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Abstract
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Keywords
Everett assignment, tax avoidance, partnerships, New Zealand, Australia

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Introduction

For most Australian professional practitioners such as lawyers, accountants and doctors, there is nothing uncommon or unusual about an arrangement in the form of an 'Everett assignment' as a means by which to minimise liability of income taxation.The position is not so clear for their counterparts in New Zealand, it seems, in view of the recent High Court decision in *Hadlee v Commissioner of Inland Revenue*.[1]

What is an 'Everett assignment'? The common notion of this is a transfer, whether voluntary or for consideration, of the whole or part of a partner's interest in the partnership from the transferor (or the 'assignor') to the transferee (the 'assignee'). Although a partner has no title to a specific property owned by the partnership, it is recognised that he has an equitable interest in the partnership assets.[2] This interest is a chose in action capable of assignment under ss 199 and 200 of the Law of Property Act 1974 (Qld) and its equivalent in other States as a 'debt or other legal thing in action'. However, as far as the assignment of part of a chose in action is concerned, the position is less simple. It is generally accepted that there can be no assignment of parts of a debt or other

1 (1989) 11 NZTC 6,155.
2 See Ford & Lee, *Principles of the Law of Trusts* (Law Book Co 1983) 136-137; *FCT v Everett* (1980) 80 ATC 4279 and cases there cited. It is considered to be an equitable interest because it is enforceable in equity only and not at law.

chose in action at law, notwithstanding any statutory provisions.[3] The assignment must therefore be in equity.[4]

Hadlee v Commissioner of Taxation

In that case, an assignment of part of the interest of a partner, Hadlee, to the assignee, a family discretionary trust called BG Hadlee Family Trust No 2, was found by Chief Justice Eichelbaum to be ineffective as a vehicle for tax minimisation purposes. His Honour took the view that:

(1) that which was assigned was a 'mere expectancy' which, though valid, in being for consideration, took effect only when the income passed into the hands of the assignor. Therefore the income was properly assessed as that of the assignor;

(2) the arrangement fell within s 99 of the the Income Tax Act 1976 (NZ) (the equivalent of the Australian provision of Part IVA of the Income Tax Assessment Act) as an arrangement the purpose or effect (or one purpose of effect) of which was 'tax avoidance' and that purpose was not 'a merely incidental' purpose or effect.

The facts

The taxpayer, Hadlee, was a partner of a well-known firm of chartered accountants, Peat Marwick. At the relevant time, this national partnership had offices in Auckland, Hamilton, Wellington, Christchurch, Dunedin and Invercargill. The national partnership agreement provided for profits to be shared according to the terms of the local office 'regulations'. Hadlee derived virtually the whole of his partnership income from the local partnership, which had a separate agreement governing the rights and responsibilities inter se of the members of the local office. Under that agreement annual income, capital gains and goodwill revaluations were allocated on the basis of 'units' of capital owned by each partner.

Prior to the assignment, Hadlee was entitled to 32 units out of a total allocation of 452. By deed of assignment dated 29 January 1981, Hadlee assigned 12.8 units of the 32 to the trustee of a trust known as BG Hadlee Family Trust No 2. Hadlee was the settlor of the trust and Sydney Bridge Nominees Ltd its trustee. The action related to the Commissioner's assessment of income tax payable by Hadlee and the trustee of his family trust for the years ended 31 March 1981 and 31 March 1982.

The recital in the Deed of Assignment stated, inter alia, that the assignor, Hadlee, wished to arrange for a degree of financial independence

3 *Re Steel Wing Co* [1921] 1 Ch 349. See also *Brice v Bannister* (1878) 3 QBD 569; *James v Humphreys* [1902] 1 KB 10; *Skipper & Tucker v Holloway and Howard* [1910] 2 KB 630. One of the reasons offered by Windeyer J in *Norman v FCT* (1963) 109 CLR 9, 29-30 was that '[b]efore the Statute an assignee was permitted to bring his action at law in the name of the assignor when he was seeking to recover a whole debt assigned to him. If a debt has been broken into parts this procedure was not appropriate. A creditor cannot recover a debt piecemeal in a court of law. Therefore, when part of a debt was assigned, proceedings to enforce the assignment has to be brought in a court of equity'.

4 See *Norman*, ibid 32.

for the benefit of his family. The assignment was expressed to be in consideration of the covenants on the part of the assignee contained in the deed and in payment of the purchase price stipulated. As far as the subject matter of the assignment or 'the property' assigned is concerned, it was defined in the deed as:

> that part, being the percentage of the partner's share in the partnership as is represented by the number of units specified in the second schedule, and without limiting the generality of the foregoing, includes that part of the right to receive the share of the profits of the partnership to which the partner would but for this deed have been entitled, and, in the event of dissolution of the partnership, that part of the share of the partnership assets to which the partner would, as between himself and his other partners, have but for this deed been entitled...

The property was to be assigned to the assignee absolutely. The deed also provided that, to the extent that legal title did not pass to the assignee, Hadlee would hold it upon trust for the assignee. The partners had sanctioned the assignment on the condition that the assignee was not to further assign, mortgage, charge or otherwise deal with or dispose of the property or any part of it. The assignee also acknowledged that it was bound to accept the account of the profits or assets of the partnership on dissolution agreed to by the partners and that it had no right to interfere in the management or administration of the partnership business or affairs. The assignee further acknowledged that it had no right to object to any amendments which might be made to the partnership agreement from time to time.

The purchase price for the assignment of the 12.8 units was $16,299.00. This was payable as to $5.00 in cash and the balance upon demand made in writing.

The issues

Eichelbaum CJ discussed a number of issues in his judgment including, for instance, the effect on the partnership on the admission or retirement of a partner. For the purposes of this note, however, attention will be focused primarily on the following issues:

(a) Whether the assignment of part of a share in a partnership amounted to an assignment of present property or a future property (sometimes referred to as a 'mere expectancy');

(b) The point in time at which the property passes; and

(c) Whether or not the assignment amounted to an arrangement within s 99 of the Income Tax Act 1976 (NZ) as an arrangement for the purposes of 'tax avoidance'.

Characterization of subject matter

1 Who is the relevant taxpayer?

His Honour began his analysis by reference to Windeyer J's dissenting judgment in *Norman v Federal Commissioner of Taxation*, where Windeyer J said:

> If we turn from attempted gifts of future property to purported dispositions of it for value, the picture changes completely. The common law objection remains.

> But in equity a would-be present assignment of something to be acquired in the future is, when made for value, construed as an agreement to assign the thing when it is acquired. A court of equity will ensure that the would-be assignor performs this agreement, his conscience being bound by the consideration. The purported assignee thus gets an equitable interest in the property immediately the legal ownership of it is acquired by the assignor, assuming it to have been sufficiently described to be then identifiable. The prospective interest of the assignee is in the meantime protected by equity.[5]

In that case, the taxpayer purported voluntarily to assign to his wife, inter alia, all the interest derived in a particular year from debt owed to the taxpayer by a firm. It was held by a majority of three to two (Dixon CJ, Menzies and Owen JJ; McTiernan and Windeyer JJ dissenting) that the arrangement was such that either the borrower or lender could terminate the loan. Since the right to interest depended on the subsistence of the loan, there was no presently subsisting right to interest payable at a future date. The subject matter was therefore future property assignable only in equity for consideration.

The above passage from Windeyer J's judgment is well established law, as is the proposition that an assignment of future property 'crystallises' when the property comes into existence. According to Eichelbaum CJ, whether the subject matter is an expectancy is of 'critical importance'. Why? Because that determines the person who would be liable to income tax as and when the property comes into existence. Eichelbaum CJ's emphatic conclusion was that, if the assigned property is an expectancy, then it reaches the assignee via the conduit of the assignor, 'however fleetingly'.[6] Consequently, the income from that property would be assessable in the hands of the assignor.

His Honour supports his conclusion by quoting Mason CJ in *Booth v Federal Commissioner of Taxation*,[7] who said that, in the case of an assignment of future property, the property vests in the assignee as and when that future property comes into existence and not before. Accordingly, 'the assignment would not be effective to prevent the income being derived or being deemed to be derived by the assignor'.[8]

Eichelbaum CJ rejected the remarks by Woodhouse J in *Kelly* v *Commissioner of Inland Revenue*,[9] who commented that in the case of an equitable assignment of future property for value, 'the assignment can operate at once as if it were a binding contract to assign the anticipated asset : then when it does come into existence, the equitable ownership in it passes automatically to the assignee'.

The analysis by Mason CJ which Eichelbaum CJ so strongly endorsed in *Hadlee* is not, with respect, necessarily logical. It was said that future property vests in the assignee only when it comes into existence. This statement is axiomatic. One cannot receive something that does not yet exist. However, where consideration is given for the assignment of future

5 Above n 3 at 24.
6 Above n 1 at 6,162.
7 (1987) 87 ATC 5100.
8 Ibid 5103.
9 [1970] NZLR 161, 162.

property, a contract is created in equity in accordance with the intention of the parties as an agreement to assign the property when it comes into existence.[10] The fact of the consideration means that the assignor's conscience is bound in equity. He holds the property not for himself but as a trustee for the assignee who had given consideration for it. Therefore, even though the income or at least the legal title to it first reaches the assignor, it is not 'derived' by the assignor for he holds it merely as a trustee. Rather, it is derived by the assignee for value. This accords with the equitable maxim that equity regards as done that which ought to be done.

2 Present property or mere expectancy?

After having concluded that, in the case of an equitable assignment of a future property, the income from that property, when it comes into existence, would first be derived by the assignor, the Chief Justice went on to say that the subject matter of the assignment, namely, part of Hadlee's interests in the partnership, was future property and therefore a mere expectancy. The grounds upon which his Honour arrived at this somewhat surprising conclusion may be summarised as follows :

(a) The assignment could not have been of present property since the assignor's entitlement to the partnership depended not only on his ownership of a 32/452nd share in the partnership but also on his continuing to work full time in the partnership exercising the skills and diligence of a partner.

(b) the subject matter might be regarded as an expectancy because the assignor might have become incapacitated through illness—as the assignor was not incapacitated, this ground was quickly dismissed.

(c) the partnership might terminate at any time.

(d) the absence of certainty of the existence of profits in any given year.

When characterising the subject matter, his Honour referred to the definition of 'the property' in the Deed of Assignment and noted that: 'Undoubtedly the assignment has been framed so as to refer, at any rate on outward appearances, at an existing subject matter, and an immediate assignment.'[11]

Notwithstanding that observation, he then referred to the dissenting judgment of Deane J (when the matter was before the Federal Court) in *Federal Commissioner of Taxation v Everett*.[12] This judgment was heavily relied upon by the Australian Commissioner when that case was unsuccessfully on appeal before the High Court.

So, instead of looking at the wording of the Deed of Assignment to ascertain the assignor's intention as to the precise terms and subject matter of the assignment—in this case, the right to receive part of the assignor's entitlement in the share of the partnership profits and the

10 See also *Holroyd v Marshall* (1862) 10 HLC 191; 11 ER 999; *Tailby v Official Receiver* (1888) 13 App Cas 523; *Re Andromia Pty Limited* (1987) 2 Qd R 134 per McPherson J at 148-150.

11 Above n 1 at 6,162.

12 (1978) 78 ATC 4,595.

assets upon dissolution of the partnership—his Honour, endorsing Deane J's analysis, embarked on a discussion on *how* those profits/income are earned. Essentially, the argument is that the assignor's entitlement to income depends not only on his ownership of the 32 units in the partnership but also on his continuing to work full time in the partnership.[13] This led Eichelbaum CJ to the conclusion that the subject matter of the assignment remained with the assignor, who had it within his power to bring the partnership to an end. He could either withdraw from it formally or effectively cause the dissolution of the partnership by committing a substantial breach of the Partnership Agreement, that is, by not devoting his time and attention to the partnership business.[14]

His Honour referred to the following passage of the majority in *FCT v Everett*:

> The respondent was entitled before the assignment to his proportionate share of the partnership profits, however much or however little energy he devoted to the practice, so long as the partnership remained on foot. Accordingly, it is a misnomer to speak of the respondent's share of the income as having been gained by his personal exertion.

He was, however, unable to take a similar view of the facts. Instead, the dissenting judgment of Deane J was preferred:

> As a matter of substance and reality, any partnership profits were primarily the result of the personal exertions of the four members of the partnership and the taxpayer's share of them was his agreed share of the fruits of those personal exertions.[15]

Although it may be implicit in the partnership arrangement that each partner faithfully continues to perform his obligations to the other partners, the income derived by the partnership is the result of the efforts of all the partners—that is, all the earnings of the partner in a given year are placed in the partnership account. Each partner is entitled under the partnership agreement to a proportionate share of the partnership profits as disclosed by the partnership accounts. It is therefore incorrect to say that the assignor's actual entitlement to the share of partnership profits was gained by his personal exertions. The assignor is entitled to his proportionate share so long as the partnership remains on foot. If, for instance, his partners decide that he was failing in his obligations to the partnership and a dissolution of the partnership subsequently occurs, the assignee would still be entitled to a share in the assignor's asset upon dissolution. The assignee's entitlement is not affected by virtue of a dissolution of the partnership. This would accord with the intention of the parties to the Deed of Assignment.

Even if one were to say that the particular share of income of the partnership to which the assignor is entitled is gained by him from

13 His Honour found it curious that clause 20 of the local partnership agreement, which dealt with expulsion of partners, did not refer to breach of clause 14 of the same agreement, which provided that each partner was to attend diligently to the business (except during his holidays) and devote his whole time and attention thereto.

14 He did note, however, that the assignor had covenanted in the deed to use his best endeavours to comply with his partnership obligations: above n 1 at 6,166.

15 Ibid 6,167.

personal exertion, it does not necessarily follow that the subject matter of the assignment is future property. What is sought to be assigned is a presently subsisting right to which the assignor is entitled because of his share of the bundle of interests in the partnership. According to the Deed of Assignment, these rights include a share in the assignor's entitlement to the partnership income and a share of his entitlement in the distribution of assets upon dissolution. The position is succinctly summed up by the majority judgment of Barwick CJ, Stephen, Mason and Wilson JJ in *FCT v Everett:*

> None the less a share in a partnership carries with it the right to receive the proportion of the partnership profits to which the partner is entitled by virtue of the partnership agreement. Consequently, when the share is assigned, it carries with it the right to receive the assigning partner's proportion of those profits. In the same fashion, when a portion of a share is assigned, the portion carries with it the right to receive the proportion of profits attributable to that portion. As the right to receive profits is inherent in the partner's interest in the partnership, unless it be excluded by the partnership agreement, it is carried on assignment of the share, even though no mention of it be made in the assignment.[16]

According to the Deed of Assignment, the rights assigned do not include the rights of the assignee to interfere, for instance, in management and administration of the partnership business or affairs. These rights remain within the control of the assignor. The question of dissolution of the partnership still depends on the actions of the rest of the partners including the assignor himself. Consequently, it might be said that, notwithstanding that the assignee is presently entitled to receive the income direct from the partnership, in respect of the other rights of the partner, such as that relating to management, the assignor would continue to exercise them as a trustee on behalf of the assignee.[17]

In respect of the argument that the property assigned was only a mere expectancy because the partnership might terminate any time, the Chief Justice, again relying on the dissenting judgment of Deane J, said that if the partnership agreement entitles the partners to resign, then the partnership could effectively terminate at any time. In short, 'not only could the objector effectively bring the operation of the assignment to an end, but any of his Christchurch partners could do so at any time.'[18]

However, if one looks at the Deed of Assignment, it expressly provides that the assignee is entitled to a part of the assignor's interest in the assets of the partnership upon dissolution. It is therefore immaterial that the partnership might terminate. What was assigned was a part of the presently existing right of the assignor to a proportion of the partnership income and a share in the distribution of the assets upon dissolution.

As far as the argument that there was no certainty that there would be any profits in any given year is concerned,[19] it is submitted that the

16 (1980) 80 ATC 4,076, 4,080.

17 *FCT v Everett*, above n 12 at 4,597.

18 Above n 1 at 6,167-6,168.

19 Ibid 6,168. It is interesting that, after having referred to a number of areas, his Honour concluded that 'it is apparent that these decisions are not decisive of the present issue': at 6,169.

assignee has a *presently existing right* to receive a share of the profits of the partnership (as disclosed by the partnership accounts) notwithstanding the fact that there may not be any profits. If the financial position of the partnership were such that no profits are made in any given year, this would affect all the partners and not the assignee alone. The property assigned is not the income from the partnership to which the partner is entitled. It is the right to receive that future share of profits when it is available.

Tax mitigation v tax avoidance

Even if Eichelbaum CJ had concluded that the subject matter of the assignment was present property and therefore the relevant taxpayers who were liable to pay income tax on that part of Hadlee's interests were the beneficiaries under the trust, it seems that his Honour would nevertheless have found the 'arrangement' to be void as one for the purposes of tax avoidance.

Section 99 of the New Zealand Income Tax Act 1976 deals with tax avoidance. To establish a breach of the provision, the Commissioner must show that:

1 There is an 'arrangement' within the meaning of the section.

2 The purpose or effect, or one purpose or effect, of such arrangement must be tax avoidance as defined, whether or not other purposes or effects are referable to ordinary business or family dealings.

3 The purpose or effect must not be 'a mere incidental' purpose or effect.

1 Arrangement

The word 'arrangement' is defined in the Income Tax Act as 'any contract, agreement, plan, or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect'. His Honour referred to the case of *Newton v Federal Commissioner of Taxation,*[20] which gave a common law definition of that word in relation to s 260 of the Australian Income Tax Assessment Act. Using the test laid down by the Privy Council, his Honour concluded that:

> [W]hat occurred here properly comes within the definition. The assignment was one step in a package or scheme, properly seen as a 'plan', prepared for the benefit of those partners who wished to take advantage of it encompassing the following steps: 1. Establishment of a family trust in standard form; 2. Incorporation of Sydney Bridge Nominees Ltd to act as trustees; 3. Execution of the assignment. . .[21]

2 Purpose or effect

In determining the purpose or effect of the transaction, Eichelbaum CJ referred to the predication test laid down by Lord Denning in *Newton*. According to this test, to bring an action within s 260 (the predecessor of the present Part IVA of the Australian Income Tax Assessment Act), the court must be able to predicate, by reference to overt acts, that the

20 [1958] AC 450.
21 Above n 1 at 6,169.

arrangement was implemented in that particular way so as to avoid tax. If the transaction is capable of explanation by reference to ordinary business or family dealings, rather than necessarily as a means to avoid tax, then they are not for the purpose of tax avoidance.

His Honour noted that under s 99 (of the New Zealand Income Tax Act), the taxpayer's motive in setting up the arrangement is irrelevant. Nor does the purpose of tax avoidance need to be a sole or principal purpose, so long as it is not a 'merely incidental' purpose or effect.[22] It is interesting to compare this with Part IVA, which requires that the purpose of obtaining a tax benefit be the dominant purpose where there are two or more purposes.[23]

Counsel for the Commissioner submitted that the high degree of integration between the trust, the company and the partnership was an indication that the purpose of tax avoidance was not merely an incidental purpose. For instance, the initial shareholders of the trust company were members of the partnership; the articles effectively prevented any persons other than partners becoming shareholders; the first directors were all partners; lack of power to remove the company as trustee and so on.[24] It was further said that, although there was no compulsion for the partners to participate in the scheme, it was clear that it was designed so that the partners could do so: '[I]t is unlikely that the partnership would have gone to the trouble of setting up so elaborate an arrangement unless it was anticipated that a number would take part.'[25] His Honour concluded on this point that:

> While I do not regard it as decisive, this element of commonality tends to indicate that the purpose and effect of the arrangement must have been such as to have application to a number of partners.

Even if one accepts that there was a commonality between the trust and the partners in Peat Marwick, it does not logically follow that the purpose, or one of the purposes, was for tax avoidance. One may concede that a 'scheme' lies behind this arrangement but, having established this however, the question becomes: what consequences necessarily follow? Precisely what 'arrangement' is being attacked here as being for tax avoidance purposes? The setting up of the trust and its connections with the partnership or the actual assignment of part of the partner's interests in the partnership to the trust? From the judgment, it seems to be the former. Yet later on in the judgment, Eichelbaum C J said that the adequacy of consideration for the *assignment* 'throws light on' the purpose of the arrangement. It is therefore unclear precisely what 'arrangement' is being scrutinized for the purposes of s 99 of the New Zealand Act. One would have thought that the relevant arrangement would be the alienation of income by assignment of a part share in the partnership.

It was submitted on behalf of Hadlee that the purpose underlying the assignment was one of mitigation of risks. The taxpayer considered that

22 Ibid 6,172.
23 Section 177A(5) of the Income Tax Assessment Act. See also Cooper, Krever and Vann, *Income Taxation, Commentary and Materials* (Law Book Co 1989) 1175 ff.
24 Above n 22.
25 Ibid 6,173.

it was prudent to assign part of his personal assets so that at least the assets assigned are protected against adverse claims affecting the partnership and thus his personal assets. This was particularly pertinent when it is recognised that the partnership is a large national partnership in which the partners are not all well known to each other. The size of the enterprise increases the exposure to risk. His Honour's response was that the subjective motives of Hadlee were irrelevant. He thought that, although it was possible to read the arrangement itself as having as one purpose and effect the creation of opportunity to establish assets in the hands of Hadlee's dependants, beyond the reach of any claimants against the partnership, this was not sufficient to establish that this was the taxpayer's sole or dominant purpose.

His Honour made reference to the case of *Commissioner of Inland Revenue v Challenge Corporation Ltd*,[26] in particular the following passage by Lord Templeman in the Privy Council:

> The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft-quoted words of Lord Tomlin in *Inland Revenue Commissioner v Duke of Westminster* [1936] AC 1, 19: 'Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it would otherwise would be'. In that case, however, the distinction between the tax mitigation and tax avoidance was neither considered nor applied.

His Lordship then went on to say that s 99 (NZ) did not apply to transactions, which can be described as tax mitigation transactions, where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the Income Tax Act 1976 (NZ) affords a reduction in tax liability.

His Honour then turned to the question of adequacy of consideration for the assignment. It was thought that, although the adequacy or otherwise of consideration did not affect the validity of the assignment, it threw light on the purpose or effect of the transaction. While accepting that the units were valued in the same way had they been purchased by an incoming partner, the Chief Justice said that the calculation related only to the value of the tangible assets and goodwill being purchased or sold. It did not take into account the fact that 'in the case of a sale of units between partners, or to a new partner, the partner acquiring the units would be remunerated for his future work by his share of the annual income.'[27]

The logic of this argument can also be questioned. It seems that his Honour was unhappy with the fact that the profits that the purchaser of units would gain in the future depended on the personal exertions of the vendor. The consideration was inadequate because no consideration was given for these future profits—consideration was only given in respect of the tangible assets and the goodwill. In this context, his Honour said: 'The vendor partner sold *merely the asset itself, not a share of the fruits of his future expenditure of effort.*'[28] [Emphasis added]

26 [1986] 2 NZLR 561.
27 Above n 1 at 6,164-6,165.
28 Ibid.

Paradoxically, earlier in the judgment, his Honour listed, as one of his reasons for finding that the subject matter of the assignment was future property, the fact the assignor was merely assigning the fruits of his labour that may be gained by him in the future and not the actual income-producing asset.

Having discussed the inadequacy of consideration in some detail and concluding that the inadequacy of the consideration 'answers any suggestion that this could be viewed as an arm's length transaction', his Honour concluded that:

> [I]nadequacy of consideration being a common feature of family dealings, I do not regard it as a decisive answer to the objector's case. Nor do I wish to be taken as implying that I would have reached a different view of the arrangement had full consideration been present.[29]

In conclusion, his Honour said that the purpose and effect of the arrangement was tax avoidance. The potential benefits were too significant and obvious:

> First, the objector undertook, post assignment, to contribute 100% of his working time for 60% of the remuneration otherwise receivable. Second, the result of the arrangement, if effective, was that the objector still had available to him, through the vehicle of the trust, the whole of the partnership income, subject (so far as the assigned income was concerned) to the provisions limiting its income prior to the establishment of the arrangement. But as demonstrated, the total tax liability generated by the income was reduced significantly. It is plain that the arrangement relieved the objector from liability, or avoided or reduced the liability, or avoided the incidence of his tax.[30]

Conclusion

It is interesting to speculate on the conclusion the present Australian High Court would reach if *Hadlee* was argued before it. The decision of the New Zealand High Court is inconsistent with the Australian High Court case of *FCT v Everett*. According to *Everett*, a share in a partnership interest is a present existing right which carries with it, inter alia, the right to receive a proportion of the partnership profits.

The authorities including *Hadlee* suggest that, if the property assigned is present property, then the income that arises from that income-producing asset is derived by the assignee and not the assignor. If the property assigned is future property, however, the position is unclear. According to *Hadlee*, the assignor derives the income (when it comes into existence) first and therefore is the relevant taxpayer. The recent Australian High Court decision in *Booth v FCT* seems to support this. However, this reasoning is inconsistent with fundamental principles of equity and cases such as *Holroyd v Marshall* and *Tailby v Official Receiver*. It is suggested that, consideration having been given for the assignment of future property, the assignor holds it as a trustee on behalf of an assignee when the property comes into existence. The relevant taxpayer is therefore the assignee.

29 Above n 1 at 6,165. One may question the relevance of considering this issue in the first place. Does it really 'throw light on' the question of purpose?

30 Ibid 6,165.

In respect of the tax avoidance issue, an *Everett* assignment has yet to be challenged on the basis of Part IVA of the Income Tax Assessment Act.[31] It is quite obvious that the increased interest in partnership assignment is largely based on the beneficial tax consequences. Given the wide terms in which Part IVA is couched, would the High Court find that the assignment amounts to an arrangement the dominant purpose of which is to obtain a tax benefit? If a share in a partnership interest is regarded as present existing property and this income-producing asset is subsequently assigned, it is arguable that Part IVA was not intended to strike down such assignments as 'arrangements' for the purposes of tax avoidance.

In June 1986, the Commissioner released Income Tax Ruling IT 2330 implying that the Taxation Department will not attack assignments under either s 260 or Part IVA that are 'on all fours' with *Everett*. The reasoning in *Hadlee*, even if it is eventually endorsed by the New Zealand Court of Appeal, is unlikely to persuade the Australian High Court to depart from its findings in *Everett*.

31 See the paper by M Smith for BLEC Workshops (Australia) in March 1987 entitled 'The Taxation of Partnerships, Galland's Case and other Recent Developments'.

S. R. Hampson, Government Printer

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