The use of extrinsic materials by the courts in the interpretation of taxation legislation

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Abstract: While the law relating to the use of extrinsic materials, such as second reading speeches and explanatory memoranda, in statutory interpretation appears to be reasonably settled, nonetheless, both the taxpayer and the Commissioner of Taxation have sought to rely on extrinsic material to support a particular interpretation of legislation. The ability to use extrinsic material can have significant implications for the taxpayer or the Commissioner. It is therefore important to understand when it is appropriate to use this material. Significant costs can be incurred by a taxpayer in basing an argument on extrinsic material, only to discover that the courts will not consider such material. This article reviews recent cases to determine to what extent these rules continue to apply and how and when tax practitioners can rely on extrinsic material to support a stance taken against the Commissioner or allow a practitioner to dispute the Commissioner's use of such material.

Introduction

Legislation is enacted to achieve certain aims. Tax legislation aims to subject particular amounts, be they monetary or "in-kind", to taxation. Legislation imposing taxation must be clear and unambiguous. While this aim is lofty and idealistic, in practice, this may not always be the case. Words may have a number of meanings and lawyers are adept at finding and using these ambiguities to their clients' benefits. The Commissioner of Taxation will also try to use ambiguities to enhance his position.

It is a basic rule of interpretation that the legislation must enact what parliament intended. If the legislation is clear and unambiguous, then it must be interpreted on the basis of those words providing that it accords with the other provisions of the Act and can easily be applied to that to which it seeks to apply. If, however, the clear and unambiguous words do not adhere to the intent of the legislation, then courts can depart from the literal interpretation. This is particularly the case if this literal interpretation will result in an absurd, capricious or irrational result.

When the words are ambiguous, the interpretation of the court will be that which will align with the legislative intent of the statute. When determining the intent of the legislation, the courts will consider the mischief which the legislation was intended to overcome. For example, fringe benefits tax was enacted to ensure that non-cash benefits provided by an employer to an employee were taxed in the hands of the employer. This was to overcome problems in earlier legislation which occurred in relation to valuation and knowledge of the benefit provided to an employee.

While the law with regard to the use of extrinsic materials in statutory interpretation appears to be reasonably settled, nonetheless, as will be seen from the cases reviewed in this article, both the taxpayer and the Commissioner of Taxation have sought to rely on extrinsic material to support a particular interpretation of legislation.

In fact, recent cases which have discussed the use of extrinsic material have resulted in some disparate decisions. The facility to use extrinsic material can have significant implications for the taxpayer or the Commissioner of Taxation. Consequently, it is important to understand when it is appropriate to use this material. Significant costs can be incurred by a taxpayer in basing an argument on extrinsic material, only to discover that the courts will not consider such material. This article will review recent cases to see if these rules continue to apply and how and when tax practitioners can rely on extrinsic material to support a stance taken against the Commissioner or allow a practitioner to dispute the Commissioner's use of such material.

The applicable law – the use of extrinsic materials in statutory interpretation

As noted in the introduction, the applicable law with regard to the use of extrinsic materials in statutory interpretation appears to be reasonably settled. The courts have refused to consider extrinsic material when it is considered that the words of the legislation were clear or when the result of using this material would be unreasonable or absurd. In *Newcastle City Council v GIO General Ltd*,[1] McHugh J quoted Lord Diplock in *Jones v Wrotham Park Settled Estates*,[2] who stated three conditions which must be met before a court can read words into legislation.

(1) the court must know the mischief with which the statute was dealing;

(2) the court must be satisfied that, by inadvertence, parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved; and

(3) the court must be able to state with certainty what words parliament would have used to overcome the omission if its attention had been drawn to the defect.

The above principles can be seen in the *Acts Interpretation Act 1901* (Cth). Relevantly, s 15AA of the *Acts Interpretation Act 1901* provides:

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

The matter which must be considered is what materials can be used when determining the intent of the legislation when the literal interpretation does not

promote the purpose or object underlying the Act. In this regard, s 15AB of the *Acts Interpretation Act 1901* permits the use of extrinsic materials to help in the interpretation of an Act. It can be used to:

- confirm the meaning of a provision taking into account its context and the intent of the legislation;
- determine how to interpret a provision which is ambiguous or obscure; or
- overcome the problems when the ordinary meaning of a word or phrase results in a manifestly absurd or unreasonable result.

Section 15AB thus allows the use of extrinsic material but this is not mandated on the courts and it is at the discretion of the court whether or not such material is considered.

As noted in *GHP 104 160 689 Pty Ltd and FCT*,[3] the task of a court or tribunal is to construe the legislation as enacted by the parliament, and not act on an a priori assumption about its purpose. In this sense, the foundation principle of the applicable law is as stated by French CJ and Hayne J in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*,[4] who refer to the statement made by Griffith CJ in *Richardson v Austin*:[5]

> "… there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention, and then, having made up one's mind what that intention was, to conclude that intention must necessarily be expressed in the statute, and proceeding to find it."

What follows from this is that, in construing a statute, the text of any particular section must be read and understood as part of the statute viewed as a whole.[6] In order to consider a section in its context, a court may be authorised to make reference to legislative history and extrinsic materials. However, this authorisation is not "at large". In this regard, reference must be made to *Certain Lloyd's Underwriters v Cross*,[7] in which French CJ and Hayne J, quoting the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*, stated as follows:[8]

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

Their Honours then added:[9]

> "Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added). And as the plurality went on to say in *Project Blue Sky*:
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> > 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'"

This has particular relevance where there is ambiguity as to the meaning of a defined term in a statute. As noted in *Esso Australia Resources Pty Ltd v FCT*,[10] the established principle is that reference cannot be had to the ordinary meaning of words where a definition in a statute may give the words a meaning different from their ordinary meaning. In fact, Keane CJ, Edmonds and Perram JJ explained in their judgment in *Esso* that there have been instances in a number of English decisions where:[11]

> "… the 'potency' of the term defined has influenced the construction of the definition. In *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd* [2005] UKHL 47; [2005] 4 All ER 107 Lord Hoffmann said (at [18]):
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> > '… a definition may give the words a meaning different from their ordinary meaning. *But that does not mean that the choice of words adopted by Parliament must be wholly ignored.* If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean.' [emphasis added]
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> A similar result occurred in *Delaney v Staples (trading as De Monfort Recruitment)* [1992] 1 All ER 944 at 947 where Lord Browne-Wilkinson construed the statutory definition of wages 'bearing in mind the normal meaning of the word'. Lord Scott of Foscote, in dissent, did something similar with the expression 'town or village green' in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25; [2006] 2 AC 674 at [82]-[83] although it is true that the majority in that appeal did not regard the definition as being sufficiently ambiguous to permit resort to the term defined."

Therefore, only where there is ambiguity as to the meaning of a defined term in a statute can reference be made to the ordinary meaning of a word. However, Gleeson CJ noted in *XYZ v The Commonwealth of Australia*[12] that there are many instances where it is misleading to construe a composite phrase simply by combining the dictionary meanings of its component parts. This principle was explained in *Sea Shepherd Australia Ltd v FCT* by Gordon J:[13]

(1) the task is to construe the language of the statute, not individual words;[14] and

(2) the task is not to pull apart a provision, or composite phrase within a provision, into its constituent words, select one meaning, divorced from the context in which it appears, and then reassemble the provision.[15] Indeed, it is rare that resort to a dictionary will be of assistance in searching for the legal meaning of a provision in a statute.[16]

Consideration of recent cases

Three cases are considered by the authors in this article:

(1) *FCT v Qantas Airways Ltd*;[17]

(2) *Re Ward and FCT*;[18] and

(3) *GHP 104 160 689 Pty Ltd and FCT*.[19]

These cases were selected for discussion because, at first glance, it appears that there are conflicting views on when a court may have recourse to extrinsic materials in order to interpret statutory provisions. However, as will be demonstrated, the different outcomes in these cases are based on a consistent application of the applicable law in this area.

FCT v Qantas Airways Ltd

FCT v Qantas Airways Ltd[17] concerned whether car parking spaces provided by Qantas to some members of its staff as part of their remuneration was a "car parking fringe benefit" as defined in the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA) and therefore whether Qantas was liable to pay FBT. The AAT concluded that Qantas was liable to pay

FBT in respect of the provision of the car spaces, apart from those at Canberra Airport.

Qantas' argument that the car parking spaces were not a "car parking fringe benefit" relied on the exception in s 39A(1)(a)(ii) FBTAA that there should be a "commercial parking station" within a kilometre of the premises at which the car spaces were provided. Qantas did not dispute that there are commercially operated parking stations within a kilometre of its premises at each airport but submitted that these parking stations were not "commercial parking stations" because they do not provide car spaces to the public in the ordinary course of their businesses.

Qantas' argument was explained by the Full Court as follows:[20]

> "Because the public spoken of in the [definition of 'commercial parking station' in s 136(1)] is to be understood as being the public including persons commuting between their homes and their ordinary places of work and not some broader public constituted by anyone using an airport parking station; and, because, correspondingly, the ordinary business of airport parking stations is the provision of parking spaces to air passengers and those who might deposit or collect such wayfarers at or from airports."

Therefore, the question turned on the meaning of the word "public" in the relevant section of the FBTAA. The Full Federal Court held that the word "public" should be given its ordinary meaning and "there is no rationale for imputing into the definition a requirement that the commercial parking station be one that employees of the employer commuting to work by car would or could in fact use".

The Full Court added:[21]

> "It was, therefore, incorrect for the Tribunal to seek to ascertain the meaning of the word 'public' in the definition of 'commercial parking station' by asking whether employees could, in fact, use the posited parking stations. It was not to the point that employees do not, in fact, use airport car parks nor is it to the point that they are prevented from doing so. The significance of the existence of a nearby commercial parking station is that it signifies the presence of value in the employer's car spaces and not that it provides an alternative to the staff."

The Full Court therefore upheld the AAT's decision and dismissed Qantas' appeal.

It appears here that there is no need to have recourse to extrinsic materials when seeking to interpret statutory provisions.

A review of the three points raised by Lord Diplock, as applied to the decision in *FCT v Qantas Airways Ltd*, would show that:

(1) the court must know the mischief with which the statute was dealing — the statute deals with the power to tax a benefit provided to employees, the value of the benefit arises from the availability of public car parking facilities which cost above a statutory amount;

(2) the court must be satisfied that by inadvertence parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved — there was no inadvertence in overlooking an eventuality to achieve the purpose of the legislation. The legislation stated that the car parks must charge above a particular rate and be able to be used by members of the public; and

(3) the court must be able to state with certainty what words parliament would have used to overcome the omission if its attention had been drawn to the defect. The word public is clear in its meaning and does not result in, or require, additional definition.

Contrast the above decision with the AAT decision in *Re Ward and FCT*.[18]

> *"The matter which must be considered is what materials can be used when determining the intent of the legislation when the literal interpretation does not promote the purpose or object underlying the Act."*

Re Ward and FCT

In *Re Ward and FCT*,[18] the AAT ruled that it has jurisdiction to review a decision by the Commissioner *not* to make a determination to disregard or reallocate excess superannuation contributions after finding that s 292-465(9)(a) of the *Income Tax Assessment Act 1997* (Cth) was "manifestly absurd".

The AAT found that the wording of s 292-465(9)(a), which provides that a person may object only "on the ground that you are dissatisfied with a determination that you applied for under this section", was "manifestly absurd". The AAT noted that a person would never be dissatisfied if the Commissioner made the determination that the person asked for. So, if the words were given their ordinary meaning, the only taxpayers entitled to object could not do so, the AAT said. In finding that the provisions were manifestly absurd, the AAT relied on the powers under the *Acts Interpretation Act 1901* to use extrinsic material, namely, the Superannuation Legislation Amendment Bill 2010, to give the words their intended meaning.

Reviewing once more the three points raised by Lord Diplock, and applying them to the decision in *Re Ward and FCT*, we could surmise that:

(1) the court must know the mischief with which the statute was dealing. It was quite clear in this case that the statute had been amended in 2010 to allow the taxpayer the option of objecting to a determination of the Commissioner. This amendment was required following the decision in *McMennemin and FCT*;[22]

(2) the court must be satisfied that by inadvertence parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. The wording of the amended section resulted in a "manifestly absurd" result which would preclude a taxpayer who was dissatisfied with the Commissioner's decision from objecting to that decision; and

(3) the court must be able to state with certainty what words parliament would have used to overcome the omission if its attention had been drawn to the defect. Parliament would have inserted words to make it clear that there is a right of objection for taxpayers who are dissatisfied with the Commissioner's determination or the Commissioner's decision not to make a determination.

Contrast the above decision (again) with the AAT decision in *GHP 104 160 689 Pty Ltd and FCT*.[19]

GHP 104 160 689 Pty Ltd and FCT

GHP 104 160 689 Pty Ltd and FCT[19] relates to disputed entitlements to enhanced tax deductibility for R&D expenditure under s 73B of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) claimed by the applicant, GHP 104 160 689 Pty Ltd, a company previously known as Xstrata

Holdings Pty Ltd prior to the merger of Xstrata and the Glencore Group.

In particular, the issue before the tribunal was whether certain expenditure was to be disallowed deductibility at the rate of 125% because it was "feedstock expenditure" within the meaning of former s 73B(1) ITAA36.

Between 2003 and 2007, the taxpayer undertook R&D, conducted by way of plant trials, to test various possible improvements to its copper and lead concentrators and its copper smelter. Many of the plant trials ran over several months. A "plant trial" refers to R&D undertaken by way of testing one or more altered integers of a plant under ordinary operational conditions to assess the changed integers' impacts on the operation of a plant as a whole.

The taxpayer sought to deduct a considerable part of its expenditure incurred during those plant trials at the premium rate of 125%. For each of the relevant tax years, the Commissioner disallowed many, but not all, items of expenditure claimed to be "research and development expenditure" and, as such, deductible at the premium rate. The taxpayer sought review of these decisions.

The Commissioner's principal submission was that all of the taxpayer's relevantly disputed expenditure was expenditure "incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities" and was thus within the meaning that s 73B(1) gives to the term "feedstock expenditure" and was therefore not deductible at the premium rate. "Feedstock expenditure" is expressly excluded from the statutory definition of "research and development expenditure".

"Feedstock expenditure" is defined as follows:

> "***feedstock expenditure***, in relation to an eligible company, means expenditure incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities, and includes expenditure incurred by the company on any energy input directly into the processing or transformation."

The Commissioner's submission to the tribunal was that, when deciding whether the disputed expenditure was "incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation" for the purposes of the definition of "feedstock expenditure" in s 73B(1), the tribunal could have recourse to extrinsic materials in seeking to ascertain the relevant meaning of the section. Such an approach was not contrary to the established principles of statutory interpretation.

However, in the tribunal's view, the text of the relevant provisions, read as part of s 73B, allowed it to ascertain the meaning conveyed by the definition of "feedstock expenditure" without any requirement to resort to extrinsic materials.

After analysis of the complex factual situation, and application of the law, especially in relation to the principles of statutory interpretation, in the tribunal's view, the inter-relationship between the various definitions within the feedstock scheme provided a "statutory lens through which the meaning to be attributed to the definition of 'feedstock expenditure' can be viewed and ascertained". To have resort to extrinsic materials in this case would, in the tribunal's view:[23]

> "… impermissibly privilege an *a priori* assertion of policy over the statute's text. The Tribunal has no quarrel with the proposition advanced on behalf of the Commissioner that his preferred reading makes understandable accounting and taxation sense, but the Tribunal's task is to construe the legislation as enacted by the Parliament. It must avoid falling into the error of assuming the legislature had a particular intention, and then, having made up its mind what that intention was, to conclude that intention must necessarily be expressed in the statute, and proceeding to find it (per French CJ and Hayne J in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378)."

Reviewing once more the three points raised by Lord Diplock, and applying them to the decision in *GHP 104 160 689 Pty Ltd and FCT,* we could surmise that:

(1) the court must know the mischief with which the statute was dealing. The statute included provisions which rolled back some of the provisions of the earlier legislation which applied to feedstock and government recoupments;

(2) the court must be satisfied that by inadvertence parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. There was a perceived imbalance in the previous rules which allowed the deduction at the premium rate while assessing the income at ordinary rates. Parliament reduced the R&D benefit which could have derived from feedstock expenditure by increasing the assessable income of a taxpayer by one-third of the relevant feedstock amount.

   In addition, there was also a 10% clawback recoupment tax on any R&D benefits which were derived from government recoupments. There was nothing in the legislation which prevented these two provisions applying jointly and both increasing assessable income and imposing additional tax. The result was that a taxpayer could be worse off by applying these provisions.

   This is patently an absurd result yet the wording is quite clear. The tribunal considered that none of the extrinsic documents referred to by the applicant addressed this specific issue of overlap causing an "absurd" outcome; and

(3) the court must be able to state with certainty what words parliament would have used to overcome the omission if its attention had been drawn to the defect. The tribunal considered what wording might have been needed to construe the definition of "feedstock" to that which the applicant wanted.[24] It considered that the degree of re-writing was so significant (almost 30 words) as to be beyond what is permissible as an aspect of statutory interpretation.[25]

Conclusion

The cases reviewed in this article have shown that both the taxpayer and the Commissioner of Taxation have sought to rely on extrinsic material to support a particular interpretation of legislation. In light of the review of these cases, it would seem that it would be a rare occurrence when a court would be permitted to have recourse to extrinsic materials in interpreting statutory provisions. It would seem even rarer that such would be permitted where there is ambiguity in relation to a composite phrase, particularly where the phrase constitutes a defined term in the statute. The authors can therefore conclude that the above cases demonstrate that the general principles (noting in particular the three conditions stipulated by Lord Diplock) regarding the use of extrinsic materials in statutory interpretation of the provisions of taxation law are quite settled. There can only be recourse to such materials if, as per *Re Ward*, the wording of a particular phrase

would lead to a "manifestly absurd" result. Thus, the implications for tax practitioners in this regard are significant. Since the courts will, in most cases, not consider the use of extrinsic materials to interpret statutory provisions, practitioners should consider very carefully before advising a client to support a stance taken against the Commissioner on the basis that this stance is founded on an interpretation of statutory provisions, which is reliant on the use of extrinsic materials. There is thus great potential for a taxpayer to embark on costly and, quite possibly, futile litigation. In the same vein, it would also be incumbent upon the Commissioner of Taxation to exercise a great deal of caution before deciding to have recourse to extrinsic materials to support a particular interpretation of statutory provisions.

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5 (1911) 12 CLR 463 at 470.
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7 (2012) 248 CLR 378 at 380.
8 (2009) 239 CLR 27 at 46-47.
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