HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 02 Jul 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S62/2021
File Title:	Commissioner of Taxation v. Carter & Ors
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondents
Date filed:	02 Jul 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE FULL COURT OF
THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **Commissioner of Taxation**
Appellant

10

and

Natalie Carter
First Respondent

Alisha Caratti
Second Respondent

Nicole Caratti
20 Third Respondent

RESPONDENTS' SUBMISSIONS

Part I: Certification

1. It is certified that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Whether a default beneficiary of a trust estate who disclaims her entitlement as such after the end of an income year is presently entitled to income of the trust estate under s 97 of the *Income Tax Assessment Act 1936* (**ITAA36**) for that income year.

Part III: Section 78B

3. The Respondents have considered whether a notice under s 78B of the *Judiciary Act 1903* is required and they do not consider that such a notice is necessary.

Part IV: Contested facts

4. The Respondents do not contest the Commissioner's narrative of facts or chronology.

Part V: Argument

Introduction

5. The Respondents contend that a default beneficiary of a trust estate who disclaims her entitlement as such is not, and has never been, presently entitled to income of the trust estate for the purposes of s 97 of the ITAA36, and accordingly is not liable to tax under that provision. The Respondents' submissions are divided into three parts.

6. First, the Respondents address the general law of disclaimer and explain that, contrary to the assumption on which the Commissioner's submissions (**AS**) proceed (AS [81]), disclaimer does not undo the passing of title. Assent by a donee is necessary for a gift to be valid and, in the absence of dissent, that assent is presumed by law. The effect of a disclaimer is to negative that presumption of assent, so that there never was a valid gift at all because the necessary element of assent is missing.

7. Secondly, the Respondents address what is now the Commissioner's first argument (AS [25]-[26], [95]), which the Commissioner says is sufficient for him to succeed even if the effect of a disclaimer is to cause a gift to be avoided *ab initio* and that avoidance is effective for the purposes of s 97 (albeit noting that the Respondents contend that a disclaimed gift was never an effective gift at all, rather than an effective gift that is avoided *ab initio*). The Commissioner's proposition is that a beneficiary who disclaims her interest as a default beneficiary nonetheless had, despite the disclaimer, a right to demand and receive "the amount" (AS [95]), which is said to be sufficient for present entitlement. For two reasons that is incorrect. One is that the Commissioner's argument

neglects one-half of the judicial explication of the concept of present entitlement, being that a presently entitled beneficiary must have an interest in the income of the trust estate that is vested in both interest and possession, which is absent on any view of the effect of a disclaimer. The other is that the Commissioner's argument elides the distinction between a right to demand and receive the income of the trust estate and a right to demand and receive the putative gift made to the beneficiary.

8. Thirdly, the Respondents address the Commissioner's second and third arguments (AS [96]-[97]), being to the effect that the "taxable facts" affecting a beneficiary's liability under s 97 are limited to the relevant income year. Contrary to AS [96]-[97], the tax legislation permits and, in some cases, requires regard to be had to conduct occurring after the end of an income year to determine a taxpayer's liability to tax during that income year. If, as the Respondents contend, the effect of a disclaimer is to negative assent to a putative gift such that there never was a valid gift at all, there is no need to resolve the interaction of s 97 and retrospectively operating general law concepts – the "taxable facts" of the relevant income year are the making of a putative, but ineffective, gift. In any event, for the purposes of s 97, the concept of present entitlement to the income of a trust estate picks up the general law attending a beneficiary's rights against the trustee in respect of trust law income, including to the extent that that concept is affected by any retrospectively operating principles of the general law.

The nature of a disclaimer

9. Assent by a donee is necessary for a gift to be valid, but that assent is presumed by law unless dissent is proved. Disclaimer does not undo the passing of title, but rather negatives an element of a valid gift that is otherwise presumed. AS [81] is mistaken.

10. Assent by a donee is necessary for a valid gift. There is a presumption or inference that the donee assents to the gift, but that may be rebutted by evidence: *Matthews v Matthews* (1913) 17 CLR 8 at 20, 43, 44 (see particularly at 44, where Isaacs and Powers JJ refer to the presumption being "cancel[led]" by testimony); *Hill v Wilson* (1873) LR 8 Ch App 888 at 896. The requirement for acceptance has been present since the foundations of English law, with Bracton writing in the early 1200s in "On the Laws and Customs of England" that a gift is of no effect unless there is mutual consent and agreement ("mutuus consensus et voluntas") on the part of both the donor and the donee with the latter having the "animus recipiendi" (Vol 2 p.62); see also J Cowel, "Institutes of the

Lawes of England" (1651), in which it is said that there must be joint consent of both the donor and donee (second book, p.111).

11. Consequently, where there is no dissent from a gift, the presumption that the donee assents is sufficient to supply the element of assent to the gift. Thus a gift may be valid even if the donor or donee dies before the donee becomes aware of the gift because, in the absence of dissent by the donee, assent is presumed. However, where there is dissent, the presumption is rebutted. In that situation, the correct analysis is not that there is deemed by law to be assent to a gift with the effect of a disclaimer being to countermand that deemed assent, but rather that disclaimer negatives the presumption of assent such that there is never a valid gift at all because one of the elements necessary for an effective gift is, and at all times has been, missing.

12. The cases referred to in AS [78] do not establish to the contrary. Each of those cases establishes that express assent is not necessary for a valid gift. That is because, in the absence of proved dissent, assent is presumed. None of those cases concerned a disclaimer. Two of those cases – ***Thompson*** *v Leach* (1726) 2 Vent 198; 86 ER 391 and ***Siggers*** *v Evans* (1855) 5 EL & BL 367; 119 ER 518 – concerned a donee who in fact assented but not until after an intervening act that could otherwise have prevented the gift from being valid. The third case – ***Butler*** *and Baker's case* (1591) 3 Co Rep 25; 76 ER 684 – was also not about disclaimer but rather about a particular statutory right of a widow subsequently to refuse certain estates already existing in her.

13. *Thompson* did not concern a disclaimer, but rather a deed of surrender to which the surrenderee expressly assented but only after the birth of a child who would have taken a remainder interest had there been no surrender. The surrenderee never dissented, and the relevant question was whether for the surrender to be valid the surrenderee needed expressly to have assented before the birth of the child. Ventris J observed that dissent from an estate was no more retrospective than assent to that estate, saying "there is as strong a relation upon a disagreement to an estate, as upon an agreement" (at 201; 392). His Lordship characterised the presumption of assent to a gift as a presumption that would operate unless the donee proved dissent, saying "stabit praesumptio donec probetur in contrarium" (the presumption stands until the contrary is proved), so that the question of assent is to be resolved by evidence but the presumption of assent will stand in the absence of contrary evidence (at 207-208; 396-397; see also at 202; 393). His Lordship also accepted that where dissent is shown the gift was never valid, describing

such a purported gift as "void" and saying that "a man cannot have an estate put into him in spight [sic] of his teeth" (at 206; 396).

14. Similarly, *Siggers* did not concern a disclaimer. It concerned an assignment of property for the benefit of the assignor's creditors. The assignee assented, but not until after one of the assignor's creditors delivered a fieri facias to the sheriff. The argument put to the Court, and that it rejected, was that in the case of onerous gifts title could not vest until there was "actual assent expressed" (at 375; 521), even if there was no dissent. After citing *Thompson*, the Court explained that a grantee may choose to claim the benefit of the grant if there had been no dissent or may choose not to take under the grant if there had been no assent (at 381; 523). *Siggers* was not concerned with whether or not a gift putatively made to a donee who dissents from it is vested in the donee but devested by the dissent, and it did not decide that point.

15. *Butler* did not concern a disclaimer in the general law sense. It concerned a person who, together with her husband, had a joint tenancy in an estate during their mutual lives and who, after her husband's death, exercised her statutory right under the *Statute of Uses* (27 H 8 c. 10) that arose on her husband's death to refuse her existing interest in the estate and instead to take her dower (see at 27a; 690). *Butler* was not a decision about the effect of a disclaimer in the general law sense but rather was concerned with statutory interpretation, being the interaction of the statutory right under the *Statute of Uses* on the widow's interest in the estate and how this affected the Crown's entitlement to a third of a testator's lands under the *Statute of Wills* (32 H 8).

16. As with *Thompson* and *Siggers*, the passage from *Butler* extracted in AS [78] is to the effect that "notice or agreement" is not necessary for a gift to be valid, which again is referring to express assent to a gift not being necessary (see note (H) to that extracted passage in the report, which refers to a person's executors bringing an action on a bond of which the person had no notice before death).

17. In any event, that section of the report of *Butler* extracted at AS [78] was not dealing with the question of whether or not the subject matter of a gift passes subject to being devested by refusal. Rather, it was dealing with the mode by which a refusal may be accomplished – whether a refusal could be done *in pais* or must be done in Court (see at 26a; 687 and 26b; 688), a point on which *Butler* has not subsequently been followed: ***Townson*** *v Tickell* (1819) 3 B & Ald 31; 106 ER 575 (at 36-37; 577); *Bonifaut v Greenfield* (1653) Cro Eliz 80; 78 ER 340.

18. Additionally, the reporter's comments extracted at AS [78] do not appear to have formed any part of the Court's reasoning. *Butler* is also reported at Popham 87; 79 ER 1199 by Sir John Popham who participated in *Butler* first as the Queen's Attorney and subsequently as Lord Chief Justice. However, Popham's report indicates that no part of the Court's reasoning depended in any way on whether or not the subject matter of a gift passes subject to being devested by refusal – that issue is not mentioned in the report, which instead shows that the decision was reached simply as a matter of statutory construction, rather than by any reference to the general law of gifts and disclaimer.

19. In ***Standing*** *v Bowring* (1885) 31 Ch D 282, the English Court of Appeal referred to those same three cases (*Butler*, *Thompson* and *Siggers*) and, it may be accepted, used language that suggests that the subject matter of a gift vests subject to being devested by dissent. However, those statements were based entirely on what was said in those three cases, with a particular emphasis being placed on *Siggers*, but, as has been explained above, none of those three cases stood for that proposition. Those three cases on which the Court in *Standing* based its decision were not explored or even referred to in argument (see at 286). Like *Siggers* and *Thompson*, *Standing* did not concern a donee who refused a gift but rather a donee who wished to accept the gift but who did not become aware of the gift having been made until after an intervening event, being, in the case of *Standing*, the donor's attempt to recall the gift. The ratio of *Standing* is no more than that the presumption of acceptance that applies in the absence of proved dissent is sufficient to satisfy the requirement that a donee accepts a gift for it to be an effective gift.

20. In contrast, there is ample support for the Respondents' contention that disclaimer negatives the presumption of assent such that there is never a valid gift in the first place. Apart from *Thompson*, none of the authorities that pre-dated *Standing* was referred to in *Standing*.

21. As noted above, in *Thompson*, Ventris J observed that where dissent is shown the gift was never valid, but rather is "void" as "a man cannot have an estate put into him in spight [sic] of his teeth".

22. In *Crewe v Dicken* (1798) 4 Ves Jun 97; 31 ER 50, Lord Loughborough LC said dissent was "where no estate passes", in contrast to conveying away the estate (at 100; 52).

23. In *Townson*, Abbott CJ described a disclaimed devise as being "null and void" (at 37;

577). Bayley J said that the effect of a disclaimer was that "the estate never was in [the donee] at all" as the devise was nothing more than an offer capable of being accepted or refused (at 38; 577). Holroyd J said that there was a presumption of acceptance of a devise in the absence of proof to the contrary but that, where it is proved that the devisee did not assent, "the estate never was in" the devisee (at 38; 577). Best J said that assent was necessary before an interest in property could pass to the devisee and that, where the devisee dissented, "no interest ever vested" in the devisee (at 39; 578).

24. In *Petrie v Bury* (1824) 3 B & C 353; 107 ER 764, Abbott CJ observed that, as there was no allegation of dissent to the estate, "Assent is therefore to be presumed" (at 355; 765). If the estate vested subject to being devested by disclaimer then, absent dissent, it would be unnecessary for the Court to refer to the presumption of assent.

25. *Furber v Furber* (1862) 30 Beav 523; 54 ER 992 concerned a legatee who had disclaimed, and Lord Romilly MR said that a legatee "has no interest unless he claims" but that it is "prima facie [to] be assumed" that the legatee does claim (at 524; 993).

26. In *In re Birchall; Birchall v Ashton* (1889) 40 Ch D 436, Lindley LJ referred to the presumption of assent in the absence of a disclaimer and said that, where the evidence showed that there had been a disclaimer, the devisee never accepted the legal estate (at 439). Similarly, Lopes LJ said that the question was one of fact rather than law (at 439) and that, it having been determined on the evidence that there had been a disclaimer, the result of that disclaimer was that "the legal estate did not pass" (at 440).

27. The Respondents' contention is clearly illustrated by *In re* ***Wimperis****; Wicken v Wilson* [1914] 1 Ch 502, in which the plaintiff disclaimed an annuity given to her under a will. Had she acquired the annuity, it would have been subject to a restraint on anticipation and so she could not have dealt in any way with the annuity, including by way of assignment or release. The so-called "protection" afforded by the restraint on anticipation was so strong that it could not be avoided "by hook or by crook – by any device, even by her own fraud" (at 509, citing *Lady Bateman v Faber* [1898] 1 Ch 144 at 149 per Lord Lindley MR). However, because the plaintiff by disclaimer had declined the gift, she did not become entitled to it and never had an estate in it, so the restraint on anticipation could never have attached (at 508, 509). That analysis necessarily requires that the effect of the disclaimer is not to devest a vested gift but to prevent the gift from vesting at all, as the restraint on anticipation would have prevented any dealing with a vested gift. *Wimperis* was cited in argument in *In re* ***Parsons****; Parsons v Attorney-*

General [1943] Ch 12 at 13 and by the Court in *In re Stratton's Disclaimer;* ***Stratton*** *v Inland Revenue Commissioners* [1958] 1 Ch 42 at 51-52, being cases on which the Commissioner relies and which the Respondents address below.

28. The position for which the Respondents contend here also represents the law in the United States of America. In that country, acceptance by the donee is also necessary for a complete gift: Restatement (2nd) of Property § 31.1. In *Jewett v Commissioner of Internal Revenue* 455 US 305 (1982), Blackmun J (with whom Rehnquist and O'Connor JJ agreed) dissented in the result but explained that a "disclaimer is a refusal to accept property *ab initio*" and that "the law of disclaimer is founded on the basic property-law concepts that a transfer is not complete until its acceptance by the recipient, and that no person can be forced to accept property against his will" (at 323). In *People v Flanagin* 162 NE 848 (1928), the Court observed that the effect of a disclaimer was that the estate the subject of the disclaimed gift "does not vest, but remains in the original owner" (at 850) and that, in applying the inheritance tax statute considered there, which applied to the titles vested as determined at the time of the decedent's death, the disclaimer had the result that the gift was never accepted so that, at the decedent's death, the taxpayer was not vested with any devise even though named in the will (at 851).

The ability to accept a gift

29. The Commissioner's first argument (AS [25]-[26], [95]) is that a disclaiming beneficiary nonetheless had, and cannot deprive herself of having had, "a right to demand and receive payment of the amount" and that this is sufficient for present entitlement for the purposes of s 97 of the ITAA36. This is said to follow from *Parsons* and *Stratton*. However, the Commissioner mistakes the effect of those cases; moreover, he neglects one-half of the judicial explication of the concept of present entitlement, which remains absent on any view of those cases.

Parsons and Stratton

30. Each of those cases concerned estate duty and the proper construction of certain anti-avoidance provisions that brought to tax property that would otherwise not form part of the deceased's estate – that which is described as "notional estate". In *Equity Trustee Executors and Agency Co Ltd v Commissioner of Probate Duties (Vic)* (1976) 135 CLR 268, it was explained that these provisions had the effect of bringing property that was not part of a deceased's estate into her or his notional estate (at 273, 279-280, 283).

31. *Parsons* concerned the construction of the phrase "competent to dispose of" in s 5(2) of the *Finance Act 1894* (UK). Lord Greene MR construed this phrase as not being a phrase of art but simply meaning "the ability to make a thing your own" (at 15). His Lordship considered that a legatee, having the ability to take or disclaim the gift, had the ability to make the legacy her or his own and therefore satisfied the statutory description (at 16). Two points emerge. First, his Lordship's characterisation of a disclaimer is entirely consistent with the Respondents'. His Lordship described the legatee as having the ability to "take" or "disclaim", rather than "retain" or "disclaim", the legacy. Secondly, his Lordship clearly distinguished between two concepts: the ability (or competence) to take the gift and the subject matter of the gift itself. As his Lordship observed (at 16), the effect of the disclaimer on the gift "does not mean that … the competence must be treated in law as not having existed" – his Lordship referred to that competence as being different from the gift itself and said that the voidness of the gift "has nothing to do with" the legatee's competence to take. That is because they are two different things.

32. *Stratton* is to similar effect. It concerned whether a testator who disclaimed certain gifts had had a "right" in respect of the subject matter of those gifts within the meaning of that term in s 45(2) of the *Finance Act 1940* (UK). The effect of that provision was, where there was an extinguishment of a right, to deem there to have been a disposition and to deem the property the subject of that deemed disposition to include a benefit conferred by the extinguishment of the right. Again, there was a distinction drawn between the ability to accept the gift and the subject matter of the gift itself. Jenkins LJ accepted that, in respect of the subject matter of the gift itself, the disclaimer "plainly" brought about "a total failure ab initio" of those gifts (at 49). However, his Lordship distinguished those gifts from the testator's right "in respect of" the gifts (at 52, 54).

33. The distinction between the ability to accept a gift and the subject matter of the gift itself is illustrated by *In the estate of Taylor* (1950) 51 SR (NSW) 16. Whereas in *Parsons* Lord Greene MR described the ability to accept as being not unlike having a binding option (*Parsons* at 17), this case involved the application of similar estate duty provisions but where the testator held a real option in respect of shares, and Street CJ drew a careful distinction between the two (at 21).

The problems with the Commissioner's reasoning

34. Contrary to AS [92]-[93], [95], the donee having the "right to demand and receive

payment of the amount" is not sufficient for that donee to be presently entitled to the income of the trust estate. That is so for two reasons.

35. The first reason is that the Commissioner's reasoning ignores part of the nature of present entitlement. As explained in ***Harmer*** *v FCT* (1991) 173 CLR 264 at 271, present entitlement requires two things: "(a) the beneficiary has an interest in the income which is both vested in interest and vested in possession; and (b) the beneficiary has a present legal right to demand and receive payment of the income". Part (a) of that requirement has been clearly established by this Court previously: *FCT v* ***Whiting*** (1943) 68 CLR 199 at 216, 219; *Taylor v FCT* (1970) 119 CLR 444 at 451, 452. However, the Commissioner overlooks that part (a).

36. A beneficiary who has disclaimed her or his entitlement does not have an interest in the income which is vested both in interest and in possession. If, as the Respondents contend above, the effect of a disclaimer is to rebut a presumed acceptance of an attempted gift then the beneficiary who has disclaimed never at any time had a vested interest in the income at all. If the Respondents are wrong in that contention then, by reason of the disclaimer avoiding the gift ab initio, the disclaiming beneficiary is deprived of any vested interest in the income (subject to the Commissioner's second and third arguments, which are addressed below).

37. On either view, even if the ability to accept the gift described in *Parsons* and *Stratton* were a "right to demand and receive payment of the income" (which it is not, for the reason given next), that neglects a necessary part of the requirement for present entitlement. The beneficiary cannot be presently entitled to the income as either she never had, or she avoided ab initio, any vested interest in that income.

38. The second reason is that the ability to accept the gift is not a "right to demand and receive payment of the income". In AS [92]-[93], [95], the Commissioner elides the distinction between a right to demand and receive payment of income and a right to demand and receive the gift. As explained above in pars. 31 to 33, each of *Parsons* and *Stratton* was careful to distinguish between the ability to accept the gift and the subject matter of the gift itself. Here, the subject matter of the putative gift to the Respondents was their respective entitlements as default beneficiaries, being for each a single putative gift rather than a separate gift of the income for each accounting period: Full Court below (**FC**) [96]-[98]; *FCT v* ***Ramsden*** (2005) 58 ATR 485 at 495 [42], 497 [57]. Had each Respondent exercised her ability to accept the putative gift, she would then have

obtained an equitable chose in action, with that chose then giving her the right to demand and receive the income for all income years where there was no effective appointment of income elsewhere. However, the ability to accept that gift is necessarily prior to, and different from, a right to demand and receive the income for an income year.

Statutory construction and temporal aspects of the general law

39. Here, the Respondents address the Commissioner's second and third arguments (AS [96]-[97]), being to the effect that the "taxable facts" affecting a beneficiary's liability under s 97 are limited to the relevant income year. First, in referring to a beneficiary being presently entitled to the income of the trust estate, s 97 picks up the general law of trusts "as it finds it". Secondly, where a statute picks up a general law concept affected by a retrospectively operating principle then, absent a contrary statutory intention, the statute picks up that general law concept as affected by that retrospectively operating principle. Thirdly, there is nothing in the text or context of s 97 that evinces a contrary statutory intention. Fourthly, contrary to AS [96]-[97], the tax legislation permits and, in some cases, requires regard to be had to conduct occurring after the end of an income year to determine a taxpayer's liability to tax during that income year.

Statutes that refer to general law concepts

40. Just as when determining whether something has been derived one must have regard to the nature of that which is said to have been derived (*FCT v Sun Alliance Investments Pty Ltd (in liq)* (2005) 225 CLR 488 at 503-504 [42], 505 [45]), when determining whether a taxpayer is presently entitled and the meaning of that phrase, one must have regard to the nature of that to which the taxpayer is said to have been presently entitled. In s 97, that is the "income of the trust estate". That concept "has a content found in the general law of trusts", being the trust law concept of income used in contrast to capital, the distinction arising in the administration of successive equitable estates and involving an application of the principles developed in Chancery for the apportionment between income and capital of receipts, outgoings and losses, subject to the terms of the trust instrument: *FCT v* ***Bamford*** (2010) 240 CLR 481 at 500-501 [17], 505-506 [36]-[42].

41. In ***Executor Trustee*** *and Agency Co of SA Ltd v FCT* (1939) 62 CLR 545, Latham CJ explained at 562 that where a revenue statute imposes a tax by reference to a general law concept such as a beneficiary's right to receive income from a trustee, the revenue must take those rights as they in fact exist between beneficiary and trustee. This does

not involve private parties binding the revenue, but simply reflects the nature of the criterion selected by Parliament for the imposition of tax. See also per Dixon J at 570.

42. This Court recently explained *Executor Trustee* in *FCT v Thomas* (2018) 264 CLR 382 at 407-408 [53]-[55], 416-417 [91]-[93]. As Gageler J said at 417 [93], the legal entitlements of the beneficiaries under the will in *Executor Trustee* were the "taxable facts" on which the taxing statute operated.

43. Similarly to *Executor Trustee*, in ***Stewart Dawson*** *& Co (Vic) Pty Ltd v FCT* (1933) 48 CLR 683, after explaining the principles on which a court of equity would apply the presumption of advancement, Dixon J stated at 691 that this presumption should be applied in revenue matters as, if a liability for tax depended on the existence or not of a trust, then "the occasion seems to demand" the application of the principles that would apply in a court of equity to determine that question.

44. *Stewart Dawson* has been subsequently approved and applied in *Danmark Pty Ltd v FCT* (1944) 7 ATD 333 at 360; in *MacFarlane v FCT* (1986) 13 FCR 356 at 367, saying that the ITAA36 takes the taxpayer's income "as it finds it – that is to say, subject to the general law in all its aspects" (approved in *Castagna v R* [2019] NSWCCA 114 at [168]-[169]); and in *Sonenco (No 87) Pty Ltd v FCT* (1992) 38 FCR 555, in which the Court said at 599 that the statute would pick up the transactions as the statute found them "that is, subject to the general law in all its relevant aspects". See also *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 257 [16], 261 [24]-[25]; *Attorney-General (NSW) v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 531.

45. Thus, the Commissioner's caution as to the term "void" and his question as to against whom a transaction must be void (AS [29]-[37]) may be simply answered by recognising that s 97 imposes tax by taking as its criterion the rights of the beneficiary against the trustee to the income of the trust estate, so any question of "voidness" is to be answered by reference to the rights of the beneficiary against the trustee. The statute takes that criterion as it finds it. Similarly, contrary to the Commissioner's concerns (AS [24], [36], [72], [97]), a disclaimer does not unilaterally "change the operation of the legislation"; nor does it advance the analysis to assert that it was "beyond the power" of the Respondents to extinguish a tax liability, which simply begs the question.

When the general law has retrospective operation

46. Several Australian cases have considered the interaction of revenue statutes with

retrospectively operating general law doctrines. With one exception, all of them have construed the relevant statute as picking up the applicable general law concept as affected by the retrospectively operating general law doctrine. Together with the above cases, those cases stand for the principle of construction that, where a statute uses a general law concept as its criterion for operation and that general law concept is affected by a retrospectively operating legal principle, the statute picks up that general law concept as affected by that retrospectively operating legal principle, absent some contrary indication in the statute. The United Kingdom Supreme Court has recently confirmed this principle for which the Respondents contend. The one Australian exception, *Chief Commissioner of State Revenue v* ***Smeaton Grange*** *Holdings Pty Ltd* (2017) 106 ATR 151, was correctly distinguished by the Full Court because it turned on the particular statutory regime under consideration, which evinced a contrary intention.

47. Dealing with the Australian cases that establish that principle, first, *Kiwi Brands Pty Ltd v FCT* (1998) 90 FCR 64 concerned a contract signed by an unauthorised individual purportedly on behalf of the taxpayer during the 1991 income year. The taxpayer ratified the execution in the 1992 income year. Having regard only to the conduct that had occurred up to 30 June 1991, in law the taxpayer had not entered into a contract in the 1991 income year. However, seeking to tax the taxpayer in the 1991 income year, the Commissioner argued that the ratification operated retrospectively. The Full Court accepted that submission and said that the ITAA36 proceeds on a basis that assumes the general law, and that included legal fictions such as the doctrine of ratification (at 79).

48. On appeal, this Court approved that reasoning, saying that although the retrospective effect of the doctrine of ratification is in some respects a fiction, it is "part of the background against which the taxation legislation operates": *FCT v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 533 [20].

49. Secondly, ***Oates*** *v FCT* (1990) 27 FCR 289 concerned a provision of the ITAA36 that prevented a taxpayer who "becomes a bankrupt" from carrying-forward tax losses. The taxpayer had become a bankrupt but subsequently had his bankruptcy annulled. Hill J held that the annulment of the bankruptcy meant that the taxpayer had not "become[] a bankrupt", as "the income tax legislation must assume the existence of and follow the result of the general law" (at 300-301).

50. Thirdly, *FCT v* ***Cornell*** (1946) 73 CLR 394 concerned Div 6 of Pt III of the ITAA36, in which s 97 is located. It involved a taxpayer who, with a view to shifting the tax

burden of dividends from himself to his ex-wife, purported to settle shares on trust for the benefit of his ex-wife so that the dividend paid on the shares would satisfy his obligations under a deed of maintenance when otherwise his ex-wife would receive the maintenance payments tax-free. Latham CJ found that no trust had been created but, in considered dicta, held that had the trust been validly created in the 1941 income year, the ex-wife's disclaimer in the 1942 income year would have been effective to disclaim for the purposes of the ITAA36 her interest for both the 1941 and 1942 income years (at 402).

51. Fourthly, *FCT v Taylor* (1929) 42 CLR 80 concerned the retrospective effect of satisfaction of the escrow condition of a testatrix's escrow after the testatrix's decease. In considered dicta, this Court said that that retrospective effect was effective for the purposes of s 8 of the *Estate Duty Assessment Act 1914* (Cth). Prior to satisfaction of the escrow condition, the escrow was not binding on the testatrix. While the escrow condition was only satisfied after the testatrix's decease, the satisfaction of that condition related back to the time that the testatrix executed the escrow such that, for the purposes of that Act, it was an inter vivos disposition, rather than a testamentary disposition, and so not subject to estate duty (at 86, 88).

52. Fifthly, *Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps* [1985] VR 70 concerned the retrospective effect of satisfaction of an escrow condition when the escrow had been conditionally delivered in Victoria but that condition was only satisfied when the instrument was located outside Victoria. By operation of the doctrine of relation back, the instrument was taken to be an effective deed from when it was in Victoria and so the Victorian revenue succeeded in imposing stamp duty (at 79).

53. Sixthly, *GE Capital Finance Australasia Pty Ltd v FCT* (2011) 219 FCR 420 concerned a potentially defectively completed form for the creation of a multiple entry consolidated group under s 719-5(4) of the *Income Tax Assessment Act 1997* (**ITAA97**). Although Gordon J held that the form was correctly completed, her Honour held that had it been defective then rectification would have been ordered, which would have been sufficient to give the same answer to the preliminary question as to the time of formation of the group (at 447 [103]; 450-451 [115]-[119], [123]).

54. The United Kingdom Supreme Court recently confirmed the principle for which the Respondents contend in ***John Mander*** *Pension Trustees Ltd v Revenue and Customs Commissioners* [2015] 1 WLR 3857. At 3864-3865 [17]-[18], Lord Sumption (with

whom Lords Neuberger and Reed agreed) accepted that events occurring after an assessment could recharacterise a taxpayer's affairs in an earlier period thereby altering the taxpayer's liability to tax, and referred with approval to ***Spence*** *v Inland Revenue Commissioners* (1941) 24 TC 311, in which it was held that, where a contract for sale of shares that was not void but merely voidable for misrepresentation was subsequently avoided, the dividends paid on the shares between settlement and avoidance of the contract were properly taxable to the vendor and not the purchaser. In *John Mander*, Lord Hodge dissented as to the result but at 3879 [84] said (with Lord Carnwarth agreeing) that the result in *Spence* was "unsurprising" as it involved "the application of normal tax rules to circumstances which the general law had reinstated". See also *AC v DC* [2012] EWHC 2032 at [31]-[32].

55. The Full Court below correctly distinguished *Smeaton Grange*. As identified at FC [106], [110], the grouping provisions of the *Payroll Tax Act 2007* (NSW) considered in that case made each member of a group jointly and severally liable for the payroll tax liability of each other member of the group that that other member of the group failed to pay. A purpose of the grouping provisions was to protect the revenue by ensuring that the payroll tax debts of one member of a group could be recovered from each other member of the group. That finding of purpose led to the conclusion that a disclaimer of a beneficial interest under a trust would not be retrospectively effective for the purposes of the grouping provisions, as that would subvert their purpose (see also *Smeaton Grange* at 157 [21], [22] per Leeming JA). In contrast to those provisions, s 97 of the ITAA36 does not serve such a purpose (see FC [106], [107], [110]).

Section 97 of the ITAA36

56. There is nothing in the text or context of s 97 of the ITAA36 that would cause that provision to be construed so as to depart from the above principle: the section refers to a general law concept – being the rights of a beneficiary against a trustee in respect of trust law income – and so in applying that provision all of the general law principles attendant on that concept, including any that have a retrospective operation, also apply.

57. Contrary to AS [74], the expression "is presently entitled" does not of necessity direct attention to a temporal question that can only be answered by reference to events that occur up to 30 June. As this Court explained in *Whiting* at 216-217, the word "presently" in that compound expression imposes a qualification as to the nature of the entitlement,

rather than the moment in time at which the beneficiary's entitlement is to be evaluated.

58. That is consistent with s 99 of the ITAA36 as originally enacted, which imposed a liability on a trustee (underlining added):

> Where there is no beneficiary presently entitled to any part of the income of a trust estate, or where there is a part of that income to which no beneficiary is so entitled …

59. The use of the word "so", rather than say "then", confirms that the word "presently" signifies the nature of the entitlement, rather than its temporal evaluation. Similarly, the third report of the Royal Commission on Taxation (1934), which formed the basis for the enactment of the ITAA36, referred at 123 [713] to where the income of the trust estate "is held for persons who are not presently entitled", again indicating that the concept being invoked referred to the nature, rather than the timing, of the entitlement.

60. Contrary to AS [73], Barwick CJ's references in ***Union Fidelity*** *Trustee Co of Australia Ltd v FCT* (1969) 119 CLR 177 to the "close of the taxation year" (at 182) and to the "conclusion of a year of tax" (at 183) do not indicate that only conduct happening up to 30 June can be taken into account in applying s 97. His Honour was there comparing the position of a beneficiary who is, at the end of the income year, entitled to receive income against the position of a beneficiary who was paid that income before the end of the income year, and his Honour pointed out that (before the amendments to Div 6 made in response to *Union Fidelity*) a beneficiary who was paid the income before the end of the income year was not presently entitled to that income.

61. His Honour's comments were not directed to the question of what conduct may be taken into account in determining present entitlement nor when that conduct must have occurred. By seizing on those particular words without appreciating their context, the Commissioner falls into error: *Comcare v PVYW* (2013) 250 CLR 246 at 256 [15]-[16]; *South West Helicopters Pty Ltd v Stephenson (No 2)* (2018) 98 NSWLR 96 at 106 [47]-[48]; *Quinn v Leathem* [1901] AC 495 at 506.

62. Similarly in AS [73], the Commissioner refers to Sundberg J's comments about present entitlement having "served its purpose" that were cited with approval in *Bamford* at 507-508 [45], but he misapplies those comments. Sundberg J was explaining the proportional relationship between trust law income and s 95 net income used in s 97 which was accepted in *Bamford*. His Honour explained that, once the "share" (i.e. proportion) of trust law income to which the beneficiary was presently entitled has been calculated,

present entitlement has "served its purpose" in that trust law income is then no longer relevant – that "share" is applied to the s 95 net income to work out the amount taxed to the beneficiary under s 97. Those comments say nothing about when a beneficiary's "share" of trust law income is to be calculated, what conduct may be taken into account in working out that share or when that conduct must have occurred.

63. Contrary to AS [76], what was said in *Harmer* at 271-272 does not assist the Commissioner's case, nor does *Colonial First State Investments Ltd v FCT* (2011) 192 FCR 298, which simply restates what was said in *Harmer*. In *Harmer*, this Court observed that court orders creating rights to be paid the interest earned on money paid into court did not create a present entitlement to income for the purposes of s 97 for income years prior to the making of the orders. Such orders only created those rights prospectively, whereas the relevant question posed by s 97 was as to the beneficiary's rights during the earlier income years. This Court contrasted this with court orders that recognised an existing beneficial interest in the money, such as where the money is held to have been subject to a pre-existing trust, in which case the beneficiary was presently entitled during the earlier income years. However, such court orders would not purport retrospectively to create rights: they are a "judicial recognition" of a right that "existed independently of the actual order" (at 271-272).

64. Significantly, nothing said in *Harmer* indicates that only conduct undertaken up to 30 June of the relevant income year can be considered for the purposes of working out the amount to which a taxpayer is "presently entitled" under s 97. The point made in *Harmer* is that present entitlement turns on a beneficiary's rights during the relevant income year, but it says nothing about what conduct may be taken into account in working out what those rights were during the relevant income year, or when that conduct must have occurred. As Lord Sumption said in *John Mander* at 3864 [17], events occurring after an assessment can recharacterise a taxpayer's affairs in an earlier period.

65. Contrary to AS [75], that s 97 refers to matters such as absence of a legal disability does not advance the Commissioner's case. Each of legal disability and present entitlement to income is a criterion adopted by s 97 that is drawn from the general law and, as explained above, in picking up those criteria from the general law the tax statute takes those general law concepts as it finds them, absent some contrary statutory intention. Such general law criteria may be affected by a retrospectively operating legal principle or they may not. If it be the case that one such general law criterion is not so affected,

there is no reason on the text of the provision or as a matter of logic to conclude that the provision only picks up a modified version of the other general law criterion stripped of the effects of any retrospectively operating legal principle that would otherwise apply.

66. Additionally, it is not necessarily the case that legal disability cannot be affected by a retrospectively operating legal principle, in the sense that events subsequent to 30 June may recharacterise a person as either having or not having a legal disability as at 30 June. One basis for legal disability may be by reason of mental disability. The legal disability that may attend mental disability is presently governed by different regimes in the States and Territories (e.g. *Mental Health Act 2007* (NSW)). However, historically, the legal capacity of those with mental disabilities has been governed by an amalgam of common law, equity and statute, and originally the finding that a person was a "lunatic" and so deprived of legal capacity was determined by an inquisition. From early times, that finding of "lunacy" could be overturned, either by traverse or by a bill to set aside transactions entered into by the committee pursuant to that finding: *Ex parte Roberts* (1743) 3 Atk 5; 26 ER 806 at 7; 807. Statutory intervention into the regime provided the Lord Chancellor with a power to direct an inquiry into whether a person was of unsound mind and, while ordinarily that inquiry was directed to the person's state of mind at the time of the inquiry, the Lord Chancellor could in special circumstances direct the inquiry to determine whether the person was of unsound mind from an earlier time (*Lunacy Regulation Act 1853* (UK) s 47). This regime was in force in Australia at the time of enactment of the ITAA36 (e.g. *Lunacy Act 1928* (Vic) s 115, Pt IV Div 2, Pt V). Thus, there is nothing inherent in the concept of legal disability that means that a beneficiary's status as being subject to a legal disability or not in an income year cannot be affected by matters occurring after the end of that income year.

Conduct after the end of the income year affecting a taxpayer's tax liability

67. In *Oates* at 300-301, Hill J rejected the Commissioner's submission that because income tax is an annual impost conduct after the end of the income year could not affect a taxpayer's tax liability for that income year.

68. Contrary to AS [72], there are various provisions of the ITAA36, which is incorporated into and read as one with the *Income Tax Act 1986* (Cth) (s 4), and the ITAA97 that permit or require conduct occurring after the end of the income year to be taken into account in computing a taxpayer's income tax liability for that income year.

69. Section 170(10AA) of the ITAA36 permits the Commissioner to amend an assessment outside the two or four-year amendment period in certain circumstances. This section was "designed to address new facts after the original assessment" and was needed to give effect to "the retrospective consequences" of subsequent events: *Metlife Insurance Ltd v FCT* (2008) 170 FCR 584 at 593 [28]-[29].

70. Section 170(9D) also permits the Commissioner to amend an assessment outside that period where after the assessment a contract is found to be void *ab initio* to ensure that Pts 3-1 and 3-3 of the ITAA97, dealing with capital gains tax (**CGT**), are taken always to have applied as if the contract had never been made.

71. Section 170(9) of the ITAA36 also permits the Commissioner to amend an assessment outside that period where the taxpayer's taxable income includes an estimated amount derived by the taxpayer but the correct amount is not ascertainable at the end of the income year because the taxpayer's operations extend over more than one year.

72. Various CGT provisions cause a capital gain or loss to be made by a taxpayer in the income year in which it entered into a contract for a thing to happen, such as a disposal of an asset: e.g. ITAA97 s 104-10(3)(a) and Note 1 to subs (3). However, quantification of that gain or loss depends on the capital proceeds, which includes amounts received by the taxpayer (s 116-20(1)), which could be in a subsequent income year. The capital proceeds could also be modified by events occurring in a subsequent income year, such as a repayment of part of the proceeds (s 116-50) or their misappropriation (s 116-60).

73. Section 59-30 provides that an amount received by a taxpayer in one income year is not assessable if the taxpayer repays the amount in a subsequent income year, even if the obligation to repay does not arise until the subsequent income year: subs (2)(b).

74. Sections 26-25(1) and (2) deny a taxpayer a deduction for interest or royalties incurred if the taxpayer fails to comply with its withholding obligations. Subsection (3) reinstitutes the deduction in the original income year if the withholding tax is paid in a subsequent income year.

75. Section 40-365 deals with a balancing adjustment event in relation to a taxpayer's depreciating asset and allows the taxpayer to reduce the amount included in its assessable income from that event for the income year in which the event occurs if the taxpayer incurs expenditure on a replacement asset. Subsection (3)(b) permits that expenditure to be incurred up to one year after the end of that income year.

76. Section 47(2A) of the ITAA36 gives certain distributions in the course of an informal winding up of a company a particular character for tax purposes. Subsection (2B) retrospectively alters the character of those distributions if the company still exists three years after the distribution.

77. Section 109D(1) deems certain loans from a private company to be a taxable dividend at the end of the company's income year. That does not apply if, by the "lodgment day" (which is after the end of that income year), either the loan is repaid (par. (b)) or the company and the taxpayer enter into a prescribed form of loan agreement (s 109N(1)).

78. Section 100AA provides that where an exempt entity is otherwise presently entitled to income of a trust estate, it is taken not to be so entitled unless the entity is notified of its entitlement within two months after the end of the income year.

79. In relation to a capital gain of a trust estate, a beneficiary may be taken to make a capital gain reflective of the trust estate's capital gain, but that depends on whether the beneficiary is "specifically entitled" to the trust estate's capital gain, which depends on appropriate records being made in the accounts or records of the trust within two months after the end of the income year: par. (c) of the definition of "share of net financial benefit" in s 115-228(1) of the ITAA97. Alternatively, the trustee can choose to make itself specifically entitled to the gain (s 115-230), and may make that choice within two months after the end of the income year: s 115-230(5).

80. In proceedings under Pt IVC of the *Taxation Administration Act 1953*, the task of the Tribunal or Court is to determine what the taxable income is: *FCT v ANZ Savings Bank Ltd* (1994) 181 CLR 466 at 479. The legislation does not ask what a taxpayer's taxable income was on 30 June of the relevant income year. It asks what the taxable income for the relevant income year is. As it is the role of the Tribunal or Court to determine what the taxable income is, and hence to apply the formulae for determining that taxable income, there is nothing in the text or structure of the legislative scheme that requires conduct occurring after 30 June to be ignored. Certainly, in the case of the Tribunal, the position is the opposite: *Fletcher v FCT* (1988) 19 FCR 442 at 453.

Consequences

81. Consequently, the tax legislation does not prohibit a taxpayer's liability to tax for an income year being affected by matters occurring after the end of the income year. If, as the Respondents contend, the effect of a disclaimer is to negative assent to a putative

gift such that there never was a valid gift in the first place, there is no need to resolve the interaction of s 97 and retrospectively operating general law concepts – the act of disclaimer does not retrospectively avoid the beneficiary's entitlement and the beneficiary simply never had any vested interest in the income of the trust estate. However, even if that contention is wrong, s 97 picks up the general law concept of trust income, and there is no reason in the text or context of that provision to gloss that statutory criterion selected by Parliament by removing from it any retrospectively operating aspect of disclaimer that applies under the general law.

82. The suggestion in AS [99] that the Respondents' position would "destabiliz[e]" Div 6 is surprising given that it is consistent with the Commissioner's published view since 1991 (IT 2651 at [10]-[13]) and decisions of the Federal Court in 2005 (*Ramsden* and *Nemesis Australia Pty Ltd v FCT* (2005) 150 FCR 152 at 163-164 [50]), and has been relied on by the Commissioner (*Yazbek v FCT* (2012) 88 ATR 672 at 681 [72]). The Commissioner instructs ATO officers to issue alternative assessments where there is uncertainty about who is presently entitled to trust law income (PS LA 2010/1 at [6]; PS LA 2006/7 at [5]), which was done here in relation to the 2011 to 2014 income years by the issue of alternative assessments to the trustee (see Respondents' further material at pp. 5, 14, 25, 34, 76, 87, 95-96, 114).

83. Should an appeal to policy arguments assist, AS [98] seems pejoratively to suggest that disclaimer is an avoidance technique employed by a beneficiary lying in wait for the Commissioner. However, any disclaimer must occur within a reasonable time. The Commissioner's suggestion distracts from the situation of the beneficiary made presently entitled to income without her knowledge or consent, such as the ex-wife in *Cornell* on whom the ex-husband sought to thrust the tax burden of dividends, a situation capable of exacerbation when the s 95 net income far exceeds the trust law income.

Part VI: Estimate

84. The Respondents estimate that they will require 2.5 hours to present their oral argument.

Dated 2 July 2021

Bret Walker
Fifth Floor St James
T: (02) 8257 2527
maggie.dalton@stjames.net.au

Jonathan Evans
Lonsdale Chambers
T: (03) 9225 8690
jonathanevans@vicbar.com.au

David Lewis
Sixth Floor Chambers
T: (02) 8915 2607
dlewis@sixthfloor.com.au

ANNEXURE A

List of statutory provisions referred to in submissions

Legislation and Regulations

1. *Income Tax Act 1986* (Cth) (current), s 4.
2. *Income Tax Assessment Act 1936* (Cth) (current), ss 47, 97, 100AA, 109D, 109N, 170.
3. *Income Tax Assessment Act 1936* (Cth) (No. 27 of 1936) (as enacted), s 99.
4. *Income Tax Assessment Act 1979* (Cth) (current), ss 26-25, 40-365, 59-30, 104-10, 115-228, 115-230, 116-20, 116-50, 116-60.
5. *Judiciary Act 1903* (Cth) (current), s 78B.