund for a 3 year period was issued. The taxpayer sought to lodge objections to the older assessments, but as the time for making objections had expired, the Commissioner refused to consider them, or to consider the issue of amended assessments for those years.

Section 90AA provided that proceedings for the refund or recovery of tax paid under or purportedly paid under the LTA Vic must not be brought against the Commissioner, unless an application for refund was lodged with the Commissioner within 3 years of the payment being made. At the Court of Appeal level, the Court found that:

[58] [2017] HCA 6

(i) the Commissioner's error resulted in an excess amount being collected which was not land tax within the meaning of the Act.

(ii) although the power to amend an assessment was discretionary, the Commissioner's knowledge that the assessments were inaccurate enlivened a statutory duty to exercise the power, and make the refund;

(iii) s.90AA did not limit or affect the Commissioner's power to make the amended assessment or refund the money, as by the amended assessment it was not land tax, and s 19 was an *"integrity mechanism*" which did not circumvent the objection and refund regime.

(iv) the Commissioner's refusal to issue amended assessments in circumstances where he knew they were inaccurate amounted to "*conscious maladministration*", which was a jurisdictional error so that relief in the form of mandamus was available.[59] The Court also ordered that interest and costs be paid by the Commissioner.

The High Court reversed the decision of the Court of Appeal and found for the Commissioner. No additional refunds, beyond the 3 years permitted under s.90AA and already paid, were found to be due and payable. The Court recognised that s 90AA and other provisions in the statutory scheme were designed to "*secure the certainty of the revenue after a reasonable opportunity to dispute the propriety of an exaction had been afforded to the taxpayer*"[60].

The Court found that what was collected was "*tax paid under, or purportedly paid under*" the LTA as provided for in s90AA and therefore caught by the section, and it was also land tax[61]. Section 19 did not compel the Commissioner to issue amended assessments and refund the excess, as section 19 was expressed in discretionary terms[62], and any refund was still governed by s.90AA.[63]. The scope of the Commissioner's authority to make a refund was confined to section 90AA(6) of the LTA Vic[64]. The Court also noted that the assessment was

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[59] ACN decision at [19]
[60] Ibid, per Kiefel and Keane JJ at [9]; per Bell and Gordon JJ at [35]; Gageler J agreed with the reasons of the others at [92]
[61] Ibid at [49] and [67]
[62] Ibid at [54] to [57]
[63] Ibid at [59]
[64] Ibid at [8]

conclusive evidence of the due making of the assessment and all particulars of the assessment were correct, except in review proceedings.[65]

The Court categorically rejected the finding that there was any factual basis for the Court of Appeal to find that the Commissioner actions were "*conscious maladministration*". The Commissioner had drawn the attention of the taxpayer to the error, and otherwise acted in good faith and within the constraints of the legislation.[66]

Although there are differences in the wording of the Queensland TAA equivalent provisions, it would be difficult for a taxpayer to distinguish this decision, if running a similar argument in Queensland. It is also another significant case on the bounds of the concept of "*conscious maladministration*".

Capital Gains Tax – Recent legislative amendments and case law

Capital gains tax (CGT) liability is often an issue that is not immediately considered in the midst of an otherwise attractive property transaction. It can be complex, so in the time available I will be focussing only on recent developments in the area.

Recent statutory amendment – Foreign resident vendors withholding regime

In a similar vein to the state government focus on foreign owners of property, the Commonwealth introduced from 1 July 2016, a new capital gains tax withholding regime applying to both Australian resident and foreign resident vendors for contracts entered into after that date[67]. Foreign residents were already required to lodge an income tax return and pay tax on any Australian assessable capital gain on certain assets.[68] However the withholding regime was introduced because of compliance concerns, and to assist in collection of foreign residents' CGT.

(a) Australian resident vendors.

An Australian resident vendor selling a relevant asset that is taxable Australian real property with a value of $2 million or more, now needs to obtain a clearance certificate from the ATO prior to settlement in order to avoid a 10% non-final withholding by the purchaser, which is paid to the ATO. A clearance certificate can be obtained online. For asset types other than

[65] S.20 of the LTA Vic referred to at [68] of ACN decision; Similar provision is contained in the TAA (Qld) in s.132.
[66] ACN decision at [4] to [5] and [23]; [80] to [86] and [92].
[67] *Tax and Superannuation Laws Amendment (2015 Measures No 6) Act 2016*
[68] *Income Tax Assessment Act 1997* (ITAA 1997), Division 855

taxable Australian real property (e.g. indirect interests, or options), a vendor declaration that they are not a foreign resident may be sufficient.

(b) Foreign resident vendors

A foreign resident is essentially a person or entity that is not an Australian resident for tax purposes.

A foreign resident who has sold property, will be similarly be subject to the requirement that the purchaser is required to withhold 10% unless the requisite clearance certificate or declaration is provided. A foreign resident in respect of which a withholding has occurred, will be entitled to a credit for the amount paid by the purchaser to the ATO, but must lodge an income tax return to claim the credit. A foreign resident vendor may also apply for a variation where for example, it will not have an income tax liability, or not make a capital gain.

(c) Relevant Assets

Assets to which the withholding provisions apply, are those assets already subject to Australian CGT on disposal by a non-resident owner i.e.

- taxable Australian real property (including a lease of land, mining, quarrying or prospecting rights)
- an indirect Australian real property interest (10% or more interest in an entity whose assets comprise more than 50% Australian real property by market value).
- an option or right to acquire such property or interest

Assets which are excluded include transactions conducted through an approved stock exchange, securities lending arrangements, and transactions where the vendor is in external administration.

Further information can be obtained from the ATO website.[69]

Recent taxation determination – TD 2017/1 – Intangible capital improvements

A recent determination has been issued by the ATO stating that it is the Commissioner's opinion that intangible capital improvements can be a separate CGT asset from a pre-CGT asset to which these improvements are made. The example given is a framer, holding pre-CGT land obtaining council approval to rezone and subdivide the land. The view is taken in

[69] https://www.ato.gov.au/general/capital-gains-tax/in-detail/calculating-a-capital-gain-or-loss/foreign-resident-capital-gains-withholding

the determination, that there is nothing in s.108-70 of the ITAA 1997 that confines its operation to tangible capital improvements.

No case law is cited in the determination.

Recent Cases

There are two recent cases in the capital gains tax area relevant to the small business CGT concession.

The small business CGT concessions were introduced in 1999, relevant to events that occur after 21 September 1999. One of the principal objectives of the legislation was to provide assistance to small business owners in recognition of the fact that they do not have the same ability to access superannuation concessions available to employees. There is a valuable discussion as to whether or not the aims of the small business CGT concessions have been achieved by these complex provisions, in an article by K Sadiq and S Marsden in a recent Revenue Law Journal if you require any further background information on this topic.[70]

Certainly, the recent decisions indicate that there can be a fine line between being eligible for the concession and being ineligible.

(a) Doutch v Commissioner of Taxation[71]

Mr Doutch sold certain mining tenements in 2008, and received cash and shares in consideration totalling $11,680,000. He declared the capital gain in the tax year of the sale, claiming a 50% CGT discount under the ITAA 1997, and was assessed on taxable income of $5.6 million. An objection was made on the basis that the small business 50% reduction in subdivision 152-C of the ITAA 1997 should also apply to the capital gain, so as to reduce it by $2.87 million. The Commissioner disallowed the objection as he concluded that the aggregated turnover of an associated entity of the taxpayer, Denarda Holdings Pty Ltd (Denarda), for the year ended 30 June 2008 was more than $2,000,000, which is the upper limit for qualification as a small business.

The taxpayer was unsuccessful both before the Administrative Appeals Tribunal and the Federal Court on appeal. The decision on appeal turned on whether or not the phrase "*in the*

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[70] Sadiz, K and Marsden, S (2015), *The Small Business CGT Concessions: Evidence from the perspective of the tax practitioner,* Revenue Law Journal, Vol 24: Iss. 1 Article 1; available at http://epublications.bond.edu.au/flj/vol24/iss1/1

[71] [2016] FCAFC 166

ordinary course of carrying on a business"[72] was to be interpreted according to its ordinary meaning. In particular, the taxpayer argued that some of the receipts, being in regard to fuel costs for provision of drilling services by Denarda to 2 customers, were "*extraordinary*" judged by reference to the ordinary course of the taxpayer's business[73]. Fuel costs were generally borne by customers, but in these two cases, fuel was paid for by Denarda and later recouped by disbursement charges levied upon its customers. The question was whether or not $55,106 should be included in the quantification of the "*annual turnover*" of Denarda.

The taxpayer relied in upon statements in the explanatory memorandum for the legislation that introduced the definition of "*annual turnover*" in 2007, the decision in *Commissioner of Taxation v The Myer Emporium Limited*[74] regarding the term "*ordinary income*", and case law on the phrase "*ordinary course of business*" as it appears in the *Bankruptcy Act 1924*. The Full Court of the Federal Court found that the Tribunal was correct to hold that the words "in the ordinary course of carrying on a business" in s 328-120(1) of the ITAA 1997 bear their ordinary meaning. It also found that the purchase of the fuel although unusual for the taxpayer, was still part of the ordinary course of the business of Denarda, i.e. the provision of drilling services. The Court also rejected Mr Doutch's contention that income may be both "*incidental to*" the normal day-to-day activities of a business and also "*extraordinary*" judged by reference to the ordinary course of the taxpayer's business.

(b) The Executors of the Estate of the late Peter Fowler and Commissioner of Taxation (the Fowler Case) [75]

This case also involved the question of the application of the small business relief provisions of Division 152 of the ITAA 1997. Mr Fowler and his late wife purchased a block of 10 residential units in 1986, and subsequently on her death in 1994, Mr Fowler became the sole owner. He sold the property in 2012 for $4.1 M, and declared a capital gain of $3.4 M but claimed a net gain of $0. He relied upon the small business capital gains concessions. The Commissioner disagreed about the application of the small business concessions, but applied the general 50% concession, such that the gain was assessed at $1.7M, and also applied a penalty and interest charge. Mr Fowler objected, and on the disallowance of the objection, then sought a review of the decision by the AAT.

One question was whether Mr Fowler was carrying on a business. Was the property sold used or held ready for use in the course of carrying on a business? The review proceedings

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[72] For the purposes of s 328-120(1) ITAA 1997
[73] Ibid at [7]
[74] (1987) 163 CLR 199
[75] [2016] AATA 416

were conducted by Mr Fowler's executors as Mr Fowler had died after the review application was filed. His executors submitted that he was conducting the business of property ownership and management or alternatively managing and letting property. The Tribunal found that Mr Fowler was not carrying on a business, and also that the property also failed to satisfy the active asset test, as its main use was to derive rent (contrary to s.152-40(4)(e) ITAA 1997).

Unfortunately in this case, due to the dementia of the taxpayer prior to death and the inability of his executors to provide substantial evidence, the Tribunal did not accept that Mr Fowler had been carrying on business, even though it is noted that he had no other means of support, other than the rental income he derived from the property[76]. However, whether or not this had been found, the exclusion regarding use of the property to derive rent would have been enough to deny Mr Fowler's estate the entitlement to the concession. The Tribunal did at least find that the administrative penalty was not payable, as Mr Fowler's executors were acting on advice from a registered tax agent.

Conclusion

The "*positives*" in the legislative and case law developments in the past year, are that it was a relatively quiet year, with limited new state revenue and CGT laws, which largely are intended to affect foreign residents or foreign persons, corporations or trusts. From a taxpayer perspective, the clarification of the use of garnishee powers in regard to third parties, will be welcome. As can be seen from some of the recent case law discussed today, there may also be "*opportunities*" for the Commonwealth to simplify its small business concession regime for CGT purposes and for QCAT to facilitate more efficient electronic filing systems.

It is hoped that the paper assists you to make the most of your opportunities in regard to advising clients on these property related tax issues.

[76] The Fowler case at [26]