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Abstract
This article takes stock of a selected range of revenue law issues which have emerged in recent times. The emphasis is on issues of concern to corporate taxpayers. These have been grouped around four broad headings: 1. Restructuring issues 2.Operational issues 3.International tax issues 4.Tax environment

Many of the areas highlighted will be key areas to watch for future developments. The article provides a useful stocktake of important corporate tax issues.

Keywords
corporate taxation

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The author wishes to thank Terry Murphy, Tax Partner, Blake Dawson Waldron, for his helpful comments in preparing this manuscript.

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COMPANIES AND TAXATION: A REVIEW OF SELECTED ISSUES

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The author wishes to thank Terry Murphy, Tax Partner, Blake Dawson Waldron, for his helpful comments in preparing this manuscript.

This article takes stock of a selected range of revenue law issues which have emerged in recent times. The emphasis is on issues of concern to corporate taxpayers. These have been grouped around four broad headings:

- ***Restructuring Issues***
- ***Operational Issues***
- ***International Tax Issues***
- ***Tax Environment***

Many of the areas highlighted will be key areas to watch for future developments. The article provides a useful stocktake of important corporate tax issues.

Introductory

This paper unashamedly has a general outlook. There is a discernible tendency in many journals to publish taxation articles that analyse only one legislative provision, or which deal with a particular topic at great depth; it is equally important for the practitioner to have a perception of the breadth of issues that may impact on a proposed dealing and to be alert to issues of more general relevance in the conduct of the clients' affairs. Accordingly, this paper will take the form of a briefing session on a variety of recent taxation developments affecting companies as well as mentioning many important matters of ongoing relevance. It does not profess to be an exhaustive catalogue of company tax issues, but instead concentrates on those considered by the author to be most topical.

The smorgasbord of issues raised can be grouped around four broad headings:

- Restructuring Issues
- Operational Issues
- International Company Issues
- The Tax Environment.

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Restructuring issues

Types of reorganisation

Many permutations and combinations may be available to effect a restructuring. Tax considerations will be only one factor in deciding the form that a restructuring should take. Objectives to be served by restructuring may include:

- administrative and managerial simplicity
- reduction in ongoing compliance and group costs (such as accounting)
- making a business more resistant to takeover
- divisionalisation so that the various businesses of a corporate group are structured in a way which reflects their natural groupings.

Very often reorganisations will involve either the transfer of assets from one company in a group to another, or the transfer of shares held in one company to a different company that is part of the same group. This in turn entails a consideration of possible capital gains provisions of the Income Tax Assessment Act 1936 (Cth) ('the Act') and stamp duty consequences.

Possible CGT relief

Strictly speaking, there is no such thing as a capital gains tax ('CGT') in Australia. Rather, certain capital gains arising under Part IIIA of the Act will be deemed to form part of the taxpayer's assessable income. Where other general assessing provisions in the Act can be applied they are to prevail over Part IIIA. The distinction is critical in the case of reorganisations, as asset disposals may give rise to tax under s 25 (eg trading stock), s 59, s 25A etc for which there is no rollover relief. Where Part IIIA is relevant, its provisions will apply to assess capital gains arising from the transfer of assets acquired by the taxpayer after 19 September 1985.

Broadly, a capital gain will arise on the disposal of an asset where the consideration received (albeit actual or deemed) exceeds the cost base of the asset. An asset's cost base comprises, amongst other things, its acquisition cost and associated incidental expenses. Where an asset has been held for twelve months, its cost base is indexed to take account of inflation.

It is important that those opportunities for CGT relief are made known and their limitations are understood. Some of the more important sections in the context of reorganisations are:

- Section 160ZZO which permits an asset to be transferred from one company to another in the same corporate group in consideration of an allotment of shares in the transferee company.
- Section 160ZZP which allows for share splits and consolidations. Really, this section simply clarifies that the redenomination of an existing asset is not a disposal. It will not assist where substantial rights are being changed (eg preference shares being converted to ordinary shares).

- Sections 160ZZPA-160ZZPD, which broadly allow for the imposition of a resident company between an existing entity and its unitholders or shareholders.

A new s 160ZZOA has been proposed which will, with effect from 15 August 1989, grant a form of modified rollover relief on the transfer of assets in specie from a subsidiary to its holding company in contemplation of the subsidiary being liquidated.

Basically, all rollovers proceed on the same premise. That is, the transfer is totally in-house and does not generate a fiscal gain. The transfer of the subject asset will not be deemed to be a disposal, and the transferee will effectively obtain the transferr or's relevant cost base at the time of the rollover. Rollover relief is not automatic. Typically, election notices will need to be given by one or more of the transferor, transferee, or interposed entity no later than the time for lodgement of their next returns. The Commissioner has a discretion to extend time.

In most cases, the consideration for the transfer of the asset must be taken in the form of an allotment of shares in the transferee. If this is not possible (eg a subsidiary transferring to a parent) then securities may be allotted to the transferor. Any capital gain or capital loss is then deferred until there is a subsequent disposal of the asset outside the group. A reorganisation may be achieved by successive rollovers, provided that each rollover satisfies the prerequisite conditions and, in the case of s 160ZZO rollovers, that the group company requirements are satisfied for the whole of the year of income. Not surprisingly, many technical anomalies exist because of the language used.

Stamp duty on reorganisations

All transfers of shares in Queensland companies will attract at least the flat 0.6% duty rate. If the shares are in a 'landholding corporation' additional duty may arise. The transfer of most other types of property will attract ad valorem conveyance duty under s 54 of the Stamp Act which is payable at progressive rates up to a maximum of 3.75% on consideration over $500,000. There is a limited exception in s 54(2) in favour of transfers of 'goods, livestock, wares or merchandise'.

If it is proposed to transfer real property and items of plant and equipment to the same transferee, a saving in duty can sometimes result by effecting the transactions separately and relying on the s 54(2) exemption. However, the Commissioner has the power to group transactions together under s 53. Where the plant and equipment is being transferred which is collectively sufficient to sustain the carrying on of a business, there is also the possibility of a deemed business transfer under s 54A(7) at ad valorem rates.

Of greater importance will be the new landholding provisions (s 56FA-FO). Briefly, these provisions seek to subject share allotments and transfers in certain landholding companies to stamp duty at ad valorem conveyance rates. Broadly, a landholding company is one which is deemed to own directly, or through its subsidiaries, land worth more than one million dollars, where that land represents more than 80% of its statutory assets. Where shares in one group company which is a landholding corporation are transferred to another group member, this can trigger an unintended stamp duty liability. The duty payable will be ad valorem, based on the value of land in Queensland represented in the shares transferred.

Significantly, a company is deemed to be entitled to land belonging to a 'subsidiary' in working out the one million dollar threshold. Subsidiary includes a wide range of relationships outside of the s 7 Companies Code definition (s 56FA(1)).

For example, suppose that a company is a potential beneficiary under a trust. The company is deemed to be entitled to all trust assets for purposes of working out whether it is a landholder. This possibility may, in some circumstances, suggest a rethink of the conventional wisdom in drafting the beneficiary clauses of discretionary trust deeds as widely as possible.

Section 49C provides for stamp duty exemption on certain reorganisations. It is, however, severely circumscribed in its operation. For example, even in a simple case of an asset transfer under s 49C(2) between two associated companies, an exemption will only be available in respect of property acquired by the transferror company since the date of association. The transfer of all earlier assets will be assessed at normal rates.

Following a merger between two corporate groups there is often the need to reposition assets into new corporate divisions. These transfers are dutiable to the extent that property is being transferred from one group company to another where that property was acquired by the transferror prior to the date of association. This is likely to be most of the property. What is needed is some provision which allows the Commissioner to have an over-riding discretion to exempt internal group asset transfers from duty where this would facilitate a restructuring in the public interest.

Restructures are undertaken to improve efficiency and competitiveness, which are obviously objectives consistent with the national good. Why should companies be locked into inefficient structures for fear of a ruinous stamp duty burden? Queensland is noticeably out of step with other jurisdictions in this area. This could not be more evident than in the case of restructures involving national operations where exemptions are approved in most other jurisdictions, but with Queensland being hamstrung by s 49C. In such a case there is no alternative but to make submissions to Treasury as to why ex gratia relief should be granted.

A final point on stamp duty implications of restructuring is the proposed 5.5% ad valorem duty on property acquisitions by foreigners. This rate is significantly higher than the present maximum 3.75% and is flat, so the benefit of the present progressive scale is lost. The definition of foreign corporation is yet to be announced, but presumably it will be something less than 50% direct or indirect foreign equity or control.

Liquidations

Where a subsidiary is to be liquidated as part of a restructuring, this can lead to punitive CGT treatment. Distributions made to shareholders upon liquidations will be treated as assessable deemed dividends to the extent they are paid out of income (s 47). It is a debatable point whether corporate shareholders are entitled to claim the intercorporate dividend rebate when receiving liquidators distributions. These distributions will be frankable. However, there will be a deficiency in available franking credits when it comes to the distribution of capital gains. The indexed or sheltered part of the gain is not taxed to the company, and therefore no franking credits are generated in respect of this part of the gain. This element of the distribution is therefore exposed to taxation in the hands of the recipient shareholder. In effect, there is no indexation of capital gains made by companies.

Companies: operational issues

Leasing premises

Recently a lot of publicity has been given to the taxation of incentive payments made to organisations as an inducement to take up leases in CBD office blocks. Inducements offered have been both in cash and in kind. The principal concern has been whether the inducement will be assessable to the party receiving it.

Of course, a new s 21A now exists to assess non-cash business benefits. It is a basic common law proposition that only gains which are convertible into cash can be treated as income. This section operates to deem benefits that would otherwise not be of an assessable character to be convertible to cash (s 21A(1)). A 'non-cash business benefit' means property or services provided after 31 August 1988 in relation to a business relationship. 'Services' includes any benefit, right, privilege or facility. Rights in relation to real property are expressly covered.[1]

There is no doubt that the safest course to adopt from the point of view of the assessability of the recipient is to not receive anything at all! In some cases, it may be possible for the lessor and lessee to fix a value for inducements, and to then factor this amount into the lease as a reduced rental throughout the term. It would be straining the language used to construe a rental reduction as a 'service', and the better view is that the amount of the reduction would not be assessable.

Rent holidays, on the other hand, are likely to be a 'service' as defined in s 21A being a quantifiable short term benefit attaching to an interest in real property (the lease). Before s 21A, lessors preferred rent holidays because they did not damage the capital value placed on the building, unlike rental reductions. Rent holidays also meant that the lessor was not prejudiced at the time of rent reviews. Tenants also preferred rent holidays from a cash flow perspective. However, other types of inducements have now become predominant because of the s 21A assessability cloud

1 See s 21A(5)).

surrounding rent holidays. These have focused on the provision of fitouts etc.

A fitout provided and owned by the lessor under a lease is arguably not a 'service' provided in term of s 21A where the rental paid is for premises and fitout. If the fitout is being rented by the tenant, it is difficult to see how any benefit, right, privilege or facility is conferred on him. By contrast, a lease for the same rent but with free use of the fitout, could be regarded as conferring a benefit. A lessor retaining ownership of fitout will be entitled to depreciation if the cost of the fitout is sufficiently connected with the production of the lessor's assessable income. If ownership of the fitout paid for by the lessor is to pass to the tenant then this could clearly be a non-cash property benefit under s 21A. Further, depreciation will not be allowed to the lessee in respect of any depreciable item which it has not paid for.

In relation to cash incentives it would be premature to draw comfort from the recent case of *Cooling v FCT*.[2] In that case a cash incentive was paid to the principal of a Brisbane legal firm for procuring that its service company enter a lease. Justice Spender found that the amount was not assessable income on ordinary concepts, and that the new s 160M(6) and s 160M(7) did not apply to deem it a capital gain.

It was very hard to predict how this decision will fare on appeal. Among the arguments available to the Commissioner were that the amount was arguably income on ordinary concepts and usages as it is a fee for a service, namely, a fee for procuring that somebody else does something. Secondly, the Commissioner contended that there is an asset (the lease of the business) in relation to which an event or transaction happened resulting in the receipt of consideration by any person (the taxpayer), so as to attract s 160M(7). The Full Court of the Federal Court held that the payment was income under s 25(1) and thus assessable.

The moral of the story is that a non-cash approach is to be preferred to a bullish approach which might enliven the operation of either s 25(1) or s 160M(7).

Equipment leasing

In the last couple of years, some very large equipment orders have relied on a tax based financing technique known as cross-border leasing. The importation of aircraft is a good example. This technique bears a great similarity to the leveraged leases of yesteryear. However, with cross-border leases the lessor is a resident of a foreign country, and the benefits arise because of the tax regime of that country rather than Australia.

Under the arrangement the owner of the leased plant will be a company in a foreign country. The foreign owner will be entitled to depreciation or investment allowances under the laws of that country. All this adds up to significant tax deduction for the foreign owner in circumstances where the cash flow is neutral. There is a resultant deferral of tax payable by the owner of the equipment because of the losses during the early

2 (1989) 20 ATR 711; on appeal 90 ATC 4472. See discussion of this decision by Robert Davis in this issue of the *Revenue LJ* at 216-221.

years. The lessee, an Australian taxpayer, will have a purchase option and hence be permitted by the Commissioner to depreciate the asset under s 54.

The value of this tax benefit is generally ultimately reflected in a reduced price for the equipment being purchased under the finance lease. Naturally, it may be prudent to seek the Advance Ruling of the Commissioner in relation to proposed transactions which seeks to rely on this technique. It can be strongly submitted that a quantifiable benefit in the form of reduced purchase price should not be assessable to the purchaser.

Financing issues

Generally speaking, the Commissioner has launched an attack on equity based financing techniques, ie, those techniques in which 'the financier' obtains tax benefits of an owner, for example depreciation.

Until recent times one of the most popular financing strategies was the establishment of unit trusts for development projects with different classes of units. A financier would contribute capital by subscribing for finance units carrying limited income rights, but reserving the right to receive distributions of tax free income. Deductions would be available to unitholders based on their ownership of the development property, especially Division 10B depreciation allowances and the former investment allowances. Tax free distributions could then be funded out of the resulting excess of accounting income over taxable income.

The Commissioner has attacked this arrangement in IT 2512 by declaring that he will regard the receipt of distributions by finance unitholders under this type of arrangement to be assessable on ordinary concepts under s 25, or under s 97. Further, under s 160ZM the cost base of post-19 September 1985 units in unit trusts will be 'eroded' to the extent of any non-assessable distributions received by the unitholder (except those referable to Division 10D depreciation).

Share based financing schemes have also been subjected to attack. A financier would contribute capital by subscribing for redeemable preference shares in the company needing finance. The company issuing the redeemable preference shares would then pay a dividend in respect of the shares, with the financier then being able to claim the benefit of the inter-corporate dividend rebate.

A related arrangement was margin lending, under which the financier would take a legal mortgage over public company shares which were being financed. During the term of the mortgage the dividends in respect of the shares would be directed to the financier holding the mortgage with the financier then claiming the intercorporate dividend rebate. Sections 46C, 46D and Ruling IT 2513 have now made these types of financing in most cases impractical. Where the Commissioner characterises a dividend as being a 'debt dividend' (ie equivalent to the payment of interest on a loan) the dividend will not be frankable and will therefore, be fully assessable to the recipient. Further, s 46D(3) prevents the intercorporate dividend rebate from being claimed.

A ruling is merely the Commissioner's opinion of the law and a statement of his administrative practice. It is not law nor is it binding. Moreover, given the objection procedure and court delays it is often de facto legislation because financiers are not prepared to fight or because the cost of fighting, even if the financier wins, outweighs the benefit. For these reasons, debt based financing has once again become predominant.

A hybrid which is being used more frequently is the convertible note. It may be possible for a developer to obtain low cost finance in exchange for the financier taking an additional return by way of capital appreciation. This is because the lender is able to convert the note into shares. As the completed project begins to appreciate in value, so will the value of shares. The conversion of the note into shares is not treated as a disposal for CGT purposes. Instead, the shares are deemed to be acquired at their date of conversion at a cost base equal to the consideration paid to acquire the note (not indexed) plus any conversion fee. Whilst the note remains a note, it must bear the hallmarks set out in s 82SA for interest paid by the company to the holder to be deductible.

It must be remembered that other sections of the Tax Act can be applied to convertible notes. If the note is a 'traditional security' in terms of s 26BB, then the difference between its acquisition cost and consideration on disposal will be assessable under that section rather than Part IIIA. The Commissioner will treat the value of the shares acquired as being the consideration for disposal of the note.

Other potentially relevant provisions from the point of view of the holder of the note are found in Division 16E. If interest payable under the convertible note is deferred, or if the note is issued at a discount, or if the note is redeemable at a premium etc, then it may be treated as a 'qualifying security'.

The point of this characterisation is to force the holder of the security to account for the return on investment on an accruals basis. In the case of a convertible note this would mean that interest would be treated as income progressively over the term of the note, instead of crystallising right at the end.

International company issues

A range of issues are relevant here and time permits only a brief statement as to basic operative principles. International tax aspects of company operations could easily form the subject of their own seminar or series of seminars. At the risk of appearing glib, some of the more important international considerations are now mentioned.

Withholding tax

Broadly, withholding tax is payable in respect of interest (including the financing of repayments of hire purchase payments), unfranked dividends, and royalties paid by a resident to a non-resident. Withholding tax is therefore a final Australian tax at source. That is, the payer is required to withhold the withholding tax from the proposed payment and to remit it to the Tax Office. Once the withholding tax has been paid the non-resident is relieved of any further liability to Australian tax in respect of the interest, royalty, or dividend received.

The rate of withholding tax is normally 10%, but is regulated by the terms of tax treaties. None of these treaties prescribe a rate any lower.

Thin capitalisation

These provisions, found in Division 16F, operate to limit the interest deduction of Australian entities in respect of foreign debt owed to foreign controllers or their associates. The limitation is set up by requiring that the non-arm's length foreign debt of an Australian entity should not exceed three times its foreign equity. To the extent that this 3:1 debt to equity ratio is exceeded interest deductions will be denied. The object of the thin capitalisation rules is to prevent the transfer of taxable Australian profits out of Australia by the resident by the use of high gearing. Excess rates of interest can be circumscribed by Division 13.

Foreign investors need to be mindful of these rules when providing funding to Australian subsidiaries to enable new projects to be carried out.

Transfer pricing

These rules militate against the sourcing of profits in low tax jurisdictions through price manipulation in international transactions. Where non-residents carrying on business in Australia pay excessive prices for goods imported from related overseas companies operating in low tax jurisdictions or sell goods at an artificially low price, this has the effect of transferring profit to those countries. Naturally, this is of relevance to non-residents as they only pay tax on profits sourced in Australia.

The thrust of the provisions is to allow the Commissioner to deem a market consideration in relation to international non-arm's length dealings. An on-shore corollary is found in s 31C which allows the Commissioner to apply a market consideration to purchases of trading stock between related resident companies.

There have been no substantial legislative changes to the transfer pricing rules in recent times. However, as a practical matter they are being policed by the ATO with greater vigilance than ever before.

Exchange gains and losses

Where foreign exchange gains or losses relate to transactions on revenue account, then they will be dealt with in accordance with normal principles; gains will be assessable as income on ordinary concepts under s 25(1), and losses will be deductible under s 51(1). For example, a loss/gain referable to a purchase of trading stock, or where it is part of the taxpayer's business to deal in foreign currencies, will be treated in this way.

Where the foreign exchange gain/loss is incurred in relation to some capital transaction incurred with a view to producing assessable income or for the carrying on of a business for that purpose, then the gain/loss will be treated in the same way as a gain or loss on revenue account under Division 3B.

It should be remembered that losses or gains will not crystallise until the borrowing, or loan, or consideration is paid. Under Division 3B a foreign exchange loss will not be deductible unless the Commissioner has been notified of the relevant contract, its terms and purposes. Notification must be given with the taxpayer's next return.

Accrual of foreign sourced income

A draft bill was prepared in December 1989 which contemplates the taxing of certain foreign sourced income on an accruals basis. In short, earnings of 'controlled foreign corporations' and trusts operating in 'unlisted' countries will be attributed to their Australian resident shareholders or beneficiaries and will be taxed here on an accruals basis. 'Unlisted countries' are those not specifically listed, ie they are not recognised as having comparable tax regimes. These will include many traditional tax havens.

It is the concept of derivation that is affected by these proposals. Deeming provisions will directly impute earnings to Australian resident shareholders and beneficiaries, notwithstanding that no dividend or distribution has been declared, or that funds have not been physically repatriated.

The effect, therefore, is to ensure that funds accumulating in offshore controlled blind trusts etc are brought to Australian tax now through deeming provisions. An exemption is proposed for 'active income'.[3]

The tax environment

Investigatory powers

The recent cases of *Citibank v FCT*[4] and *Allen Allen & Hemsley v DFCT*[5] have confirmed the very wide nature of the Commissioner's access power under s 263 of the Act. That section gives the Commissioner and duly authorised ATO officers, unrestricted access to all places, documents, books etc of the occupier of premises. The High Court has recently granted special leave to the taxpayer to appeal from the Full Federal Court decision which sanctioned the use of s 263 powers in relation to an audit.[6]

The section makes legal that which would otherwise be a trespass at common law. The power is, however, subject to the doctrine of legal professional privilege. Privileged documents include those within the purview of the solicitor/client relationship which are brought into existence for the purposes of giving or receiving legal advice.

3 It should be noted that the passage of the proposed legislation through Parliament in its present form is by no means certain.

4 89 ATC 4268.

5 89 ATC 4294.

6 *IEL v DFCT* 89 ATC 5316.

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In fairness to the Commissioner, it should be noted that the s 263 power is one which is exercised sparingly. However, there is no doubt that its very existence is a sobering thought for many. Procedural understandings have been reached with the Commissioner as to how the s 263 power is to be exercised. Key elements of the understandings reached with the Commissioner and other enforcement authorities are that occupiers or premises subjected to s 263 raids are to be allowed reasonable time in which to obtain legal advice, and that documents in respect of which privilege is claimed may be delivered into the custody of the court pending a judicial determination.

The appropriate response to the increased use of the Commissioner's investigatory powers is to have a rehearsed plan of action to be activated in the event of an ATO raid. As a general matter, taxpayers should be aware that administrative decisions taken by the Commissioner of Taxation (not directly forming part of the process of assessment) may be reviewable under the Administrative Decisions (Judicial Review) Act 1977. Thus, the Commissioner's decision to exercise his powers under s 263 may be the subject of judicial review.[7]

Self-assessment

Companies too have now entered the era of self-assessment. Self-assessment means that taxpayers are now responsible for determining their own taxable incomes. The Commissioner has a discretion to accept as correct all the information contained in a taxpayer's return and will routinely do so.

ATO staff spared from laboriously checking return details can be redeployed in other areas, especially audit and investigation. The ATO has refined its target selection processes for audits, and one highly publicised audit program has focussed on Australia's one hundred largest corporations.

Audits are, of course, disruptive and some larger companies have had to co-exist with ATO officers on their premises for months at a time. The increased level of audit activity, and prospect of substantial penalties militate against tax abuse under the self-assessment regime. A procedure does exist whereby the taxpayer can flag uncertain matters by appending a notice to their return (s 169A), and this will avoid penalties if the Commissioner subsequently disagrees with the taxpayer's interpretation of the law as expressed in the s 169A notice.

As an administrative measure, new company tax returns have been introduced whereby the return completed by the taxpayer becomes the actual assessment. Taxpayers should approach record-keeping with new vigilance, particularly when it comes to substantiation requirements. Taxpayers should also consider mock audits in consultation with their accountants.

7 See *Southern Farmers Group Limited* discussed in CCH Tax Week (9 February 1990) p 4.

Taxation by administrative ruling

As a result of successful applications made under the Freedom of Information Act some years ago, the Commissioner began publishing tax rulings and guidelines used by assessing officers. The practice of issuing administrative rulings has proliferated, and they have become more than mere explanations as to how the Commissioner will apply the Act in practical situations. Many recent rulings have taken on a quasi-legislative character, filling gaps in the Act or making up themselves for imprecisely drafted legislation. Rulings are now law, but do enable taxpayers to know where the Commissioner stands.

So-called private rulings are now possible under IT2500 in relation to intended transactions. Some comfort can be gained by applying for private rulings prior to entering into transactions because they will signal the Commissioner's attitude. The Commissioner states in Ruling IT2500[8] that he will generally not depart from the advice given in private rulings unless required to do so by a subsequent change in the law. However, all Rulings including IT2500 are subject to ITI which says that the Commissioner is not bound by rulings. Thus, private rulings do not create a legal estoppel, though it is thought that the Commissioner would not lightly depart from them. Further, private rulings are premised on the taxpayer making full disclosure of all material facts.

A final comment is that skilfully framed submissions may lead the ATO to reach the desired conclusion. It is imperative, therefore, that applications for private rulings are couched in the right way, bearing in mind the need to make full disclosure.

Corporate prosecution and directors' personal liability

The Commissioner does have power to prosecute taxpayers under the Tax Administration Act instead of seeking to impose penalties under the Income Tax Act. The Commissioner's decision to launch a prosecution will involve a waiver of penalties under the Tax Act. However, the Court entering the conviction does have the ability to impose a fine in addition to the statutory penalty. Recent authority suggests that the amount of any such fine should broadly correspond to the amount of tax penalties waived, and it is thus no trifling matter.

Generally, the Commissioner will not commence a prosecution unless the circumstances described in IT2246 are satisfied. Relevant considerations in deciding to commence a prosecution will include non-co-operation and obstruction on the part of the taxpayer. Adverse publicity attendant upon prosecution is also something of which the taxpayer should be mindful.

The recent *Sony* case[9] is on point. The Sony Corporation pleaded guilty to four charges of misleading the ATO regarding its 1987 taxable income. Sony had apparently closed off its income year early, achieving a deferral of tax. Sony pleaded guilty and was fined over $30,000.

8 Paragraph 6.
9 See CCH Tax Week (12 January 1990) p 2.

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There is a risk that company officers could be exposed to prosecution for a variety of offences under the Tax Administration Act. In particular, reference is made to s 8Y. Of even greater concern is the potential for company officers to be made personally liable for debts of their company. The circumstances where this can happen are likely to be extreme, but are not unknown. For example, in a recent sales tax case, a director was ordered to pay $247,604 in sales tax owing by his company. How is this possible? Section 21B of the Crimes Act 1914 (Cth) can be used to impose reparation orders against persons convicted of Commonwealth offences. As mentioned previously, company officers can be convicted of tax offences arising for the conduct of their companies under s 8Y of the Tax Administration Act.[10]

Conclusion

This paper has introduced but a few of the contemporary issues which may be of interest to corporate taxpayers. There is certainly no substitute for a thorough technical working knowledge of relevant legislation. It is also helpful, however, to periodically conduct a 'stocktake' of both current issues and those of continuing relevance in order to restore a perspective on the range of issues which may arise in the life of a tax practice.

10 See ATO South Sydney Office Media Release (30 October 1989) reported *Butterworths Weekly Tax Bulletin*, para 1022.