

CITATION: *Graham v Commissioner of Taxes* [2008] NTMC 023

PARTIES: EDWARD & JOSEPHINE GRAHAM

v

COMMISSIONER OF TAXES

TITLE OF COURT: TAXATION & ROYALTIES APPEAL  
TRIBUNAL

JURISDICTION: TAXATION APPEAL

FILE NO(s): 20727329

DELIVERED ON: 9 April 2008

DELIVERED AT: Darwin

HEARING DATE(s): 29 January 2008 & 9 April 2008

JUDGMENT OF: Dr John Allan Lowndes

**CATCHWORDS:**

TAXATION AND ROYALTY APPEALS TRIBUNAL – TAXATION APPEAL –  
NATURE OF APPEAL – APPEAL DE NOVO – APPLICABLE LAW –  
STATUTORY INTERPRETATION OF TAXING PROVISIONS –  
CONSTITUTIONALITY OF TERRITORY TAXATION LAWS

*Taxation (Administration) Act* 2007 ss 4, 56BA, 56BAA, 56BAC, 105A

*Taxation (Administration) Act* 2008 ss 151 & 162

*Stamp Duty Act* 2006 Schedule 1 5(7)

*Interpretation Act* (NT) s 12

*Esber v Commonwealth* (1992) 174 CLR 430 Applied

*Tourism Holdings Pty Ltd v Commissioner of Taxation* (NT) [2005] NTCA 3  
Considered

*Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* [2007] NTSC 09 Considered

*Lumsden v IR Commissioners* [1914] AC 877 Applied

*Symington v Port Adelaide Corp* (1974) 8 SASR 209 Followed

*Pearce & Geddes Statutory Interpretation in Australia* 6<sup>th</sup> Edition

**REPRESENTATION:**

*Counsel:*

Appellant: In person

Respondent: Ms J Dennis

*Solicitors:*

Appellant:

Self-represented

Respondent:

Solicitor for the Northern Territory

Judgment category classification:

A

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[2008] NTMC 023

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74

IN THE TAXATION & ROYALTIES APPEAL TRIBUNAL  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20727329

[2008] NTMC 022

BETWEEN:

EDWARD & JOSEPHINE GRAHAM  
Plaintiff

AND:

COMMISSIONER OF TAXES  
Defendant

REASONS FOR DECISION

(Delivered 9 April 2008)

Dr John Allan Lowndes SM:

**THE NATURE OF THE PROCEEDINGS**

1. This is an appeal brought by Edward John Graham and Josephine Graham (the appellants) pursuant to s 105A (1)(a) of the *Taxation (Administration) Act* (the old TAA) against a decision of the Commissioner of Taxes (the respondent) disallowing an objection to stamp duty assessment (lodgement no 110583).
2. The objection arose out of the issue of a stamp duty assessment in relation to a Transfer to Trustee form executed by the appellants on 25 June 2006 whereby a one third interest in the fee simple estate in Unit 6 Lot 6595 Town of Darwin – more commonly known as 15/9 Esplanade, Darwin - was vested in them in their capacity as trustees of the E & J Graham Superannuation Fund. More precisely, the appellants, as registered owners of the subject land, transferred to themselves a two third interest in the fee simple as joint tenants as well as a one third interest to themselves as

trustees for the self managed superannuation fund. The one third interest was valued at \$200,000 which attracted the imposition of ad valorem duty assessed at \$6,800.

3. The grounds of objection were twofold:
  - (1) the transfer effected no conveyance of dutiable property as there was no change of ownership of the property and no change of beneficiary;
  - (2) the transfer was effected to comply with or take advantage of Australian Government superannuation legislation and was not a scheme to avoid stamp duty.
4. The Commissioner's reasons for disallowing the objection are set out in full below:

The Transfer to Trustee form executed by you on 25 June 2007 effected or evidenced a transaction whereby you, as registered owners of the fee simple estate in land, declared that you hold one third of that interest as trustees of the Fund.

For the reasons set out below, such a transaction is liable to duty as if it was a conveyance of that interest.

Stamp duty is imposed on instruments that effect or evidence the conveyance of dutiable property. Dutiable property is defined to include land in the Territory (including an interest in land) and a declaration of trust over dutiable property is liable to duty as if the declaration were a conveyance of property. For that purpose, the dutiable property vested in the declarant is to be taken to be the property conveyed; the declarant is to be taken to be the conveyee; and the conveyance is taken to have occurred at the time the declaration is made.

This reflects the fact that a declaration of trust creates new beneficial interests in the property the subject of the declaration, in this case subject to both the terms of the deed by which the Fund was established and the relevant Australian Government legislation governing superannuation funds.

Absent an express provision in the stamp duty legislation, the Commissioner does not have a general discretion to exempt a taxpayer from duty or to reduce the amount of duty payable by a taxpayer. There is no exemption relating to a conveyance of property into a superannuation fund (or declaration of trust over property), whether or not the property is owned by the trustees of the fund immediately beforehand.

You have also submitted that this transaction was not a scheme to avoid stamp duty and was effected to comply with or to take advantage of the Australian Government's superannuation laws. I accept that you do not have any intention to avoid stamp duty and the assessment does not reflect a decision of the TRO that you had such an intention. Rather, the transaction is one that falls within the ambit of the stamp duty legislation and is liable to ad valorem duty.

As discussed above, the stamp duty legislation does not exempt the conveyance of property to a superannuation fund from duty. Similarly, while the Australian Government superannuation legislation has a number of concessions and tax incentives, no exemption is provided from stamp duty imposed by a state or territory government on dutiable property that is conveyed to a superannuation fund in compliance with the superannuation legislation.

For the foregoing reasons, I am of the opinion that stamp duty was correctly assessed and that your objection should be disallowed.

## **THE NATURE OF THE APPEAL**

5. The first issue to be considered is the nature of the present appeal.
6. As stated above, the appeal was instituted pursuant to s 105 A(1)(a) of the old TAA, as in force immediately prior to 31 December 2007, and before the commencement of the *Taxation (Administration) Act 2007* ( the new TAA) on 1 January 2008.
7. The respondent submitted that “as the machinery for seeking a review of an objection decision had been set in train but not completed before the relevant repeal/amendments, the appeal proceedings in the Taxation and Royalty Appeals Tribunal are to be continued as if the law had remained the same as it was at the time the appeal was instituted”.<sup>1</sup>
8. In support of that submission, the respondent relied upon the combined operation of ss 151 and 162(2) of the new TAA.<sup>2</sup>
9. Section 162(2) of the new TAA reads as follows:

However, if at the date of transition proceedings by way of objection or appeal had been commenced under the old law, those proceedings are to be dealt with under the old law and, if those proceedings lead to an appeal or further appeal, that is also to be dealt with under the old law.

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<sup>1</sup> See p 2 of the respondent's written submissions dated 17 March 2008.

<sup>2</sup> See p 2 of the respondent's written submissions dated 17 March 2008.

10. By way of explication, s 151 (1) of the new TAA provides as follows:

In this Part:<sup>3</sup>

date of transition means 1 January 2008

old law means relevant provisions of the following Acts (and regulations under the following Acts) as in force before the date of transition:

(a) the *Taxation (Administration) Act*<sup>4</sup>

(b) the *Stamp Duty Act*<sup>5</sup>

11. The respondent submitted that s 162(2) of the new TAA made it clear that as the appeal was commenced under the old TAA and old SDA “seeking in accordance with those statutes, a review of the Commissioner’s decision on the appellant’s objection”, the appeal is to be heard and determined according to the old law, that is under the provisions of the old TAA and old Stamp Duty Act.<sup>6</sup>

12. The respondent submitted that s 162(2) was more than a purely procedural provision:

...as s162(2) is concerned with more than just procedural matters and does more than simply obviate the need to bring fresh proceedings under Part 11 of the new TAA. If the proceedings were to be continued in accordance with the old TAA but determined in accordance with the new TAA and new SDA, one would expect the Legislative Assembly to have made that clear (*Esber v The Commonwealth of Australia* (1992) 174 CLR 430 at 436-438).<sup>7</sup>

13. The respondent also submitted that the appellants had, as at 1 January 2008, “acquired or accrued a right to have their appeal to the Tribunal determined pursuant to Part V of the old Act”.<sup>8</sup> More particularly, it submitted as follows:

Section 12 of the *Interpretation Act* protects anything that may truly be described as a right (even if it may fairly be categorised as inchoate or

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<sup>3</sup> Section 162(2) appears under Part 15 of the new TAA, to which s 151 (1) relates.

<sup>4</sup> The old TAA.

<sup>5</sup> The old SDA.

<sup>6</sup> See p 2 of the respondent’s written submissions dated 17 March 2008.

<sup>7</sup> See p 2 of the respondent’s written submissions dated 17 March 2008.

<sup>8</sup> See p 2 of the respondent’s written submissions dated 17 March 2008.

contingent in nature).The appellants have such a right. It was a right in existence at the time of the repeal of the old SDA and the substantial amendments made to (or alternatively, the repeal of) the old TAA.

That being so, and in the absence of a contrary intention, the right was protected by section 12 of the Interpretation Act and was not affected by the repeal and/or substantial amendment of the old TAA and old SDA (*New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act (1988)* 14 NSWLR 685 at 696-677). Section 162(2) does not demonstrate a contrary intention. Rather, it is consistent with section 12 of the *Interpretation Act*.

14. I consider that the transitional provisions of s 162(2) of the new TAA make it abundantly clear that the present appeal is governed by the provisions of s 105A (3) of the old TAA and that the merits of the appeal are to be determined by reference to the substantive taxing provisions in force at the time the Commissioner made his decision disallowing the objection.
15. It is not necessary to rely upon s 12 of the *Interpretation Act* (NT) to determine the nature of the present appeal and the manner in which it is to be determined.
16. The purpose of provisions such as s 12 of that statute is to avoid “the need to include transitional provisions whenever Acts or sections of Acts are repealed or omitted”: *Pearce and Geddes Statutory Interpretation in Australia* 6<sup>th</sup> ed at [6.7]. They are basically a default provision having “the effect of preserving the position as it existed under the repealed Act: *Pearce and Geddes* (supra) at [6.7]. In order to displace the operation of such provisions, “express words are necessary to take away rights that have accrued or liabilities that have been incurred under a repealed Act”: *Pearce and Geddes* (supra) at [6.7]. In order to displace the effect of such provisions there must be a contrary legislative intention.
17. *Esber v Commonwealth* (1992) 174 CLR 430 is a case in point. In that case a member of the Defence Forces applied under the provisions of the *Compensation (Commonwealth Government Employees) Act 1971* to redeem his weekly payments of compensation. The application was rejected. The

applicant then applied to the Commonwealth Administrative Appeals Tribunal for a review of that decision. After the application for review had been made, but before the application was heard by the Tribunal, the 1971 Act was repealed by the *Commonwealth Employee's Rehabilitation and Compensation Act 1998* (Cth), which provided that certain payments of compensation were not redeemable. Section 129(2) of the new Act provided that proceedings instituted under the 1971 Act, but not completed upon repeal of that Act, "may be continued on and after that day and, where the proceedings are so continued, the relevant authority and the Commonwealth shall be parties to the proceedings".

18. As pointed out by Mason CJ, Deane, Toohey and Gaudron JJ in *Esber v Commonwealth* (supra) at 440:

Once the appellant lodged an application to the Tribunal to review the delegates' decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely "a power to take advantage of an enactment. Nor was it a mere matter of procedure: it was a substantive right".

19. In other words, by virtue of s 8 of the *Acts Interpretation Act 1901* (Cth) – the equivalent of s 12 of the *Interpretation Act* (NT) - the appellant's right of appeal or review was a substantive right that had accrued under repealed legislation, and the appellant had a substantive right to have his application heard and determined under that legislation and not under the new legislation. The new Act did not affect that substantive right since it expressed no intention to do so.
20. However, as indicated above, s 162(2) of the new TAA leaves no work for s12 of the *Interpretation Act* to do, because it expressly preserves an appellant's substantive right to have his or her appeal heard and determined by reference to the old TAA and old SDA.
21. The respondent also submitted that the decision of the Court of Appeal in *Tourism Holdings Australia Pty Ltd v Commissioner of Taxation* (NT)



[2005] NTCA 3 and the decision of Mildren J in *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* [2007] NTSC 09 supported the proposition that the present appeal is to be determined in accordance with the substantive taxing provisions in force at the time the Commissioner disallowed the appellant's objection.

22. The respondent's detailed submission is as follows:

Riley J determined that the nature of the appeal before him was such that the taxpayer was prohibited from relying on evidence on appeal that was not previously before the Commissioner. However, the majority of the Court of Appeal determined that the nature of the appeal was an "appeal de novo" (per Martin CJ at [7], [9], [12], [19]-[20], Angel J at [92]-[93]). This characterisation was later reflected in section 105A of the old TAA.

However, it is also clear from the Court of Appeal decision that the appeal de novo, while allowing fresh evidence to be admitted, required the ascertainment of the taxpayer's liability to pay duty in accordance with the relevant statutes in force at the time of the transaction. Angel J called this the "taxable fact".

Martin CJ traced the history of section 9BA of the old TAA and discussed the subsequent addition of section 9BB at [45]-[58]. If applicable, section 9BB would have determined the issue in dispute between the parties (ie the extent to which the goodwill of the business the subject of the transaction was taxable in the Territory) in favour of the Commissioner. However, it was common ground between the parties and amongst all members of the Court (including Riley J at first instance) that section 9BB was inapplicable because it post dated the taxable fact, irrespective of how the nature of the appeal was characterised or described.

This approach was confirmed by Mildren J after the enactment of section 105A in *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* [2007] NTSC 09. His Honour noted at [3] that the appeal was in the nature of an appeal de novo, but decided the taxable fact on the legislation that was in force at the date of the relevant transaction (see [29] – [30]).

A key issue in this case was whether the value of land was 60% or more of the total value of the property the subject of the relevant transaction, as required by s 56N of the Act at the time of the transaction. By the time of the hearing before Mildren J, section 56 N had been repealed and the 60% threshold was no longer applicable. Again, this would have determined the issue in dispute between the parties in favour of the Commissioner. However, it was common ground between the parties and the Court that the appeal de novo was to be determined in accordance with the taxing provisions in force at the time of the transaction, not at the time of the hearing.

The conclusion which must be drawn from the two cases discussed above is that notwithstanding that the appeal is described as an appeal de novo, it is to be

determined in accordance with the substantive taxing provisions in force at the time of the relevant transaction.<sup>9</sup>

23. Although I do not agree with all aspects of that submission – in particular the more descriptive aspects - I accept its general thrust. While the two cases referred to by the respondent do not give direct expression to the following proposition, the overall tenor of the judgments contained therein is that where an appeal has been commenced prior to an amendment of legislation that has altered the approach to be taken on the appeal, the appeal is to be determined on the basis of the law as it stood at the time the decision under appeal was made;<sup>10</sup> and this is so notwithstanding the appeal is by way of a hearing de novo.<sup>11</sup>
24. That approach seems to encapsulate the general rule of the common law that “a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events”: see *Maxwell v Murphy* (1957) 96 CLR 261 per Dixon J cited in Pearce and Geddes (supra) at [10.1].<sup>12</sup>
25. However, it is not necessary to rely on the two decisions referred to by the respondent to determine the nature and ambit of the appeal in the present case – especially when those authorities do not specifically deal with the statutory regime to which the present proceedings are subject. The transitional provisions of s 162(2) of the new TAA speak for themselves in

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<sup>9</sup> See pp 3-4 of the respondent’s written submissions dated 17 March 2007.

<sup>10</sup> In the specific context of the *Taxation (Administration) Act* (NT), the applicable law will, in the usual course, be the law in force at the time of the relevant transaction which gives rise to a stamp duty liability. For the stated proposition see *Western Australian Planning Commission and CPP Pty Ltd* [2006] WASAT 379 per Barker J; *Health Resorts of Australasia Pty Ltd and Western Australian Planning Commission* [2007] WASAT 60 per Judge J Chaney (Deputy President).

<sup>11</sup> The decision of the Court of Appeal in *Tourism Holdings Pty Ltd v Commissioner of Taxation* [2007] NTCA 8 is to a similar effect.

<sup>12</sup> That general principle was recast in the following form in *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 by Fullagar J:

There can be no doubt that the general rule is that an amending enactment – or, for that matter, any enactment – is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which occurred before its commencement.

defining the nature and scope of the present appeal. That section makes it clear that the appeal is to proceed by way of a hearing de novo and the appeal is to be determined by reference to the substantive provisions in force at the time the Commissioner made his decision disallowing the appellant's objection.

26. Section 105A (3) of the old TAA provides that the present appeal is an appeal de novo. On such an appeal, the burden of proving a decision or determination of the decision maker is incorrect, or an assessment made by the decision maker is excessive, is on the appellant/taxpayer: see s 105A(4).
27. Section 105C(1) of the old TAA requires, inter alia, that a notice of appeal lodged by a taxpayer, state fully and in detail the grounds of the appeal and be accompanied by any material relevant to the appeal that was not before the decision maker when making the decision being appealed against. Section 105C(3) provides that the grounds of appeal are not limited to the grounds on which the objection was made.
28. Section 105 E of the old TAA provides as follows:
  - (1) As soon as practicable after being served under section 105C(2) with the notice of appeal, the decision maker must lodge with the Registrar and serve on the appellant a copy of –
    - (a) the records of the decision maker relevant to the appeal, including a copy of the decision being appealed against; and
    - (b) any submissions about the appeal the decision maker wishes to make to the Tribunal.
  - (2) The decision maker's response is not limited to the reasons for disallowing the objection or allowing it in part only.
29. Section 105 V(1)(b) of the old TAA directs the Tribunal to determine an appeal on the material lodged by the parties with the Registrar, unless the Tribunal is satisfied the circumstances of the appeal require a hearing to be conducted. The Tribunal may only conduct a hearing if it is satisfied the circumstances of the appeal require it: see s 105V(1)(e).

30. In determining an appeal, the Tribunal may confirm the decision appealed against, vary that decision, substitute another decision that would have been available to the decision maker or remit the matter to the decision maker for reconsideration: see s 105F of the old TAA.
31. Although an appeal de novo usually entails the appellate tribunal determining the appeal by applying the law as it stands at the time the appeal is heard,<sup>13</sup> s 162(2) of the new TAA obliges the Taxation and Royalty Appeals Tribunal to deal with the proceedings under the old law, that is in accordance with the provisions of the old TAA and the old SDA. In other words, the present appeal is to be determined by reference to the substantive taxing provisions in force at the time the Commissioner made his decision disallowing the objection.
32. Section 162(2) has the effect of creating a hybrid form of “appeal de novo”. Although no restriction is placed on the material that might be provided to the Tribunal for its consideration, the Tribunal is bound to decide the merits of the appeal in accordance with the law applicable at the time the decision under appeal was made, and not according to those provisions operative at the time the appeal is heard.
33. There is nothing unusual about this variation on an appeal de novo. For example, in *Esber and the Commonwealth of Australia* (supra at 440) the majority (constituted by Mason CJ, Deane, Toohey and Gaudron JJ) held that although the application for review was in the nature of a hearing de novo, the review was to be determined by reference to the applicable provisions under the repealed Act.<sup>14</sup>

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<sup>13</sup> See *Western Australia v Ward* (2002) 2132 CLR 1; *Edwards v Noble* (1971) 125 CLR 296; *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *Ex parte Curie*; *RE Dempsey* (1968) 70 SR (NSW) 1.

<sup>14</sup> In his dissenting judgment ( at 448) Brennan J held that the de novo nature of the review process militated against the provisions of the repealed Act being applied, as “the law as it then exists is applied, not the law as it existed at an earlier time”.

## **THE RECORDS OF THE DECISION MAKER RELEVANT TO THE APPEAL**

34. In accordance with s 105E(1)(a) of the old TAA Act, the decision maker lodged with the Registrar and served on the appellants the following records of the decision maker relevant to the appeal:

- Letter from Michael Butler (Territory Revenue Office) to the appellants dated 27 September 2007 setting out the reasons for disallowing the objection;
- Letter from Solomon Gaturu (Territory Revenue Office) to the appellants dated 10 August 2007 requesting further information concerning the objection;
- Letter from Solomon Gaturu to the appellants dated 7 August 2007 acknowledging receipt of the objection;
- Letter from the appellants to Jayne Balding (Territory Revenue Office) dated 3 August 2007 in support of the objection;
- Letter from Jayne Balding (Territory Revenue Office) to appellants dated 25 June 2007 advising of the issue of an assessment of stamp duty;
- Letter from John Curley (Australian Valuation Office) to Jayne Balding (Territory Revenue Office) dated 14 June 2007 providing a valuation of the subject property;
- Letter from Jayne Balding (Territory Revenue Office) to Australian Valuation Office dated 13 June 2007 seeking a valuation of the subject property;
- Letter from the appellants to Jayne Balding (Territory Revenue Office) dated 7 June 2007 in relation to the imposition of stamp duty on the subject transfer;
- Notice of Assessment of Stamp Duty (lodgement number 110583) dated 25 June 2007;
- Stamp Duty lodgement form (lodgement number 110583) lodged 25 June 2007;

- Transfer to Trustee form – Unit 6 Lot 6595 Town of Darwin lodged 7 June 2007;
- Record of administrative interests and information – Unit 6 Lot 6595 Town of Darwin dated 10 August 2007;
- Australian Business Register: The Trustee for E&J Graham Superannuation Fund (ABN 57 489 779 412) undated;
- E&J Graham Superannuation Fund Deed of Trust dated 12 March 2007.

35. For ease of reference, the above records have been marked Exhibit 1 in these proceedings.

### **THE SUBMISSIONS**

36. The appellants' submissions were incorporated or contained in a number of documents:

- Notice of Appeal;
- Document entitled "Other Matters Relating to the Appeal" dated 2 November 2007;
- Appellants' Reply to Commissioner's Submissions dated 14 December 2007;
- Undated Addendum;
- Written submissions dated 3 March 2008;

37. Again for the ease of reference, these submissions have been marked as Exhibit 2 in these proceedings.

38. The appellant's objection to the imposition of stamp duty on the subject transfer may be summarised as follows:

- (1) The transfer effected no change of ownership nor any change of beneficiary: see *Coglan and Coglan* (2001) FLC 93-220. There was no sale, conveyance or transfer of ownership as there was no change of control or beneficiary interest: see

*Charles v Federal Commissioner of Taxation; Costa & Duppe Properties Pty Ltd & Ors* (1986) VR 90 and *Softcorp Holdings Pty Ltd v Commissioner of Stamp Duties* 87 ATC 4532;

- (2) A transfer (conveyance) of ownership or control of property has not occurred and the asset was and remains beneficially owned by Edward John and Josephine Graham. There has been no sale of the asset or part of the asset, conveyance or transfer: see *Commissioner of Stamp Duties (NSW), Crambrook Nominees P/L & Blake Corp P/L v Commissioner of Taxes* (2000) NTSC 86;
- (3) The transfer did not involve any dutiable property. In particular, the property in question is not dutiable because duty was paid at the time of its purchase. Duty is dependent upon a transfer of equity in property. No equitable interest was transferred. Section 56 BA of the old TAA does not apply;
- (4) The conveyance (if it is to be treated as such) was not made for valuable consideration. If the instrument of conveyance (transfer) is deemed dutiable property, then it may fall within the exemption provided by item 9A(b) of Schedule 2 of the old SDA;<sup>15</sup>
- (5) Division 8AA does not attract stamp duty because of the exemption provided under Schedule 2 item 9A(b) of the old SDA. The subject matter of the conveyance was acquired by an instrument that has been duly stamped. Moreover, there has been no change in beneficial interest in the property and no attempt to avoid stamp duty;
- (6) As a matter of fairness, the transfer should not be subject to stamp duty: see the NT Treasury Conveyance Duty and Discretionary Trusts Anti-Avoidance Measures (2001-2002) Budget;
- (7) In *Papadikas Nominees Pty Ltd v Commissioner of Taxes* (2007) NTMC 050 the Tribunal stated that “another important value that revenue law should seek to uphold is that of equitable treatment of taxpayers. It is important that relief discretion is exercised consistently between taxpayers in the like circumstances”. Accordingly, a taxpayer utilising a trust

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<sup>15</sup> Subject to paragraph (ba), a conveyance made by a trustee to a beneficiary, where the conveyance is not made for valuable consideration and the conveyance is in conformity with a trust contained in a validly constituted trust and the property the subject of the conveyance was acquired by the trustee by virtue of an instrument which was duly stamped or has been exempted from duty under this Schedule or was not otherwise subject to duty.

where there is no change of ownership or control under Division 8AA should be treated in the same manner as a taxpayer changing a title from tenants in common or joint tenancy or vice versa as provided in Division 8AAA relief;

- (8) The preconditions for the accrual of a beneficial interest have been fulfilled by both appellants – there are no preserved benefits requirements that remain unfulfilled. Therefore, ownership is established as one and the same prior to and after the said declaration of trust;
- (9) The property is not dutiable under s 56 BA of the old TAA because (a) duty was paid at the time of purchase and a further imposition of stamp duty would be tantamount to double taxation and (b) there is no dutiable property involved in the transfer because there is no value involved as there has been no transfer in equitable interest control or ownership;
- (10) The intent of the old SDA was to prevent inequity and double taxation;
- (11) The Anti - Avoidance measures are not intended to double tax property owners who are one and the same beneficiaries indicated on the title and in the trust documents. There has been no change of beneficiary. No consideration has been paid nor any debt forgone. Furthermore, stamp duty was duly paid at the time the property was purchased;
- (12) Double taxation is not to occur: see the South Australian *Stamp Duty Act (2007)* and Stamp Duty Document Guide;
- (13) The *Stamp Duty Act (SA)* as well as the *Stamp Duty Act (NT)* 2006 and 2008 indicate that double taxation is not to occur in relation to the stamping of trust documents;
- (14) The imposition of double taxation is unconstitutional. Although ss 51 and 55 of the Australian Constitution permit the States and Territories to raise taxation, those provisions do not permit double taxation ie taxing the same taxpayers twice with respect to their beneficial ownership in a property or properties;
- (15) Section 56BAA of the old TAA provides that “change of control in relation to a beneficiary, trustee or other body corporate, means a change in the person or persons acting together who may (directly or indirectly) exercise or



substantially influence the exercise of the majority of voting power at meetings of the directors of the beneficiary, trustee or other body corporate”. No such event has occurred;

- (16) Section 56 BAC (1) of the old TAA which imposes duty where there is a change in beneficiary or trustee under a discretionary trust is not applicable because there has been no change in beneficiary. In any event, the provisions of subsection (3) relieve the instrument from the payment of stamp duty as the subject transfer did not involve the avoidance of tax: see also the *Anti Avoidance Measures (2001- 02) Budget*;
- (17) In *Lake City Freighters Pty Ltd* (1984) 157 CLR 309 at 319 Brennan J stated that “in choosing between a primary, broader meaning of the words in a section and a secondary, narrower meaning that corresponds with the subject matter dealt with in surrounding sections, it is relevant to consider whether the particular section has an operation independent of the operation of the surrounding sections or whether the operation of the particular section affects or is affected by the operation of the surrounding sections”. Consequently, it is evident that the avoidance and relief measures are interrelated in intent and it is the intent of the legislation to provide relief in instances where there is no consideration or value, or any transfer of equitable ownership and no attempt at stamp duty avoidance;
- (18) The transfer is not a scam or scheme to avoid stamp duty but a transfer in accordance with legislation necessary to comply with the Australian Government superannuation laws;
- (19) The transfer is exempt from the imposition of stamp duty because, inter alia, it does not constitute a tax avoidance scheme or form part of any such scheme;
- (20) The intent of the Act does not warrant the imposition of stamp duty other than at a nominal rate for the registration of an instrument;
- (21) Schedule 1 (7) of the *Stamp Duty Act (NT) 2006* provides that “a declaration of trust that declares the same trusts as those on which and subject to which the same dutiable property was transferred to the person declaring the trust if ad valorem duty has been paid on the transfer or the agreement to transfer” attracts stamp duty at the rate of \$5.00.

39. The respondent’s submissions were set out in the following documents:

- Respondent's Submissions dated 3 December 2007;
- Respondent's Further Submissions dated 17 March 2008.

40. For the ease of reference, the respondent's submissions have been marked Exhibit 3 in these proceedings.

41. The respondent's submissions as to the liability of the subject instrument to stamp duty may be summarised as follows:

*General*

- (1) Stamp duty is imposed on instruments that effect or evidence the conveyance of dutiable property pursuant to s 4 and Schedule 1 of the old SDA. Dutiable property includes land in the Northern Territory: see s 4(1) of the old TAA;
- (2) Section 4(1) of the old TAA defines a "conveyance" as including a "declaration of trust ... whereby dutiable property ... is vested in or accrues to a person". The word "whereby" in that definition "identifies the means by which or owing to which a certain result or effect is obtained" and "qualifies not merely the immediately preceding expression ... but all that proceeds": *Chief Commissioner of Stamp Duties for NSW v Buckle & Ors* 98 ATC 4097 at 4012.
- (3) Section 56 BA (1) of the old TAA provides that duty is payable on a declaration of trust over dutiable property as if the declaration were a conveyance of property. Section 56BA (2) provides that the dutiable property vested or to be vested in the declarant is to be taken to be the property conveyed; the declarant is to be taken to be the conveyee (and as such liable to pay stamp duty pursuant to s 50(1) TAA); and the conveyance is taken to have occurred at the time the declaration was made. Section 56BA(3) provides that a "declaration of trust" means a declaration that identified dutiable property vested or to be vested in the person making the declaration is to be held in trust for the person(s) or for the purposes referred to in the instrument.
- (4) The subject transfer (instrument) is a declaration of trust whereby the appellants, as registered owners of the subject property, declared that the said property was to be held by

them as trustees, subject to the trust named the E&J Graham Superannuation Fund: see s 126 *Land Title Act*.

- (5) The subject transfer (instrument) is a “declaration of trust over dutiable property” for the purposes of s 56BA of the old TAA. Accordingly, the instrument is liable to the imposition of stamp duty as if it were a conveyance of dutiable property and is to be assessed for stamp duty on the basis of the unencumbered value of the subject property as no consideration had been paid: see item 5(1) of Schedule 1 of the old SDA.
- (6) The subject transfer is either a “declaration of trust” for the purposes of s 56BA of the old TAA and/or a “conveyance” of dutiable property (by means of a “transfer”) within the meaning of s 4(1) of that Act.
- (7) Section 56BA(3) of the old TAA encapsulates the common law hallmarks of a declaration of trust, but also amplifies the term “declaration of trust”. The subject transfer clearly falls within the ambit of s 56BA on the basis that (1) the declaration of trust over dutiable property is to be taken, for stamp duty purposes, to effect a conveyance of the property (2) the dutiable property vested in or to be vested in the declarant is to be taken to be the property conveyed (3) the declarant is to be taken to be the conveyee and (4) the conveyance is to be taken to have occurred at the time the declaration was made.<sup>16</sup>
- (8) The definition of “conveyance” in s 4(1) of the old TAA draws attention to two aspects (1) to the dutiable property which was received or acquired by the conveyees<sup>17</sup> by reason of transfer or assignment to, vesting in or accrual to that person, not to what dutiable property moved from the conveyors and (2) to the means by which or owing to which that result is achieved, being the methods specified and identified in the definition of “conveyance” such as a transfer, declaration of trust or settlement.
- (9) Although at common law one cannot effectively contract with oneself or convey an interest in land to oneself, ss 13 and 52 (being validating provisions) of the *Law of Property Act* authorises transfers of property by an owner (such as Mr

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<sup>16</sup> The respondent relies upon *Coates v Commissioner for Railways* (1961) 78 WN (NSW) 377 at 384:

When a statute provides that something shall be deemed to be a fact, it is necessarily implicit in such a provision that the assumption shall be made if necessary contrary to fact; and it is not open to a person against whom the provision operates...to challenge that assumption by seeking to establish the fact”.

<sup>17</sup> See s 4(1) where “conveyee” means a person to whom dutiable property or a marketable security is conveyed.

Graham and/or Mrs Graham) to the owner or another (such as Mr and Mrs Graham as trustees for the E & J Graham Superannuation Fund).

- (10) The subject transfer caused or evidenced the transfer to, vesting in or accrual to the conveyees (Mr and Mrs Graham as trustees for the E & J Graham Superannuation Fund) of dutiable property.
- (11) The transfer in question extinguished the interest of Mr and Mrs Graham as joint tenants of the subject property and created the following interests, the interest of Mr and Mrs Graham as joint tenants with respect to a two – thirds interest in the property and Mr and Mr Graham as trustees of the E&J Graham Superannuation Fund (as tenants in common with respect to a one –third interest in the property, which was held by the trustees inter se as joint tenants). Upon registration of an instrument under the *Land Title Act*, the particulars of the lot in the land register are altered and a new and different indefeasible title for the lot is created: see ss 39 and 40 *Land Title Act*. Title is comprised by the record contained in the register; and the title of registered proprietor derives from the fact of registration. A lot or interest in a lot “passes” by registration of an instrument: see s 60 *Land Title Act*.
- (12) The subject transfer amounted to a “conveyance” of dutiable property for the purposes of the old TAA and the old SDA and was therefore liable for the amount of stamp duty assessed by the Commissioner.

*As to the appellants’ argument that there was no conveyance of dutiable property as there was no change of ownership or beneficiary of the subject property*

- (13) Although a declaration of trust generally involves a change in ownership,<sup>18</sup> s 56 BA of the old TAA does not require any change of ownership or change of beneficiary.
- (14) However, in the present case the transfer effected a change in ownership and beneficial interest because prior to the declaration of trust, the whole estate in possession – legal as well as equitable – of the property was held by the appellants as joint tenants, while following the declaration of trust, the appellants held the property jointly as trustees under the terms

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<sup>18</sup> See *DKLR Holding Co (No 2) Pty Ltd v Commissioner of State Duties (NSW)* (1982) 149 CLR 431; *Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98.

of the superannuation fund. Being members of that fund, the appellants no longer retained a beneficial interest in the property. Until a prescribed occurrence or event that crystallises a member's right into an actual entitlement, a member of a superannuation fund is neither the legal or beneficial owner of the amount credited to their account from time to time: see *Re Conram; Ex parte Official Trustee in Bankruptcy v Inglis* (1992) ALR 353 at 356-357; *CSR Ltd v The Chief Commissioner of State Revenue* [2006] NSWSC 1380 at [11]-[12].

- (15) The nature of a beneficiary's right in a regulated superannuation trust amounts to no more than an expectancy, since benefits from a regulated superannuation fund cannot be paid until a condition of release is satisfied: see ss 10(1), 17A, 9 and 62 *Superannuation Industry (Supervision) Act* 1993(Cth).<sup>19</sup> Early payment of superannuation benefits to a fund member can only be made if a relevant condition of release is satisfied and any restrictions (if applicable) on the cashing of benefits is complied with.
- (16) Generally, a member's preserved benefits (including restricted non-preserved benefits) are retained in a superannuation fund or rollover fund until a member's retirement on or after his or her preservation age: see clauses 1.7, 1.25, 1.26, 1.30, 7.1, 7.8, 21.3, and 23 of the Graham superannuation fund, with particular reference to clause 22 that provides that the fund is subject to the *Superannuation Industry (Supervision) Act* 1993 (Cth) and *Superannuation Industry (Supervision) Regulations* 1994 (Cth).<sup>20</sup>

*As to the appellants' submission that as the conveyance was not made for valuable consideration, the transaction fell within an exemption provided by item 9A(b) of Schedule 2 of the old SDA*

- (17) The subject transfer does not constitute or evidence a conveyance of dutiable property from a trustee to a beneficiary and therefore does not attract an exemption from stamp duty.

*As to the appellant's submission that pursuant to the provisions set out in Part 111 Division 8 AAA of the old TAAA duty should not be imposed because duty is not payable where there is a change in*

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<sup>19</sup> Section 31 *Superannuation Industry (Supervision) Act* 1993 (Cth) and Regulations 5.04 – 5.08 and 13.06 *Superannuation Industry (Supervision) Regulations* 1994 (Cth) protect that expectancy.

<sup>20</sup> See in particular regulation 6.17 which provides that member's benefits must not be paid except when the fund is required or permitted to pay them under Part 6 of the Regulations.

*beneficiaries and trustees if the change is not a tax avoidance scheme or part thereof*

- (18) Section 56BAC of the old TAA provides for the imposition of duty where there is a change of or in control of a beneficiary under a discretionary trust and a change of or in control of a trustee of the trust within a 12 month period. Such changes are exempt from duty where they are not a tax avoidance scheme or part thereof: see s 4B TAA. These provisions do not apply to the subject instrument.
- (19) Duty was not imposed pursuant to any of the provisions in Part 111, Division 8AAA of the old TAA (ss 56BAA – 56 BAC) and are therefore irrelevant to the present proceedings.

*As to the appellant's submissions in relation to the Revenue SA Stamp Duty Guide; schedule 1(7) (by which it is understood that reference is being made to item 5(7) of Schedule 1 to the old SDA); s 6(4) of the old SDA<sup>21</sup> and s 4B of the old TAA<sup>22</sup>*

- (20) These provisions are irrelevant to the current proceedings.

*As to the appellant's submissions regarding the unconstitutionality of the imposition of stamp duty on the subject transfer*

- (21) The old TAA and old SDA are not repugnant to, or inconsistent with, the Commonwealth laws and are otherwise constitutionally valid for the following reasons.
- (22) Pursuant to s 6 *Northern Territory (Self Government) Act 1978* (Cth) the Northern Territory Legislative Assembly has the power to make laws with respect to acts, matters or things situate in or having a sufficient nexus with the Territory – for example laws imposing stamp duty on instruments or transactions – notwithstanding ss 51(ii) and 55 of the Constitution.
- (23) The old TAA and old SDA do not affect or purport to affect the operation of a relevant law of the Commonwealth (namely, s 292.80 *Income Tax (Transitional Provisions) Act 1997* (Cth) and the provisions of the *Superannuation Industry (Supervision) Act* (Cth), which authorised the making of in

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<sup>21</sup> That section provides that subject to the Act and the *Taxation (Administration) Act*, stamp duty is not imposed on an instrument that is a counterpart or copy of another instrument that has been duly stamped.

<sup>22</sup> That section deals with the definition of a “tax avoidance scheme” and the means by which a scheme is determined to be a tax avoidance scheme.

specie distributions to a superannuation fund at the relevant time) nor do they destroy or detract or purport to destroy or detract from a right, privilege or entitlement thereby conferred under those Commonwealth laws because (a) both the Territory and Commonwealth laws are susceptible of simultaneous obedience; (b) the old TAA and old SDA do not take away or diminish a legal right, privilege or entitlement provided by the Commonwealth laws (which, in respect of s 292.80 *Income Tax (Transitional Provisions) Act* and the *Superannuation Industry (Supervision) Act*, are facultative or permissive in nature) and (c) the Commonwealth laws do not evince a legislative intent to “cover the field”.

(24) With respect to (a), it was submitted that a member of the E & J Superannuation Fund could make an in specie contribution of business real property between 10 May 2006 and 30 June 2007, provided stamp duty was paid on the transfer or instrument of transfer in relation to properties in the Northern Territory.

(25) In relation to (b) it was submitted as follows:

The provisions of the Commonwealth laws are not mandatory save if an election is made under the *Superannuation Industry (Supervision) Act* to become a “regulated superannuation fund”. If an election is made, the relevant provisions of the *Income Tax (Transitional Provisions) Act* and the *Superannuation Industry (Supervision) Act* were intended to have a limiting effect in authorising (1) a member of E & J Graham Superannuation Fund (being a regulated superannuation fund) to make up to one million dollars in after-tax contributions (including in specie contributions of business real property) between 10 May 2006 and 30 June 2007 and (2) the trustees of the E&J Graham Superannuation Fund to accept an in specie transfer of the interests in the property during that period of time.

The old TAA and old SDA neither undermined nor significantly negated the efficacy and availability of the rights, privileges or entitlements afforded to the contributors by the Commonwealth laws to make a contribution of their respective interests in the property to the trustees of the E&J Graham Superannuation Fund during the material time.

The said legal rights, privileges or entitlements were not unlimited or absolute. They were limited or qualified by reference to compliance with the general law regulating and

governing transactions or instruments intended to give effect to the transfer.

- (26) In relation to (c), the old TAA and old SDA and the Commonwealth laws had their own distinct fields of operation – the former were concerned with the imposition of stamp duty for Territory purposes while the latter dealt with superannuation and/or federal income tax for federal purposes. Furthermore, s 350 *Superannuation Industry (Supervision) Act* provides that to the extent that the law of a State or the Northern Territory are capable of operating side by side with that Act, the intention of Parliament is that the Commonwealth Act is not to apply to their exclusion.

### **THE DETERMINATION OF THE APPEAL**

42. Whether or not the subject transfer was subject to the imposition of stamp duty as assessed by the Commissioner is to be determined by examining the relevant provisions of the old TAA and old SDA, and construing those provisions in accordance with the principles of statutory interpretation applicable to taxing or fiscal provisions.
43. The approach to interpreting taxing or fiscal provisions is well established. Such provisions should be interpreted strictly, but not in such a way as to defeat the purpose of the legislature.<sup>23</sup>
44. As stated by Viscount Haldane LC in *Lumsden v IR Commrs* [1914] AC 877 at 896:
- ...the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation.<sup>24</sup>
45. As pointed out by Gifford, a Court should consider “the context, scheme and purpose of the Act as a whole”.<sup>25</sup> However, such an approach “does not

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<sup>23</sup> See *Scott v Cawsey* (1907) 5 CLR 132 at 154-5. See also Pearce & Geddes *Statutory Interpretation in Australia* at [9.33].

<sup>24</sup> For the invocation of the literal approach to statutory interpretation in taxing cases see also Corcoran and Bottomley *Interpreting Statutes* p 29; *Pfeiffer v Stevens* (2001) 209 CLR 57 per Kirby and Gummow JJ.

<sup>25</sup> Gifford *Statutory Interpretation*, p 182. where the author cites: *WT Ramsay Ltd v IRC* [1982] AC 300 at 323.



justify a Court reading into an Act words which are not there in order to modify ‘as against the fiscal subject, words which have a plain, natural and ordinary meaning in his favour’.<sup>26</sup>

46. There is a concomitant general principle that “a person is only to be taxed if clearly falling within the words of the section if the Act in the end leaves a doubt as to its meaning, the taxpayer is to be given the benefit of the doubt”.<sup>27</sup> However, as is evident from the statements made by Sangster J in *Symington v Port Adelaide Corp* (1974) 8 SASR 209 at 214-15, this latter principle is beginning to wane in importance:

One only has to read a series of tax cases on any one point, however, to notice that the emphasis given by the High Court of Australia to this principle has markedly diminished over the years, until by now this principle must, in my opinion, merely take its place amongst the other principles available to be invoked in any given case, and as subordinate to the primary task of looking at the words used and ascertaining whether they have an ordinary and natural meaning, and to the ultimate task of ascertaining what the Legislature meant by the words it used.<sup>28</sup>

47. In *DFCT v Sheehan* (1986) 86 ATC 4718 at 4728 Tadgell J stated:

If there are two constructions of which a taxing Act is capable, one of which would facilitate the evident object of the legislature and the other of which would plainly thwart it, one is not justified in preferring the latter merely because it would be more favourable to the subject.<sup>29</sup>

48. The construction of taxing statutes is subject to the overriding principle that it must be clear that the subject or subject matter is liable to the imposition of tax: see Pearce and Geddes (supra) at [9.36].

49. Finally, as stated by Pearce and Geddes:

While taxing legislation is generally to be interpreted in the same way as other legislation, provisions allowing an objection to be made to the amount assessed and review to be sought of a decision on that objection can properly be described as beneficial provisions and should be interpreted accordingly: *Port of*

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<sup>26</sup> Gifford n 25, p 182.

<sup>27</sup> See Pearce and Geddes n 23 at [9.33]. See also *IR Commrs v Westminister (Duke)* [1936] AC at 24-5 which was cited with approval by Latham CJ in *Anderson v Commr of Taxes (Vic)* (1937) 57 CLR 233 at 239.

<sup>28</sup> See Pearce and Geddes n 23 at [9.33].

<sup>29</sup> Referred to in Pearce and Geddes n 23 [9.33].

50. The starting point is to identify the specific provisions under which the Commissioner made the stamp duty assessment.
51. The Commissioner purported to impose stamp duty on the subject transfer in accordance with the provisions of s 56BA of the old TAA:
  - (1) Duty is payable on a declaration of trust over dutiable property as if the declaration of trust were a conveyance of the property.
  - (2) For the purposes of subsection (1) –
    - (a) the dutiable property vested or to be vested in the declarant is to be taken to the property conveyed;
    - (b) the declarant is to be taken to be the conveyee; and
    - (c) the conveyance is to be taken to have occurred at the time the declaration is made.
  - (3) In this section, “declaration of trust” means a declaration (other than by will or testamentary instrument) that identified dutiable property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or for the purpose or purposes, mentioned in the declaration although the beneficial owner of the property or the person entitled to appoint the property may not have joined in or assented to the declaration.
52. This section is expressed in plain and unambiguous language. There is no doubt as to the meaning of the section. It is clear that the provision makes “a declaration of trust”, as defined in the section, liable to the imposition of stamp duty. The section imposes stamp duty not only on transactions that would constitute a declaration of trust at common law or instruments evidencing such a transaction, but also on transactions constituting a declaration of trust in the statutorily expended sense or on instruments evidencing same. Moreover, the purpose or object of the provision is to make such transactions or instruments dutiable as if they were a conveyance

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<sup>30</sup> Pearce and Geddes n 23 at [9.45].

of property, and liable for the payment of stamp duty at the ad valorem rates applicable to a conveyance of property.

53. The purpose or object of an Act or a particular statutory provision need not be set out in express words:

A Court can determine “the object of the legislation from a consideration of the provisions of the legislation”, “by implication” or “by necessary implication.”<sup>31</sup>

54. Expressed another way, a Court may “divine or impute” the purpose or object of an Act.<sup>32</sup> In such instances:

...the challenge is to deduce the relevant purpose of the Act, or of the provision being interpreted, without [an] explicit starting point. This usually can be achieved by a reading of the rest of the Act.<sup>33</sup>

55. In my opinion, the literal interpretation of s 56BA of the old TAA is entirely consistent with the object or purpose of the section as deduced from a reading of that section within the overall context of the Act.
56. The subject transfer falls within the words of the section and is therefore liable to the imposition of stamp duty. The subject transfer clearly constitutes or evidences a declaration of trust within the meaning of s 56BA (3).
57. As pointed out by the respondent, it is not necessary for the transfer to effect a change of ownership. The provisions of s 56BA do not require a change of ownership as a precondition for the imposition of stamp duty. However, for the reasons advanced by the respondent, the subject instrument created new beneficial interests in the property the subject of the declaration of trust. The appellant’s submission that the transfer should not be subject to stamp duty because it did not effect a sale, conveyance or transfer of

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<sup>31</sup> Gifford n 25, p 50 citing *Municipal Officers’ Association of Australia v Lancaster* (1981) 37 ALR 559 at 579-580, per Evatt and Northrop JJ (FCA FC); *Byrne v Garrison* [1965] VR 523 at 529; *Bawn Pty Ltd v Metropolitan Meat Board* (1970) 92 WN (NSW) 823 at 842 per Mason JA.

<sup>32</sup> Gifford n 25, p 52 citing *Black –Clawson International Ltd v Papierwerke Waldhoff- Aschaffenberg AG* [1975] AC 591 at 645; *Farrell v Alexander* [1977] AC 59 at 81; *Hatton v Beaumont* [1997] 2 NSWLR 211 at 225.

<sup>33</sup> Pearce and Geddes n 23 at [2.11]. See *Pileggi v Australian Sports Drug Agency* (2004) 138 FCR 107.

ownership is without substance and cannot be sustained. Section 56BA treats a declaration of trust, within the meaning of the section, as a conveyance of property.

58. The appellants relied directly and indirectly upon the provisions of Division 8AAA of the old TAA in support of their objection to payment of stamp duty on the transfer.
59. It needs to be borne in mind that the Commissioner did not purport to assess the subject transfer pursuant to the provisions of Division 8AAA TAA: ss 56BAA – 56BAC. Those provisions are concerned with the imposition of duty on the addition of beneficiaries and change in control of a beneficiary or a change in or in control of a trustee under a discretionary trust.
60. The appellant's submissions, insofar as they relate to the provisions of Division 8AAA, are irrelevant and hence have no bearing on the determination of this appeal. The exempting provisions in that Division cannot be invoked by the appellants for the purpose of claiming relief from the payment of stamp duty in relation to the subject instrument. Those exempting provisions only apply in relation to transactions or instruments of the type specified in Division 8AAA. The subject transfer does not fall within any of the prescribed categories. The exempting provisions in Division 8AAA have no application to the subject transfer.
61. The appellants appear to be relying upon some cross-fertilisation or cross-pollination between s 56BA and the exempting provisions of Division 8AAA of the old TAA. In other words, those provisions should be read as indirectly applying to s 56BA or the Commissioner should have considered those provisions when assessing the subject transfer for stamp duty. There is no basis for that construction of the statutory provisions. The provisions of s56BA, and the provisions contained in Division 8AAA operate independently of each other. There is no statutory cross-over.

62. In my opinion, the Commissioner cannot exempt an instrument, falling within the ambit of s 56BA, from the payment of stamp duty by applying the exempting provisions contained in Division 8AAA. Furthermore, the Commissioner does not have a general discretion to exempt the subject transfer from the payment of stamp duty.
63. The appellants' submission that the subject transfer is not dutiable because it was not for valuable consideration misses the point. As the instrument clearly falls within the purview of s 56BA of the old TAA, it is to be treated as if it were a conveyance of property, and by virtue of that characterisation the instrument attracts a liability for stamp duty, assessable at the ad valorem rates applicable to conveyances of property.
64. It is also immaterial that stamp duty was paid by the appellants at the time of their purchase of the subject property. The present instrument, constituting or evidencing a declaration of trust, attracts a separate liability to stamp duty, and stamp duty paid earlier by the appellants with respect to the earlier transaction or transfer cannot be brought into account in assessing the duty payable on that instrument.
65. The Revenue SA Stamp Duty Guide is irrelevant to the present appeal. Similarly, item 5(7) of Schedule 1 to the old SDA is not applicable to the subject transfer. Section 6(4) of the old SDA and s 4B of the old TAA are also inapplicable.
66. The appellants complain that the assessment of stamp duty on the subject transfer is unfair because stamp duty was paid in relation to the purchase of the subject property, and to now subject the property to a further and additional impost amounts to an instance of "double taxation".
67. However, it is important to consider what is meant by "double taxation" and to define the circumstances under which its occurrence may become objectionable, from a legal perspective.

68. Many transactions are subject to different taxes or duties under different pieces of legislation. In that sense the transaction is subject to “double taxation” – even “multiple taxation”. There is nothing objectionable about that.
69. In other cases, such as the present, a transaction or instrument evidencing that transaction may become dutiable even though stamp duty has been previously paid in relation to an earlier related transaction or instrument evidencing that transaction. Again, although that may appear on its face to be a case of “double taxation”, the imposition of duty is not objectionable.
70. “Double–taxation” is only objectionable when a tax or duty is imposed twice on the one transaction or instrument, evidencing that transaction. That is clearly not the case here. The original purchase of the property was a different transaction to the present transaction. The transfer evidencing the earlier transaction - a conveyance of property – was a different transfer to the present transfer, which amounts to a conveyance of property in the form of a declaration of trust.
71. The appellants’ argument that the subject transfer should not have been assessed for the payment of stamp duty because it was effected to comply with or to take advantage of the Australian Government legislation, and was not a scheme to avoid stamp duty, is not accepted. That argument ignores, or overlooks, the proper relationship between the old TAA and old SDA and the Commonwealth legislation. I do not consider that the constitutional argument advanced by the appellants has any merit. As submitted by the respondent, the old TAA and old SDA are not repugnant to, or inconsistent, with the Commonwealth laws and are otherwise constitutionally valid. The Commonwealth and the Territory legislation are capable of operating side by side, and indeed so operated in relation to the subject transfer.
72. Although provisions allowing an objection to be made to an amount assessed pursuant to a taxing or fiscal statute and review to be sought of a decision

on that objection are regarded as beneficial provisions, which are to be interpreted accordingly, this is not a case where it is appropriate to place a beneficial construction on the relevant provisions of the old TAA and old SDA in such a way as to exempt the subject transfer from the payment of stamp duty.

73. For the above reasons, the appellants have failed to discharge the statutory burden of proving that the decision or determination of the Commissioner was incorrect.
74. I propose to dismiss the appeal, and to confirm the Commissioner's decision disallowing the objection. However, before taking that course, I wish to ensure that the valuation of the interest in the subject property, upon which stamp duty was assessed, is not an issue in this appeal. I propose to hear the parties in relation to that aspect before making a final order or orders in this matter. I propose to also hear the parties in relation to the question of costs as governed by s 105W of the old TAA.

Dated this 9th day of April 2008.

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Dr John Allan Lowndes  
STIPENDIARY MAGISTRATE