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# From Switzerland to New Zealand: Around the world in 13 cases

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*Justice Edmonds is well known for his decisions which involve questions of law relating to Pt IVA of the Income Tax Assessment Act 1936 (Cth), capital gains tax, the goods and services tax and taxation of the not-for-profit sector. As such, there is no doubt that cases determining principles of international tax law are the lesser known of Justice Edmonds' judgments. Despite this, their significance and influence cannot be underestimated. As with any grouping of international tax cases, common themes emerge. In this instance, Justice Edmonds' influence on treaty interpretation as well as on issues of residence, source and jurisdiction to tax becomes apparent. His influence in decisions relating to Pt IVA also incorporated aspects of international tax, as did several cases relating to capital gains tax. In this article, we explore the influence Justice Edmonds has had in this important area of tax law and policy.*

## INTRODUCTION

In the years between 2006 and 2014, Justice Edmonds presided over no less than 13 cases which specifically dealt with principles of international tax,<sup>1</sup> with eight being single judgments and five which were heard on appeal. The scope of these 13 cases is far reaching and demonstrates the prodigious aptitude his Honour had during his time on the Bench for statutory and treaty interpretation. Perhaps the most insightful of his Honour's understanding of the complexities of international tax issues are his judgments relating to tax treaties to which Australia is a party. These cases take readers on a journey through the complexities of dealing with conflicts between domestic and treaty laws, determining which taxes are covered by treaties as well as examining withholding taxes and inconsistencies between jurisdictions, all the while traversing many countries around the world. However, his Honour's insights into international tax go well beyond treaty cases.

Fundamental concepts of international tax, including residence, source and taxing jurisdiction were also considered in cases that Edmonds J presided over. A common misconception is that the interpretation of provisions such as ss 23AG, 23AJ and 27H of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936) is clear, and, if not, matters concerning these provisions are dealt with at a lower level than the Federal Court. Despite this, Justice Edmonds was involved in decisions dealing with all three of these provisions, either at first instance or on appeal. Each of the cases, while not complicated on the facts, involved complex issues of statutory interpretation.

The structure of this article is as follows. First, the cases that involved the interpretation of double tax treaties are discussed and analysed. As noted, some of these decisions involve the most complex examples of tax jurisprudence, and Justice Edmonds' skill in statutory interpretation is clearly evident in the cases considered in this section. Following this analysis, the article moves to a consideration of cases involving residence, source and taxing jurisdiction. The cases considered under this heading also involve complex issues of statutory interpretation and serve to amply illustrate his Honour's precision and skill in how this should be undertaken in the context of complex tax laws. We then provide a conclusion.

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<sup>1</sup> The 13 cases discussed in this article are what the authors considered the most significant international tax decisions in which Justice Edmonds participated. However, this list is not exhaustive as the authors also recognise that there are cases that involve ancillary issues of international tax which have not been covered by this article. For example, the prominent case of *RCI Pty Ltd v Federal Commissioner of Taxation* (2011) 84 ATR 785; [2011] FCAFC 104, presided over on appeal by Edmonds, Gilmour and Logan JJ, is well known as a Pt IVA anti-avoidance decision. However, because the facts involved an international corporate reorganisation it inherently also involved international tax issues.

## INTERPRETING DOUBLE TAX TREATIES

Australia's first comprehensive double tax treaty was concluded with the United Kingdom in 1946.<sup>2</sup> Since then, Australia has entered into comprehensive treaties with more than 40 countries, including most of its major trading partners.<sup>3</sup> In addition, Australia has entered into over 30 tax information exchange agreements (TIEAs) with various countries, agreements relating to East Timor and, in October 2012, Australia ratified the OECD *Convention on Mutual Administrative Assistance in Tax Matters*. The decisions of Edmonds J that are discussed in this section have made a significant contribution to the interpretation of these instruments.

We raise the point that Australia first entered into a comprehensive double tax treaty in 1946 because it is perhaps the most well-known of Edmonds J's treaty cases, *Virgin Holdings SA v Federal Commissioner of Taxation*,<sup>4</sup> that dealt with the interaction of treaty provisions and domestic law introduced after the conclusion of a treaty. It is also noteworthy that this decision came some 18 years after the seminal High Court decision on tax treaty interpretation in *Thiel v Federal Commissioner of Taxation*,<sup>5</sup> which also concerned the interpretation of the *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income* (Australia-Swiss Double Tax Agreement).

The case of *Virgin Holdings SA* came before Edmonds J after the taxpayer's objection against the Commissioner's notice of amended assessment was disallowed. Briefly, the case involved Virgin Holdings SA, a foreign resident company incorporated in Switzerland, which did not carry on business in Australia. Virgin Holdings SA was a shareholder in Virgin Blue Holdings Ltd, an Australian resident company. Because of a company group restructure and various transactions, Virgin Holdings SA disposed of shares in the Australian resident company resulting in a capital gain and an (amended) assessment in Australia of A\$192,746,072 taxable income. The question before Edmonds J was whether the Commissioner was denied the right to tax the amount by virtue of the business profits article (Art 7(1)) of the Australia-Swiss Double Tax Agreement.

More specifically, the issue for determination was whether Australia's double tax agreements concluded prior to the introduction of the comprehensive capital gains tax regime denied Australia the right to tax the capital gains of an enterprise of the "other State" under the domestic capital gains tax provisions in circumstances where Australia was not able to tax the business profits of that same enterprise because of the business profits article of the relevant double tax treaty.

As noted by Edmonds J at first instance, it was surprising that the issue had not arisen previously, especially when it had been the subject of a Taxation Ruling on capital gains under pre-CGT treaties which made it clear that the Australian Taxation Office (ATO) was of the view that "Australia's right to tax gains taxable in Australia exclusively under the capital gains tax regime ... is not limited by pre-CGT treaties".<sup>6</sup> On this point, he stated:

... as I have previously observed in *Hastie Group Limited v Commissioner of Taxation* [2008] FCA 444; 2008 ATC 20-019 at [2], for some unknown reason, so many of the more controversial or topical issues which have arisen in practice in recent times seem to carry the baggage of a significant time-lag before

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<sup>2</sup> J Taylor, "Legislative Comment: The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946" (2009) 2 *British Tax Review* 201, 201.

<sup>3</sup> Double tax agreements are given force of law by being enacted as part of the *International Tax Agreements Act 1953* (Cth). The *Income Tax Assessment Act 1936* (Cth) and *Income Tax Assessment Act 1997* (Cth) are both incorporated into the Agreements Act and, in the event of any inconsistency between the Agreements Act and either of the other Acts (other than in relation to Pt IVA and s 160AO of the ITAA 1936), the Agreements Act has priority. Details of tax treaties that Australia has entered into are available from the following sources: the Australian Treaties Database on the website of the Department of Foreign Affairs and Trade (DFAT) (<[www.dfat.gov.au/treaties/index.html](http://www.dfat.gov.au/treaties/index.html)>), the Australian Treaties Library on the AustLII website (<[www.austlii.edu.au/au/other/dfat/](http://www.austlii.edu.au/au/other/dfat/)>), the website of the ATO (<[www.ato.gov.au](http://www.ato.gov.au)>) and the Treasury (<[www.treasury.gov.au](http://www.treasury.gov.au)>).

<sup>4</sup> *Virgin Holdings SA v Federal Commissioner of Taxation* (2008) 214 FCR 278; 70 ATR 478; [2008] FCA 1503.

<sup>5</sup> *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338; 21 ATR 531; [1990] HCA 37.

<sup>6</sup> Australian Taxation Office, *Income Tax and Capital Gains Tax: Capital Gains in Pre-CGT Tax Treaties*, TR 2001/12, [4].

they are agitated in this Court. The more so in this case, because the Ruling was preceded by a number of writings by commentators with undoubted qualifications taking different views on the issue.<sup>7</sup>

After a comprehensive analysis of the judgments in *Thiel*, Edmonds J ultimately determined that the Australia-Swiss Double Tax Agreement denied Australia the right to tax the amount in question. Self-evidently, the issue in *Virgin Holdings SA* was a controversial one, especially given the significant fiscal implications of the decision, not only in the case itself but for future cases involving similar fact situations.

The reasoning in *Virgin Holdings SA* is instructive on the interpretation of Art 7, the business profits article, which is written in virtually the same terms in all of Australia's double tax treaties. However, it should not be forgotten that Edmonds J also extended his analysis to encompass the broader issue of the general principles of the interpretation of double tax treaties, as well as discussing "taxes covered" under Art 2, and "alienation of property" under Art 13 of the Australia-Swiss Double Tax Agreement. Ultimately, the case did not turn on the interpretation of Art 13, although his Honour concluded that, if it did, Art 13 would also deny Australia the right to tax the disputed amount.

Two separate issues arose in the interpretation of Art 2; first, whether the meaning and scope of "Australian income tax" in Art 2(1) should be ambulatory or static; and, second, whether a capital gains tax was "substantially similar" to taxes existing at the date the treaty was entered into. His Honour was of the view that the amount was within the term "the Australian income tax" in Art 2(1)(a) of the Australia-Swiss Double Tax Agreement and was therefore income to which the Agreement applied and therefore did not have to deal with the second issue. However, his Honour, in considering the Art 2(2) issue, stated: "I will do so out of deference to the submissions that were made and in recognition of the reality that these proceedings are unlikely to stop with my judgment".<sup>8</sup> He concluded that "if tax on a 'net capital gain' under the regime introduced by Part IIIA into the ITAA36 is not part of 'the Australian income tax' for the purpose of Art 2(1)(a) of the Australia-Swiss Agreement, then ... I am of the firm view that it is substantially similar to 'the Australian income tax'".<sup>9</sup> His Honour's expectation of an appeal in *Virgin Holdings SA* was unfounded; no appeal resulted as the Commissioner withdrew his appeal to the Full Federal Court and, on 13 October 2010, Taxation Ruling TR 2001/12 was withdrawn.

A matter of mere days after Edmonds J handed down his decision in *Virgin Holdings SA*, he handed down another decision in a second tax treaty interpretation case. While generally not regarded as being as significant as *Virgin Holdings SA* from a precedential and impact perspective, *Deutsche Asia Pacific Finance Inc v Federal Commissioner of Taxation (No 2)*<sup>10</sup> highlights his Honour's exceptional ability to interpret complex tax treaties. Only one article of the tax treaty was in question, Art 11, dealing with interest withholding tax.

In *Deutsche Asia Pacific Finance Inc*, the taxpayer (DAPFI) was a corporate resident of the United States which had acquired an interest in a limited partnership in Australia. There was no permanent establishment in Australia at which it carried on business (so the business profits article did not apply). Under Australia's domestic debt/equity rules, the interest was classified as a "debt interest". This domestic law provided that what is, in form, dividends, is, in substance, interest and should be taxed as interest, and so the ultimate issue before Edmonds J was the application of the interest withholding tax article of the tax treaty. The case turned on a unique provision (not based on the OECD Model Tax Convention) contained in the Australia-United States Double Tax Agreement which was designed to address the avoidance of United States withholding tax by framing what is in legal and economic effect an entitlement to a proportion of the profits of an enterprise as "interest".

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<sup>7</sup> *Virgin Holdings SA v Federal Commissioner of Taxation* (2008) 214 FCR 278; 70 ATR 478; [2008] FCA 1503, [4].

<sup>8</sup> *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338; 21 ATR 531; [1990] HCA 37, [49].

<sup>9</sup> *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338; 21 ATR 531; [1990] HCA 37, [58].

<sup>10</sup> *Deutsche Asia Pacific Finance Inc v Federal Commissioner of Taxation (No 2)* (2008) 172 FCR 336; 73 ATR 1; [2008] FCA 1570.

The article in question, Art 11(3) of the Australia-United States Double Tax Agreement, contains an exemption from interest withholding tax where “the interest is derived by a financial institution which is unrelated to and dealing wholly independently with the payer”. However, the exemption does not apply where Art 11(9) is relevant. Article 11(9) states:

- (9) Notwithstanding the provisions of paragraphs (1), (2), (3) and (4):
- (a) interest that is paid by a resident of one of the Contracting States and that is determined with reference to the profits of the issuer or of one of its associated enterprises, as defined in sub-paragraph (a) or (b) of paragraph (1) of Article 9 (Associated Enterprises), being interest to which a resident of the other State is beneficially entitled, also may be taxed in the Contracting State in which it arises, and according to the laws of that State, at a rate not exceeding 15 percent of the gross amount of the interest

As Edmonds J explained:

Article 11(9)(a) is the product of a mediation between the different approaches of the US and Australian domestic laws. Its purpose is to permit either Contracting State to exclude from the lower rate of tax permitted by Art 11 what is in form interest, but in substance a division of profits which should be governed by Art 10 [Dividend withholding tax]. But the negotiated policy served by Art 11(9)(a) does not extend to what is in substance interest, but in form a division of profits. Neither the legislative policy of ss 871 and 881 of the IRC [Inland Revenue Code] nor that of Div 974 and related provisions of the [Australian] Assessment Acts is achieved by treating Art 11(9)(a) as applying to the receipts by DAPFI.<sup>11</sup>

His Honour concluded that Art 11(9)(a) of the Australia-United States Double Tax Agreement applied to the distributions to DAPFI so as to override the denial of the right to tax under Art 11(3)(b) of the Agreement.<sup>12</sup>

It would be nearly five years before Edmonds J handed down another single judgment decision relating to the interpretation of a tax treaty, yet it was the Australia-United States Double Tax Agreement that was again the topic of dispute in *Resource Capital Fund III LP v Federal Commissioner of Taxation*.<sup>13</sup> Once more, Edmonds J was tasked to consider a significant international tax issue which had not previously been considered in Australia or, apparently, any other jurisdiction.<sup>14</sup> The principal issue considered in this case was the conflict between the tax treatment of a partnership which is taxable in one jurisdiction (Australia) and transparent (and so not subject to tax) in another (the United States). For the purposes of this discussion,<sup>15</sup> the issue before Edmonds J was whether the Australia-United States Double Tax Agreement provided taxing rights to Australia. The case of *Resource Capital Fund III LP* is also inextricably concerned with the capital gains tax provisions of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) which is not considered further in this article.

*Resource Capital Fund III LP* involved a limited partnership formed in the Cayman Islands, with the majority (97%) of the partners being resident in the United States. The limited partnership invested in shares in an Australian company. At a later date it sold the shares for a considerable profit. For Australian tax purposes, the limited partnership, being a “corporate limited partnership”, was treated as a taxable entity. The ATO assessed the limited partnership on the basis that the sale of the shares was subject to capital gains tax under Div 855 of the ITAA 1997. Two points were in contention: first, whether the Australia-United States Double Tax Agreement prevented Australia from taxing the gain; and second, whether the “principal asset test” in Div 855 of the ITAA 1997 was satisfied.

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<sup>11</sup> *Deutsche Asia Pacific Finance Inc v Federal Commissioner of Taxation (No 2)* (2008) 172 FCR 336; 73 ATR 1; [2008] FCA 1570, [36].

<sup>12</sup> For a comprehensive analysis of the decision see R Vann, “Commentary on *Deutsche Asia Pacific Finance Inc v Commissioner of Taxation*” (2008) 11 *International Tax Law Reports* 366.

<sup>13</sup> *Resource Capital Fund III LP v Federal Commissioner of Taxation* (2013) 95 ATR 504; [2013] FCA 363.

<sup>14</sup> See <<http://www.minterellison.com/Publications/Full-Federal-Court-overturns-Resource-Capital-Fund-III-LP-case>>.

<sup>15</sup> Justice Edmonds also had to determine the question of whether the “principal asset test” in Div 855 of the *Income Tax Assessment Act 1997* (Cth) was satisfied.

Consistent with previous judgments, Edmonds J commenced with the confirmation that tax treaties should be interpreted according to international legal principles which apply to treaty interpretation. He then went on to interpret the tax treaty in question concluding that the ATO could not issue an assessment to the limited partnership because of the effect of the treaty. The decision was based on the determination that there was an inconsistency between the application of the double tax agreement and the application of the Assessment Acts as to the entity or entities to be taxed on the gain derived on the sale of the shares and that that inconsistency had to be resolved in favour of the application of the double tax agreement to the limited partners in Resource Capital Fund III LP (RCF III LP) against the application of the Assessment Acts to RCF III LP, the limited partnership.

Ultimately, however, this decision was not to stand. On 3 April 2014, the Full Federal Court (Middleton, Robertson and Davies JJ) overturned Edmonds J's ruling,<sup>16</sup> with Special Leave to Appeal to the High Court refused. In reaching its conclusion, the Full Federal Court held that the double tax agreement and the *International Tax Agreements Act 1953* (Cth) did not prevent the Commissioner from assessing the limited partnership on the gain from the disposal of shares in St Barbara Mines Limited. This was because the Full Federal Court held that there was no inconsistency between the provisions of the ITAA 1997 and the treaty because the treaty did not apply to RCF III LP – it was not a resident of the United States. Accordingly, the treaty did not preclude RCF III LP's liability to Australian tax.

Further, to the extent that there was an inconsistency, the Full Federal Court concluded that any inconsistency was between United States tax law and Australian tax law with respect to the tax treatment of RCF III LP. United States tax law was relevant because that was the place of residence of many of RCF III LP's partners. The Court also concluded that the ability of the United States partners to obtain benefits under the double tax agreement was a different question to the question of whether the effect of the provisions of the double tax agreement taxed RCF III LP's gain differently to the ITAA 1997. Despite the decision of Edmonds J being overturned on appeal, this case was ground-breaking when first considered by his Honour because the main issue it involved related to the treatment of a partnership that is tax transparent in one jurisdiction and taxable in another, and the application of a double tax agreement. As noted, this issue had not been previously considered.

This section demonstrates that Edmonds J, in his single judgments in cases that came before him, made a significant contribution to the interpretation of tax treaties to which Australia is a party. Interestingly, his Honour sat on only one case that involved the Full Bench of the Federal Court where a treaty issue arose. In *Russell v Federal Commissioner of Taxation (No 2)*,<sup>17</sup> Dowsett, Edmonds and Gordon JJ were tasked with an analysis of the Australia-New Zealand tax treaty, and in particular, the business profits article (Art 7). This case was essentially decided on the facts with the appeal based on the argument that the judge at first instance failed to properly apply the treaty. Both Edmonds and Gordon JJ concurred with the judgment of Dowsett J in relation to the international tax issue, rejecting the appeal in relation to this particular point.

## RESIDENCE, SOURCE AND JURISDICTION TO TAX

Often, when we think of international tax cases, we immediately think of the complex issues surrounding tax treaties, such as those discussed above, and other complex issues like transfer pricing or controlled foreign companies. Despite this, many of the international cases presided over by Edmonds J have dealt with issues of residency, source and the jurisdiction to tax or cancel tax benefits through provisions like Pt IVA of the ITAA 1936.

In the first set of cases examined in this section, a common theme that emerges from Edmonds J's decisions is the issue of collection, with these cases ranging from issues such as the interpretation of the Commissioner's administrative powers and how "money" is defined, to the ability of the Commissioner to cancel foreign tax credits under Pt IVA.

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<sup>16</sup> *Federal Commissioner of Taxation v Resource Capital Fund III LP* (2014) 225 FCR 290; [2014] FCAFC 37.

<sup>17</sup> *Russell v Federal Commissioner of Taxation (No 2)* (2011) 79 ATR 578; [2011] FCAFC 50.

From a tax administration perspective, perhaps the most difficult international tax issue that arises is the actual collection of tax, especially involving non-residents. Yet, generally, these issues do not come before the Federal Court. Australia has in place various mechanisms to facilitate the collection of taxes where the taxpayer is a foreign resident. One such measure is a Notice under s 255 of the ITAA 1936 which allows the Commissioner to require a person (including a company) in receipt, or having control or the power of disposal of money belonging to a non-resident, to pay the tax due and payable by the non-resident. The proper construction of s 255 has been the subject matter of several cases, culminating in the definitive High Court decision of *Bluebottle UK Ltd v Deputy Commissioner of Taxation*,<sup>18</sup> which ultimately overruled the decisions of Edmonds J in *Elsinora Global Ltd v Healthscope Ltd (No 2)*<sup>19</sup> and Lindgren J in *Federal Commissioner of Taxation v Wong*.<sup>20</sup> All three cases turned on the interpretation of s 255(1) of the ITAA 1936, which states:

- (1) With respect to every person having the receipt control or disposal of money belonging to a non-resident, who derives income, or profits or gains of a capital nature, from a source in Australia or who is a shareholder, debenture holder, or depositor in a company deriving income, or profits or gains of a capital nature, from a source in Australia, the following provisions shall, subject to this Act, apply:
  - (a) the person shall when required by the Commissioner pay the tax due and payable by the non-resident;
  - (b) the person is hereby authorized and required to retain from time to time out of any money which comes to the person on behalf of the non-resident so much as is sufficient to pay the tax which is or will become due by the non-resident;
  - (c) the person is hereby made personally liable for the tax payable by the person on behalf of the non-resident to the extent of any amount that the person has retained, or should have retained, under paragraph (b); but the person shall not be otherwise personally liable for the tax;
  - (d) the person is hereby indemnified for all payments which the person makes in pursuance of this Act or of any requirement of the Commissioner.

In *Elsinora*, Edmonds J was required to determine whether, for the purposes of s 255(1)(a), at the time the Notice is served, the person must have receipt, control or disposal of the money or whether it was sufficient that they would subsequently have receipt, control or disposal at which time ss 255(1)(b), (c) and (d) would be triggered. His Honour concluded that it was *not* necessary for the person to have receipt, control or disposal of the money belonging to the non-resident at the time of the notice with such a construction promoting the section's undoubted legislative function and purpose as a tax collection mechanism. He pointed out that a contrary view would mean that the Commissioner would have to know when a person had receipt, control or disposal of the money belonging to the non-resident before the notice could be served. Agreeing with Lindgren J in *Wong*, he stated:

I agree that a notice given under par (a) can be expressed to have an ambulatory or ongoing operation and to require the recipient to pay not only tax that is already due and payable, but tax which may become due and payable in the future. As his Honour says, such construction is supported by par (b).<sup>21</sup>

Ultimately, the High Court came to a different conclusion in *Bluebottle*, noting that while s 255(1)(a) concerns payment and s 255(1)(b) concerns retention, the two could not be treated as wholly distinct and separate.<sup>22</sup>

More than seven years after handing down his decision in *Elsinora*, Edmonds J was once again presented with a case concerning the interpretation of s 255 of the ITAA 1936. On this occasion, in *Resource Capital Fund IV LP v Federal Commissioner of Taxation*,<sup>23</sup> the question arose as to what constituted "money" for the purposes of a s 255 Notice; specifically, whether money was confined to

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<sup>18</sup> *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598; 67 ATR 1; [2007] HCA 54.

<sup>19</sup> *Elsinora Global Ltd v Healthscope Ltd (No 2)* (2006) 61 ATR 482; [2006] FCA 18.

<sup>20</sup> *Federal Commissioner of Taxation v Wong* (2002) 121 FCR 60; 50 ATR 203; [2002] FCA 756.

<sup>21</sup> *Elsinora Global Ltd v Healthscope Ltd (No 2)* (2006) 61 ATR 482; [2006] FCA 18, [52].

<sup>22</sup> For Justice Edmonds' own analysis of these cases see: Richard Edmonds, "Recent Tax Litigation: A View from the Bench" (2008) 3 *Journal of the Australasian Tax Teachers Association* 1.

<sup>23</sup> *Resource Capital Fund IV LP v Federal Commissioner of Taxation* (2013) 95 ATR 638; [2013] FCA 801.

Australian currency or whether it included foreign currency (in this case, Canadian currency). Through an analysis of the High Court's decision in *Bluebottle*, his Honour concluded that "money" in s 255(1) of the ITAA 1936 was confined to Australian currency and did *not* include foreign currency. He stated:

Having regard to the intersecting operation of paras (a) and (b) of s 255(1) referred to by the High Court in *Bluebottle* at [96] and recognising that content can be given to the obligation to retain imposed by s 255(1)(b) only if an assessment has issued (at [97]), the operation of the section as a whole ... can be seen as one where the primary obligation is to make payment to the Commissioner of the tax assessed to the non-resident. The obligation to "retain" is ancillary to and facultative of the obligation to pay, not an independent objective of the statute.

As the primary obligation to pay can only be discharged in Australian currency; and as the ancillary or facultative obligation to retain is expressed as "so much (of any money which comes to him on behalf of the non-resident) as is sufficient to pay the tax which is or will become due by the non-resident", the reference to "money" in para (b) clearly refers to the currency of the tax obligation, not to foreign currency nor, in the absence of authorisation or requirement to convert, the proceeds of its sale. Moreover, there is no reason to give the word "money" in the chapeau to s 255(1) any different construction.<sup>24</sup>

The Commissioner's appeal from the decision of Justice Edmonds was ultimately successful, with Allsop CJ and Gordon and Jagot JJ finding that nothing from the text or purpose of the word "money" in s 255(1)(b) suggested that it should be limited to Australian dollars.<sup>25</sup> Given the recent nature of this case and the continually evolving way of transacting business in an increasingly globalised world, we may expect to see further contention as to what constitutes "money" for the purposes of s 255 of the ITAA 1936. We would pose the question (with no view as to the answer) whether perhaps, in the future, the Commissioner may be paid in Bitcoin<sup>26</sup> if s 255 is extended that far?

As can already be seen from the above discussion, Edmonds J's judgments have provided students of tax with textbook exemplars as to the vexed issue of how to approach the interpretation of complex tax legislation. *Blank v Federal Commissioner of Taxation (No 2)*<sup>27</sup> is another such example. *Blank* involved an application to reopen argument following publication of reasons for judgment but before pronouncement of final orders. The applicant filed for leave to reopen the case to make submissions concerning the application of s 23AG of the ITAA 1936, arguing that some part of an amount which had been determined to be ordinary income, and therefore assessable, qualified as foreign earnings derived from foreign service. Specifically, the applicant contended that approximately two-thirds of each payment received was exempt. Edmonds J held that:

the operative exemption from tax is created by s 23AG(1); it requires the foreign earnings to be derived from foreign service; this means, in my view, exclusively from foreign service and not from service which is in part foreign service and in part service which is not foreign service.<sup>28</sup>

He went on to say that:

s 23AG(1) does not contain the words "to the extent to which" the foreign earnings are derived from foreign service, such as to accommodate a dissection or apportionment of the kind contemplated by [former] s 51(1) of the 1936 Act, according to some reasonable method.<sup>29</sup>

Justice Edmonds also sat on appeals to the Full Federal Court in cases involving the application of international tax provisions providing for exemptions. Two particular cases stand out; one involving corporate and trust structures, the other involving an individual taxpayer. The first, *Intoll Management*

<sup>24</sup> *Resource Capital Fund IV LP v Federal Commissioner of Taxation* (2013) 95 ATR 638; [2013] FCA 801, [32]-[33].

<sup>25</sup> *Federal Commissioner of Taxation v Resource Capital Fund IV LP* (2013) 215 FCR 1; 95 ATR 816; [2013] FCAFC 118.

<sup>26</sup> Bitcoin is an innovative payment network and a new type of money which uses peer-to-peer technology to operate with no central authority or banks. Rather, managing transactions and the issuing of bitcoins is carried out collectively by the network. Bitcoin is open-source; its design is public, nobody owns or controls Bitcoin and everyone can take part.

<sup>27</sup> *Blank v Federal Commissioner of Taxation (No 2)* [2014] FCA 517.

<sup>28</sup> *Blank v Federal Commissioner of Taxation (No 2)* [2014] FCA 517, [35].

<sup>29</sup> *Blank v Federal Commissioner of Taxation (No 2)* [2014] FCA 517, [37].

*Pty Ltd v Federal Commissioner of Taxation*,<sup>30</sup> involved the interpretation of s 23AJ of the ITAA 1936. *Intoll* involved the question of the application of s 23AJ to dividends paid to a trustee where that entity was the trustee of a trust which was the head company of a consolidated group. In a joint judgment, the Court held that the dividends were non-assessable non-exempt income under s 23AJ. Of relevance for this article is the Court's observation that the issue was principally one of statutory interpretation. They stated, "in recent times, the High Court has repeatedly said that in matters of statutory construction, where the words of the statute (the text) are clear, they have 'paramount significance'".<sup>31</sup>

The second case of note concerning the exemptions is *Federal Commissioner of Taxation v Macoun*,<sup>32</sup> which involved a taxpayer who had been employed overseas from 1992 until his early retirement at age 60 in 2007 when he received early retirement pension payments of \$130,000 per annum in the 2008/09 and 2009/10 income years (the relevant years). At issue was whether these monthly pension payments, which were otherwise liable to tax under s 27H of the ITAA 1936, became exempt income under s 6(1)(d)(i) (and item 2, Pt I of the Fourth Sch) of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (the IOPI Act).

The IOPI Act conferred on a person, who held an office in an international organisation to which the Act applied (not in issue in this case), an exemption from tax on salaries and emoluments received from the organisation. The Commissioner contended that the pension payments were not in the nature of deferred or delayed "salary" or "emoluments" but were post-employment defined benefit pensions and therefore taxable. He contended that the meaning of "emolument" was confined to a monetary benefit payable to one who was presently serving in employment.

At first instance, the Administrative Appeals Tribunal (AAT) had found that the pension payments were exempt from tax on the basis that the payments were properly characterised as "emoluments" as they were profits or gains arising from an office or employment or as compensation for services by way of remuneration. Once it was accepted that the payments were emoluments, the AAT concluded that they continued to bear that impressed character after the person ceased to hold office. From this decision, the Commissioner appealed to the Federal Court and the case was heard by Edmonds, Perram and Nicholas JJ.

Justice Edmonds delivered a joint judgment with Nicholas J and the case is another clear example of his Honour's acumen in relation to statutory interpretation. After observing that the AAT had adopted the ordinary meaning of "emolument" as defined in the Macquarie and Oxford dictionaries, their Honours noted that the AAT was "heavily influenced by the consideration that 'entitlement' to the pension arose during the taxpayer's term of employment and that this entitlement did not cease on termination on employment". They went on to add that the approach of the AAT was flawed because:

it adopts a "bottom up" approach to the construction of a statute (the IOPI Act) by reference to the terms of relevant delegated regulation (the Regulations), rather than a "top down" approach.<sup>33</sup>

It followed that there was a clear dichotomy established by s 6(1)(d) of the IOPI Act between the privileges and immunities which applied to a person who held office, and the immunities which applied to a person who had ceased to hold office. The clear language of s 6(1)(d) provided a more secure basis from which to infer the relevant legislative purpose. Furthermore, the consideration of "entitlement" arising during the course of employment was totally irrelevant; the only relevant consideration was "receipt".

Given the above reasoning, as the taxpayer did not hold office in the relevant years of income, Edmonds and Nicholas JJ concluded that the privilege conferred by the IOPI Act was *not* available in respect of the pension payments received, even if they continued to be "emoluments" to which he

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<sup>30</sup> *Intoll Management Pty Ltd v Federal Commissioner of Taxation* (2012) 208 FCR 115; 91 ATR 518; [2012] FCAFC 179.

<sup>31</sup> *Intoll Management Pty Ltd v Federal Commissioner of Taxation* (2012) 208 FCR 115; 91 ATR 518; [2012] FCAFC 179, [33].

<sup>32</sup> *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265; [2014] FCAFC 162.

<sup>33</sup> *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265; [2014] FCAFC 162, [40].



became entitled while holding office. An application by the taxpayer for Special Leave to Appeal to the High Court was granted; however, the subsequent appeal was unanimously dismissed.

Some of the other cases in this section can be summarily dealt with in a similar vein to the approach of the Court. We would argue that this is justified both by the Court and in the context of this article. The first of these cases is *Mulherin v Federal Commissioner of Taxation*<sup>34</sup> in which the issue was whether the applicant was a resident of Australia in the 2007 year of income by reason of being “a person ... who resides in Australia”, as the Commissioner asserted he was; or whether he was not a resident, having departed Australia with the intention of living in Singapore on 28 June 2006. Ultimately, the Court (Edmonds, Griffiths and Pagone JJ) concluded that the Tribunal’s reasons were adequate and it had not erred in law. As such, the ground of appeal was held to be incompetent.

In 2008, Edmonds J was the first judge to consider measures introduced to amend the dividend imputation regime in the case of *Hastie Group Ltd v Federal Commissioner of Taxation*.<sup>35</sup> The measures, effective from May 1997, were designed to curb the unintended usage of franking credits through franking credit trading schemes. The provisions sought to achieve this objective by quarantining the franking surpluses of companies on their ceasing to be effectively owned by non-residents. In this case, interacting with these rules were the consolidation regime in Pt 3-90 of the ITAA 1997. It was also the first time judicial consideration had been given to these complex provisions.<sup>36</sup> In essence, this was again another example of Edmonds J’s talent for statutory interpretation, ultimately determining that s 208-50(2) of the ITAA 1997 did *not* operate to exclude the company, Austral Holdings Pty Ltd, as a “former exempting entity”. The facts of the case involved Austral Holdings which was the head company of another consolidated group, which included an entity that was an exempting entity prior to acquisition. Upon acquisition, that entity became a “former exempting company” resulting in its franking credits being quarantined. When Austral Holdings formed a consolidated group, the status of the acquired entity was transferred. Austral Holdings became owned by non-residents. Hastie then acquired all of the shares in Austral Holdings which meant it ceased to be an exempting entity. The taxpayer argued that Austral Holdings status was to be ignored at the time of acquisition. Had this argument been successful, the quarantined franking credits available in Austral Holdings would have become available to Hastie. Justice Edmonds found for the Commissioner, dismissing the objection against a private ruling. He explained:

There does not seem to me to be any rational reason, nor any support in the explanatory memoranda, for the proposition that a period of effective ownership by non-residents lasting for less than 12 months should operate to free quarantined franking credits (arising from a prior period of several years of effective ownership by non-residents) from the restrictions of the legislative scheme under Div 208 ...

For the foregoing reasons, I am of the view that when Austral Holdings was taken over by Hastie Holdings on 6 February 2004, it became (again) a former exempting entity by reason of the provisions of subs 208-50(1); subs 208-50(2) did not preclude this. On the contrary, it facilitated that status by requiring its less than 12 month transitory status as an exempting entity to be ignored.<sup>37</sup>

The case was appealed by the taxpayer with the Full Federal Court (Ryan, Gordon and Foster JJ) upholding the decision of Edmonds J.

Two cases on the jurisdiction to tax or cancel benefits under provisions like Pt IVA of the ITAA 1936 conclude our analysis in this section. The first case, *Leighton v Federal Commissioner of Taxation*<sup>38</sup> concerned whether a non-resident taxpayer was liable to tax as a trustee under former s 98(3) of the ITAA 1936 on income from trading Australian shares through stockbrokers in Australia. Briefly, in this case, the taxpayer was an individual non-resident residing in Monaco. In the 2002, 2003 and 2004 years he was contracted by two non-resident corporations (Salina and Kolton) to

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<sup>34</sup> *Mulherin v Federal Commissioner of Taxation* (2013) 96 ATR 835; [2013] FCAFC 115.

<sup>35</sup> *Hastie Group Ltd v Federal Commissioner of Taxation* (2008) 70 ATR 353; [2008] FCA 444.

<sup>36</sup> As Justice Edmonds himself notes, this interaction had been the subject of academic and other writings, for example, see Stephen Barkoczy, “Consolidation and Imputation” (2003) 6 *Journal of Australian Taxation* 78.

<sup>37</sup> *Hastie Group Ltd v Federal Commissioner of Taxation* (2008) 70 ATR 353; [2008] FCA 444, [41], [43].

<sup>38</sup> *Leighton v Federal Commissioner of Taxation* (2011) 84 ATR 547; [2011] FCAFC 96.

engage in share trading in Australia, using share trading accounts in the corporations' names with monies channelled through a custodian account with an Australian bank held in the taxpayer's name.

The Commissioner assessed the taxpayer as trustee of the net income of a trust estate (being the income derived from the share trading) under former s 98(3) of the ITAA 1936 and, at first instance, Justice Gordon of the Federal Court held that the taxpayer satisfied para (b) of the definition of "trustee" in s 6(1) as he had the administration or control of income affected by a trust and that was sufficient to make him a trustee within the meaning of s 6. It is from this decision that the taxpayer appealed to the Full Federal Court, which consisted of Edmonds, Gilmour and Logan JJ, who allowed the appeal in their joint judgment.

In allowing the appeal, Edmonds, Gilmour and Logan JJ noted that, to be liable as trustee, the taxpayer must stand in some relation to a proprietary right by virtue of which net income of the trust estate arose. They went on to conclude that Salina and Kolton were each carrying on a business of trading in shares; the shares concerned were the trading stock of those businesses. The effect of this was that the gross proceeds of the share sales constituted the assessable income of Salina or Kolton, and such derivation occurred either when the share sale contracts were entered into or, at the latest, when they were settled, and the gross purchase outgoings constituted allowable deductions. Importantly, their Honours conclude that it was Salina and Kolton that were the parties to the share sale and purchase contracts and it was they who derived the income from the sale of the trading stock represented by the shares. They did so without the intervention of any person as trustee, *only* a broker acting as agent. Further, they derived that income irrespective of whether they or a third party received income on their behalf.

The final case considered in this section is *Citigroup Pty Ltd v Federal Commissioner of Taxation*<sup>39</sup> which examined whether the provisions of Pt IVA of the ITAA 1936 applied to entitle the Commissioner to cancel foreign tax credits to which the taxpayer was otherwise entitled. Relevant to this case, in 1998 the federal government amended the provisions of Pt IVA of the ITAA 1936 in relation to schemes entered into after that time which were designed to acquire or generate foreign tax credits to be used to shelter low-taxed foreign source income from Australian tax. As explained by Justice Edmonds, the announcement found legislative expression in s 177C(1). The relevant paragraphs read:

177C(1) Subject to this section, a reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as a reference to:

- (a) ...
- (b) ...
- (ba) ...
- (bb) a foreign tax credit being allowable to the taxpayer where the whole or a part of that foreign tax credit would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out;

and, for the purposes of this Part, the amount of the tax benefit shall be taken to be:

- (c) ...
- (d) ...
- (e) ...
- (f) in a case where paragraph (bb) applies – the amount of the whole of the foreign tax credit or of the part of the foreign tax credit, as the case may be, referred to in that paragraph.

In affirming that Pt IVA of the ITAA 1936 could apply to cancel foreign tax credits that the taxpayer was otherwise entitled to, Edmonds J also referred to a para (d) which was inserted into s 177F(1), as part of the amendments referred to, in order to enable the Commissioner to cancel a tax benefit which is referable, in whole or in part, to a foreign tax credit. The Full Federal Court (Stone, Jessup and Perram JJ) dismissed both the taxpayer's and the Commissioner's appeal against this decision.

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<sup>39</sup> *Citigroup Pty Ltd v Federal Commissioner of Taxation* (2010) 81 ATR 412; [2010] FCA 826.

## **CONCLUSION**

In conclusion, though the cases determining principles of international tax law are the lesser known of Justice Edmonds' judgments, it can be seen from the 13 cases examined in this article that the scope of these decisions has been far reaching and has touched on many complex areas of domestic and international tax law. All the decisions demonstrate the exceptional ability his Honour had during his time on the Bench for statutory and treaty interpretation. Moreover, many of these cases involved not only some of the most complex domestic tax provisions but also examined their interaction with international treaties and other instruments. Some of the cases also involved a consideration of provisions that had hitherto not been examined by the courts, so in this way his Honour's decisions were also at the vanguard of jurisprudence in the complex areas they covered.

His Honour's acumen, precision, intellectual rigour and clarity of thought are all qualities which are evident in his decisions, and both the profession and the body of knowledge in this area are much improved for the wisdom that he provided through his judgments. While his presence on the Federal Court will be greatly missed, the enduring impact, significance and influence of his judgments will never be forgotten.