

1-1-2006

## The Interpretation of Taxation Legislation by the Courts - A Reflection on the Views of Justice Graham Hill

John Tretola

Follow this and additional works at: <http://epublications.bond.edu.au/rlj>

---

### Recommended Citation

Tretola, John (2006) "The Interpretation of Taxation Legislation by the Courts - A Reflection on the Views of Justice Graham Hill," *Revenue Law Journal*: Vol. 16 : Iss. 1 , Article 5.  
Available at: <http://epublications.bond.edu.au/rlj/vol16/iss1/5>

This Journal Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:EPublications@bond). It has been accepted for inclusion in Revenue Law Journal by an authorized administrator of [ePublications@bond](mailto:EPublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

---

# The Interpretation of Taxation Legislation by the Courts - A Reflection on the Views of Justice Graham Hill

## **Abstract**

This article looks at the changing approach that both the Australian High Court and the House of Lords have taken over the last 70 or so years in interpreting taxation legislation. This changing approach reflects underlying changes in community attitudes.

Particular consideration is given to the High Court's changing interpretation of the general anti-avoidance provision (formerly s 260 and now Part IVA of the *Income Tax Assessment Act 1936*).

The article focuses on the observations of Justice Graham Hill and his Honour's views as to the correct approach for a court to take in interpreting taxation legislation. His Honour made it clear that a court should adopt a purposive approach by applying the ordinary meanings of the words used, to give effect to the legislative purpose behind the legislation. This approach requires looking to the context of the legislation in its widest sense to give effect to the objects of the legislation. However, such an approach should not be used to advance any personal theories of justice.

Justice Hill was widely regarded as having been the leading Australian tax judge for more than a decade before his untimely death in 2005.

## **Keywords**

tax legislation, interpretation, income tax

## **Cover Page Footnote**

This article was prepared in honour of Justice Graham Hill. It considers a number of papers presented by Justice Hill on various issues concerning the interpretation of tax law, such as his presentation at the 2001 South Australia State Convention of the Taxation Institute of Australia entitled 'How is tax to be understood by the courts?'

# THE INTERPRETATION OF TAXATION LEGISLATION BY THE COURTS - A REFLECTION ON THE VIEWS OF JUSTICE GRAHAM HILL<sup>1</sup>

*John Tretola\**

This article looks at the changing approach that both the Australian High Court and the House of Lords have taken over the last 70 or so years in interpreting taxation legislation. This changing approach reflects underlying changes in community attitudes.

Particular consideration is given to the High Court's changing interpretation of the general anti-avoidance provision (formerly s 260 and now Part IVA of the *Income Tax Assessment Act 1936*).

The article focuses on the observations of Justice Graham Hill and his Honour's views as to the correct approach for a court to take in interpreting taxation legislation. His Honour made it clear that a court should adopt a purposive approach by applying the ordinary meanings of the words used, to give effect to the legislative purpose behind the legislation. This approach requires looking to the context of the legislation in its widest sense to give effect to the objects of the legislation. However, such an approach should not be used to advance any personal theories of justice.

Justice Hill was widely regarded as having been the leading Australian tax judge for more than a decade before his untimely death in 2005.

*That was a way of putting it - not very satisfactory:  
Leaving one still with the intolerable wrestle  
With words and meanings...*

TS Eliot

---

\* Lecturer, School of Commerce, Adelaide University.

1 This article was prepared in honour of Justice Graham Hill. It considers a number of papers presented by Justice Hill on various issues concerning the interpretation of tax law, such as his presentation at the 2001 South Australia State Convention of the Taxation Institute of Australia entitled 'How is tax to be understood by the courts?'

(2006) 16 REVENUE LJ

## **Traditional approaches to statutory interpretation**

Statutory interpretation often resembles a process involving a kind of wrestling with words and their meanings. It is worthwhile to briefly revisit some basics.

### **The literal rule**

This approach requires that a provision be interpreted in accordance with the intention of parliament, as determined by an examination of the language used in the statute as a whole.<sup>2</sup> Under the literal rule, words are to be given their ordinary and natural meaning. The court does not involve itself with the consequences of the interpretation.

### **The golden rule**

This approach allows the court to take into account the consequences of a particular interpretation. If the literal meaning of the words results in an absurdity; the court will modify the ordinary meaning of the words to overcome this. This approach allows for rectification of an error in the wording of the provision when a literal meaning may not result in the intention of parliament being realised. Lord Wensleydale outlined the approach to the golden rule in *Grey v Pearson*.<sup>3</sup>

### **The mischief rule**

This approach allows the court to determine the reasons or purpose for the passing of the Act by parliament (the mischief to which the Act is directed) and provides for an interpretation to be preferred that advances the purpose of the Act to one that does not. This approach is only applied if there is an ambiguity in the legislation.<sup>4</sup>

## **Community perceptions to the role of courts**

Justice Hill stated in 2001:

In the good old days, some think, judges interpreted the law having regard to the language used by Parliament and gave the benefit of the doubt to the taxpayer. If

---

2 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-2.

3 (1857) 6 HLC 61, 106.

4 *Heydon's case* (1584) 3 Co Rep 7a, 7b.

## INTERPRETATION OF TAX LEGISLATION

Parliament wanted to tax, it was up to Parliament to make its intentions clear; if Parliament wanted to hit the target, it had to do so cleanly.<sup>5</sup>

Justice Hill went on to say that there is an underlying perception that judges have become more interventionist or activist, especially so in areas such as human rights and constitutional law.<sup>6</sup> This activist approach is seen by some as undemocratic, as judges are, by taking this role, perceived to be usurping the role of the elected representatives of parliament.

Judicial attitudes to the interpretation of laws have changed over time, which is not surprising, as Justice Hill noted,<sup>7</sup> since community attitudes also change over time and judges are, of course, a part of the community. In respect to the interpretation of taxation laws, Justice Hill observed that judicial attitudes had swung from one side to the other and consequently there was not a lineal progression in judicial attitudes to the interpretation of tax legislation.<sup>8</sup>

This article explores how that role has changed by highlighting certain specific discrete periods where it can be observed that judicial attitudes to the interpretation of taxation legislation took on a discernable character.

### **An early (pre-1935) example of an 'activist' approach to interpretation**

In Australia, early judicial activism was seen in the 1934 High Court case of *Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd.*<sup>9</sup> The case involved the newly enacted sales tax legislation which sought to impose sales tax on persons who were manufacturers or wholesale merchants. At issue was whether or not a manufacturer was liable to sales tax on the sale of second hand goods (in this case, second hand electrical motors).

The legislation drew no distinction between sales of new goods and second hand goods, although, the parliamentary debates indicated that parliament had contemplated the imposition of the sales tax on second hand goods. Nevertheless, the

---

5 Justice Hill, 'How is tax to be understood by the courts?' Paper presented at the Taxation Institute of Australia, SA State Convention, 4 May 2001, 1.

6 Ibid. See also, *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1.

7 Above n 5, 1.

8 Ibid 2.

9 (1934) 52 CLR 85.

(2006) 16 REVENUE LJ

High Court took a purposive view of the legislation by holding that the purpose of the sales tax legislation was to impose a one-time tax on goods and so consequently no sales tax applied to second hand goods.

### **The literalist period**

Shortly after the *Ellis & Clark* decision, a literalist period in the interpretation of tax legislation in both Australia and the United Kingdom emerged. During this period, both the High Court and House of Lords interpreted taxation statutes according to a strict or literal construction of the language used in the legislation and accordingly, any ambiguity found in the legislation was to be resolved in favour of the taxpayer.

This approach was first articulated back in 1936 in the House of Lords decision in *Duke of Westminster*,<sup>10</sup> when community attitudes to taxation, as observed by the courts generally, saw taxation as something approaching theft.<sup>11</sup>

The Duke of Westminster, it may be recalled, entered into a deed with his gardener to pay the gardener, in his employment, a fixed sum per week for a period of seven years or during the joint lives of the parties. The question was whether the Duke could deduct for tax purposes the annual payments. By a majority, the House of Lords upheld the Duke's position that the sums were not payments of salary or wages. He was entitled, accordingly, to deduct them as 'annual payments'. Lord Atkin dissented. Lord Tomlin delivered the leading judgment:

It is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called 'the substance of the matter,' and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some of the earlier cases.

The sooner this misunderstanding is dispelled...the better it will be for all concerned.

---

10 [1936] AC 1.

11 Above n 5, 5. Justice Hill noted that income tax was a relative newcomer to the law, being a 20th century burden on property. Hence the law at this time saw tax as a punitive measure.

## INTERPRETATION OF TAX LEGISLATION

Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.<sup>12</sup>

Almost immediately after this case (in 1937) the High Court adopted this same literal approach as was evident in the case of *Anderson v Commissioner of Taxes (Vic)*,<sup>13</sup> a case that involved the application of a probate duty statute. Indeed, the High Court cited with approval statements from English cases supporting this literal approach. Latham CJ stated:

The principle to be applied in the determination of this case has been referred to by Lord Russell of Killowen in the following words in *Inland Revenue Commissioners v Westminster (Duke)*: - 'I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a court's view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or spirit of the statute.<sup>14</sup> The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case.

Further, in *Anderson*, Rich and Dixon JJ stated,<sup>15</sup> by citing with approval the comments of the House of Lords in *Ormond Investment Company v Betts*:<sup>16</sup>

Lord Buckmaster ... described the rule as a 'cardinal principle ... a principle well known to the common law that has not been and ought not to be weakened' - namely, that the imposition of a tax must be in plain terms.<sup>17</sup>

Lord Atkinson ... expressed the rule as follows: 'It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a

---

12 *IRC v Westminster* [1936] AC 1, 19.

13 (1937) 57 CLR 233, 239.

14 Above no 12 (Russell LJ).

15 *Ibid* 243.

16 [1928] AC 143.

17 *Ibid* 151.

(2006) 16 REVENUE LJ

subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of a statute must be adhered to, and that so-called equitable constructions of them are not permissible'.<sup>18</sup>

However, the high water mark of the literalist approach to interpreting tax legislation is found in the years of the Barwick High Court (1964 -1981).

*FCT v Westradere Proprietary Ltd*<sup>19</sup> shows an example of the strict literal approach taken by Barwick CJ. His Honour stated:

It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax.

The function of the court is to interpret and apply the language in which Parliament has specified in those circumstances. The court is to do so by determining the meaning of the words employed by the Parliament according to the intention of the Parliament, which is discoverable from the language used by the Parliament. It is not for the court to mould or attempt to mould the language...<sup>20</sup>

That his Honour took a strict literal approach to interpreting taxation legislation is beyond dispute. Barwick's unofficial biographer, David Marr wrote of him:<sup>21</sup>

His approach to tax was...taxes were penalties imposed by the state, which stood between citizens and their right to prosper from their enterprise. Tax laws could be construed in highly technical terms, without regard for the purpose they were designed to serve.<sup>22</sup>

Marr further commented on Barwick's approach to the anti-avoidance provision of the day s 260:<sup>23</sup>

---

18 Ibid 162.

19 (1980) 144 CLR 55.

20 Ibid 59-60.

21 David Marr, *Barwick* (1980) 47. Marr notes that Sir Garfield Barwick had a laissez-faire view of the world.

22 Ibid 227-8.

23 Ibid 131.

## INTERPRETATION OF TAX LEGISLATION

Section 260 was a provision for which he had no sympathy. It was designed to put an end to ingenious and artificial schemes of taxation avoidance, yet to Barwick's mind the ingenuity of a scheme was always a positive attraction.

And again later,<sup>24</sup> Marr stated:

The tax avoidance industry boomed in Australia in the 1960s as a direct result of the work of the Barwick High Court. Under Barwick's guidance the court approached tax schemes with great precision and learning, dissecting them and taking little interest in their overall shape and the purposes for which they were put into operation. Throughout the 1970's there were calls for the drafting of new and tighter tax laws to make it impossible for the court to arrive at the conclusions it had but it is doubtful what legislation might achieve: the loopholes are not in the laws but in the minds of the judges who apply them.<sup>25</sup>

There were many judgments of the Court in which Barwick CJ participated, which had the effect of fatally weakening the general anti-avoidance provision at the time, s 260.<sup>26</sup> More will be said on this issue later. In addition, there were cases that encouraged tax avoidance, such as *Investment & Merchant Finance Corp Ltd v Commissioner of Taxation*,<sup>27</sup> which set the scene for tax scheme partnerships by accepting that those participating were actually carrying on a business and that shares acquired for the tax scheme were capable of being trading stock.

### **The period after the Barwick High Court**

Justice Hill found the period immediately after the Barwick High Court not as easy to characterise.<sup>28</sup> Generally, the strict adherence to the literal approach became less fashionable.

Indeed, Gibbs J in *Western Australian Trustee Executor and Agency Co Ltd v Commissioner of State Taxation*,<sup>29</sup> a case involving the application of death duty legislation, while not

---

24 Ibid 293.

25 Ibid.

26 Above n 5, 11. Justice Hill points out that the case which was thought to have sounded the death knell of s 260 was *Cridland v Commissioner of Taxation* (1977) 140 CLR 330, a case whose leading judgment was delivered by Mason J who, his Honour points out, was later seen as a judicial activist.

27 (1971) 125 CLR 249.

28 Above n 5, 11.

29 (1980) 80 ATC 4567.

(2006) 16 REVENUE LJ

expressly rejecting the rule that ambiguity must be resolved in favour of a taxpayer, took a less strict approach. After referring to *Anderson*, his Honour said:

The established rule that no tax can be imposed on a subject by an Act of Parliament without words which clearly show an intention to lay the burden upon him does not mean that the court will strive to find loopholes where none are apparent; the words of the Act must be given a fair and reasonable construction without leaning one way or the other.

However ... if the terms of the Act plainly impose the tax they should be given effect, equally if they do not reveal a clear intention to do so the liability should not be inferred from ambiguous words. If the words in question are words of exception or exemption the same rules of construction should be applied.<sup>30</sup>

### Moves to a more purposive approach

The High Court in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*<sup>31</sup> signalled a shift away from the literalist approach to a more purposive approach, although Justice Hill was quick to point out the case is far less radical than many commentators have claimed.<sup>32</sup> The case concerned the availability of tax losses within a group of companies and hence the application of s 80C (3) of the *Income Tax Assessment Act 1936*. The provisions of s 80 had been amended from time to time, as loopholes in its application were revealed. This was happening during the period of a growing tax avoidance industry in the trafficking of tax losses. The amendments were designed to ensure that s 80C (3) was only available where there was a real 40% continuity of ownership. The taxpayer had relied upon the ordinary meaning of the words that Parliament had used. If this interpretation were accepted, the amendments would have been virtually ineffective.

In rejecting the literal interpretation of the provision, Mason and Wilson JJ delivered the leading judgment jointly. They gave two reasons for concluding that there should be a departure from the literal wording contained in s 80C (3). First, their Honours agreed that the literal reading did not conform to the legislative intent as ascertained from the provisions of the statute. The literal reading gave rise to a result, which could be viewed as 'absurd', 'irrational' or 'obscure.' Secondly, their Honours found, in the history of the amendments to s 80, the 'mischief' which the legislature sought to

---

30 Ibid 4571.

31 (1980) 147 CLR 297.

32 See Justice Hill's discussion in 'A Judicial Perspective of Tax Law Reform' (1998) 72 ALJ 685, 688.

## INTERPRETATION OF TAX LEGISLATION

remedy. There had been an oversight on the part of the drafter. Accordingly, the provision should be construed to give effect to the legislative intention, which an analysis of the provisions as a whole revealed. Their Honours stated:

But the propriety of departing from the literal interpretation is not confined...It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.<sup>33</sup>

### **Principles of statutory interpretation arising from the judgments in *Cooper Brookes***

Justice Hill stated in 2001 that the following principles could be extracted from the *Cooper Brookes* case as a guide to the present judicial approach to the interpretation of taxation statutes:

1. The fundamental rule of interpretation is to ascertain what Parliament intended as expressed in the words it has used.<sup>34</sup>
2. Context is vital. Sections are not to be construed in isolation.<sup>35</sup>
3. Where the language of a statute is clear and unambiguous and consistent with context it must be given its ordinary and grammatical meaning, even if the result is inconvenient.<sup>36</sup>
4. Where two constructions are open the court will prefer the construction that avoids inconvenience or injustice.<sup>37</sup>
5. Where the literal meaning of words is to be departed from it must be clear that that literal meaning does not give effect to the intention of the legislature and that a departure from the literal meaning will achieve that intention.<sup>38</sup>
6. The literal meaning will be departed from where it gives rise to an operation that is capricious or irrational.<sup>39</sup>

Justice Hill explained that there is no doubt that the task of a judge in interpreting any statute is to endeavour to ascertain the meaning of the words used. Often this will not be a problem as the words are clear and the statute will mean what it says, but words

---

33 (1980) 147 CLR 297, 321.

34 Ibid 304 (Gibbs CJ), 319 (Mason and Wilson JJ).

35 Ibid 304 (Gibbs CJ).

36 Ibid 305 (Gibbs CJ).

37 Ibid.

38 Ibid 310 (Stephen J).

39 Ibid 320-1 (Mason and Wilson JJ).

(2006) 16 REVENUE LJ

are capable of ambiguity.<sup>40</sup> When ambiguity arises the task is to ascertain the meaning of the words as Parliament intended them to be read, and that meaning is ordinarily to be found in the actual words used. Justice Hill considered that it is the **context** in which the words appear which is critical to resolving any ambiguity.

### Importance of context

The High Court stressed the issue of context in the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd*.<sup>41</sup> Their Honours said:

the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and mischief which...the statute was intended to remedy. ...if the apparently plain words of a provision are read in the light of the mischief, which the statute was designed to overcome, and of the objects of the legislation, they may wear a very different appearance.

Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

### What is context limited to?

Before changes were made to the *Acts Interpretation Act 1901* (Cth) it was widely accepted that regard could **not** be had to extrinsic materials, such as Second Reading Speeches, explanatory memoranda and the like. However, as was explained by Mason J in his judgment in *Commissioner of Taxation v Whitfords Beach Pty Ltd*,<sup>42</sup> regard could be had to extrinsic materials, in some limited circumstances, to discover the mischief that the statute was designed to remedy.

With the amendments to the *Acts Interpretation Act 1901* and the insertion of §§ 15AA and 15AB, regard can now be had to the purpose or object of an Act of Parliament and extrinsic material can be considered in order to determine the purpose or object underlying the Act or provision.

---

40 Above n 5, 13.

41 (1995) 187 CLR 384, 408.

42 (1982) 150 CLR 355, 375.

## INTERPRETATION OF TAX LEGISLATION

### Which interpretation to apply?

Although Justice Hill emphasised the need to resolve any ambiguity in interpretation by looking at the context, he readily noted that by looking to the wider context, two or more interpretations might open up. This arises due to the nature of words in the English language, which are inherently ambiguous (giving rise, as TS Eliot puts it, to this 'intolerable wrestle with words and meanings') and so this raises the question as to which choice between the competing interpretations is to be applied. This inevitably results in a choice favouring either the Commissioner or the taxpayer. Justice Hill made clear, however, that applying the underlying 'policy' of a taxing provision should not be synonymous with ensuring more tax is payable.<sup>43</sup>

Kirby J, as President of the New South Wales Court of Appeal, rejected the approach (also known as the special rule) of interpreting tax legislation - by resolving ambiguities in favour of a taxpayer - and stated:

revenue legislation is no longer to be treated as special. There is neither a presumption in favour of, nor against, the construction urged by the Commissioner.

The court's duty is simply to try to work out what Parliament was getting at when it enacted the provisions in dispute.<sup>44</sup>

In 2003 in the High Court in *Austin v The Commonwealth*,<sup>45</sup> Kirby J stated:

In earlier times it used to be said that legislation imposing taxation was subject to a strict construction, in favour of the taxpayer. However, in more recent times, this Court has departed from the narrow and literal interpretation of words appearing in legislation, including that imposing taxation, in favour of an interpretation that seeks to achieve the apparent purposes or objects of the enactment as expressed in its terms.<sup>46</sup>

---

43 Justice Hill, 'Some thoughts on the principles applicable to the interpretation of the GST' (Paper presented at the ATAX UNSW-15th Annual GST & Indirect Tax Conference, Noosa Qld, 10-13 April 2003) at 4.

44 *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* (1995) 31 ATR 457, 459.

45 *Austin v The Commonwealth* (2003) 51 ATR 654.

46 *Ibid* 723-4.

(2006) 16 REVENUE LJ

Kirby J added that in the case of federal legislation, the purposive principle is supported by the *Acts Interpretation Act 1901* (Cth).<sup>47</sup> Not surprisingly, Michael D'Ascenzo, the Commissioner of Taxation, endorses this policy approach.<sup>48</sup> Indeed, in quoting a Canadian writer,<sup>49</sup> Mr D'Ascenzo expressed the hope that tax law would be interpreted 'to make the law work in a constructive and positively directed fashion, tempered by a thoughtful awareness of its intrinsic limits'.

This view, quite apart from strengthening the efficacy of tax administration, is no doubt centred on the Holmes maxim that taxation is the price we pay for a civilised society.<sup>50</sup> As an example of the intrinsic limits applicable under Australian income tax law, the Commissioner could cite the example that no culpability penalties would apply where reasonable care is exercised or a reasonably arguable position exists. However, as Justice Hill made clear,<sup>51</sup> whilst he accepted that taxation is the price to be paid for a civilised society, arbitrary or unintelligible tax laws most likely will lead to an uncivilised society.

Taxation is self assessing and so, in theory at least, a taxpayer should be able to understand the law and the liability which Parliament has imposed upon him or her and so should be able to plan their affairs with the relative certainty that neither an unexpected tax assessment or penalty will follow. Further, international investment and commerce both require that taxation laws be clear and certain. The eminent, and now retired, New Zealand judge, Sir Ian McKay, recently highlighted a danger of following a purposive approach too enthusiastically:<sup>52</sup>

A purposive approach should not be made an excuse for starting with an assumption as to the underlying purpose, and then forcing the words into a preconceived and strained construction to fit that assumption.

In one of Justice Hill's last decisions, he explained his approach to statutory interpretation (the majority of the Federal Court agreed with him) in a case involving

---

47 Ibid.

48 Michael D'Ascenzo, 'Along the Road to Damascus: A Framework for interpreting the Tax Law' (2000) *Journal of Australian Taxation* 384.

49 WJ Scott, 'Looking Forward into the Past: Financial Innovation' (1995) 43 (5) *Canadian Tax Journal* 1147, 1166.

50 *Compania de Tobaccos v Collector of Inland Revenue* (1927) 275 US 87, 100, quoted in *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416.

51 Above n 5.

52 Sir Ian McKay's 'Interpreting Statutes-A Judge's View' (2000) 9 OULR 743, 749.

## INTERPRETATION OF TAX LEGISLATION

the interpretation of GST legislation, *HP Mercantile Pty Ltd v Commissioner of Taxation*.<sup>53</sup> The case concerned the eligibility of HP Mercantile, in its capacity as Trustee of the Recoveries Trust, to claim input tax credits for GST paid on due diligence services acquired from a third party.

In holding that HP Mercantile was not entitled to claim input tax credits, as it only made one supply, the supply of recovering the debts, which was a financial supply and hence input-taxed,<sup>54</sup> Justice Hill made the following comment on the statutory interpretation of taxing statutes: 'a more profitable approach to the question of construction is to consider both the policy which is enshrined in Division 11 and the legislative context.'<sup>55</sup> Justice Hill in adopting this approach took a step back from the specific wording of the provision (s 11-15 of the GST Act in the case) and looked instead to the intended operation of the section. In explaining this approach, Justice Hill noted:

It is clear, both having regard to the modern principles of interpretation...that the Court will prefer an interpretation of a statute which would give effect to the legislative purpose, as opposed to one which would not. This requires the Court to identify that purpose, both by reference to the language of the statute itself and also any extrinsic material, which the Court is authorised, to take into account.<sup>56</sup>

Justice Hill explained his approach to the interpretation of the GST Act:<sup>57</sup>

An alternative approach to the question of the interpretation of all laws, including taxation laws, is that they be given a purposive construction.

The purposive construction is given legislative force by the provisions of section 15AA of the Acts Interpretation Act 1901.<sup>58</sup>

---

53 [2005] FCAFC 126.

54 As provided for in Subdivision 40-A of the *A New Tax System (Goods & Services Tax) Act 1999* (referred to here as the GST Act).

55 Above n 51, [43] (Hill J).

56 Ibid [44] (Hill J).

57 There is no suggestion as to why this approach would not also extend to any other taxing statute and indeed Hill J said as much, see below n 104.

58 Above n 42, 2.

### A value-based approach

New Zealand commentators argued that a purposive approach is not possible when it is difficult to determine parliamentary intent and therefore, instead, a value-based interpretation is required.<sup>59</sup> This is likely to arise where even extrinsic aids do not clearly express parliament's intention in regard to a particular provision. In such a case, the commentators note, that courts are able to consider fundamental values that exist outside of the statute when interpreting the statute. What this approach essentially provides is that courts can make a presumption about Parliamentary intent. Further, Professor Burrows<sup>60</sup> argues that fundamental values operate as part of our legal system and are independent of parliamentary intent. Therefore, if parliament intends to enact something that contravenes fundamental values but does not do so with clear enough language, then the court can override parliamentary purpose in favour of preserving a fundamental value.<sup>61</sup>

Justice Hill had expressed his suspicions that some of his fellow judges in Australia consciously or unconsciously were applying a type of value-based approach when he said: 'I suspect, but can not verify, that most judges decide first the outcome they wish to reach and then use the appropriate maxim of interpretation to justify it, rather than first applying the maxim of interpretation to reach the outcome.'<sup>62</sup> Justice Hill thought that his view was that judicial decision-making should never proceed by reference only to judicial conscience or political philosophy or values, however defined, but must always be principled based.<sup>63</sup>

This echoed what Gibbs CJ stated in *Cooper Brookes*<sup>64</sup> when he said:

it is not for judges to put their own ideas of justice or social policy in place of the words of the statute. For if judges depart from the ordinary meaning of unambiguous

---

59 K Tokeley, 'Trends in Statutory Interpretation and the Judicial Process' [2002] VUWLRev 41 commenting on observations made by Professor John Burrows in 'The Changing Approach to the Interpretation of Statutes' *Roles and Perspectives in the Law* 561.

60 Ibid. See example of the minority decision in *R v Salmond* [1992] 3 NZLR 8, 13.

61 Of course it is relevant to point out that New Zealand does have a Bill of Rights Act, which Australia does not.

62 Justice Hill, 'A Judicial Perspective of Tax Law Reform' (1998) 72 ALJ 685, 686.

63 Above n 5, 23.

64 (1980) 147 CLR 297, 305.

## INTERPRETATION OF TAX LEGISLATION

provisions this, may degrade into mere judicial criticisms of the propriety of the acts of the Legislature.<sup>65</sup>

### Statutory interpretation in the context of anti-avoidance legislation

#### Section 260

Section 260 was the general anti-avoidance provision prior to the enactment of Part IVA (Part IVA being enacted with effect from 27 May 1981). Section 260 was written as a kind of 'catch all' provision. The section provided:

Every contract, agreement or arrangement made or entered into, orally or in writing ... shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly:

- (a) altering the incidence of any income tax; or...
- (d) preventing the operation of this Act in any respect be absolutely void as against the Commissioner.<sup>66</sup>

A survey of judicial history demonstrates that s 260 was limited by four specific drawbacks during its operation.

The choice principle.

The antecedent transaction theory.

The ordinary family and business transaction exemption.

The section's broad language.

#### The choice principle

The choice principle is anchored in the view that if a taxpayer merely made a choice between two or more amounts of liability, s 260 could not be intended to take these choices away. Thus, the taxpayer was not avoiding tax if he/she made a decision, which attracted less tax.

Barwick CJ, in *Slutzkin v FCT*,<sup>67</sup> explained it in the following way:

---

65 Ibid 305. Quoting Lord Moulton in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107, 130.

66 Section 260 of the *Income Tax Assessment Act 1936*.

67 (1977) 140 CLR 314.

(2006) 16 REVENUE LJ

the choice of the form of transaction by which a taxpayer obtains the benefit of his assets is a matter for him: he is quite entitled to choose that form of transaction which will not subject him to tax, or subject him only to less tax than some other form of transaction might do.

Again, in *Brambles Holdings Ltd v FCT*,<sup>68</sup> his Honour stated:

section 260 as amended ought not to be construed as denying such a right to the citizen, even where he deliberately chooses the form of a transaction into which he contemplates entering so as to attract the benefit of the statute.<sup>69</sup>

The choice principle was first applied in *WP Keighery Pty Ltd v FCT*<sup>70</sup> resulting in the Commissioner's s 260 argument defeat. The case involved a taxpayer who sought to re-organise their company's share capital so as to make the company non-private for tax purposes and so not subject to additional tax under the then Division 7. In *Mullens*<sup>71</sup> (a case involving deductions available to owners of mining shares) the High Court affirmed the operation of the choice principle. Stephen J, quoting from *WP Keighery*,<sup>72</sup> stated that s 260:

intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayer's any right between choice of alternatives which the Act itself lays open to them.

*Cridland*<sup>73</sup> was yet another case in which the choice principle was successfully argued by the taxpayer to defeat the Commissioner's s 260 argument. The taxpayer in *Cridland* was a university student who applied for a unit in a unit trust whose trustee carried on the business of primary production. The court accepted it was the taxpayer's sole purpose in applying for this unit to obtain the benefit of averaging his income according to the primary production averaging provisions. Nevertheless, the court concluded that s 260 did not apply simply because the taxpayer sought to avail himself of a favourable tax concession.

---

68 (1977) 138 CLR 467.

69 Ibid 470.

70 (1957) 100 CLR 66.

71 (1976) 135 CLR 290.

72 (1957) 100 CLR 66, 92.

73 *Cridland v FCT* (1977) 140 CLR 330.

## INTERPRETATION OF TAX LEGISLATION

The operation of the choice principle was later restricted by the High Court's decisions in *FCT v Gulland*<sup>74</sup> and *Watson<sup>75</sup> & Pincus*.<sup>76</sup> Nevertheless, the decisions in those cases were not handed down until 1985, some four years after the repeal of s 260.

### The antecedent transaction theory

The antecedent transaction theory provided that s 260 could not be used to reconstruct a taxpayer's income. Accordingly, all s 260 could do was to annihilate a transaction. In *FCT v Kareena Hospital Pty Ltd*,<sup>77</sup> s 260 successfully prevented the transformation of loss income derived by one company into the assessable income of another. The facts of the case involved one company which carried on the business of a private hospital and which had large profits entering into an arrangement with another company, which had accumulated trading losses, for the sole purpose of reducing the first mentioned company's taxable income and thus tax payable.

### The ordinary business and family dealings exception

The third drawback with s 260 owes its origins to Lord Denning's predication test from *Newton*.<sup>78</sup> The test provided that if the transaction could be explained by reference to ordinary family or commercial dealings, then s 260 would not apply, as there would not be a tax avoidance purpose. Therefore, in *Bayly v FCT*<sup>79</sup> and *Jones v FCT*<sup>80</sup> transfers of interests in a pharmacy business to the respective taxpayers' wives was treated in both instances as a normal, ordinary, everyday occurrence and thus the respective transfers did not attract the operation of s 260. Contrast those decisions with *FCT v Gulland* and *Watson & Pincus*,<sup>81</sup> where the respective taxpayers sought to incorporate their respective medical practices. This transaction did attract the operation of s 260, as it was not held to be an ordinary business or family dealing. In *Gulland*, Gibbs CJ stated:<sup>82</sup>

Section 260 creates many difficulties of interpretation, but some matters may now be taken to be settled. The section does not refer to the motives of the taxpayer...the purpose or effect of the arrangement must be ascertained from

---

74 (1985) 160 CLR 55.

75 Ibid.

76 Ibid.

77 (1979) 10 ATR 525.

78 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1.

79 (1977) 7 ATR 215.

80 (1977) 7 ATR 229.

81 (1985) 160 CLR 55.

82 Ibid 65.

(2006) 16 REVENUE LJ

the terms of the arrangement itself and from overt acts by which it was carried into effect. Not every arrangement which results in a saving of tax will be struck down by the section.

The majority of the High Court held that the choice principle recognised in *WP Keighery Pty Ltd*, that allows a taxpayer to take advantage of tax benefits provided by a specific provision of the Act, did not apply to an arrangement which did not attract such a benefit but sought to divert income from one taxpayer to another.

### The section's broad language

The fourth major drawback in the operation of s 260 related to its broad language.

As early as 1921, Knox CJ stated in *DFCT v Purcell*<sup>83</sup> that if the provisions of s 260 were construed literally, they would extend to every transaction that had the effect of reducing the taxpayer's income. Similarly, in *Newton*<sup>84</sup> Fullagar J stated<sup>85</sup> that a literal interpretation of s 260 would result in its application 'to cases which it is hardly conceivable the legislature should have had in mind.' However, Fullagar J added that any limitation, which the court may seek to apply, would result in the section being deprived of all practical effect.

Interestingly, Mason J in *Cridland*<sup>86</sup> observed that this prediction by Fullagar J had been proved accurate by noting that there was a 'high contrast' between the generality of the language in which the section was expressed and the very restricted operation afforded to it by the courts. Mason J stated: 'It is therefore a source of some surprise that (s 260) continues to be relied upon when its defects and deficiencies have been apparent for so long.'<sup>87</sup>

Justice Hill in *Davis v FCT*<sup>88</sup> (a case which concerned an attempt to assign income from one beneficiary to another) made the following observation about s 260:

The difficulty of any general anti-avoidance section is to adopt a construction which, on the one hand, places the section in a proper perspective vis-à-vis the other provisions of the Act while on the other hand giving the section work to do in an appropriate case. It is clear enough that it can never have been the

---

83 (1921) 29 CLR 464, 466.

84 *Newton v Federal Commissioner of Taxation* (1957) 96 CLR 577.

85 *Ibid* 646.

86 (1977) 140 CLR 330, 337.

87 *Ibid*.

88 89 ATC 4377, 4400.

## INTERPRETATION OF TAX LEGISLATION

legislative purpose that section 260 should be the most important ... provision in the Act.

His Honour went on to comment on the history of legislative interpretation of s 260 and noted that the decisions revealed fluctuating views as to the extent that s 260 should be read down. He also added that once the process began of reading down the provision to reflect its proper place in the Act, there were difficulties of where that reading down should end.

### What about Part IVA?

The stated aim of Part IVA when introduced was clear enough as stated by the then Treasurer, John Howard:

The proposed provisions - embodied in a new Part IVA of the Income Tax Assessment Act- seek to give effect to a policy that such measures ought to strike down blatant, artificial or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their affairs.<sup>89</sup>

The legislative aim, according to Justice Hill,<sup>90</sup> was to return the law to what it was thought to be at the time of the Privy Council decision in *Newton*.<sup>91</sup> Although, of course, ensuring the particular difficulties which s 260 encountered were overcome.<sup>92</sup>

The *Newton* case involved a predication test as expressed by Lord Denning. The predication test requires that it is necessary to look at what was really done, not just at the formal documents. As a result, if it could be predicated by looking at the overt acts by which the arrangement was implemented that the arrangement was done in that particular way so as to avoid tax, then the anti-avoidance provision would apply and cancel the benefit.

However, Justice Hill noted in May 2005 that:

---

89 Commonwealth, Second Reading Speech, House of Representatives, 27 May 1981, John Howard, Treasurer.

90 Who was, incidentally, involved in the drafting of Part IVA.

91 Above n 78.

92 Section 260, it should be recalled, was only an annihilating section rather than one that allowed reconstruction. Part IVA, by virtue of s 177F, allows the Commissioner to reconstruct the taxpayer's taxable income without reference to the tax benefit.

(2006) 16 REVENUE LJ

what seems to be happening – it was probably predictable anyway – is that the Commissioner, armed with success in the Courts, particularly in recent times, is gradually seeking to apply Part IVA to schemes which may be thought to extend beyond the ambit of that original aim.<sup>93</sup>

Three distinct and separate elements are needed in order for Part IVA to apply to a particular scheme.<sup>94</sup>

First, it is necessary to identify the relevant ‘**scheme**,’ as defined in s 177A of the *Income Tax Assessment Act* 1936. Second, the relevant ‘**tax benefit**,’ as defined in s 177C, must be identified. Third, and most importantly, it is necessary to form a conclusion as to the ‘**dominant purpose**’ of the taxpayer (or a person associated with the taxpayer) as required under s 177D. To form a conclusion as to the dominant purpose the eight factors as set out in s 177D(b) need to be applied. Having applied these eight factors, a conclusion can then be made as to whether a taxpayer (or a person associated with the taxpayer) entered into, or carried out the scheme, or part of it, for the dominant purpose of obtaining a tax benefit.

*Peabody*<sup>95</sup> was the first Part IVA case to reach the High Court. The facts of the case are quite complicated, but essentially it involved the acquisition of shares in a company before they were offered as part of a public float. The acquisition of the shares was arranged in such a way so as to prevent a tax liability arising upon their disposal. In the end, although there was an unquestioned tax benefit obtained, the Commissioner lost on the Part IVA argument as he assessed the ‘wrong taxpayer’.<sup>96</sup>

*Spotless*<sup>97</sup> was the next significant Part IVA case heard by the High Court. On its facts, it was more clearly a tax avoidance case,<sup>98</sup> not only because the facts involve a complicated arrangement, but also because without the tax benefits in question (the higher after-tax interest received) the arrangement made no commercial sense. It was

---

93 Justice Hill, ‘Part IVA and Division 165: Where are we now?’ TIA 2005 (Paper presented at the Taxation Institute of Australia, SA State Convention, 7th May 2005) 1.

94 The term ‘scheme’ is defined in s 177A in broad terms to include ‘any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.’

95 *FCT v Peabody* (1993) 181 CLR 359.

96 The Commissioner sought to apply Part IVA against Mrs Peabody instead of the Trustee of the Peabody Family Trust.

97 *FCT v Spotless Services Ltd* (1996) 186 CLR 404.

98 Above n 93, 4.

## INTERPRETATION OF TAX LEGISLATION

argued by the taxpayer in *Spotless* that the conclusion to be reached as to dominant purpose should be based on the derivation of the greater after tax return and not on the derivation of the smaller pre tax income, which, in fact, was exempted from tax. This, it was argued, was the commercial advantage. This argument was rejected because the greater after tax return was only possible due to the tax benefit obtained.

The leading joint judgment in the High Court was delivered by Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ (with McHugh J delivering a separate judgment, although he agreed with the majority decision). Their Honours pointed out that there was no real dichotomy between commercial gain on the one hand and a tax benefit on the other.<sup>99</sup> Therefore, it would not be correct to say that the predominant purpose is commercial when the commercial purpose is dependent upon the tax advantage.

Their Honours held that a reasonable person would conclude that the taxpayers entered into, or carried out, the scheme for the dominant purpose of obtaining a tax benefit (namely the exemption from Australian tax of the interest derived in the Cook Islands under s 23 (q) of the *Income Tax Assessment Act 1936*<sup>100</sup>). The High Court in *Spotless* made it clear that Part IVA is to be interpreted and applied according to its own terms and thus was not to be interpreted with ‘muffled echoes of old arguments’ concerning s 260 or other legislation.<sup>101</sup>

*Hart*<sup>102</sup> was the next major case involving Part IVA heard by the High Court. Although the High Court disagreed with Justice Hill (who had delivered the leading judgment in the Full Federal Court<sup>103</sup>) on the conclusion as to dominant purpose that Part IVA requires, nevertheless the High Court (by majority at least) affirmed Justice Hill’s approach.<sup>104</sup> This approach required, in determining the dominant purpose of the taxpayer under s 177D(b), that it is necessary to consider all eight factors as set out in that paragraph. This involves a ‘weighing up’ process which is necessary, as some factors may not be relevant, some may be neutral and some may point towards or away from the conclusion.<sup>105</sup>

---

99 Above n 97, 415.

100 Section 23(q) has since been repealed.

101 Above n 97, 414.

102 *FCT v Hart* (2004) 217 CLR 216.

103 *FCT v Hart* (2002) 121 CLR 206.

104 Above n 101, [70] (Gummow and Hayne JJ), and [92] (Callinan J).

105 It is noted that Hill J first expressed the need for this ‘weighing up’ process in his leading judgment in *Peabody v FCT* (1993) 93 ATC 4104, 4113-4.

(2006) 16 REVENUE LJ

Justice Hill viewed the High Court's decision in *Hart* as a case where the particular form of the transaction, the wealth optimiser aspects, required the conclusion that the dominant purpose of the taxpayer was tax driven. Indeed, his Honour saw this decision as another way of applying the test from *Newton*<sup>106</sup> that if it is predicated that the taxpayer carried out the transaction 'in that way' to avoid tax then Part IVA would apply.<sup>107</sup>

Justice Hill also made the point that sometimes judges substitute some other test from that to be found in the language of Part IVA.<sup>108</sup> For example, his Honour made the point that in the *Hart*<sup>109</sup> decision at first instance, the trial judge, Gyles J, used as the test to be applied, the question whether, without the taxation benefits, the particular form, shape or structure of the transaction made sense. This is not a test found in the wording of Part IVA.

Similarly, other commentators, Justice Hill noted, who emphasise a 'smell test' were likewise ignoring the actual language of the section.<sup>110</sup> These 'other tests,' as Justice Hill put it, may be helpful in a particular case, but they do not apply the statutory test that Part IVA requires.<sup>111</sup>

Justice Hill commented in May of 2005 that the Courts have incrementally expanded Part IVA since it was first introduced in 1981. He saw this as not surprising and as having come about in two ways. First, due to the recognition by the High Court in *Spotless* and in *Hart* that Part IVA can apply to a scheme even when a commercial benefit is obtained, where that commercial benefit is only obtained by reason of the tax benefit. Second, by the approach of the majority of the High Court in *Hart*, who concluded that Part IVA applied as the transaction was structured in a particular way to obtain the tax benefit, an approach that echoes the *Newton* predication test.

---

106 Above n 78.

107 Above n 93, 18.

108 Ibid 3.

109 *Hart v Commissioner of Taxation* (2001) ATC 4708.

110 Interestingly, the former Commissioner of Taxation, Michael Carmody, is recognised as the person who first identified this 'smell test' when he used it in a speech given to the 13th National Convention of the Taxation Institute of Australia in March 1997, when he stated (at p 13 of the speech) '...if you get a strong aroma of contrivance in the arrangement put to you, take caution and enter at your own risk'.

111 Above n 93, 3.

## INTERPRETATION OF TAX LEGISLATION

**Does the doctrine of fiscal nullity apply in Australia?**

When the House of Lords first applied its early judgments on fiscal nullity<sup>112</sup> there was a view that this was a judicially crafted anti-avoidance doctrine. The principle of fiscal nullity requires there to be a pre-ordained series of transactions (or one composite transaction) into which steps have been inserted that have no commercial or business purpose apart from the avoidance of tax. When these two conditions are met, the inserted steps are to be disregarded for fiscal purposes. The court would then look at the end result and how that end result will be taxed will depend upon the terms of the taxing statute that is sought to be applied. The facts of the *Ramsay* decision (upon which the doctrine of fiscal nullity is based) involved a company seeking to create an allowable loss to offset a chargeable capital gain. The House of Lords held that this 'loss making' scheme was 'contrived' and not 'such a loss as the legislation is dealing with.'<sup>113</sup> Therefore, the steps to contrive the loss were ignored.

It may be thought that this doctrine arose in the House of Lords as a result of their strong emphasis on form over substance, as evident in its earlier decision in *Inland Revenue Commissioners v Duke of Westminster*.<sup>114</sup> Despite acknowledging that this was a possible reason for the doctrine's origin, Justice Hill still found it difficult to accept that steps, which actually happened, could be disregarded for fiscal purposes.<sup>115</sup>

The House of Lords, in *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd*,<sup>116</sup> affirmed the doctrine's application to UK revenue law. Their Lordships pointed out that the doctrine of fiscal nullity was not a new legal principle.

As Lord Nicholls stated, the doctrine involved no more than the Court determining the legal nature of the transaction and then relating that to the relevant fiscal legislation.<sup>117</sup> By doing so, his Lordship stated, the court is looking at the transaction as a whole in the context to which it properly belongs.<sup>118</sup> Lord Hoffmann stated that 'there is ultimately only one principle of construction, namely to ascertain what parliament meant by using the language of the statute.'<sup>119</sup> He went on to say that the

---

112 *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300; *Inland Revenue Commissioners v Burmah Oil Co Ltd* (1981) 54 STC 200; *Furniss v Dawson* [1984] AC 474.

113 *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, 326.

114 [1936] AC 1.

115 Above n 5, 21.

116 [2003] 1 AC 311.

117 *Ibid* 318, [1].

118 *Ibid* 319, [4].

119 *Ibid* 325, [29].

(2006) 16 REVENUE LJ

commercial context should influence the construction of the concepts used by parliament.<sup>120</sup>

However, the High Court in *John v Commissioner of Taxation*<sup>121</sup> (a case concerning share trading losses in a share trading partnership) held that in the context of income tax, the doctrine of fiscal nullity was incompatible in Australia with a general anti-avoidance provision such as s 260 or now Part IVA. The High Court's decision was made on the basis that the doctrine of fiscal nullity was one of statutory construction. Where there is a specific statutory provision on a topic there is no room for implication of any further matter on the same topic.<sup>122</sup> Since s 260 (and now Part IVA) in the *Income Tax Assessment Act 1936* makes specific provision on the issue of tax minimisation arrangements, it therefore excludes an implication of a further limitation upon what a taxpayer may or may not do for the purpose of obtaining a tax advantage.<sup>123</sup> In reaching this decision, the High Court agreed with Gibbs J in *Patcorp Investments*<sup>124</sup> where his Honour stated: 'the presence of section 260 makes it impossible to place upon other provisions of the Act a qualification which they do not express, for the purpose of inhibiting tax avoidance.'<sup>125</sup>

It remains to be seen whether the High Court ever again attempts to apply this doctrine. Although based on the clear statements made by the Court in *John*, it is unlikely that the doctrine will ever apply in Australian income tax law whilst a general anti-avoidance provision exists.

## Conclusion

In the last 70 or so years, the interpretation of tax legislation both in Australia and the United Kingdom has swung from one extreme to another. From the *Duke of Westminster* case in England in the mid 1930s to the highpoint of literalism in the 1970s that marked the Barwick High Court, the pendulum generally swung firmly in favour of the taxpayer. From 1980, beginning with the High Court decision in *Cooper Brookes*, and from 1982 with the House of Lords decision in *Ramsay*, a more purposive approach can be seen, where the pendulum has swung more generally in favour of the revenue authorities. This result is not surprising, since community attitudes have also

---

120 Ibid 329, [41].

121 (1989) 83 ALR 606.

122 This was seen as an express application of the statutory interpretation maxim *expressum facit cessare tacitum*.

123 Above n 121, 617.

124 (1976) 140 CLR 247.

125 Ibid 292.

## INTERPRETATION OF TAX LEGISLATION

altered markedly during this period and judges, in their decision-making, whether consciously or not, by and large reflect the community attitudes of the day.

It may be said that the task of interpreting some legislation can be an 'intolerable wrestle with words and meanings.' The interpretation of taxation legislation, due to its inherent complexity, appears to be even more of such a wrestle. Justice Hill emphasised continually that there is a need for balance between the needs of taxpayers for certainty and the rights of the Commissioner to collect the tax authorised by Parliament.<sup>126</sup> His Honour recently summarised the judicial principles that he favoured for the interpretation of tax legislation, as follows:

The Courts will construe ... legislation having regard to its context in the widest sense of that word with a view to adopting a construction which gives effect to the legislative policy to be found in the language which Parliament has used but having regard to relevant intrinsic materials.<sup>127</sup>

A construction will not be adopted which is absurd or irrational, but even the literal meaning of the words used may be departed from if to do so is necessary to give effect to the purpose or objects of the legislation, but not merely because the interpretation to be adopted conforms to some personal theory of justice.<sup>128</sup>

These principles have much judicial support,<sup>129</sup> with the result that by and large tax statutes are being interpreted in the same way as any other statute, not favouring either the Commissioner or taxpayer, but by reference to the language used in the context in which it appears so as to give effect to the legislative policy underlying the legislation.

This is, of course, an application of the purposive approach, which clearly today is favoured, giving the judge in a tax matter a much greater discretion than the literal approach permitted.<sup>130</sup> This purposive approach to interpreting tax statutes should be less likely to result in overly strict technical interpretation of tax laws as was evident in the heady days of the Barwick High Court. Nevertheless, whilst this judicial approach leaves considerable latitude, Justice Hill was clear that judicial decision-making should never proceed by reference only to judicial conscience or political

---

126 Above n 5, 22.

127 Above n 43, 6.

128 Ibid.

129 Above n 62, 686.

130 Above n 43, 2.

(2006) 16 REVENUE LJ

philosophy but must always be principled based. This last mentioned thought of Justice Hill has been echoed by many members of the judiciary both in Australia and the United Kingdom over the years. Simply put, courts should not arrogate to themselves the legislative function, for if courts were to do this then there is a real risk that the rule of law would be replaced by an arbitrary form of taxation.<sup>131</sup>

---

131 This same warning was given in varying forms by Lord Tomlin in the *Duke of Westminster* case [1936] AC 1, 19; by Lord Simon in *Ransom v Higgs* (1974) 1 WLR 1594, 1617; and by Deane J, as he then was, in *FCT v Westradere Proprietary Ltd* (1979) 38 FLR 306 and endorsed by Barwick CJ in the High Court appeal of this case, *FCT v Westradere* (1980) 144 CLR 55, 60.