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The Taxation of Isolated Sales under Section 25 (1) ITAA: TR 93/2 v Joint Submission

Abstract

The taxable nature of the proceeds from isolated sales raises many difficult questions of law and fact. While it is clear that profits stemming from the sale of property are taxable when the vendor is in the business of selling such assets, when such proceeds will be considered taxable when the person is not in such a business remains to some extent unclear. This article critically examines the Federal Commissioner of Taxation's view as to the taxable nature of isolated receipts, expressed in TR 92/3, and the professional bodies' reply, concluding that neither presents an accurate picture of the law.

Keywords

isolated receipts, sale of property, taxation

THE TAXATION OF ISOLATED SALES UNDER SECTION 25(1) ITAA: TR 92/3 v JOINT SUBMISSION



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The taxable nature of the proceeds from isolated sales raises many difficult questions of law and fact. While it is clear that profits stemming from the sale of property are taxable when the vendor is in the business of selling such assets, when such proceeds will be considered taxable when the person is not in such a business remains to some extent unclear. This article critically examines the Federal Commissioner of Taxation's view as to the taxable nature of isolated receipts, expressed in TR 92/3, and the professional bodies' reply, concluding that neither presents an accurate picture of the law.

Introduction

The Commissioner's Taxation Ruling 92/3 (TR 92/3), purporting to provide guidelines for determining whether profits from isolated transactions are taxable income within s 25(1) of the Income Taxation Assessment Act 1936 (ITAA), has recently spurred much discussion. Equally controversial is the professional tax and accounting bodies'¹ response² to the ruling suggesting it to be almost totally erroneous.

This article examines these conflicting pronouncements in light of existing case law in a bid to provide some certainty to the taxation of isolated transactions. Ultimately, it will be contended, neither represents a correct perspective of the law. It will be suggested that, of the six issues considered, the Commissioner has erroneously³ stated the law with respect to four issues,⁴ whilst the law pertaining to two

¹ Taxation Institute of Australia, Institute of Chartered Accountants, Australian Society of Certified Practising Accountants and the Law Council of Australia.

² Or more correctly, in response to its predecessor, Exposure Draft Ruling 72 (EDR 72). The joint submission is set out in "Isolated Transactions: Commissioner's Face Set Against the Law" (1993) 27(7) *Taxation in Australia* 413.

³ Or at least dealt with the law in a misleading or unhelpful manner.

⁴ Issues, 2, 3, 4 and 5.

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issues⁵ is mis-stated in the professional tax and accounting bodies' joint submission. Only the adoption of a hybrid document will accurately inform taxpayers.

A final ancillary, yet crucial issue stemming from this debate is the inappropriateness of the Commissioner's blatant refusal to "design" TR 92/3 in accordance with Hill J's decision in *Westfield Ltd v FCT* (*Westfield Ltd*).⁶ The Commissioner has expressed his disagreement with Hill J's judgment and imposed his own view of the law on self-assessing taxpayers. It will be submitted that such practice is inappropriate and undermines, not only the workability of the self assessment regime, but also the framework of the rule of law.

TR 92/3

The Commissioner's primary statement of the law governing the application of s 25(1) to isolated sales is found in paragraphs 6 and 35 of the ruling. These state that a profit from an isolated transaction is generally income when:

- (a) the intention or purpose of the taxpayer in entering into the transaction was to make a profit or gain; and
- (b) the transaction was entered into, and the profit was made, in the course of carrying on a business or in carrying out a business operation or commercial transaction.

Whilst the ruling states such elements to be derived from the High Court's decision in *FCT v Myer Emporium Ltd*⁷ (*Myer Emporium*), in some respects the statement purports to extend beyond the findings in that case and subsequent determinations.⁸

To an extent, a preferable approach is reflected in the professional bodies' joint submission:⁹

As a general rule, profit from an isolated transaction involving the sale of property will form part of a taxpayer's

⁵ Issues 1 and 2.

⁶ (1991) 91 ATC 4234.

⁷ (1987) 163 CLR 199.

⁸ In particular, the decision in *Westfield Ltd*, above n 6.

⁹ Above n 2 at 171.

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income when both the following elements are present:

- (a) The taxpayer acquired the property for the purpose of profit making by the means, or by means by which included the very means, which the profit was in fact made; and
- (b) The acquisition and sale of the property took place in the context of a business operation or in a commercial transaction."

Whilst it will be contended that this general statement needs to be modified to accommodate different rules for business and non-business taxpayers, generally it more correctly reflects the law.

These statements raise, inter alia, six issues:

- * must profit-making be the taxpayer's sole or dominant purpose;
- * must that purpose be present when the asset is acquired;
- * is this purpose determined objectively or subjectively;
- * must there be a correlation between the intended means of making a profit and the means by which the profit was in fact made;
- * what is the meaning of "business operation or commercial transaction"; and
- * do different rules apply to "business" and "non-business" taxpayers.

These issues are considered in turn in light of TR 92/3, the professional bodies' joint submission and, most importantly, the relevant judgments.

Sole or dominant purpose

Paragraph 6 of TR 92/3 states the "intention or purpose of the taxpayer in entering into the transaction [must be] to make a profit or gain ...". Whilst this key statement does not advert to the importance that must attach to that intention, paragraph 8 continues by stating that "it is not necessary that the intention or purpose of profit-making be the sole or dominant intention or purpose for entering into the transaction. It is

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sufficient if profit-making is a significant purpose".¹⁰ Example 5 given in TR 92/3 and set out in paragraphs 80-82, is also based on this view that profit-making need not be the sole or dominant purpose. In the example it is expressed that a company's underlying hope in buying shares is to acquire control of a target company and that sale of the shares is only a contingency plan if control is not achieved. Despite the absence of a dominant intention of profit-making by resale, the ruling states that the profit stemming from the sale of the shares is taxable income.

In support of this view, the ruling cites, inter alia, *FCT v Cooling*¹¹ (*Cooling*) and *Moana Sand Pty Ltd v FCT*¹² (*Moana Sand*).

*Moana Sand*¹³ involved the purchase of land for the purpose of working/selling the sand on such land. Once the sand was exhausted, the land was to be held until it was "ripe" for subdivision. In time, the land was resumed for \$500,000.¹⁴

The Federal Court held the consequent profit was taxable under both s 25(1) and the second limb of s 26(a),¹⁵ despite subdivision and resale not being the dominant purpose underlying the purchase.¹⁶ This rejection of the need for a sole or dominant profit-making purpose was not, however, reasoned. Whilst the Court referred to the need for a sole or dominant purpose of profit-making by resale for the operation of the first limb of s 26(a),¹⁷ no rationale for excluding such a requirement from s 25(1) was proffered. The Court seemingly just assumed it was not necessary.

Thus whilst *Moana Sand*¹⁸ supports the Commissioner's stance, it does not provide strong authority for the proposition.

*Cooling*¹⁹ concerned the taxable nature of a lease incentive payment to procure, inter alia, a firm of solicitors to enter into a ten year lease agreement with respect to a floor of a building. Whilst not the sole

¹⁰ This view is repeated at paragraph 40 and implicit in paragraph 51.

¹¹ (1990) 21 ATR 13 at 26; 90 ATC 4472 at 4484.

¹² (1988) 19 ATR 1853; 88 ATC 4897.

¹³ Ibid.

¹⁴ Before the sand was exhausted.

¹⁵ The second limb of s 26(a) renders taxable profits stemming from a profit-making scheme or undertaking.

¹⁶ Above n 12 at 4903.

¹⁷ Ibid at 4902. The first limb of s 26(a) renders taxable profits made on the resale of property acquired with a profit-making intention.

¹⁸ Ibid.

¹⁹ Above n 11.

reason for occupying the premises, obtaining a commercial profit through the lease incentive was "a not insignificant purpose."²⁰

The Full Court of the Federal Court held the payments to be income according to ordinary concepts and assessable under s 25(1). Unlike the decision in *Moana Sand*,²¹ Hill J expressly considered whether a sole or dominant profit-making intent was necessary for s 25(1) to apply. He concluded that "neither the sole nor the dominant purpose" of entering into the scheme need be profit-making.²²

Hill J believed this suggestion did not conflict with the primary authority in the area, *Myer Emporium*.²³ In *Myer Emporium*²⁴ the taxpayer company required funds to enable it to diversify its business. To this end the company entered into a series of transactions designed to give rise to a non-taxable gain by the company. First, it lent monies to a subsidiary company at a commercial rate of interest, repayable over seven years. Then, a few days later, the taxpayer assigned to a finance company its right to receive the interest under the loan as and when it became due and payable. In return, the taxpayer company received a lump sum payment of \$45 million.

The High Court held the amount received for the assignment to be income according to ordinary concepts. The Court rejected counsel for the taxpayer's suggestion that the proceeds from an isolated transaction otherwise than in the ordinary course of business could not constitute income.²⁵ The Court believed the proceeds from such isolated transactions could be income, "so long as the taxpayer entered into the transaction with the intention or purpose of making a relevant profit or gain from the transaction."²⁶ Here, the High Court held, the transaction was entered into in the ordinary course of the company's profit-making business.

While the High Court referred to the need for a profit-making intention, there was no explicit statement that this needed to be the sole or dominant profit-making purpose. Nor is there any implicit requirement that profit-making be "the" reason. As Hill J noted in

²⁰ Ibid at 4484. Note in AAT Case 8492 (1993) 24 ATR 1216 the Tribunal found a similar premium to be income on the basis that it was a payment for services rendered.

²¹ Above n 12.

²² Above n 11; also relying on *Moana Sand*, above n 12.

²³ Above n 7.

²⁴ Ibid.

²⁵ Ibid at 209-210.

²⁶ Ibid at 211.

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Cooling,²⁷ there is no suggestion in the Court's judgment that they disagreed with Murphy J's finding of fact that the dominant purpose underlying the transaction was to allow Myer to obtain working capital to facilitate diversification. Obtaining a profit was simply a necessary part of realising this objective. Despite this finding, the Court held s 25(1) to be applicable. Thus the Court must have considered it sufficient that the profit-making purpose was less than dominant.

Consequently, it appears the Commissioner has judicial support for his statement in paragraph 8. Whilst there must be a profit-making intention,²⁸ there is no need for it to be the sole or dominant purpose.

Nevertheless, the professional tax and accounting bodies' joint submission rejects this suggestion:

It was well established by the time of the repeal of the first limb of section 25A²⁹ that the purpose referred to was the sole or dominant purpose actuating the acquisition of the property. The Professional Associations submit that profits from isolated transactions which formerly had to be considered under the first limb of Section 25A are not income under Sub-section 25(1) where the taxpayer's profit-making purpose is not the sole or dominant purpose. The proposition in the EDR to the contrary is unsustainable.

Three possible bases for the view that profit-making must be the taxpayer's sole or dominant purpose have been suggested:

- i) the decision in *Myer Emporium*;³⁰
- ii) the need for a sole or dominant profit-making purpose under the first limb of s 25A; and
- iii) the excessive scope the Commissioner's view would accord s 25(1).

First, the professional bodies assert that *Myer Emporium*³¹ suggests the profit-making purpose must be accorded a greater importance than that suggested by TR 92/3. In support, it is stated that the High Court required profit-making to be "the" purpose.³²

²⁷ Above n 11.

²⁸ Which was held to be absent in the recent decision of the Full Court of the Federal Court in *Hytco Hiring Pty Ltd v FCT* (1992) 92 ATC 4696 at 4700.

²⁹ Which replaced s 26(a).

³⁰ Above n 7.

³¹ Ibid.

³² Ibid at 210.

Whilst the High Court's judgments do refer to "the" purpose and "the" intention of profit-making, if the Court's intention was to confine these principles in the manner suggested in the joint submission, surely it would have expressly included the words "sole or dominant." Moreover, as noted above, as the dominant reason underlying the scheme in *Myer Emporium*³³ was obtaining finance to diversify the business, the Court could not have believed that profit-making needed to be the "sole or dominant" purpose, otherwise the monies would not have been held to be income. It is not open from a consideration of *Myer Emporium*³⁴ to suggest TR 92/3, at least in this respect, does not echo current judicial opinion.

Second, the professional bodies suggest that, as the first limb of s 25A is limited to occasions where profit-making is the sole or dominant purpose,³⁵ s 25(1) should also be so confined. This argument is not persuasive. Logically, its force is no greater than the Commissioner attempting to support his view by pointing to the fact that the second limb of s 25A does not require a sole or dominant purpose of profit-making.³⁶

Finally, the professional bodies state that, were the Commissioner's statement accurate, there would be little scope for the operation of s 25A or Part IIIA, as practically all sales would be caught by s 25(1). As it is a normal part of every purchase that the purchaser hopes any subsequent resale will be at a profit, every sale will be caught by s 25(1).³⁷

This contention overstates the scope of the "Myer principle." As stated in *FCT v Hyteco Hiring Pty Ltd (Hyteco)*,³⁸ *Westfield Ltd*³⁹ and *FCT v Spedley Securities Ltd (Spedley)*,⁴⁰ not every "receipt by a business would necessarily be of an income nature ... this would be contrary to authority, to the Act itself and to basic concepts concerning the

³³ Ibid.

³⁴ Ibid.

³⁵ See, for example, *Evans v FCT* (1936) 55 CLR 80 at 99; 3 ATD 301 at 308.

³⁶ See *Whitfords Beach Pty Ltd* (1982) 150 CLR 355; *Moana Sand*, above n 12 at 4903-4904; *FCT v Bidencope* (1978) 78 ATC 4222 at 4234; *London Australia Investment Co Ltd v FCT* (1977) 77 ATC 4398.

³⁷ Cf "Isolated Transactions," above n 2 at 172.

³⁸ Above n 28 at 4700.

³⁹ Above n 6 at 4241.

⁴⁰ (1988) 88 ATC 4126. The taxpayer in this case received a lump sum as compensation for any possible damage (ie loss of reputation/goodwill) stemming from another company refusing to take up a loan the taxpayer had arranged.

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distinction between income and capital.⁴¹ More specifically, the *Myer* principle is only applicable where, *inter alia*, (i) the taxpayer had a profit-making intention⁴² and (ii) the sale is a business operation or commercial transaction.⁴³

Thus it is submitted that the Commissioner's statement of the law is correct in so far as he suggests a sole or dominant purpose of profit-making is not a prerequisite for applying s 25(1).

Timing of intention

Paragraph 6 of TR 92/3 states that "the intention or purpose of the taxpayer in entering into the *transaction* [must be] to make a profit or gain ..." Whilst the ruling does not define "transaction", which could therefore include the "acquisition" of the asset, later paragraphs make it clear this was not the Commissioner's intent. Paragraphs 9 and 41 state that "it is usually, but not always, necessary that the taxpayer has the purpose of profit-making at the time of acquiring the property." Paragraph 42 makes it even clearer that the Commissioner believes a gain will be income even though the taxpayer's initial intention was not profit-making. This paragraph states that, as long as the taxpayer changes his mind and later decides to enter into a profit-making transaction, that will suffice.

In support, the ruling cites, *inter alia*, *FCT v Whitfords Beach Pty Ltd (Whitfords Beach)*.⁴⁴ Here a company was created to acquire land to ensure its shareholders access to the beach for fishing. There was no profit-making intention underlying the acquisition. In time, the original shareholders sold their shares in the company. The new shareholders purchased their shares with the intention of developing and subdividing the land for resale at a profit. The company adopted a new set of articles reflecting this change in intention and, under the new shareholders' control, two companies were appointed to develop the land. The development was a financial success and the Commissioner assessed the consequent profits as income within s 25(1) and s 26(a).

⁴¹ *Spedley*, *ibid* at 4130. As the lump sum was capital in nature, being for loss of reputation/goodwill, it was not assessable under s 25(1).

⁴² Which was held to be absent in the recent decision of the Full Court of the Federal Court in *Hytco*, above n 28 at 4700. If the taxpayer is a non-business taxpayer, this intention must exist at the time of acquisition: *Westfield Ltd*, above n 6 at 4243.

⁴³ *Myer Emporium*, above n 7.

⁴⁴ Above n 36.

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The High Court upheld the Commissioner's assessment of the profits under s 25(1). Whilst strictly this case involved an initial non profit-making intent being subsequently replaced with a profit-making intent, thereby providing support for paragraph 42, the Court considered this to be an exceptional case. The Court clearly did not believe that as a general rule the profit-making intention need only be contemporaneous with the sale of the asset. Gibbs CJ⁴⁵ and Wilson J⁴⁶ "gravely doubt[ed]" whether the profits would have been taxable under s 25(1) but for the change in underlying ownership. In effect they treated this change as effecting a re-purchase of the property by the company for profit-making purposes. This is clear from Gibbs CJ's later statement that "the mere realisation of a capital asset not *acquired for the purpose* of profit-making by sale would not be either assessable income within s 25(1) or ... s 26(a)."⁴⁷

Thus it is submitted that *Whitfords Beach*,⁴⁸ whilst prima facie supporting the Commissioner's statement, should be viewed as an exceptional case that does not provide an authoritative basis for the general claim embodied in paragraphs 6 and 42 of TR 92/3.

At paragraph 30, the ruling also quotes a passage from *Myer Emporium*,⁴⁹ which could be seen as supporting the view that a profit-making intention need only underlie the sale of the asset.⁵⁰

Generally speaking, however, it may be said that if the circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the taxpayer's business.

However, the same passage continues.⁵¹

The authorities establish that a profit or gain so made will constitute income if the property generating the profit or gain was *acquired* in a business operation or commercial transaction *for the purpose of profit-making* by the means giving rise to the profit.

⁴⁵ Ibid at 369-370.

⁴⁶ Ibid at 398-399.

⁴⁷ Ibid at 367.

⁴⁸ Ibid.

⁴⁹ Above n 7.

⁵⁰ Ibid at 209-210.

⁵¹ Ibid at 210.

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Later passages appear to entrench the view that the relevant point for formulating a profit-making intention is the acquisition of the asset:

profits made on a realisation or change of investments may constitute income if the investments were *initially acquired* as part of a business *with the intention or purpose* that they be realised subsequently in order to capture the profit arising from their expected increase in value.

Especially pertinent to the suggestion in paragraph 42 that profits will be income if the taxpayer changes his or her mind and later decides to enter into a profit-making transaction⁵² is the Court's statement that:⁵³

It is one thing if the decision to sell an asset is taken after its acquisition, there having been no intention or purpose at the time of acquisition of acquiring for the purpose of profit-making by sale. Then, if the asset be not a revenue asset on other grounds, the profit made is capital because it proceeds from a mere realisation.

This passage of the judgment in *Myer Emporium*⁵⁴ contradicts paragraph 42. Yet what of the earlier suggestion in *Myer Emporium*⁵⁵ that the profit-making intent may merely underlie the "transaction"? Can this inconsistency in language be reconciled?

On one view, the first reference to "transaction" may be seen as loose language, the Court intending to confine the *Myer* principle's operation to assets acquired with a profit-making intent. If this is so, the professional bodies' view that the profit-making intent must exist at acquisition would be correct.

An alternative view suggests that TR 92/3 has mistakenly attempted to "amalgamate into one test what are really separate tests, each of which is applicable to separate types of taxpayers."⁵⁶ This view suggests that the *Myer* principle incorporates two different tests,

⁵² As per paragraph 42 of TR 92/3.

⁵³ Above n 7 at 210. The passage continues: "But it is quite another thing if the decision to sell is taken by way of implementation of an intention or purpose, existing at the time of acquisition, of profit-making by sale, at least in the context of carrying on a business or carrying out of a business operation or commercial transaction".

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Allerdice, "Ruling TR 92/3: The Voice of the Profit" (1993) 27(7) *Taxation in Australia* 408 at 409.

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applicable depending on whether the transaction is a "business" or "non-business" transaction. This distinction is considered in greater detail below. Simply put, where the sale is connected with the taxpayer's business, it will suffice if the taxpayer enters into the transaction of sale with a profit-making intent. By contrast, where the sale is not a necessary incident of the taxpayer's business, the intent must exist at the acquisition of the asset. This view of *Myer Emporium*⁵⁷ accommodates the seemingly inconsistent reference to, first, "transaction", then, "acquisition".

This suggestion, and the rationale for the distinction, finds support in the majority's judgment in *Myer Emporium*.⁵⁸ The Court noted:

Because a business is carried on with a view to profit, a gain made in the ordinary course of carrying on the business is invested with the profit-making purpose, thereby stamping the profit with a character of income.

Similarly, in *Westfield Ltd*⁵⁹ Hill J declared:

In a case where the transaction which gives rise to the profit, is itself part of the ordinary business ... the identification of the business activity itself will stamp the transaction as one having a profit-making purpose The profit-making purpose can be inferred from the association of the transaction of purchase and sale with that business activity.

As businesses are conducted with a view to profit, where the transaction is connected with the ordinary business of the taxpayer, it can more easily be inferred that the asset was acquired with a profit-making intention. By contrast, for "non-business" transactions, acquisition with a profit-making intention must be determined.

This distinction between "business" and "non-business" transactions is supported by later passages in Hill J's judgment. He continues by noting that, if the activity is not an incident of a business, the proceeds will only be taxable income "if the appellant had a purpose of profit-making at the time of acquisition So much is implicit in the decision of the High Court in *Myer*."⁶⁰

⁵⁷ Above n 7.

⁵⁸ Ibid.

⁵⁹ Above n 6 at 4242.

⁶⁰ Ibid at 4243. See also at 4241.

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*Westfield Ltd*⁶¹ involved the purchase of land by the taxpayer company to develop a shopping centre.⁶² The land was ultimately sold to AMP, the taxpayer company contracting with AMP to design and construct a shopping centre on it. The Commissioner included the profit from the sale in the taxpayer's assessable income.

As the resale of land in that case was not part of, or a necessary incident of, the taxpayer's business activities,⁶³ Hill J concluded that the profit would only constitute income if the property had been *acquired* with a profit-making purpose. On the facts, he held that the taxpayer had not acquired the land for resale; this was no more than a possibility. Rather, the taxpayer company intended to develop the land itself. For this reason, the profit was not considered taxable under s 25(1).

Even more recently, in *Hytco*⁶⁴ the Full Court of the Federal Court also held that the requisite timing of the profit-making intent differed in "business" and "non-business" transactions. In the latter case, the Court said, the amount would only be income if the asset was *acquired* for the purpose of profit-making.⁶⁵ Where such an intention did not exist at the point of acquisition,⁶⁶ the Court declared that the profit would only be taxable if the sales were in the ordinary course of business.⁶⁷ As the subject transactions in that case, the disposal of fork lift trucks, were not made in the course of, or as an incident of, the taxpayer's business of hiring such trucks, the profits would only be income if they were acquired for resale. On the facts, that was not the taxpayer's intent and the profits were consequently held not to be income.

Whilst at one point the ruling distinguishes between business and non-business taxpayers⁶⁸ and paragraph 31 states that an underlying profit-making intent can be inferred when the transaction is in the

⁶¹ Ibid.

⁶² First, the taxpayer company acquired an option over the subject land and neighbouring properties. The taxpayer's initial plans to develop the area were abandoned, however, until it learned that a competitor was attempting to secure an option over the subject area. The taxpayer responded by securing a further option and, in time, purchasing the land.

⁶³ Above n 6 at 4242. The taxpayer's business activities being the construction, leasing and management of shopping centres: above n 6 at 4242.

⁶⁴ Above n 28.

⁶⁵ Ibid at 4699.

⁶⁶ Ibid at 4700.

⁶⁷ Ibid.

⁶⁸ Paragraph 1 explicitly, and paragraph 31 implicitly, distinguish between "business" and "non-business" taxpayers.

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ordinary course of a business, the ruling fails to confine paragraph 6 to business taxpayers.

It would have been more appropriate for both TR 92/3 and the joint submission to specify two quite separate tests in relation to the timing of the profit-making intention:

- i) where the sale is by a business taxpayer, the profit-making intention need only be established at the time of the transaction; and
- ii) where the transaction is by a non-business taxpayer, a profit-making intention must exist at the initial acquisition.

Is the purpose determined objectively or subjectively?

Paragraphs 7 and 38 of TR 92/3 state that the profit-making intention or purpose "is not the subjective intention or purpose of the taxpayer. Rather, it is the taxpayer's intention or purpose discerned from an objective consideration of the facts and circumstances of the case." At first glance, the paragraphs may be stating simply that the taxpayer's statement of intent is not the end of the inquiry and must be tested closely in light of the objective circumstances.⁶⁹ If that is the intended meaning, it cannot be disputed. If, however, it suggests that the taxpayer's actual intent is irrelevant,⁷⁰ it is submitted that the paragraph states too strongly the objective nature of the test.

In support of the statement in paragraphs 7 and 38, the ruling relies, *inter alia*,⁷¹ on the statement in *Myer Emporium* that:⁷²

it may be said that if the circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income

The use of the word "inference", the ruling suggests, indicates that intent is to be determined objectively.

⁶⁹ Cf Allerdice, above n 56 at 410, citing *Pascoe v FCT* 11 ATD 108 at 111.

⁷⁰ As would seem to be the case from example 7 where it appears objective factors are treated as prevailing over the parties' subjective intent.

⁷¹ The Ruling also quotes from Parsons, *Income Taxation in Australia* (1985) 202 for the application of an objective test.

⁷² Above n 7 at 209-210.

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The meaning of this passage is best understood in its context. The Court was referring to a business purchase. In light of the fact that businesses are "carried on with a view to profit,"⁷³ the Court thought it legitimate to infer that the asset was acquired for profit-making. The passage does not suggest that the taxpayer's actual intention should be ignored, particularly in a non-business context. Thus it is submitted that, if the Court accepts the taxpayer's statement as to his/her subjective intention, this must prevail over contradictory objective circumstances.⁷⁴

This view finds support in *Westfield Ltd.*⁷⁵ Hill J rejected counsel for the Commissioner's suggestion that objective considerations indicated that the taxpayer had a profit-making intention, noting that if effect were given to these factual inferences, that would "necessarily involve the rejection of Mr Saunders' evidence to the contrary."⁷⁶ Hill J clearly believed the witness's apparently truthful statement prevailed over objective factors suggesting the contrary.

Profit-making by intended means

Paragraphs 14 and 57 of TR 92/3 state:

It is not necessary that the profit be obtained by a means specifically contemplated (either on its own or as one of several possible means) when the taxpayer enters into the transaction. ... It is ... sufficient if a taxpayer enters into the transaction with the purpose of making a profit by one particular means but actually obtains the profit by a different means.

This statement is contrary to the present state of the law. As Hill J stated in *Westfield Ltd.*⁷⁷

where the transaction falls outside the ordinary scope of the business, so as not to be part of that business, there must exist, in my opinion, a purpose of profit-making by the very means by which the profit was in fact made. So much is implicit in the decision of the High Court in *Myer*.

⁷³ Ibid.

⁷⁴ Cf Allerdice, above n 56 at 410.

⁷⁵ Above n 6.

⁷⁶ Ibid at 4240.

⁷⁷ Ibid at 4243.

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In support, Hill J reiterated the passage from *Myer Emporium*⁷⁸ requiring the asset to be acquired "for the purpose of profit-making by the means giving rise to the profit."⁷⁹ Thus the profit must stem from the very means intended at the purchase of the asset.

Hill J continued by asserting that, where the taxpayer's scheme lacks specificity, there only being a general intention to making a profit, "the mode of achieving that profit must be one contemplated by the taxpayer as at least one of the alternatives by which the profit could be realised."⁸⁰

Consequently, whilst Hill J's judgment accords with paragraph 56 of TR 92/3,⁸¹ paragraphs 14 and 57 are directly contrary to *Westfield Ltd.*⁸² As much was acknowledged in TR 92/3's predecessor, Exposure Draft Ruling 72 (EDR 72). Paragraph 45 of EDR 72 stated:

We do not agree with the proposition made by Hill J as implicit in the High Court's decision in *Myer*. In any event, the Federal Court adopted an unduly narrow approach in applying *Myer*.

Notwithstanding the High Court's recent declaration that the Full Court of the Federal Court is "the ultimate Court of Appeal in taxation matters subject only to exceptional cases in which this Court grants special leave to appeal,"⁸³ through TR 92/3 the Commissioner has denied the authority of that Court's pronouncement in *Westfield Ltd.*⁸⁴

The appropriateness of incorporating into a public ruling a statement which is admitted to be contrary to the existing state of the law is considered below. For present purposes, it is sufficient to consider the

⁷⁸ Above n 7.

⁷⁹ Above n 6 at 4243, emphasis added in Hill J's judgment.

⁸⁰ Ibid at 4243. Hill J referred to *Steinberg v FCT* (1975) 134 CLR 640 as such a case, noting that the Court held "that it was not necessary to fall within the second limb [of s 26(a)], that every step which culminates in the making of a profit should be planned or foreseen." Whilst *Steinberg v FCT* (1975) 134 CLR 640 concerned the application of s 26(a), Hill J believed these principles to be equally applicable to s 25(1).

⁸¹ That is, that it suffices if "(a) a taxpayer acquires property with a purpose of making a profit by whichever means prove most suitable and a profit is later obtained by any means which implements the initial profit-making purpose...; or (b) a taxpayer requires (sic) property contemplating a number of different methods of making a profit and uses one of those methods in making a profit".

⁸² Above n 6.

⁸³ *FCT v Westfield* 22 ATR 400.

⁸⁴ Above n 6.

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correctness of Hill J's assertions and the suggestion in paragraph 58 that the law on this issue "is not clear."

The ruling cites, in support of paragraph 56,⁸⁵ *Steinberg v FCT* (*Steinberg*)⁸⁶ and *Premier Automatic Ticket Issuers Ltd v FCT* (*Premier Automatic Ticket Issuers*).⁸⁷ It is submitted that while these cases may support the assertions in paragraph 56, they suggest paragraph 57 to be erroneous.⁸⁸

In *Steinberg*⁸⁹ Barwick CJ declared that:

there must be a plan: it must be the taxpayer's plan and it must exist, in my opinion, at the time of the acquisition of the property: indeed, that acquisition, in my opinion, must be itself part of the scheme and the property acquired the intended vehicle for carrying the scheme into execution.

This statement supports Hill J's view that the effected profit-making plan must have been intended/foreseen at the point of acquisition.

Whilst Gibbs J in that case suggests the taxpayer may adopt "one of the many alternatives" that his plan leaves open, thereby returning himself a profit," this statement is confined to situations where the taxpayer acquired the property for the purpose of making a profit by the "easiest or most advantageous way." Thus, while the statement supports paragraph 56, it does not give credence to the suggestion that where a contemplated means is abandoned the receipts are nevertheless taxable income.⁹⁰

Again in *Premier Automatic Ticket Issuers*,⁹¹ the Court also required a specific scheme, identifiable at the date of acquisition, to be executed to give rise to the profit.

More importantly, in the context of s 25(1), the decision in *Myer Emporium*⁹² negates the assertions in paragraphs 14 and 57. In the

⁸⁵ The correctness of which is not disputed.

⁸⁶ Above n 80.

⁸⁷ (1933) 50 CLR 268.

⁸⁸ Note, however, that these cases concerned s 26(a), not s 25(1).

⁸⁹ Above n 80.

⁹⁰ As Stephen J acknowledged, if an original scheme is abandoned and a new scheme implemented, any assessable profits are calculated by reference to the value of the asset at the inception of the new scheme. See *Kratzmann v FCT* (1970) 70 ATC 4043.

⁹¹ Above n 87.

⁹² Above n 7.

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course of the majority's judgment, it is stated that the sale must be "by way of implementation of an intention or purpose, existing at the time of acquisition, of profit-making by sale ..."⁹³ As noted earlier, the High Court continued by asserting in even clearer terms that the gain will only constitute income "if the property generating the profit or gain was acquired ... for the purpose of profit-making *by the means giving rise to the profit*."⁹⁴ Paragraphs 14 and 57 are, therefore, not only contrary to *Westfield Ltd*,⁹⁵ but *Myer Emporium*⁹⁶ itself.

Consequently, it is submitted that, contrary to the suggestion in paragraph 58, the law with respect to this issue is very clear; there must be a correlation between the means of profit-making initially intended and the means which gives rise to the profit in actuality.⁹⁷

In support of the assertions in paragraphs 14 and 57, the ruling also cites *Moana Sand*.⁹⁸ Paragraph 58 does not clearly state how the decision supports the claims in paragraph 57. It may be that the Commissioner is suggesting that the intended means of profit-making in that case was resale to either another family company or a third party sub-divider⁹⁹ and that the compulsory resumption was therefore not within the means initially intended. If the case is so viewed, it would support the claims in paragraph 57.

Three points can, however, be made in this regard. First, it could be suggested that the resumption was akin to a sale to a third party developer, and thus within one of the intended means.¹⁰⁰ As the Court itself noted, "[n]othing turns ... upon any distinction between a conversion ... into cash by means of compulsory acquisition and a similar conversion by means of an ordinary sale ...".¹⁰¹ The Court

⁹³ Ibid at 213; quoted also in Allerdice, above n 56 at 411.

⁹⁴ Ibid at 210.

⁹⁵ Above n 6.

⁹⁶ Above n 7.

⁹⁷ Quaere, whether, in light of Hill J's qualification in the above quoted passage, this only applies to non-business taxpayers.

⁹⁸ Above n 12.

⁹⁹ As described, *ibid* at 4901, 4902 and 4904.

¹⁰⁰ This is supported further by the Court's rejection of the suggestion that the company's "scheme or plan had not advanced to the time when it would have contemplated sale." The Court stated it to be impossible "to doubt that if a buyer had come along offering an attractive price for the land, in advance of its being ready for subdivision, the company would have entertained that offer upon its commercial merits": *ibid* at 4905.

¹⁰¹ *Ibid* at 4904-5, quoting Kitto J in *Hobart Bridge Co Ltd v FCT* (1951) 82 CLR 372 at 382. While the comment was with respect to s 26(a), there is no reason to suggest the Court did not entertain the view also in respect to s 25(1).

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continued by noting that whilst the sale was "pursuant to the compulsory acquisition, [it] was the fulfilment of the ultimate purpose of the company in relation to the land."¹⁰²

Second, in *Moana Sand*,¹⁰³ the taxpayer may have only intended to make a profit by whatever means. If the case is so viewed it again would only support paragraph 56(a).

Finally, and more importantly, whether a correlation between the intended means of making a profit and the means by which the profit was in fact made was necessary was not considered by the Court.¹⁰⁴ If the decision rests on a rejection of this requirement, it does not rest on a reasoned rejection.

Whilst *Moana Sand*¹⁰⁵ may provide authority for paragraph 57, the clear assertions to the contrary in *Westfield Ltd*¹⁰⁶ and *Myer Emporium*¹⁰⁷ should be preferred. Particularly given the High Court's confirmation that Hill J's judgment in *Westfield Ltd*¹⁰⁸ was not based on a misinterpretation of the *Myer* principle,¹⁰⁹ the decision should be viewed as an authoritative pronouncement of this aspect of the law.

Thus it is submitted that the means that gives rise to the profit must have been intended by the taxpayer at the point of acquisition and that paragraph 57 is erroneous.

Business operation or commercial transaction

As noted above, for profits to be taxable under the *Myer* principle, the profit must have been made in the course of carrying out a "business operation" or a "commercial transaction". Such transactions stand in contra-distinction to a mere realisation of a capital asset.¹¹⁰

Paragraphs 46-50 of TR 92/3 examine the classification of activities as a "business operation or commercial transaction." The ruling states that

¹⁰² Ibid at 4905.

¹⁰³ Ibid.

¹⁰⁴ Though it considered a similar question with respect to s 26(a): ibid at 4904.

¹⁰⁵ Ibid.

¹⁰⁶ Above n 6.

¹⁰⁷ Above n 7.

¹⁰⁸ Above n 6.

¹⁰⁹ Above n 83 at 400 and 402.

¹¹⁰ *Whitfords Beach*, above n 36 esp at 368. Cf "Isolated Transactions," above n 2 at 174.

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a transaction will fall within this phrase "if the transaction or operation would constitute the carrying on of a business except that it does not occur as part of repetition or recurring transactions or operations."¹¹¹ Paragraphs 13 and 49 set out factors that the Commissioner believes pertinent to determining whether the transaction satisfies this definition.¹¹²

It is submitted the general principle stated in paragraph 49 and the factors set out in paragraphs 13 and 49 are not helpful and tend to mislead. Factors (a)¹¹³ and (f),¹¹⁴ for example, pertain to the nature of the taxpayer, rather than the nature of the transaction. Factor (c), "the amount of money involved in the operation or transaction and the magnitude of the profit sought or obtained," also bears special mention, as it is directly contrary to Gibbs J's assertion in *Whitfords Beach*,¹¹⁵ that "the mere magnitude of the realisation does not convert it into a business" transaction.

The misleading nature of these factors is magnified by the examples provided in the ruling. Example 1 involves the purchase of shares by a taxpayer with a "significant" purpose of profit-making through their increase in value. We are told, from these bare facts, that the profit stemming from the sale of the shares 18 months later was "not a business operation or commercial transaction," but merely an investment. The ruling so concludes without adverting to the circumstances of that sale.

Even stranger, example 3 suggests that the profit made on a sale of shares to family members at an undervalue is not "business or

¹¹¹ Paragraph 49.

¹¹² "(a) the nature of the entity undertaking the operation or transaction;
 (b) the nature and scale of other activities undertaken by the taxpayer;
 (c) the amount of money involved in the operation or transaction and the magnitude of the profit sought or obtained;
 (d) the nature, scale and complexity of the operation or transaction;
 (e) the manner in which the operation or transaction was entered into or carried out;
 (f) the nature of any connection between the relevant taxpayer and any other party to the operation or transaction;
 (g) if the transaction involves the acquisition and disposal of property, the nature of that property; and
 (h) the timing of the transaction or the various steps in the transaction."

¹¹³ That is, the nature of the entity undertaking the operation, ie company or individual.

¹¹⁴ The nature of the connection between the taxpayer and the other party involved in the transaction, ie family connections. This distinction is criticised in detail later in this article.

¹¹⁵ Above n 36.

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commercial in character," but rather a family dealing. If all that is required to place a transaction outside the scope of s 25(1) is that the sale be to family members at an undervalue the "potential for tax avoidance will be enormous."¹¹⁶

Example 7 is equally misleading. Here the taxpayers have sold shares in a company established to acquire land. Whilst the example deals with the sale of shares, strangely, the commentary is more directed to the reason for purchasing the land. Further, two bases for concluding that the sale of the shares was a business operation are of questionable relevance: (i) the use of a corporation and (ii) the magnitude of the monies involved. In light of the decision in *Hyteco*¹¹⁷ and *Westfield Ltd*,¹¹⁸ the use of a corporation is not indicative of a business operation. Similarly, the suggestion that the amount involved in example 7 indicated that the profits were income is erroneous given Gibbs J's comment to the contrary in *Whitfords Beach*.¹¹⁹

Perhaps more importantly, the commentary pertaining to example 7 fails to appreciate that in cases involving the development of land it is very much a matter of degree whether the transaction will tip over the edge and be seen as more than a mere realisation of a capital asset. As Gibbs J stressed in *Whitfords Beach*,¹²⁰ whether the transaction amounts to a business operation is a matter of fact to be determined on a case by case basis. Consequently, example 7 is misleading in so far as it suggests the profit in such cases is clearly income. Similar cases have involved extensive litigation culminating in decisions both for and against the Commissioner.¹²¹

Thus it is submitted that the professional bodies have correctly criticised the examples set out in TR 92/3 as deficient and unhelpful.¹²²

Business v non-business taxpayer

Whilst not reflected in the statements in paragraphs 6 and 35, at one point the ruling recognises the distinction between "business" and "non-business" taxpayers. Paragraph 1 defines the term "isolated

¹¹⁶ Allerdice, above n 56 at 412.

¹¹⁷ Above n 28.

¹¹⁸ Above n 6.

¹¹⁹ Above n 36.

¹²⁰ Ibid.

¹²¹ "Isolated Transactions", above n 2 at 176.

¹²² Ibid at 176. Cf Allerdice, above n 56 at 411.

transactions" as referring to:

- (a) those transactions outside the ordinary course of business of a taxpayer carrying on a business; and
- (b) those transactions entered into by non-business taxpayers.

As noted above, this distinction is not carried through to the important suggestions of the law in paragraphs 6 and 35. In particular, the ruling fails to reflect the existence of two very different tests, one for "business" taxpayers and the other for "non-business" taxpayers.

Whilst the notion of a "non-business" taxpayer is not explicitly defined in TR 92/3, paragraph 32 considers in contradistinction the term "ordinary course of business." This paragraph suggests two scenarios to be within the phrase:

- (i) a profit or gain arising from a transaction which is itself part of the ordinary business of a taxpayer (judged by reference to the transactions in which the taxpayer usually engages) - provided that the gross receipts from the transaction lack the character of income ... and
- (ii) a profit or gain arising from a transaction which is an ordinary incident of the business activity of the taxpayer, although not a transaction entered into directly in its main business activity ...¹²³

It is submitted that this definition accurately presents the situations which will be classified as business transactions.

The first scenario is applicable to cases where, for example, insurance companies and banks switch their investments, the consequent realisation of capital assets constituting an integral part of that taxpayer's business.¹²⁴

*Cooling*¹²⁵ provides an example of the second scenario. In that case the Court rejected the suggestion that the taxpayer's business was simply the performance of professional services, to the exclusion of the receipt of lease incentive payments. Just as the costs of moving are a

¹²³ Cf Hill J in *Westfield Ltd*, above n 6 at 4242.

¹²⁴ See, for example, *London Australia Investment Company Ltd v FCT*, above n 36.

¹²⁵ Above n 11.

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deductible expense,¹²⁶ the receipts pertaining to such a move were held also to be an incident of carrying on a business.¹²⁷ When the taxpayer carries on business from leased premises, the Court held, the leasing of new premises was just as much an act in the ordinary course of the taxpayer's business activities as the business's trading activities.¹²⁸ As the receipt of incentive payments was an ordinary incident of leasing premises, the profit was held to have been received in the ordinary course of business.¹²⁹

The only possible point of dispute with paragraph 32 lies with the meaning of the phrase "ordinary incident of the business activity" in sub-paragraph (ii). Whilst Hill J required the transaction to be an "ordinary incident" of the business in *Cooling*,¹³⁰ in *Westfield Ltd*¹³¹ he described the transaction as having to be a "necessary incident" of the business activity.¹³² The stricter terminology used in the latter pronouncement, coupled with the actual findings in *Westfield Ltd*¹³³ and *Hyteco*,¹³⁴ reconsidered below, makes it clear that the connection must be more than incidental. The receipt must have a real connection with the taxpayer's business.

In support of the definition in paragraph 32, the ruling cites, inter alia, *Westfield Ltd*.¹³⁵ As noted above, Hill J required an actual/real connection between the transaction and the taxpayer's business.¹³⁶ In ascertaining whether the transaction was an incident of the taxpayer's business, Hill J declared the initial step was to identify the taxpayer's business through "a wide survey and an exact scrutiny of the taxpayer's activities."¹³⁷ In *Westfield Ltd*,¹³⁸ Hill J concluded that the taxpayer's business was "the construction of shopping centres, their leasing and management."¹³⁹ Once the business was so identified, it was then easier to discern that the reselling of land was not "part of the ordinary business activity at all, or, for that matter, a necessary incident of that business activity."

¹²⁶ Citing *Lister Blackstone Pty Ltd v FCT* (1976) 76 ATC 4285 at 4286.

¹²⁷ Above n 11.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Above n 11.

¹³¹ Above n 6.

¹³² Ibid at 4242.

¹³³ Ibid.

¹³⁴ Above n 28.

¹³⁵ Above n 6.

¹³⁶ A temporal connection was not sufficient: *ibid* at 4242.

¹³⁷ *Californian Copper Syndicate v Harris* (1904) 5 TC 159 at 166, quoted *ibid* at 4241.

¹³⁸ Ibid.

¹³⁹ Ibid at 4242.

The most recent case where the transaction was found not to be a necessary incident of the taxpayer's business was *Hyteco*.¹⁴⁰ Whilst the taxpayer's business was to be determined by "a wide survey ... of the taxpayer's activities,"¹⁴¹ this survey revealed the taxpayer's business to be the hiring of fork lifts, as opposed to both their hiring and sale.¹⁴² Thus the Full Court of the Federal Court concluded that the disposal of fork lift trucks was not in the course of, or as an incident of, the taxpayer's business of hiring such trucks.¹⁴³

Hill J so concluded, even though it was inevitable that the trucks would be sold when they were no longer suitable for hiring. To this end he noted that the "sale of fork lift trucks at a profit is not an ordinary incident of the business activity of a company hiring out such trucks, any more than the sale of redundant typewriters or word processing equipment is an ordinary incident of the business of a solicitor or accountant."¹⁴⁴

From the decisions in *Westfield Ltd*¹⁴⁵ and *Hyteco*,¹⁴⁶ it is clear that the courts require the isolated sale to have a real connection with the taxpayer's business before the "business taxpayer" limb of the *Myer* principle will be applicable.

Appropriateness of Commissioner's actions

The incorrectness of aspects of the Commissioner's ruling also raises the appropriateness of incorporating into a public ruling principles which the Commissioner acknowledges do not accord with the judiciary's views. Paragraph 45 of EDR 72 explicitly stated that "[w]e do not agree with the proposition made by Hill J" in *Westfield Ltd* and believe in "any event, the Federal Court [in *Westfield Ltd*] adopted an unduly narrow approach in applying *Myer*." Whilst the comment was not repeated in TR 92/3, as already noted, Hill J's statement of the law

¹⁴⁰ Above n 28.

¹⁴¹ Ibid, quoting *Western Gold Mines NL v FCT (WA)* (1938) 59 CLR 729 at 740; *London Australia Investment Co Ltd v FCT*, above n 36 at 116; *GP International Pipecoaters Pty Ltd v FCT* (1990) CLR 124 at 138.

¹⁴² Ibid.

¹⁴³ Ibid at 4699.

¹⁴⁴ Ibid at 4704. The profit stemmed from the sale of the "very apparatus with which the taxpayer conducted its business, not a profit from the process by which the taxpayer operated to obtain regular returns by means of regular outlays ...": ibid at 4702.

¹⁴⁵ Above n 6.

¹⁴⁶ Above n 28.

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is not reflected in the principles espoused in that ruling.

The Commissioner's suggestion in EDR 72 that the law is unclear and that Hill J's interpretation is unduly narrow is misconceived.¹⁴⁷ The statements in *Westfield Ltd*¹⁴⁸ and *Myer Emporium*¹⁴⁹ represent the law¹⁵⁰ upon which rulings should be based.

Nor is this an isolated occasion where the Commissioner has taken it upon himself to "make law" via a public ruling. Income Tax Ruling 2456 (IT 2456), for example, claims that a tax rebate may be considered a tax benefit for Part IVA purposes, even though internal documents reveal that four branches of the Australian Tax Office recognised the statement to be incorrect.¹⁵¹ Despite acknowledging in these documents that it was unlikely that the courts would uphold the statement, the Ruling was handed down to "put the brakes on" certain transactions.¹⁵²

Similarly, EDR 73 denied the deductibility of interest on funds borrowed to pay dividends. This was despite the belief within the Tax Office that "[i]nterest of this nature would generally always be allowed as a deduction."¹⁵³

It is submitted that this practice of "law making" through rulings which the Australian Tax Office recognises to be indefensible must stop. The Commissioner should administer the Act in accordance with the law¹⁵⁴ rather than internal Tax Office policy. Rulings should not be revenue driven. "It is not for the Commissioner to set his face against the law as it is and administer the Act in accordance with the law as he perceives it should be."¹⁵⁵

These criticisms are particularly pertinent under the present self-assessment regime. Given the force of public rulings,¹⁵⁶ (inter alia, the need for taxpayers to self-assess in accordance with their terms and the fact that rulings are considered "relevant authorities" for the

¹⁴⁷ Cf "Isolated Transactions", above n 2 at 174.

¹⁴⁸ Above n 6.

¹⁴⁹ Above n 7.

¹⁵⁰ Cf "Isolated Transactions", above n 2 at 174.

¹⁵¹ For a fuller discussion of this ruling see Bryant, "Tax Administration - Rulings under Self Assessment", unpublished paper presented at CPA tax forum, Sydney, 25 August 1993.

¹⁵² Ibid at 1.

¹⁵³ Ibid at 2.

¹⁵⁴ Section 8.

¹⁵⁵ "Isolated Transactions", above n 2 at 174.

¹⁵⁶ Section 170BA(3)(a)-(c).

purpose of determining a "reasonably arguable case" under s 222C), inclusion of erroneous statements in rulings such as TR 92/3 amounts to an inappropriate usurpation of law-making authority.¹⁵⁷ Such actions only serve to undermine the rule of law.¹⁵⁸

These criticisms are particularly valid when, as in this case, the decision rejected by the Commissioner is a unanimous decision of the Full Court of the Federal Court,¹⁵⁹ which the High Court has declared¹⁶⁰ to have correctly applied *Myer Emporium*.¹⁶¹ It is to be hoped that the Commissioner will reconsider his actions with respect to TR 92/3 and ensure similar misleading usurpations of law-making power do not occur in the future.

Conclusion

It is interesting to conclude by reflecting on the "success rate" of TR 92/3 and the joint submission in respect to the six issues discussed:

- (i) sole or dominant purpose: Commissioner right/joint submission wrong;
- (ii) timing of intention: both wrong for failing to acknowledge there to be two different tests;
- (iii) objective or subjective intention: Commissioner wrong;
- (iv) correlation between intended means and the actual means giving rise to the profit: Commissioner wrong/joint submission correct;
- (v) meaning of "business operation or commercial transaction": Commissioner misleading/joint submission's criticism valid; and
- (vi) distinction between "business" and "non-business" taxpayers: whilst the Commissioner's description of the former is correct,

¹⁵⁷ Cf "Isolated Transactions", above n 2 at 174.

¹⁵⁸ Hill, "The Distinction Between Income and Capital in Regard to Land and Other Property Income Tax" (1992) *WA State Convention of Taxation Institute* 11 at 20.

¹⁵⁹ Which the High Court declared now constitutes the highest court of appeal in taxation matters: *Westfield*, above n 83 at 400.

¹⁶⁰ Ibid.

¹⁶¹ Above n 7.

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there is no definition of the latter, nor is the distinction reflected in paragraphs 6 and 35.

It is submitted, in summary, that in respect to these issues the law is as follows:

- (i) profit-making need not be the taxpayer's sole or dominant intent, it need only be a significant purpose;¹⁶²
- (ii) business taxpayers need only have the requisite intent at the time of transacting, whilst non-business taxpayers must have such an intent at the point of acquisition;¹⁶³
- (iii) the taxpayer's subjective intent is relevant;¹⁶⁴
- (iv) the profit must stem from the means contemplated by the taxpayer at the point of acquisition;¹⁶⁵
- (v) whether a sale is a business operation or commercial transaction is a matter of degree to be determined on a case by case basis;¹⁶⁶ and
- (vi) for the taxpayer to be a "business" taxpayer the transaction must either be an integral part of the business or a necessary incident of such business.¹⁶⁷

¹⁶² *Moana Sand*, above n 12 and *Cooling*, above n 11.

¹⁶³ *Myer Emporium*, above n 7 and *Westfield Ltd*, above n 6.

¹⁶⁴ *Westfield Ltd*, *ibid*.

¹⁶⁵ *Myer Emporium*, above n 7 and *Westfield Ltd*, *ibid*. Quaere whether this only applies to non-business taxpayers: *Westfield Ltd*, *ibid* at 4243.

¹⁶⁶ *Whitfords Beach*, above n 36.

¹⁶⁷ *Hytco*, above n 28, *Cooling*, above n 11 and *Westfield Ltd*, above n 6.