

# Australian Taxation Law



**CCH**

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22nd Edition

Woellner

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Murphy

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# taxation Law



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# Foreword to the first edition

If two of the important criteria of a “good” taxation system are simplicity and certainty (¶1-190 and ¶1-195), the Australian taxation system and particularly the *Income Tax Assessment Act 1936* fail the test miserably. The spate of anti-avoidance legislation, a reaction to the excesses of the tax avoidance era of the seventies, and the more recent taxation reform package have brought about legislation of almost unrivalled complexity.

The legislation is in some cases unintelligible: without a commerce or law degree the ordinary taxpayer stands no chance of finding his way through the morass and even with these qualifications his advisers will of necessity have to struggle to make sense of language that is as convoluted as it is confusing. Nor is the task of the taxation officer any easier. Many provisions in the legislation are not applied for the simple reason that no one is able to comprehend them. The need for a work that will operate as a guide to the traveller through these murky waters is painfully apparent.

In 1946, Mr Hannan, in his “Treatise on the Principles of Income Taxation”, while adverting to the desirability of enunciating a series of authoritative propositions (on s 51(1)), resignedly accepted the impossibility of such a task. Some 40 years on, the possibility of formulating authoritative principles on any matter relating to tax is even more daunting. The torrent of decisions, judicial and administrative, that has been handed down over that time, together with the outpourings of the legislature, have made the study of taxation almost unmanageable.

The need for a systematic approach to the study of taxation is obvious enough to the student. If the student were to see taxation as involving no more than an endless series of individual instances no overview of the subject would be possible. But it is not only the student who is in need of a systematic approach to the problem. The practitioner who is unaware of the system will have endless difficulty even finding the problem, let alone proceeding to a solution for that problem.

So it is not the student alone who will benefit from the present work. Indeed there are to be found discussed in these pages many of the great taxation issues of the present, without an appreciation of which it would be impossible to predict the outcome of particular factual situations.

By way of example, no issue could be more significant in the judge-made law of income taxation than the issue of the role of purpose in s 51(1) of the Act. The course of authority from *Ure v FC of T* 81 ATC 4100 and *Ilbery v FC of T* 81 ATC 4661 to the more recent cases of *FC of T v Just Jeans Pty Ltd* 87 ATC 4373 and *FC of T v John* 87 ATC 4713 have been a judicial reaction to tax avoidance; yet the boundaries of the doctrine (that purpose is relevant) are far from clear.

Two taxpayers incurring the same outgoings in circumstances identical save for their subjective motives and purposes should be treated in the same way for the purposes of an income tax law. To grant a taxation deduction to the taxpayer who is naive, while denying it to the taxpayer who is sophisticated, would be arbitrary. If an outgoing is incurred in circumstances where there is, objectively seen, a connection between the incurring of the outgoing and the activity which is directed towards the production of assessable income, that outgoing should satisfy the tests of deductibility irrespective of either subjective motivation or purpose.

Once it is accepted (as it must presently be) that subjective purpose intrudes to some extent into the issue of deductibility (albeit not necessarily as a test of deductibility), there is opened up the question whether the relevant purpose is the sole purpose, the dominant purpose or some purpose less than the dominant purpose. For the present these issues are best discussed, in *Magna Alloys & Research Pty Ltd v FC of T* 80 ATC 4542, in judgments in which two members of the present High Court, then sitting in the Federal Court, participated.

What, however, has not yet been the subject of discussion is the problem thrown up when a deduction is disallowed on the basis, say, that it was incurred for the sole purpose of obtaining a tax deduction, yet assessable income is in fact derived in the course of the scheme. Is the assessable income to be ignored, or is the result that the deduction only is to be ignored, leaving the taxpayer nevertheless in receipt of the assessable income upon which he is then to be taxed? Further in deduction cases, what role does an anti-avoidance section play?

In the long run, however, it is not the “common law” of taxation that holds the greatest significance. If there is one lesson that must be learned by anyone who wishes to understand taxation it is this: Go back to the Statute and read it!

One of the all time great taxation advisers was once asked a question by a client concerning s 51(1). The adviser had undoubtedly read the section hundreds, perhaps thousands of times. Yet, perhaps to the surprise of his lay client, he opened the Statute, perused the words and tested the issue by reference to the words he read. There is no other alternative.

So it is, that the authors of the present work return the reader to the Statute, offering on the way a helpful summary of its salient features.

Australia has over the years been well served by its taxation literature — the present work continues the tradition.

23 September 1987

Graham Hill, QC

# Preface

## to the twenty-second edition

This twenty-second edition of *Australian Taxation Law* incorporates major legislative, case law and administrative reforms that have taken place in taxation law up to 1 July 2011, as well as various developments that have occurred since that date. There have been many content changes made throughout the book, to ensure that the book remains the most up to date text available.

As with prior editions, our main aim has been to explain the increasingly complex and voluminous taxation laws in clear and simple language. In order to achieve this, we have made extensive use of flow-charts and practical examples, to make it easier to understand the application of theory to practical situations.

We have continued to focus on the federal taxation system, with particular emphasis on income tax, capital gains tax, corporate tax, fringe benefits tax, as well as significant analysis of the ubiquitous goods and services tax. This edition also includes an analysis of the Henry Tax Review's reform proposals and subsequent developments.

We wish to acknowledge the significant contribution by the editing and production staff at CCH, in particular Marcus Lai, Mary Zachariah, Kenny Ng, Ahmad Nubly Isahak, Lai Li Kuan, Mohd Ashraf Mohd Rafdzi and Beverley Kirkby.

Finally, and most importantly, we must thank our families, whose ongoing support, encouragement and sacrifices make completion of each edition possible.

December 2011

RH Woellner

S Barkoczy

S Murphy

C Evans

D Pinto

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# List of Abbreviations

## List of Abbreviations

The following abbreviations are used in the Australian Taxation Law.

AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ABN Act	<i>A New Tax System (Australian Business Number) Act 1999</i>
ABR	Australian Business Register
ADF	Approved deposit fund
ADI	Authorised deposit-taking institution
ADJRA	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFOF	Australian venture capital fund of funds
AFTS Report	Australia's Future Tax System Report to the Treasurer (Final Report of the Henry Tax Review)
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ATC	<i>Australian Tax Cases (CCH)</i>
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
AWOTE	Average weekly ordinary time earnings
BAS	Business Activity Statement
BELC	Broad-exemption listed country
CFC	Controlled foreign company
CGT	Capital gains tax
COT	Continuity of ownership test
CPI	Consumer price index
DAC	Departure authorization certificate
DFC of T	Deputy Federal Commissioner of Taxation
DPO	Departure prohibition order
DTA	Double taxation agreement
DVS	Direct value shift
EST	(Australian) Eastern Standard Time
ESVCLP	Early stage venture capital limited partnership
ETP	Employment termination payment
FBT	Fringe benefits tax
FBTAA	<i>Fringe Benefits Tax Assessment Act 1986</i>
FC of T	Federal Commissioner of Taxation
FIF	Foreign investment fund
FIFO	First in first out
FLA	<i>Family Law Act 1975</i>
FLIC	Film licensed investment company
FMD	Farm management deposit
FOIA	<i>Freedom of Information Act 1982</i>
FTC	Foreign tax credit

## List of Abbreviations

FTRA	<i>Financial Transaction Reports Act 1988</i>
GIC	General interest charge
GST	Goods and services tax
GVSR	General value shifting regime
HECS	Higher Education Contribution Scheme
HELP	Higher Education Loan Programme
IED	Income equalization deposit
IRDB	Industry Research and Development Board
ISC	Insurance and Superannuation Commissioner
ITAA36	<i>Income Tax Assessment Act 1936</i>
ITAA97	<i>Income Tax Assessment Act 1997</i>
ITAR	Income Tax Assessment Regulations 1997
ITR	Income Tax Regulations 1936
ITRA	<i>Income Tax Rates Act 1986</i>
ITTPA	<i>Income Tax (Transitional Provisions) Act 1997</i>
IVS	Indirect value shifting
LILO	Last in last out
LPR	Legal personal representative
LTA	<i>Land Tax Act 1956</i>
LTMA	<i>Land Tax Management Act 1956</i>
OSSA	<i>Occupational Superannuation Standards Act 1987</i>
PAYE	Pay-as-you-earn
PAYG	Pay As You Go
PDF	Pooled development fund
PPS	Prescribed payments system
PST	Pooled superannuation trust
R&D	Research and development
RBA	Running balance account
RBL	Reasonable benefit limit
RPS	Reportable payments system
RSA	Retirement savings account
RSAA	<i>Retirement Savings Accounts Act 1997</i>
RSAR	Retirement Savings Accounts Regulations 1997
SBT	Same business test
SCTACA	<i>Superannuation Contributions Tax (Assessment and Collection) Act 1997</i>
SCTIA	<i>Superannuation Contributions Tax Imposition Act 1997</i>
SGAA	<i>Superannuation Guarantee (Administration) Act 1992</i>
SGC	Superannuation guarantee charge
SGCA	<i>Superannuation Guarantee Charge Act 1992</i>
SISA	<i>Superannuation Industry (Supervision) Act 1993</i>
SISR	Superannuation Industry (Supervision) Regulations 1994
SME	Small or medium enterprise
SPOR	Shorter period of review (taxpayers)
SSAA	<i>Small Superannuation Accounts Act 1995</i>
STCT	Small Taxation Claims Tribunal

## List of Abbreviations

STS	Simplified Tax System
TAA	Taxation Administration Act 1953
TFN	Tax file number
TLIP	Tax Law Improvement Project
TPTACA	Termination Payments Tax (Assessment and Collection) Act 1997
UAP	Uniform administrative penalty
VCA	Venture Capital Act 2002
VCF	Venture capital franking
VCLP	Venture capital limited partnership
VCMP	Venture capital management partnership

# Key tax websites

## Key tax and tax reform sites

Australia's Future Tax System (Henry Tax Review)	<a href="http://taxreview.treasury.gov.au">taxreview.treasury.gov.au</a>
Australian Parliament — Internet Tax Resources	<a href="http://www.aph.gov.au/library/intguide/law/taxlaw.htm">www.aph.gov.au/library/intguide/law/taxlaw.htm</a>
Australian Taxation Office	<a href="http://www.ato.gov.au">www.ato.gov.au</a>
Board of Taxation	<a href="http://www.taxboard.gov.au">www.taxboard.gov.au</a>
Business Coalition for Tax Reform	<a href="http://www.bctr.org">www.bctr.org</a>
CCH Australia Ltd	<a href="http://www.cch.com.au">www.cch.com.au</a>

## Federal government

AusIndustry	<a href="http://www.ausindustry.gov.au">www.ausindustry.gov.au</a>
Australian Business Register	<a href="http://www.abr.business.gov.au">www.abr.business.gov.au</a>
Australian Competition & Consumer Commission (ACCC)	<a href="http://www.accc.gov.au">www.accc.gov.au</a>
Australian Government Entry Point	<a href="http://australia.gov.au">australia.gov.au</a>
Australian Prudential Regulation Authority (APRA)	<a href="http://www.apra.gov.au">www.apra.gov.au</a>
Australian Securities & Investment Commission (ASIC)	<a href="http://www.asic.gov.au">www.asic.gov.au</a>
Business Entry Point	<a href="http://www.business.gov.au">www.business.gov.au</a>
Commonwealth Ombudsman	<a href="http://www.comb.gov.au">www.comb.gov.au</a>
Department of Finance & Deregulation	<a href="http://www.finance.gov.au">www.finance.gov.au</a>
Department of Treasury	<a href="http://www.treasury.gov.au">www.treasury.gov.au</a>
Inspector-General of Taxation	<a href="http://www.igt.gov.au">www.igt.gov.au</a>
Parliament House	<a href="http://www.aph.gov.au">www.aph.gov.au</a>
Tax Issues Entry System (Ties)	<a href="http://www.ties.gov.au">www.ties.gov.au</a>
Treasurer	<a href="http://www.treasurer.gov.au">www.treasurer.gov.au</a>

## State and territory revenue offices

Australian Capital Territory	<a href="http://www.revenue.act.gov.au">www.revenue.act.gov.au</a>
New South Wales	<a href="http://www.osr.nsw.gov.au">www.osr.nsw.gov.au</a>
Northern Territory	<a href="http://www.nt.gov.au/ntt/revenue">www.nt.gov.au/ntt/revenue</a>
Queensland	<a href="http://www.osr.qld.gov.au">www.osr.qld.gov.au</a>
South Australia	<a href="http://www.treasury.sa.gov.au">www.treasury.sa.gov.au</a>
Tasmania	<a href="http://www.treasury.tas.gov.au">www.treasury.tas.gov.au</a>
Victoria	<a href="http://www.sro.vic.gov.au">www.sro.vic.gov.au</a>
Western Australia	<a href="http://www.dtf.wa.gov.au">www.dtf.wa.gov.au</a>

## Courts

ACT Supreme Court	<a href="http://www.courts.act.gov.au/supreme">www.courts.act.gov.au/supreme</a>
Administrative Appeals Tribunal	<a href="http://www.aat.gov.au">www.aat.gov.au</a>
Family Court of Australia	<a href="http://www.familycourt.gov.au">www.familycourt.gov.au</a>
Federal Court of Australia	<a href="http://www.fedcourt.gov.au">www.fedcourt.gov.au</a>
High Court of Australia	<a href="http://www.hcourt.gov.au">www.hcourt.gov.au</a>
Supreme Court of NSW	<a href="http://www.lawlink.nsw.gov.au/sc">www.lawlink.nsw.gov.au/sc</a>
Supreme Court of Victoria	<a href="http://www.supremecourt.vic.gov.au">www.supremecourt.vic.gov.au</a>
Supreme Court of Queensland	<a href="http://www.courts.qld.gov.au">www.courts.qld.gov.au</a>
Supreme Court of Tasmania	<a href="http://www.supremecourt.tas.gov.au">www.supremecourt.tas.gov.au</a>
Supreme Court of Western Australia	<a href="http://www.supremecourt.wa.gov.au">www.supremecourt.wa.gov.au</a>

## Other useful sites for source materials

Australasian Legal Information Institute	<a href="http://www.austlii.edu.au">www.austlii.edu.au</a>
Australian Tax Law Library	<a href="http://www.austlii.edu.au/au/special/tax">www.austlii.edu.au/au/special/tax</a>
ComLaw (Commonwealth Law)	<a href="http://www.comlaw.gov.au">www.comlaw.gov.au</a>
Worldlii	<a href="http://www.worldlii.org">www.worldlii.org</a>

## Key tax and superannuation associations/organisations

Association of Superannuation Funds of Australia (ASFA)	<a href="http://www.superannuation.asn.au">www.superannuation.asn.au</a>
Self-Managed Super Fund Professionals' Association of Australia (SPAA)	<a href="http://spaa.asn.au">spaa.asn.au</a>
Taxation Institute of Australia	<a href="http://www.taxinstitute.com.au">www.taxinstitute.com.au</a>

## Accounting associations/organisations

Association of Taxation & Management Accountants	<a href="http://www.atma.com.au">www.atma.com.au</a>
CPA Australia	<a href="http://www.cpaaustralia.com.au">www.cpaaustralia.com.au</a>
Institute of Chartered Accountants in Australia	<a href="http://www.charteredaccountants.com.au">www.charteredaccountants.com.au</a>
Institute of Public Accountants	<a href="http://www.publicaccountants.org.au">www.publicaccountants.org.au</a>
National Tax & Accountants Association	<a href="http://www.ntaa.com.au">www.ntaa.com.au</a>

## International tax authorities

Canada (Canada Revenue Agency)	<a href="http://www.cra-arc.gc.ca">www.cra-arc.gc.ca</a>
China (State Administration of Taxation)	<a href="http://www.chinatax.gov.cn">www.chinatax.gov.cn</a>
Hong Kong (Inland Revenue Department)	<a href="http://www.ird.gov.hk">www.ird.gov.hk</a>
Malaysia (Inland Revenue Board of Malaysia)	<a href="http://www.hasil.gov.my">www.hasil.gov.my</a>
New Zealand (Inland Revenue)	<a href="http://www.ird.govt.nz">www.ird.govt.nz</a>
Singapore (Inland Revenue Authority of Singapore)	<a href="http://www.iras.gov.sg">www.iras.gov.sg</a>
United Kingdom (HM Revenue & Customs)	<a href="http://www.hmrc.gov.uk">www.hmrc.gov.uk</a>
United States of America (Internal Revenue Service)	<a href="http://www.irs.gov">www.irs.gov</a>
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Deputy Federal Commissioner of Taxation	DFC of T
departure prohibition order	DPO
double taxation agreement	DTA
direct value shift	DVS
(Australian) Eastern Standard Time	EST
early stage venture capital limited partnership	ESVCLP
employment termination payment	ETP
fringe benefits tax	FBT
Fringe Benefits Tax Assessment Act 1986	FBTAA
Federal Commissioner of Taxation	FC of T
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first in first out	FIFO
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## ¶1-000 Overview

Before proceeding to a technical analysis of tax law in later chapters, it is useful to provide a broader context and perspective on income and other taxes. This overview involves a brief analysis of the history of taxation and an overview of its socio-economic and political role and implications, and the present structure of taxation in Australia.

It is all too easy to lose sight of these wider aspects, and to focus exclusively on the increasingly intricate technical principles and practices of taxation law. However, tax is a social process and, without some understanding of how and why taxation develops and changes, it is difficult to understand the present system, the dynamics which precipitate change, or to develop a feeling for likely future changes and directions.