The Literal and Purposive Approach to Interpretation in Respect to Taxation Legislation

It has often been stated that a strict literal approach should be applied when interpreting taxation legislation.[1] Latham CJ in *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233 at 239, quoting Lord Cairns in *Partington v Attorney-General*,[2] stated the following:

> … as I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

The idea is that courts should not subject a taxpayer to the detriment of a taxation provision unless the provision is clear and unambiguous.[3] It has been stated that if there is any ambiguity, the matter should be resolved in favour of the taxpayer.[4] It is arguable that the principle espoused by Lord Cairns is not surprising given the fact that, in the past, the strict literal approach has enjoyed considerable support in relation to legislation generally.[5] However in recent times the purposive approach has garnered increasing legitimacy.[6] The question is whether or not the purposive approach now has a role to play in the interpretation of taxation legislation? Recent cases now stand as clear authority for

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[1] *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233 at 239 (Latham CJ); *Commissioner of Stamp Duties (NSW) v Simpson* (1917) 24 CLR 209 at 214-215 (Barton J); *Inland Revenue Commissioners v Westminster (Duke)* [1936] AC 1 at 24-25 (Lord Russell of Killowen); *Scott v Cawsey* (1907) 5 CLR 132 at 154-155 (Isaacs J); *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 59-60 (Barwick CJ).

[2] (1869) LR 4 E & I App HL 100 at 122.

[3] *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233 at 243 (Rich and Dixon JJ); *Heward v The King* (1906) 3 CLR 117 at 127-128 (Barton J).

[4] *Liquor Administration Board (NSW) v Wolfe* (1993) 32 NSWLR 328 at 329 (Gleeson CJ).

[5] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-162 (Higgins J).

[6] *Cole v Director-General of Department of Youth and Community Services* (1987) 7 NSWLR 541; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; *Acts Interpretation Act 1901* (Cth) s 15AA.

the principle that taxation legislation should be interpreted just like any other statute.[7] Having said this, there appears to be some hesitancy in judges to move away from the traditional literal approach and to apply the purposive approach as a real alternative.[8]

As previously mentioned, the principle that taxation legislation should be subject to a strict literal interpretation was advocated so a taxpayer would not be forced to contribute funds unless the words of a provision clearly make it so.[9] It is interesting to note that before this principle was established, the approach to interpretation was not always so favourable to taxpayers. Back in 17th century England, after having privatised the collection of stamp duty, the Lord Treasurer, in an attempt to help private collectors in judicial matters, is reported to have stated the following:

> … not doubting but that all disputes … will find the most favourable construction for the King that the words and intention of the act will reasonably bear.[10]

This statement would clearly not have much support in today's political and social climate, but it does illustrate that statutory interpretation principles are not set in stone. One factor that obviously has an influence on which principles will prevail at any one time is the personal views of judges. The influence of particular judges will be discussed later in regard to the judgments of Barwick CJ.

Along with taxation legislation, judges have also, in the past, advocated that penal provisions should be subject to a strict interpretation.[11] It is understandable that a penalty should only be imposed on someone when the words of the legislation clearly make it so, but why is taxation legislation a special category in regards to interpretation? In

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[7] *Deputy Commissioner of Taxation v Chant* (1991) 24 NSWLR 352 at 356 (Kirby P); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 323 (Mason and Wilson JJ).
[8] *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173; *Mills v Meeking* (1990) 169 CLR 214; *Trevisan v Federal Commissioner of Taxation* (1991) 29 FCR 157.
[9] *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233 at 243 (Rich and Dixon JJ); *Heward v The King* (1906) 3 CLR 117 at 127-128 (Barton J).
[10] Graham Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72 *Australia Law Journal* 685, 685.
[11] *Tuck v Priester* (1887) 19 QBD 629 at 638 (Lord Esher MR); *Ex parte Zietsch*; *Re Craig* (1944) 44 SR (NSW) 360 at 365 (Jordan CJ).

Symington v Port Adelaide Corp,[12] Sangster J suggested that the reason is because taxes in some degree operate as penalties.[13] Just like many penal provisions, the operation of a taxation provision often results in the forced extraction of money. In the case *Scott v Cawsey*,[14] which involved the interpretation of a criminal statute, Isaacs J expressly stated that penal and fiscal statutes should be treated the same way.[15] Deane J in *Hepples v FCT*[16] stated that because of the high legal costs associated with litigation, the least a taxpayer is entitled to demand is that a legislative intent to impose taxation will be expressed in clear words.[17]

The principle in favour of a strict literal approach clearly puts the burden on the legislature to ensure taxation legislation is unambiguous; however it has been stated that courts will not go out of their way to impede the operation of taxation provisions.[18] Rowlatt J in *The Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71 ('*Cape Brandy Syndicate*') stated the following:

> … [the principle in favour of a strict literal approach] does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

Although this approach seems to make sense, the judgments in *Cape Brandy Syndicate*, and its subsequent appeal, illustrate a fundamental weakness of the strict literal approach to interpretation.[19] *Cape Brandy Syndicate* involved the *Finance (No. 2) Act 1915* which imposed an excess profits duty on trade or businesses commenced after the outbreak of the First World War in 1914. By subjecting the legislation to a strict literal interpretation, Rowlatt J held that the *Finance (No. 2) Act 1915*, in isolation, did not apply to businesses

[12] (1974) 8 SASR 209.
[13] Ibid 214.
[14] (1907) 5 CLR 132.
[15] Ibid 154-155.
[16] (1991) 173 CLR 492.
[17] Ibid 511.
[18] See *English Sewing Cotton Co Ltd v Inland Revenue Commissioners* [1947] 1 All ER 679.
[19] See *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403.

that commenced after the outbreak of war in 1914. However Rowlatt J eventually held that the appellants were to be taxed because later Acts made it clear that the *Finance (No. 2) Act 1915* was intended to apply in the aforementioned circumstance.[20] The decision was upheld on appeal, but interestingly two of the judges, Scrutton and Younger LJJ, also applying a strict literal approach, found that the *Finance (No. 2) Act 1915*, even without reference to later Acts, did apply to businesses starting after the outbreak of war.[21] This outcome illustrates that words in the English language are inherently ambiguous. The literal approach assumes that a word or a phrase has a single meaning that can be deduced solely from the language on the page. However *Cape Brandy Syndicate* illustrates how different judges, all using the literal approach, can come up with two different meanings of the same provision.

It is arguable that the fact taxation legislation has traditionally been subject to a strict literal interpretation should not come as a surprise. The literal approach has had significant support in relation to all types of legislation. Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-162 ('*Engineers*') stated the following:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.

Even though this passage has been criticised for indicating that the literal approach will apply in every situation no matter what the result, it has often been quoted in support of the literal approach.[22] Given statements like this, it is arguable that the principle that taxation legislation should be subject to a strict literal interpretation simply represents the

[20] *The Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71-72. See also *Attorney-General v Clarkson* [1900] 1 QB 156 at 165 (Sir Francis Jeune).
[21] *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403.
[22] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 319-320.

principle that has applied in relation to all forms of legislation. This position was clearly set out in *Commissioner of Stamp Duties (NSW) v Simpson* ('*Simpson*').[23] Barton J, citing Viscount Haldane in *Lumsden v Inland Revenue Commissioners*,[24] stated the following:

> The duty of Judges in construing Statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of Statutes which impose taxation.[25]

The High Court in *Simpson* sought to determine whether a 'deed poll' constituted a 'settlement' for the purposes of s 49 of the *Stamp Duties Act 1898* (NSW). Section 3 of the *Stamp Duties Act 1898* (NSW) defined the word 'settlement' as meaning 'any contract or agreement'. By adopting a strict literal approach, the court held that only a contract or an agreement could constitute a settlement. There was no serious contention that a deed poll was a contract or an agreement so it was held that s 49 was not applicable. This meant that the taxpayer did not have to pay any stamp duty.

To say that a strict literal approach, like the one advocated by Higgins J in *Engineers*, has traditionally been the primary approach to statutory interpretation is misleading. Lord Dilhorn in *Stock v Frank Jones (Tipton) Ltd*[26] pointed out that since as far back as the 17th Century courts have sought to interpret statutes 'according to the intent of them that made it'.[27] In 1857, Lord Wensleydale in *Grey v Pearson*[28] placed a significant limitation on the literal approach, commonly called the 'golden rule':

> … in construing wills and indeed statutes, and all written documents, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.[29]

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[23] (1917) 24 CLR 209.
[24] [1914] AC 877 at 896.
[25] *Commissioner of Stamp Duties (NSW) v Simpson* (1917) 24 CLR 209 at 216.
[26] [1978] I WLR 231.
[27] Ibid 234.
[28] (1857) 6 HLC 61; 10 ER 1216.
[29] Ibid at 106; 1234.

Interestingly, ten years before Higgins J's espousal of a very strict literal approach in *Engineers*, he quoted with approval Lord Wensleydale's 'golden rule' in *Australian Boot Trade Employes' Federation v Whybrow & Co*.[30] Unlike Higgins J in *Engineers*, the 'golden rule' accepts that certain exceptions must be allowed in relation to the literal approach.

Another rule that seems to contradict the strict literal approach is the 'mischief rule', which has its origins back in 1584 in *Heydon's Case*.[31] The 'mischief rule' allows the court, when interpreting a statute, to consider the mischief which the legislation was enacted to remedy.[32] Therefore, given the existence of these exceptions, it is arguable that the approach to interpreting taxation legislation has been different compared with other types of legislation. Whereas judges have, in some cases, been willing to enforce ambiguous legislation by looking beyond the words of a particular provision, judges have seemingly not been so willing to enforce ambiguous taxation legislation.[33]

The principle that taxation legislation was to be interpreted using a strict literal approach was strongly supported by the former Chief Justice of the High Court of Australia, Sir Garfield Barwick. Barwick was Chief Justice from 1964 to 1981. In that time he decided 74 published income tax cases.[34] Throughout these decisions he advocated the view that the legislature should clearly express its intent, and that it is the court's role to give effect to it.[35] Barwick CJ was not the only judge during his time as Chief Justice to advocate such a principle. Gibbs J in *Western Australian Trustee Executor and Agency Co Ltd v Commissioner of State Taxation of WA*,[36] a case in which Barwick CJ was not involved, clearly expressed the idea that a liability to pay tax 'should not be inferred from ambiguous words'.[37]

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[30] (1910) 11 CLR 311 at 341-342.
[31] (1584) 3 Co Rep 7a; 76 ER 637.
[32] Ibid 7b; 638.
[33] *Brunton v Commissioner of Stamp Duties* [1913] AC 747 at 760; *Attorney-General v Milne* [1914] AC 765 at 781.
[34] Graham Hill, 'Barwick CJ: The taxpayer's friend'?' (1997) 1 *The Tax Specialist* 9, 11.
[35] *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55; *Mullens Investments Pty Ltd v Federal Commissioner of Taxation* (1976) 135 CLR 290; Hill, above n 34, 9.
[36] (1980) 147 CLR 119.
[37] Ibid 126.

Barwick CJ's views on taxation legislation were most clearly expressed in the case *Federal Commissioner of Taxation v Westraders Pty Ltd* ('*Westraders*').[38] This case involved s 36A of the *Income Tax Assessment Act 1936* (Cth), which on a literal interpretation allowed the taxpayer to make a profit and still claim a loss for tax purposes. The Commissioner argued the taxpayer's conduct amounted to a tax avoidance scheme and should therefore be disallowed under s 260 of the *Income Tax Assessment Act 1936* (Cth). Barwick CJ, as part of the majority, rejected this argument and held that, under a literal interpretation, s 36A could apply to allow the taxpayer to claim a loss. Barwick CJ relied on the decision in *Inland Revenue Commissioners v Westminster (Duke)*,[39] which advocated the literal approach be applied when interpreting taxation legislation. Barwick CJ stated that the principle espoused in *Inland Revenue Commissioners v Westminster (Duke)* was 'basic to the maintenance of a free society'.[40] Barwick CJ also stated the following:

> It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax. The function of the court is to interpret and apply the language in which the Parliament has specified those circumstances. The court is to do so by determining the meaning of the words employed by the Parliament according to the intention of the Parliament which is discoverable from the language used by the Parliament. It is not for the court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve, though not expressed in the actual language employed.[41]

In dissent, Murphy J strongly advocated that a strict literal approach cannot be applied, even in relation to taxation legislation, when it contradicts the meaning intended by the legislature.[42]

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[38] (1980) 144 CLR 55.
[39] [1936] AC 1 at 24-25.
[40] *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 60.
[41] Ibid 59-60.
[42] Ibid 80.

The problem with Barwick CJ's application of the literal approach in *Westraders* is that it allowed conduct, which appeared to be a tax avoidance scheme, to be lawful. Barwick CJ argued that a taxpayer has the right to choose a particular form of transaction based on the requirements of a statute.[43] Murphy J rejected this view:

> In my opinion, strictly literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.[44]

Not surprisingly, a year after *Westraders*, the legislature enacted s 15AA of the *Acts Interpretation Act 1901* (Cth), which expressly endorses the purposive approach. Section 15AA states that:

> 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.

Although it is arguable the trend towards the purposive approach actually began prior to the enactment of s 15AA, it is clear that, since the enactment, legislation generally has increasingly been interpreted using a purposive approach.[45]

Unlike the 'mischief rule' or the 'golden rule', s 15AA does not require any absurdity, ambiguity or inconsistency before the purposive approach can be used.[46] In England, the trend has also been away from the strict literal approach. Lord Griffiths in *Pepper v Hart*

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[43] Ibid 60-61.
[44] Ibid 80.
[45] *Director-General of the Department of Corrective Services v Mitchelson* (1992) 26 NSWLR 648 at 654 (Kirby P); *Cole v Director-General of Department of Youth and Community Services* (1987) 7 NSWLR 541 at 549 (McHugh J); *Symington v Port Adelaide Corp* (1974) 8 SASR 209 at 214 (Sangster J).
[46] *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J).

[1993] AC 593 at 617 expressly stated this point:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.

The modern approach to interpretation seems to be that the context of the legislation can be considered at the outset, rather than only when there is some ambiguity.[47] However it is important to note that some judges have sought to place significant limitations on the purposive approach.[48] Burchett J in *Trevisan v Federal Commissioner of Taxation*[49] made it clear that s 15AA does not give the court the power to redraft legislation.[50] He stated that the purpose of a provision must still 'be found in the words of Parliament'.[51] Having said this, there is a clear trend towards the purposive approach. The question is, what impact has this trend had in relation to the interpretation of taxation legislation? There is strong authority for the position that, just like other forms of legislation, a purposive approach should now be applied.[52] However, even after the enactment of s 15AA, there are still remnants of the traditional strict literal approach.[53]

The principle that taxation legislation is a special category, needing to be interpreted using a particularly strict literal approach, was clearly rejected by Sangster J in *Symington v Port Adelaide Corp* (1974) 8 SASR 209 at 214-215:

> One has only to read a series of tax cases on any one point, however, to notice that the emphasis given by the High Court of Australia to this principle has markedly diminished over the years, until by now this principle must, in my opinion, merely take its place amongst the other principles available to be invoked in any given case, and as subordinate to the primary task of looking at the words

[47] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1997) 194 CLR 355 at 381.
[48] *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J); *Trevisan v Federal Commissioner of Taxation* (1991) 29 FCR 157 at 162 (Burchett J).
[49] (1991) 29 FCR 157.
[50] Ibid 162.
[51] Ibid.
[52] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.
[53] *Hepples v FCT* (1991) 173 CLR 492; *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173.

> used and ascertaining whether they have an ordinary and natural meaning, and to the ultimate task of ascertaining what the Legislature meant by the words it used.

It is interesting to note that this statement was made during Barwick CJ's time as Chief Justice of the High Court. Obviously Sangster J thought the principle in favour of a strict literal approach carried less weight than Barwick CJ did.

The idea that a purposive approach now has a role to play in the interpretation of taxation legislation was clearly set out by the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* ('*Cooper Brookes*').[54] Interestingly, the decision in *Cooper Brookes* was handed down while s 15AA was before Parliament, but before it came into operation.[55] The High Court in *Cooper Brookes* sought to determine whether a subsidiary company that incurred tax losses satisfied the 'continuity of beneficial ownership' test under the *Income Tax Assessment Act 1936* (Cth). Section 80C(3) deemed that the references to the loss company in s 80B(5), which is an anti-avoidance provision, be references to the holding company. The problem was that it was the subsidiary company that incurred losses, not the holding company. Therefore, on a literal interpretation, s 80C(3) could have no application. Gibbs CJ, Stephen, Mason and Wilson JJ formed the majority and held that in such a case the literal approach must be departed from. Mason and Wilson JJ stated the following:

> The fact that the Act [*Income Tax Assessment Act 1936* (Cth)] is a taxing statute does not make it immune to the general principles governing the interpretation of statutes. The courts are as much concerned in the interpretation of revenue statutes as in the case of other statutes to ascertain the legislative intention from the terms of the instrument viewed as a whole.[56]

In regards to the 'general principles governing the interpretation of statutes', Mason and Wilson JJ stated that the purposive approach was not confined to cases of 'absurdity' or 'inconsistency'.[57] Mason and Wilson JJ stated the following in regards to when the

[54] (1981) 147 CLR 297.
[55] Jeffrey W Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part One' (1993 - 1994) 22 *Federal Law Review* 116, 168.
[56] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 323.
[57] Ibid 320.

literal approach could be departed from:

> It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.[58]

It is important to note that Gibbs CJ warned that if the language is unambiguous, departing from the literal approach 'may lead judges to put their own ideas of justice or social policy in place of the words of the statute'.[59] It is not the role of judges to override the clear intent of legislation but, given the inherent ambiguity of words, judges often seem to get around such restraints.[60]

As has been mentioned, both *Cooper Brookes* and *Westraders* dealt with anti-avoidance provisions. Anti-avoidance provisions are intended to prevent taxpayers from creating schemes to avoid paying tax. As was clearly evident from Barwick CJ's decision in *Westraders*, a strict literal approach to the interpretation of taxation legislation can allow tax avoidance schemes to take advantage of weaknesses in taxation legislation. It has been stated that Barwick CJ's approach to interpretation was responsible for the demise of the anti-avoidance provision that existed during his time as Chief Justice, s 260 of the *Income Tax Assessment Act 1936* (Cth).[61] In 1981, the same year Barwick CJ retired from the bench and the same year s 15AA was enacted, a new anti-avoidance scheme was enacted in the form of Part IVA of the *Income Tax Assessment Act 1936* (Cth). Part IVA was clearly intended to overcome many of the problems s 260 faced during Barwick CJ's time as Chief Justice. Although Barwick CJ's decision in *Westraders* has been cited in later cases involving tax avoidance schemes, the decision in *Cooper Brookes* suggests

[58] Ibid 321.
[59] Ibid 305.
[60] Ibid 305.
[61] Geoffrey Lehmann, 'The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism' (1983) 9 *Monash University Law Review* 115, 132.

that courts will now adopt a more purposive approach.[62] A purposive approach will make it harder for taxpayers to avoid paying tax because judges will not be constrained by the words of a taxation provision and will be able to look at the purpose behind them.

Kirby P in *Deputy Commissioner of Taxation v Chant* (1991) 24 NSWLR 352 at 356 ('*Chant*') advocated a similar principle to the one expressed by the High Court in *Cooper Brookes*:[63]

> Many of the problems which have bedevilled the construction of the Income Tax Assessment Act have derived from the adoption of a purely textual approach and from a tendency to treat the labyrinthine complexity of the Act as an excuse for dealing with it in a special way, different from that adopted in the case of other statutes. There is no legitimate basis for adopting such an approach to the interpretation of the Act. So far as I am concerned, it is just another statute of the Federal Parliament. Within any authority binding on me, its words must be given their ordinary meaning, so far as possible to achieve their ostensible purpose.

After being appointed to the High Court in 1996, Kirby J applied the principle he espoused in *Chant* in a case called *Federal Commissioner of Taxation v Ryan* ('*Ryan*').[64] In *Ryan*, Kirby J stated the following:

> It [*Income Tax Assessment Act 1936* (Cth)] should be construed, like any other federal statute, to give effect to the ascertained purpose of the Parliament. The taxpayer's construction, which is available, does this. The Commissioner's does not. The former should therefore be preferred.[65]

Ryan dealt with s 15AB of the *Acts Interpretation Act 1901* (Cth). Although s 15AB does not expressly state extrinsic material can be used to ascertain the purpose of a provision, a dissenting Kirby J held that extrinsic material could be used to determine the purpose of a provision in the *Income Tax Assessment Act 1936* (Cth). In *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd*,[66] a case decided before the enactment of s 15AB, Mason J allowed the use of parliamentary debates to determine the meaning of a taxation

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[62] *Trustees of the Walsh Trust v FCT* (1983) 67 FLR 202 at 215 (Shepherdson J); *Re Hatfield Enterprises Pty Ltd & Companies Act* [1982] 1 NSWLR 430; (1982) 40 ALR 513 at 516-517 (Rogers J).
[63] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 323.
[64] (2000) 201 CLR 109.
[65] Ibid 146.
[66] (1982) 150 CLR 355.

provision. Mason J stated that reference to what is said in Parliament is not usually allowed, but it is allowed when the provision is enacted to remedy a mischief.[67]

In 2006, the High Court, while in the process of refusing the taxpayer's appeal in relation to the decision in *HP Mercantile Pty Ltd v Commissioner of Taxation*,[68] clearly indicated that the purpose of a taxation provision was relevant to its interpretation:

> … the statutory scheme and legislative context and purpose carry the day …[69]

The case involved the interpretation of s 11.15(5) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). Although a strict literal approach may have given some support to the taxpayer's argument, the High Court preferred a purposive approach which favoured the Commissioner.[70]

Although the aforementioned cases are clear authority for the position that taxation legislation should be interpreted just like any other form of legislation, some judges have held on to the traditional idea that a strict literal approach should be applied when interpreting taxation legislation.[71] Deane J in *Hepples v FCT*[72] clearly favoured the principle that taxation legislation should be subject to a strict literal interpretation, and stated that such an approach was supported by 'common sense'.[73] In *Hepples v FCT*, the taxpayer, on ceasing to be employed, was paid $40,000 by his employer. The payment was in exchange for the taxpayer agreeing he would not carry on, or be interested in, certain businesses and would not divulge any trade secrets. The issue was whether or not the payment would form part of the taxpayer's assessable income for the purposes of the *Income Tax Assessment Act 1936* (Cth). Deane J held that because the Act did not make it

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[67] Ibid 373.
[68] [2005] FCAFC 126; (2005) 143 FCR 553.
[69] Transcript of Proceedings, *HP Mercantile Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (High Court of Australia, Gummow ACJ and Kirby J, 16 June 2006).
[70] Ibid.
[71] *C & J Clark Ltd v Inland Revenue Commissioners* [1975] 1 WLR 413 at 419 (Scarman LJ); *BP Refinery (Westernport) Pty Ltd v Hastings Shire* (1977) 180 CLR 266 at 280.
[72] (1991) 173 CLR 492.
[73] Ibid 511.

clear that such payments would form part of a taxpayer's assessable income, which the legislature could easily have done, the payment was not assessable.

The tension between the literal approach and the purposive approach was clearly illustrated in the case *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd*.[74] In this case, the court sought to determine whether a duty could be imposed on a taxpayer in regards to rent that was to be determined in the future. Whether duty could be imposed depended on the interpretation of the term 'rent reserved' in s 78D of the *Stamp Duties Act 1920* (NSW). If it was held that 'rent reserved' had a broad meaning, more in line with the term 'rent payable', then duty could be imposed. It was clear that the purpose of the *Stamp Duties Act 1920* (NSW) would be promoted by a broad interpretation of 'rent reserved'. Although the court interpreted the term 'rent reserved' as meaning the same as 'rent payable', they did not expressly use the purposive approach. The court did not refer to s 33 of the *Interpretation Act 1987* (NSW), which is the equivalent of s 15AA of the *Acts Interpretation Act 1901* (Cth). Although Kirby P agreed that the strict literal approach has now been abandoned, which he had stated previously in *Chant*,[75] he warned that courts must give effect to the actual words used in a provision:

> The court is bound to give effect to the purpose of Parliament as expressed in its language. If, by that language, the possible objective of the Commissioner misfired, that was simply the consequence of the choice of a technical expression. Revenue legislation is full of technical expressions. It is not for the court to cure problems presented by the language chosen.[76]

This passage is similar to Burchett J's warning in *Trevisan v Federal Commissioner of Taxation*[77] that the purpose of a provision must still 'be found in the words of Parliament'.[78] Instead of applying a purposive approach, Kirby P simply found that the term 'rent reserved' had a meaning other than its technical meaning. Kirby P held that the

[74] (1995) 38 NSWLR 173.
[75] (1991) 24 NSWLR 352 at 356.
[76] *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173 at 175-176.
[77] (1991) 29 FCR 157.
[78] Ibid 162.

term 'rent reserved' meant nothing more than 'rent agreed to be paid'.[79] This case illustrates that although the strict literal approach has been abandoned, the courts are seemingly still not completely comfortable applying the purposive approach.

The apparent abandoning of the strict literal approach does not mean courts do not still regard the imposition of taxation as a serious matter. Courts will not give effect to taxation legislation that is imposed in 'an arbitrary or capricious manner'.[80] If the legislation is not sufficiently clear then a court may decide that they have no option other than to hold that the taxpayer is not to be taxed.[81]

Along with the demise of the strict literal approach, the idea that ambiguities should be resolved in favour of the taxpayer has also apparently been rejected.[82] The principle that ambiguities should be resolved in favour of the taxpayer was particularly used in relation to exemption and exception provisions.[83] However it now seems that, as is the case with all other types of legislation, a purposive approach will be preferred.[84]

As well as provisions that impose taxation, taxation legislation also contains provisions that allow taxpayers to object to the amount of tax imposed and then to seek a review of the assessment. As indicated by Balmford J in *Port of Melbourne Authority v Melbourne City Council (No. 2)*,[85] some of the principles espoused in relation to taxation legislation are only applicable to provisions that impose taxation, rather than provisions that create rights of objection and review.[86] Having said this, Balmford J cited the aforementioned quote by Mason and Wilson JJ in *Cooper Brookes* stating that the 'courts are as much concerned in the interpretation of revenue statutes as in the case of other statutes to

[79] *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173 at 176.
[80] *MacCormick v FCT* (1984) 158 CLR 622 at 640.
[81] *Customs and Excise Duty Commissioners v Top Ten Promotions Ltd* [1969] 1 WLR 1163 at 1178 (Lord Wilberforce).
[82] *DFCT v Sheehan* (1986) 86 ATC 4718 at 4728 (Tadgell J).
[83] *Burt v FCT* (1912) 15 CLR 469 at 482 (Barton J).
[84] *Diethelm Manufacturing Pty Ltd v FCT* (1993) 44 FCR 450 at 457 (French J).
[85] [2004] VSC 217.
[86] Ibid [40].

ascertain the legislative intention from the terms of the instrument viewed as a whole'.[87] Balmford J held that this principle was applicable to all types of taxation legislation. It is interesting to note that Balmford J adopted a fairly liberal construction of the provision in question, which is somewhat analogous to the way courts deal with remedial provisions.[88]

From this analysis of cases dealing with taxation legislation, it is clear that the principle that taxation legislation should be subject to a strict literal interpretation, which was advocated back in 1869 by Lord Cairns, is no longer applicable.[89] Although remnants of the traditional approach remain, there is an obvious trend towards a more flexible purposive approach. Since cases such as *Cooper Brookes*[90] and *Ryan*,[91] it is clear that taxation legislation will be interpreted using the same principles that apply to all forms of legislation. In my opinion, the seeming unwillingness of the court to apply the purposive approach in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd*[92] represents an unwillingness that applies in relation to legislation generally, rather than just in relation to taxation legislation. As mentioned earlier in regard to Burchett J's decision in *Trevisan v Federal Commissioner of Taxation*,[93] judges seem eager to place limitations on the purposive approach, rather than applying it as a real alternative to the literal approach.

[87] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 323.
[88] *Bull v Attorney-General (NSW)* (1913) 17 CLR 370.
[89] *Partington v Attorney-General* (1869) LR 4 E & I App HL 100 at 122.
[90] (1981) 147 CLR 297.
[91] (2000) 201 CLR 109.
[92] (1995) 38 NSWLR 173.
[93] (1991) 29 FCR 157 at 162. See also *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J).

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