

**SUPREME COURT OF SOUTH AUSTRALIA**

(Civil: Application)

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**TOTAL BEVERAGE AUSTRALIA PTY LTD v CORPORATE LINK AUSTRALIA PTY LTD**

**[2013] SASC 45**

**Judgment of The Honourable Justice Sulan**

**11 April 2013**

**CORPORATIONS - WINDING UP - WINDING UP IN INSOLVENCY - STATUTORY DEMAND -  
APPLICATION TO SET ASIDE DEMAND - GENUINE DISPUTE AS TO INDEBTEDNESS - ASSESSING  
GENUINENESS - GENERALLY**

**CORPORATIONS - WINDING UP - WINDING UP IN INSOLVENCY - STATUTORY DEMAND -  
APPLICATION TO SET ASIDE DEMAND - FOR DEFECT OR SOME OTHER REASON - SOME OTHER  
REASON**

**CORPORATIONS - WINDING UP - WINDING UP IN INSOLVENCY - STATUTORY DEMAND -  
APPLICATION TO SET ASIDE DEMAND - DEMAND GREATER OR LESS THAN AMOUNT DUE**

Application to set aside a statutory demand - parties transacted through various entities in a number of agricultural managed investment schemes - whether genuine dispute exists - whether debt properly owed to defendant - whether debt is due and payable - whether debt subordinate to repayment of another debt - whether amount of debt should be varied.

Held: Statutory demand set aside.

There was no genuine dispute as to whom the debt is owed - plaintiff's own records indicate the debt owed to defendant - whether debt is due and payable in genuine dispute - allegation that debt subordinate to repayment of Bank SA loan facility went beyond mere assertion - had demand not been set aside it would have been varied.

*Corporations Act 2001* (Cth) s 459G, s 459H, s 459J, referred to.

*Spencer Constructions Pty Ltd v B&M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452; *Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd* (1994) 13 ACSR 37; *Roadships Logistics Ltd v Tree* [2007] NSWSC 1084; *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785; *Greenwood Manor Pty Ltd v Woodlock* (1994) 48 FCR 229; *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd* [2002] NSWSC 411; *Rohalo Pharmaceutical Pty Ltd v RP Scherer SpA* (1994) 15 ACSR 347; *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359; *A R Pilot Pty Ltd v Gilouriotis* [2007] NSWSC 396; *Europecars Pty Ltd v Century International Ltd* [1999] FCA 538, considered.

## TOTAL BEVERAGE AUSTRALIA PTY LTD v CORPORATE LINK AUSTRALIA PTY LTD

[2013] SASC 45

### Civil: Application

1. **Sulan J:** This is an application brought by the plaintiff, Total Beverage Australia Pty Ltd ("Total Beverage"), pursuant to s 459G of the *Corporations Act 2001* (Cth) ("the Act") for an order setting aside a creditor's statutory demand. On 21 December 2012 the defendant, Corporate Link Australia Pty Ltd ("Corporate Link"), claimed a total sum of \$928,329.38 for an unpaid loan including interest.
2. Total Beverage seeks to set aside the statutory demand on the grounds that there is a genuine dispute as to whether Corporate Link is the creditor. Total Beverage alleges another company now in administration is the creditor. Further it is claimed that payment of the alleged loan is subordinate to repayment of a loan to Bank SA. Alternatively, Total Beverage seeks to have the amount of the demand varied.

### Background

3. The factual matrix in which the dispute arose is complex and involves the parties transacting through various entities in a number of agricultural managed investment schemes. I shall recount the facts so far as is necessary to provide a background.
4. Total Beverage was incorporated in April 1971. It is a wholly owned subsidiary of the FABAL Group Pty Ltd ("FABAL"). Christopher Day is a director of Total Beverage and had most of the contact and discussions with Corporate Link in relation to the purported agreements to which these proceedings relate.
5. Corporate Link was incorporated in February 1984. Peter Holt was a director of Corporate Link from 29 February 1984 to 15 May 2011 and was responsible for dealings between the two companies.
6. Mr Holt was also associated with another company, Holt Norman & Co Pty Ltd ("Holt Norman"). Holt Norman was the trustee of a service trust supplying administrative services to the financial planning industry and was the holder of an Australian Financial Services License. It is now in administration. Holt Norman is the entity which Total Beverage alleges is the creditor of the unpaid loan.

7. On 9 October 2007, an agreement was entered into between Holt Norman, FABAL and a third entity, P J Nash Pty Ltd trading as Westmores (“Westmores”). I will refer to this agreement as the “the MIS Development Agreement”.<sup>[1]</sup> Pursuant to the agreement, the parties agreed to develop, market and administer a commercial cherry orchard development to be known as the Tasmanian Premium Cherries Project (“the Cherries Project”). The project was promoted by Total Beverage.

#### Basis of Debt

8. The debt to which the statutory demand relates arises as a result of the operation of the Product Disclosure Statement of the Cherries Project. Relevantly, [section 4.7](#) of the Product Disclosure Statement provides:<sup>[2]</sup>

The Responsible entity may pay commissions of up to a maximum of \$1,000 per Interests in the Tassie Cherries Project of 8% of PDS funds to this PDS to any person or organisation to whom it is authorised to pay commissions pursuant to the [Corporations Act](#) and the Corporations Regulations. It will pay these commissions out of the Initial and Ongoing Management Service Fee shown above in the Contribution Fee and detailed as Grower Fees Section 4.6. *In addition, from its own funds, the Responsible Entity or other companies within the same group of companies might pay additional fees to Australian Financial Service Licensees who have provided particular assistance of an administrative or promotional nature in connection with the Tassie Cherries Project.*

[Emphasis is mine.]

9. As a result of Corporate Link advising its clients to invest \$8.65 million in the Cherries Project, an amount of \$865,000 became payable to Holt Norman as holder of the relevant Australian Financial Services License (“the AFSL debt”). An amount of \$435,000 also became payable by Total Beverage to Westmores for advising its clients to invest in the Cherries Project. Total Beverage does not dispute that the debts arise as a result of the operation of the Product Disclosure Statement.

#### Bank SA facilities

10. On 24 November 2006, Bank SA provided to Total Beverage an offer to a multi-option loan facility with a total limit of \$2,120,000 to enable Total Beverage to offer loan facilities to growers and investors in the agribusiness of FABAL.<sup>[3]</sup> It was intended that investors would be provided with an opportunity to invest in Aussie Cherries and/or the project itself.

11. In addition to a number of other conditions attached to the loan facility, Bank SA required that:

- . Funding sought by investors beyond \$200,000 required the prior approval of Bank SA to be obtained; and
- . A cash security by Total Beverage for a minimum of \$250,000 was required where loans exceeded \$620,000.

12. On 18 June 2008, Bank SA offered to increase the loan facilities to Total Beverage.<sup>[4]</sup> This was specifically to allow finance for growers in the Tassie Cherries Project up to a maximum of \$200,000 per grower.

13. Notwithstanding the June 2008 increase in Bank SA loan facilities, further funds were required by Total Beverage to enable the project to continue.

#### The subordinate loan

14. Total Beverage claims that an agreement was reached between the parties involved in the Cherries Project in June or July of 2008. It is alleged that the terms of the agreement were that the debts arising as a

result of the operation of the Product Disclosure Statement for promotion of the Cherries Project would not become due and payable until such time as all the loans payable by Total Beverage to Bank SA were repaid ("the Subordinate Loan Agreement").

15. Corporate Link denies that an agreement in such terms ever existed. Corporate Link claims that the Mr Holt, on behalf of Corporate Link, told Mr Day that he would allow Total Beverage to delay payment of the AFSL debt on an "at call" arrangement. Corporate Link denies that it agreed to await the payment of all amounts owing to Bank SA by Total Beverage before the AFSL debt would be repayable.

## Issues

16. Total Beverage submits that that statutory demand should be set aside. Two grounds are advanced on this submission. The first is that, pursuant to s 459H(1)(a) of the Act, the demand should be set aside on the basis that there is a genuine dispute as to the existence and amount of the debt. It is claimed by Total Beverage that the AFSL debt, the subject of the demand, is not properly owed to Corporate Link but is owed to Holt Norman.

17. The second ground is that, pursuant to s 459J(1)(b) of the Act, the demand should be set aside on the basis that there is some other reason why the demand should be set aside. It is alleged by Total Beverage that, by operation of the Subordinate Loan Agreement, the AFSL debt is not due and payable because Total Beverage's Bank SA loan facilities have not been repaid.

18. In the alternative, Total Beverage seeks to have the amount of the demand varied pursuant to s 459H(4) of the Act.

## Discussion

### A genuine dispute

19. The meaning of a genuine dispute in the context of an application to set aside a statutory demand has been expressed in a number of ways: the dispute must be "bona fide and truly exist in fact". Further the grounds for alleging the dispute must be "real and not spurious, hypothetical, illusory or misconceived";<sup>[5]</sup> "not plainly vexatious or frivolous";<sup>[6]</sup> and the dispute is genuine unless the claim is "so devoid of substance that no further investigation is warranted".<sup>[7]</sup>

20. In *Eyota Pty Ltd v Hanave Pty Ltd* McLelland CJ in Eq considered the meaning of the phrase:<sup>[8]</sup>

It is, however, necessary to consider the meaning of the expression "genuine dispute" where it occurs ... in my opinion that expression connotes a plausible contention requiring investigation, and raises much of the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be not having "sufficient prima facie plausibility to merit further investigation as to its [truth]" (cf *Eng Me Yong v Letchumanan* [1980] AC 331 at 341), or "a patently feeble legal argument or an assertion of fact unsupported by evidence": cf *South Australia v Wall* (1980) 24 SASR 189 at 194.

But it does mean that, except in such an extreme case [i.e. where evidence is so lacking in plausibility], a court required to determine whether there is a genuine

dispute should not embark upon an enquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute .... In *Re Morris Catering Australia* it was said the essential task is relatively simple - to identify the genuine level of a claim ...

21. The authorities are clear that there is a distinction between determining whether a claim is genuine and determining the claim on the merits. The *Corporations Act* does not require the court to determine whether the alleged claim will succeed. In *Greenwood Manor Pty Ltd v Woodlock*,<sup>[9]</sup> Northrop J said:

Although it is true that the Court, on an application under ss 459G and 459H is not entitled to decide a question as to whether a claim will succeed or not, it must be satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt. If it can be shown that the argument in support of the existence of a genuine dispute can have no possible basis whatsoever, in my view, it cannot be said that there is a genuine dispute. This does not involve, in itself, a determination of whether the claim will succeed or not, but it does go to the reality of the dispute, to show that it is real or true and not merely spurious.

22. The onus to show that the dispute is genuine falls on the party on whom the statutory demand is served. However, it is accepted that the burden is not high. In *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd*, Barrett J noted that the task of a company seeking to set aside a statutory demand 'is by no means at all a difficult or demanding one'<sup>[10]</sup>. In cases such as *Rohalo Pharmaceutical Pty Ltd v RP Scherer SpA*<sup>[11]</sup> the burden shouldered by the applicant in the case of setting aside a statutory demand has been likened to the burden of a creditor applying for summary judgment:

The creditor would not be entitled to summary judgment if the company raised a defence or cross-claim deserving of a trial, and, concomitantly, a defence or cross-claim would not be struck out or dismissed if it raised an issue deserving of a trial. ... The task confronting a company applying to set aside a statutory demand of establishing the "genuineness" of a dispute or claim is, in my opinion, no more onerous than that which would confront it if it were seeking to meet an application by the creditor for summary judgment.

Genuine dispute as to whom the debt is owed

23. Total Beverage submits that there is a genuine dispute as to whom the AFSL debt is owed. The affidavit of Mr Day states that the AFSL debt is owed to Holt Norman and that it could only become payable to Corporate Link by way of transfer or assignment. He attests that in September 2010 Mr Holt requested an assignment or transfer of the AFSL debt to Corporate Link but that no such transfer of assignment was effected. Mr Day states that he has considered the books and records of Total Beverage and has not been able to identify any document that evidences that Holt Norman transferred or assigned the AFSL debt to Corporate Link. Day states that Total Beverage's consent to any such assignment would be subject to Corporate Link acknowledging the terms of the Subordinate Loan Agreement. Total Beverage submits that this dispute is sufficient to dispose of the claim.

24. Corporate Link submits that no assignment or transfer was necessary because the amount was always ultimately owing to “Corporate Link Australia as trustee for the PR Holt Family Trust”. An extract of a deed establishing the PR Holt Family Trust was provided to the Court.<sup>[12]</sup> The original trustee of the trust is Fourth Jantor Pty Ltd which was the previous name of Corporate Link.<sup>[13]</sup>

25. Corporate Link contends that although Holt Norman was a party to the MIS Development Agreement, the debt in issue arises from the operation of the Product Disclosure Statement. Holt Norman is not specifically mentioned in the Product Disclosure Statement and the MIS Development Agreement pre-dates that Product Disclosure Statement.

26. Corporate Link contends that, pursuant to the Product Disclosure Statement, the holder of the relevant Australian Financial Services License, Holt Norman, holds the commission income payable to it on trust for those who actually sell the interests in the managed investment scheme. It is alleged that Corporate Link is the entity which is entitled to the funds as the actual seller of the interests in the scheme.

27. I am not satisfied that there is a genuine dispute as to whom the AFSL debt is owed. Journal entries in Total Beverage’s own accounts dating from 27 June 2008 indicate a debt of \$865,000 owing to Corporate Link.<sup>[14]</sup> In an email dated 26 October 2010 Mr Day requests Mr Holt to “acknowledge/validate” to Total Beverage’s auditors that the loans are owing to Corporate Link.<sup>[15]</sup> Mr Holt did so by email dated 29 October 2010.<sup>[16]</sup> In addition, Mr Holt replied to an email by the auditors of Aussie Cherries Limited, Bentleys Pty Ltd, stating:

Dear Theresa

I have clarified this every year to the appropriate people & would really like someone to record it properly.

First of all I do not even know of anyone called Mary Holt.

The loans that remain outstanding are to Corporate Link Australia Pty Ltd atf The P R Holt Family Trust. The amounts are correct however the entity to whom the funds are owed needs to be corrected once & for all.

Thank You

### **Debt is not due and payable**

28. Total Beverage submits that as the AFSL debt has not become due and payable, it is not a debt that is capable of grounding a statutory demand. Total Beverage submits that this constitutes “some other reason” for setting aside a statutory demand under s 459J(1)(b) of the Act.

29. In *NT Resorts Pty Ltd v Deputy Commissioner of Taxation*, Finkelstien J discussed the characterisation of an allegation that a debt was not due and payable by reference to setting aside a statutory demand:<sup>[17]</sup>

On what ground then should the applicant base its application? There are only two possibilities. The first is s 459H(1)(a) that permits an application to be made when there “is a genuine dispute ... about the existence ... of a debt to which the demand relates”. Here there is no dispute about the existence of the debts due to the Crown. What is said is that those debts were not due and payable. Does such an allegation fit within the language of the ground? It would if the “debt” that is referred to in s 459H(1)(a) is only a debt of the class that can be included in a



statutory demand; that is a debt that is due and payable. In that event the application could be made under s 459H(1)(a). But it is by no means clear that this construction is available. The second possibility is that the application should be based on s 459J(1)(b). There is no doubt that this ground is available if s 459H(1)(a) is not.

In reality it is not necessary to reach a concluded view on the matter (although I should say that I incline in favour of the view that s 459J(1)(b) is the only available ground) for the reason that the standard of proof would in either case be the same. That is to say if the application must be made under s 459J(1)(b) the court would not exercise its discretion to set aside the demand unless it was satisfied that there was a genuine dispute about whether the debt to which the demand relates was due and payable

30. Two things are clear from this passage. Firstly, a claim that a debt is not due and payable can be argued as a ground for setting a statutory demand aside under s 459J(1)(b) of the Act.<sup>[18]</sup> Secondly, that a court will not exercise its discretion to set aside the demand unless it is satisfied that there is a genuine dispute about whether the debt to which the demand relates was due and payable. In other words, the onus on an applicant in relation to setting aside a statutory demand under s 459J(1)(b) is that same as that under s 459H(1)(a) of the Act.

31. Corporate Link submits that the allegation that the AFSL Debt is not due and payable as a result of the operation of the Subordinate Loan Agreement, is a mere assertion and, as such, does not meet the threshold of a genuine dispute. In support of this submission, Corporate Link points to the fact that the affidavit of Mr Day provides no particulars surrounding the Subordinate Loan Agreement in terms of when or where the agreement was entered into and who was present at the time.

32. Corporate Link further submits that, although given time to do so by this Court, the fact that Total Beverage has not responded to the assertions in the affidavits of Mr Holt and Mr Nash that no such agreement exists and that the Holt and Nash loans were always at call, can be taken into account when considering whether the existence of the Subordinate Loan Agreement is a mere assertion.

33. Corporate Link seeks to rely on *Europecars Pty Ltd v Century International Ltd*.<sup>[19]</sup> In that case, the applicant responded to the affidavit in the statutory demand by disagreeing with some particular items stating that it disputed the reconciliations and methodology in the respondent's schedule. The respondent then file a further affidavit with a detailed itemisation of the disputed claim to which the applicant did not respond either by way of affidavit or oral evidence. Lehane J noted: <sup>[20]</sup>

No further evidence was given by the applicant: particularly, the applicant did not attempt to explain whether, having seen the basis of the calculation, he continued to dispute the whole amount or any particular items making up the amount. I think it inevitably follows that the applicant's evidence on this matter must be regarded as mere assertion and that I should hold that the applicant has not discharged the burden of satisfying me that, as to the item in question, there is a genuine dispute.

34. Corporate Link submits that the principle and reasoning adopted by Lehane J ought to be applied, with the same conclusion, to the affidavit of Mr Day.

35. I am of the view that the assertion by Total Beverage that the Subordinate Loan Agreement exists, is to be distinguished from the circumstances in *Europecars* that led Lehane J to conclude that allegation in contention was a mere assertion. In *Europecars*, Lehane J was dealing with assertions relating to the methodology used by the respondent to calculate the amount of the debt owing where the quantum of the claim was in dispute.

36. Whilst Total Beverage has not provided detailed particulars of the alleged agreement or responded to particular assertions by the director of Corporate Link, I am satisfied that there is a genuine dispute as to the existence of Subordinate Loan Agreement.

37. The minutes of a Total Beverage meeting of members dated 27 June 2008 notes:[21]

Bill Norman and Peter Holt have agreed that Holt Norman will not call upon this loan until the entire Bank SA loan is repaid.

Phil Nash and Robin Westmore have agreed that P J Nash will not call upon this loan until the entire Bank SA loan is repaid.

38. Further reference to the Subordinate Loan Agreement is found in the minutes of Total Beverage meeting of members dated 20 December 2008.[22] The minute discusses the partial payment of the Nash Debt:

Phil Nash, as the sole director of PJ Nash, has agreed that the loan to PJ Nash will be reduced by \$85,120 to allow for the grower loan to remain at \$200,000. He further instructed the management of FABAL to allow any money owing to PJ Nash for fees and services to be reduce the loan of Phil Nash.

The board acknowledged that this mean [sic] that the PJ Nash and Holt Norman loans were reduced prior to the bank loan but accepted that accrued interest on each of these loans would cover these amounts within 12 months.

39. In a memorandum dated 1 August 2012 Mr Day,[23] on behalf of Total Beverage, wrote to Mr Holt answering a series of questions that had been posed to him by Mr Holt in an email dated 29 June 2012.[24] The relevant passage reads:

*Why are the substantial funds owing to Corp Link from Total Beverage not paid if they are virtually debt free as I have now been informed.*

Your information is incorrect.

I have advised previously that Total Beverage owes BankSA nearly \$1.625 million at 30 June 2012. When the accounts of Total Beverage are finalized in the next 30 days, we will provide you a copy of these as discussed. However, in the short term, we attach the 2011 Total Beverage financial report and provide you a copy of the term loan summaries from BankSA.

As you are aware the annual provision of **20xx – Total Beverage Loans & Aussie Cherries spreadsheet**, the loan provided by Holt Norman Ashman Baker / Corporate Link is subordinate to the BankSA loan. This was agreed by Phil Nash, Bill Ashman and yourself in July 2008. This was also provided to you in writing on 15 September 2010 at your request – a copy is attached.

Corporate Link loans accrue interest on the same basis as our BankSA costs, these funds are not payable back to Corporate Link until Full payment to BankSA has been made.

[Emphasis in original.]



40. In *NT Resorts Pty Ltd v Deputy Commissioner of Taxation*, Finkelstein J remarked:[25]

...However an allegation that a debt is not due and payable is not always capable of easy resolution. There will be many cases where the court will be required to examine and consider complex issues of fact, sometimes involving the credibility of witnesses, before it could resolve the matter. Thus, an application to set aside a statutory demand could become a hearing of significant proportions. The court may be required to make orders for pleadings and discovery and there may well be cross-examination of witnesses. This would be a most unsatisfactory and unfortunate result. An application to set aside a statutory demand, being a summary process with evidence on affidavit, is hardly an appropriate vehicle for a trial of substantive issues...

41. The observations of Finkelstien J are apposite in this case. In my view, the issue of whether or not the AFSL debt is due and payable is a genuine dispute.

42. In terms of s 459H, I am satisfied that the “substantiated amount” is less than the “statutory minimum”, with the result the Court must proceed in accordance with s 459H(3) and set the statutory demand aside .

### **Varying the demand**

43. Under the terms of the Bank SA loan facility, Total Beverage was unable to provide loans to individual growers in excess of \$200,000. Three clients of Corporate Link were potentially provided with loans that were in excess of the amount permitted by Bank SA. It is alleged by Total Beverage that, to ensure compliance with the loan facility, it was agreed that the three Corporate Link clients would each have \$28,096 (\$84,279 in total) lent against the AFSL debt of \$865,000.

44. It is conceded by Corporate Link that the issue of whether the amount of \$84,279 is to be deducted from the AFSL debt is in genuine dispute.

45. Had I not found that the demand should be set aside, I would have made an order pursuant to s 459H(4) of the Act that amount of the demand be reduced by \$84,279.

### **Conclusion**

46. I would set aside the statutory demand issued to Total Beverage on 21 December 2012.

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[1] Exhibit DG-7.

[2] Exhibit PRH-1.

[3] Exhibit DG-5.

[4] Exhibit DG-8.

[5] *Spencer Constructions Pty Ltd v G&M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452, 464.

[6] *Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd* (1994) 13 ACSR 37, 39.

[7] *Roadships Logistics Ltd v Tree* [2007] NSWSC 1084, [24].

[8] *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, 787.

[9] (1994) 48 FCR 229, 233.

[10] [2002] NSWSC 411, [23].

[11] (1994) 15 ACSR 347, 353-4.

[12] PRH-6.

[13] DG-3.

[14] DG-18 and PRH-5.

[15] DG-13.

[16] DG-14.

[17] *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359, 367.

[18] See also the characterisation of a debt not yet due and payable in *A R Pilot Pty Ltd v Gilouriotis* [2007] NSWSC 396 per Barret J.

[19] [1999] FCA 538.

[20] *Europecars Pty Ltd v Century International Ltd* [1999] FCA 538, [15].

[21] Exhibit DG-9.

[22] Exhibit DG-15.

[23] Exhibit DG-17.

[24] Exhibit DG-16.

[25] *NT Resorts Pty Ltd v Deputy Commissioner of Taxation* (1998) 153 ALR 359.