



Law Council
OF AUSTRALIA

Business Law Section

26 August 2021

Mr Nathan White
Australian Taxation Office

By email: Nathan.White@ato.gov.au

Dear Mr White,

The Commissioner of Taxation's Decision impact statement – Eichmann v FCT [2020] FAFC 155

The Taxation Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) is one of the fourteen specialist committees established within the Business Law Section to offer technical advice on different areas of law affecting business. Each of these Committees approaches issues of law reform and practice from a different perspective, which reflects their respective primary focus.

The Committee welcomes the opportunity to comment on the Commissioner of Taxation's draft decision impact statement (**DIS**) regarding the Full Federal Court's decision in *Eichmann v FCT*.

The Committee considers the Full Federal Court's decision is instructive regarding the manner in which the Small Business CGT Concessions contained in Division 152 of the *Income Tax Assessment Act 1997* operate. While the Committee agrees with the current contents of the Commissioner's draft DIS, it also considers that one important aspect of the decision should be added to the DIS, namely that part of the Court's *ratio* regarding the statutory context of the legislation, where it said¹:

39 The beneficial nature of the small business relief is also discernible in the Guide to Div. 152, s. 152-1, which states that, "[t]o help small business", the small business concessions are available on satisfaction of the relevant conditions. Guides are of limited assistance in interpreting the 1997 Act, but they may be considered in "determining the purpose or object underlying [a] provision": s. 950-150(2)(a). We have considered s. 152-1 in this way in construing s. 152-40(1)(a).

40 It follows that because s. 152-40(1)(a) is beneficial in nature, "its language should be construed so as to give the most complete remedy which is consistent "with the actual language employed" and to which its words "are fairly open": Khoury v. Government Insurance Office of New South Wales (1984) 165 C.L.R. 622 at 638 per Mason, Brennan, Deane and Dawson JJ. In that respect, a beneficial construction of legislation may, in our view, legitimately influence constructional choices in a given case which arise from the use of generalised language to describe a necessary connection between two things; here those two things are the use of an asset and the carrying on of a business.

¹ At [39] – [40]

Given the above, the Committee considers that the following paragraph should be added to the DIS:

The Full Federal Court also noted that in construing the phrase “active asset”, given the context and purpose of the small business CGT concessions, a beneficial construction of the language should be employed, as the provisions are beneficial in nature.

The Committee would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee Angela Lee at angela.lee@vicbar.com.au or Committee Member Justin Byrne at justin.byrne@qldbar.asn.au, if you would like to do so.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Greg Rodgers', written in a cursive style.

Greg Rodgers
Chair, Business Law Section