

AUSTRALIAN TAX REVIEW

Volume 41, Number 4

November 2012

EDITORIAL

Renewed community interest in tax: What will it lead to? 171

ARTICLES

Dispelling the urban myth around s 95A(2) – Alex Evans

Section 95A(2) of the Income Tax Assessment Act 1936 (Cth) has puzzled many practitioners since its introduction in Div 6 in 1980, mainly because the rationale for its introduction, and the circumstances that it was intended to address, were never clear. One explanation that garnered currency over the years was that because s 95A(2) expands the ordinary scope of the present entitlement concept, it was designed to aid and clarify the interpretation of that term. This article examines a Cabinet document from 1979, which only became publicly accessible in 2010, that sheds light on the federal government’s intention in introducing s 95A(2). The material in that document shows that s 95A(2) was actually designed to create an exclusion from s 99A, to match an exclusion in Div 6AA, for income derived by compensation trusts, and that linking the exclusion in Div 6 with present entitlement was merely a technique for achieving the desired policy result. 173

Constraining the recovery powers of the Commissioner: Judicial considerations in granting a stay – Rodney Fisher

The Commissioner has wide powers for the collection and recovery of tax which has been assessed and is due and payable, even if the assessment is the subject of an unresolved dispute. However, the courts have been willing to stay recovery proceedings in cases of a disputed assessment where allowing collection would bankrupt the taxpayer, thus precluding the resolution of the dispute. This article examines the circumstances under which a court may grant a stay, arguing that such power partially redresses the power imbalance in favour of the Commissioner, and serves the interests of the law by allowing a tax dispute to be resolved. To prevent frivolous disputes being used to defer collection, the article argues that a threshold test for determining genuine disputes would be the reasonably arguable position test. 187

“Plutarch’s Paradox” – or the case of the interminable trust – Robin Woellner

This article examines the decision in *FCT v Clark* and its implications. On appeal, the Full Federal Court held that dramatic and sudden changes to the various elements of a dormant private unit trust did not break the continuity of the trust estate required to enable the new controllers to utilise the carry-forward tax losses created under the former regime. The High Court refused special leave. The question that arises is, was the decision consistent with the policy underlying the loss carry-forward deduction, and with the courts’ role as “pragmatic tax analysts”? Are the courts asking the wrong question: not whether “a” trust estate continued after the changes, but whether the “same” trust estate continued? 203

VOLUME 41 – 2012

Table of Authors	227
Table of Cases	229
Index	235