STAMP DUTY

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A. REFINANCING OF NSW MORTGAGES

On the basis of announcements made by the New South Wales Treasurer when delivering the State Budget on 21 May, the financial press carried stories under various headlines indicating some form of abolition of loan security duty on mortgages. In spite of the impression which may have been created by those headlines the government's proposals do not involve the **abolition** of loan security duty at large. Rather, the proposals are directed to preserving the benefit of loan security duty paid upon a mortgage over New South Wales property as at the time of its refinancing. This outcome is to apply regardless of whether the refinancing involves an assignment from the existing financier/mortgagee to a new financier/mortgagee or the discharge of an existing mortgage and the grant of a new mortgage.

The stated policy objective underlying the proposal was to remove a financial impediment to mortgagors refinancing existing mortgages on terms more favourable to the mortgagor. In the words of the New South Wales Treasurer: *"Now borrowers will be able to chase the best interest rate deals. Up until now banks and financial institutions have been protected by this tax on refinancing."* According to the Treasurer's announcement, the measures would commence with effect from 1 July 1996, but it is understood that it is now proposed that they commence as at 1 June 1996.

Although the technical means by which this outcome would be achieved were not indicated in the Treasurer's announcement, they would inevitably involve an effective abolition or displacement of the operation of section 84CAB of the Stamp Duties Act 1920 (the NSW Act) and a possible extension of the operation of section 84CAA of the NSW Act. Discussions with representatives of the New South Wales Office of State Revenue have confirmed this is so and provided the following examples of the way in which the proposal would operate.

Assume that:

- a mortgage over New South Wales property has been stamped with loan security duty under the NSW Act to cover borrowings of an amount of $200,000;
- the mortgagor wishes to refinance the debt with a different financier at a time when the indebtedness secured has been paid down to $100,000;
- the substitute financier will take either an assignment of the existing mortgage or a new mortgage in place of the existing mortgage;

- following the refinancing the mortgagor borrows a further $200,000 in two tranches of $50,000 and $150,000 respectively.

If there had been an assignment of the existing mortgage in connection with the refinancing, the further advance of $50,000 would attract no liability to loan security duty (since the total indebtedness secured of $150,000 would not exceed the existing stamp duty coverage) and the further advance of $150,000 would attract a liability to loan security duty calculated by reference to the amount of $100,000 (being the amount of the secured indebtedness exceeding the existing stamp duty coverage). If the existing mortgage had been discharged and a new mortgage granted to the new financier, there would be a liability to stamp the new mortgage with loan security duty only when and to the extent that the indebtedness secured exceeded the amount by reference to which the prior mortgage had been stamped (ie at the time of the further advance of $150,000 and by reference only to the amount of $100,000).

As noted, it is likely that the achievement of these outcomes would involve an effective abolition of section 84CAB and an extension of the scope of section 84CAA of the NSW Act:

Section 84CAB

Although an assignment of a mortgage is itself exempt from duty pursuant to section 97AE of the NSW Act, such an assignment would have significant loan security duty implications in the event of an advance under or secured by the assigned mortgage at the time of or following the assignment. Those implications would be attributable to the operation of section 84CAB of the NSW Act. The effect of that section is that an assigned mortgage over New South Wales property is deemed to be a new mortgage on which no loan security duty has been paid where the mortgage is assigned to:

- a person who, in connection with the assignment or at a later time, makes an advance or additional advance under or secured by the mortgage; or

- a person who does not make such an advance but who is a party to arrangements under which such an advance is made.

This produces the result that, when determining whether loan security duty is payable in respect of the advance made at the time of the assignment or subsequent to the assignment, no credit is available in respect of loan security duty which had been paid upon the loan security as at the assignment. Thus, in the example considered above, section 84CAB would operate such that no account would be taken of the loan security duty paid to cover indebtedness of $200,000 when determining what liability to loan security duty would arise in connection with the refinancing. Furthermore, by virtue of sub-section (6) of section 84CAB no credit would be available in respect of such duty when determining the liability for duty payable upon a security which is collateral with the assigned mortgage. Prior to amendments to section 84CAB operating with effect from 1 January 1993, the section would have applied only where the assignment of the mortgage had occurred at the instigation of the mortgagor. With effect from 1 January 1993, it became immaterial to the application of the section whether the assignment of the mortgage was at the instigation of the mortgagor or the mortgagee.

It is noteworthy that section 84CAB applies where there is a legal assignment of the mortgage even though there may be no change in beneficial entitlements. Conversely, the section would not apply where there was a change in beneficial ownership of the mortgage but no change in legal title. The operation of the section in a case where the assignment effected only a change in legal title but no change in beneficial ownership caused practical problems where a security trustee holding mortgages for the benefit of other financiers was replaced by another security trustee. In that case, even though the financier beneficiaries for whom the mortgage was held on trust may not have changed, any advances or draw downs made under or secured by the mortgage following the change in security trustee would have attracted the operation of section 84CAB and a liability to loan security duty irrespective of the amount of loan security duty previously paid upon the mortgage.

It is also noteworthy that it is a precondition to the operation of section 84CAB that there be an advance of moneys made in connection with or subsequent to the assignment of mortgage. For these purposes a payment of moneys by a new financier to an existing mortgagee at the request of the mortgagor and in consideration of an assignment of the mortgage would constitute an advance by the new financier. If, as is likely to be the case, the advance would fall within the moneys secured by the assigned mortgage, the New South Wales Commissioner of Stamp Duties expresses the view in Revenue Ruling SD 236 that the advance would attract the operation of section 84CAB. The ruling concedes that, where the mortgage is assigned at the instance of the mortgagee without a request on the part of the mortgagor, there would generally be no advance attracting the operation of section 84CAB at the time of the assignment of the mortgage. In those circumstances the Commissioner presumably considers that any payment of purchase price by the assignee mortgagee to the assignor mortgagee would not have constituted an advance to the mortgagor by the assignee mortgagee. However, even in the case where the assignment was made at the instance of the mortgagee and not at the request of the mortgagor, any subsequent advance made under or secured by the mortgage would according to the ruling (and quite consistently with the terms of the section) attract the operation of section 84CAB.

If, as anticipated, the implementation of the Treasurer's proposals involves the effective abolition of section 84CAB, the consequence would be that loan security duty paid upon a mortgage which was assigned would be taken into account in computing the duty payable upon the assigned loan security or a collateral security in respect of an advance at the time of or subsequently to the assignment. It is significant that an effective credit for existing loan security duty would only be preserved through the abolition of section 84CAB where the mortgage upon which the duty has been paid remains on foot and is not discharged. Accordingly, the government's apparent policy objective of assisting borrowers to refinance existing debts on more favourable terms would only partially be achieved by an effective abolition of section 84CAB. If, as appears to be the case, the government also wishes to facilitate refinancing in circumstances where the stamped mortgage is discharged, section 84CAA provides one example in limited circumstances of how this might be achieved.

Section 84CAA

According to Revenue Rulings SD 123 and 186, section 84CAA was inserted into the NSW Act to assist primary producers to refinance loans to take advantage of more competitive interest rates and loan packages. Sub-section (1) of section 84CAA provides that, notwithstanding any other provision of the NSW Act, duty is not chargeable on so much of the advance under a mortgage as secures the balance outstanding under an earlier mortgage where:

- the latter mortgage applies to the same, or substantially the same, land; and
- the land is used for primary production or for commercial fishing.

In Revenue Ruling SD 123 the New South Wales Commissioner considered the operation of section 84CAA in a case where a mortgage over primary production land which secured (and was presumably stamped to cover) an advance of $100,000 was refinanced when the outstanding indebtedness had reduced to $50,000. The example postulates that a new financier paid out the secured indebtedness of $50,000 and took a new mortgage over the same land. In that case, by virtue of section 84CAA, the new mortgage would be exempt from loan security duty in relation to only the first $50,000 of indebtedness secured (being the outstanding indebtedness under the original mortgage at the time of refinancing). The benefit of the loan security duty paid on the original mortgage in respect of the additional $50,000 originally borrowed would be lost. This outcome would not correspond with the Treasurer's proposal which would be to preserve the benefit of all loan security duty paid on the earlier mortgage and not merely the loan security duty referable to the level of secured indebtedness outstanding at the time of refinancing. Thus, in the example considered in Revenue Ruling SD 123, the result of the Treasurer's proposal would be that the new mortgage would be exempt from loan security duty in respect of the first $100,000 indebtedness secured.

The scope of the protection conferred by sub-section (1) of section 84CAA was expanded with effect from 23 April 1991 by the addition of sub-section (2) of the section. According to sub-section (2) the protection from duty afforded by section 84CAA applies where the later mortgage applies to additional land or additional assets other than land. According to Revenue Ruling SD 186 the addition of sub-section (2) was required notwithstanding that the later mortgage over additional land or assets other than land would be collateral to an earlier mortgage. If the earlier loan security had itself obtained an exemption from duty through the operation of section 84CAA, the subsequent collateral securities over additional land or assets other than land would, in the absence of section 84CAA(2), be liable to full ad valorem duty since the earlier loan security to which they were collateral would have been exempt from duty. Thus, there would not be any duty to credit against the duty to which the collateral securities would have been liable in the absence of section 84CAA(2) of the NSW Act.

B. HIRING ARRANGEMENT DUTY - HIRE PURCHASE AGREEMENTS - NEW SOUTH WALES BUDGET ANNOUNCEMENT

In delivering the New South Wales Budget the Treasurer announced that, following consultation with the finance industry, New South Wales hiring arrangement duty would be levied on a broader base from 1 October 1996 but, subject to one qualification, the rate of duty would be halved to ensure revenue neutrality. The qualification is that the existing rate of duty would apply to short term consumer hiring and other non-financial rentals. The Treasurer did not expressly state in what way the duty base would be broadened. However, a representative of the New South Wales Office of State Revenue has said that commercial hire purchase agreements and other financing arrangements would be included in the duty base.

The first Exposure Draft for the stamp duties rewrite proceeded on the present basis that there would be an exemption from hiring arrangement duty or its counterpart for "hire purchase agreements". However, the effective scope of that exemption from hiring arrangement duty or its counterpart would be narrowed by a new definition of an eligible "hire purchase agreement" which would in practice have excluded many commercial hire purchase agreements. Under the NSW Act the current definition of a "hire purchase agreement" in section 74D(1) extends to a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments but does not include an agreement:

- whereby the property in the subject goods passes at the time of agreement or on or at any time before delivery of the goods; and

- for the letting of goods or an agreement for the purchase of goods together with real property or an interest in real property or with any business or interest in a business.

The effective definition proposed for the purposes of the rewrite Draft extends to an arrangement that would result in the ownership of goods by the person to whom they are hired except where this occurred by the exercise of an option. Thus, if an agreement regarded commercially as a hire purchase agreement provided for ownership of the hired goods to be acquired by exercise of an option, the agreement would be subject to the duty imposed upon arrangements for the hire of goods and would not qualify for exemption from that duty. An agreement which would qualify for exemption from the duty imposed upon a hire of goods (eg because ownership would be acquired otherwise than by exercise of an option) would nonetheless be liable to ad valorem conveyance duty at the time ownership was acquired by the bailee if the subject matter comprised dutiable property. This would be the case if, for example, at the time the ownership passed the subject matter of the hire purchase agreement had become fixtures.

By its Budget announcement the New South Wales Government has confirmed and accelerated the imposition of hiring arrangement duty upon hire purchase agreements. It remains to be seen whether and how the other jurisdictions involved in the rewrite will respond.

Two particular matters are noteworthy in relation to the Budget announcement. First, the definition of the distinction between financing and non-financing hiring arrangements will be critical since it will determine which rate of duty (the existing rate or the new 50% rate) is to

apply. Secondly, the announcement made no mention of the cap on hiring arrangement duty currently applicable in New South Wales ($10,000) provided that certain preconditions are satisfied. Obviously, the announcement is of much greater significance if the financing arrangements to be subjected to the new lower rate of hiring arrangement duty are not entitled to a cap on the duty imposed at the new rate.

C. HIRING ARRANGEMENT DUTY / BUSINESS RENTAL DUTY - ANCILLARY USE OF GOODS

Introduction

There are many commercial arrangements frequently entered into which involve one of the parties to the arrangement using goods (moveable property) belonging to another party to the arrangement. Under some such arrangements the use of the goods is the essence of the arrangement. A casual hiring of a motor vehicle from a car rental company or a finance lease of plant and equipment provide but two of many examples in this category. In contrast there are arrangements where the use of goods is merely incidental or ancillary to the essence of the arrangement. An example in this category arises where the provider of telecommunications or electronic services supplies to the consumer an item of equipment to be used in the reception of the service where the property in the equipment remains with the service provider. Another example arises where one party confers intellectual property rights upon another person and access to the intellectual property is obtained through the use of physical medium (eg tape or disk) which remains the property of the first party. In such a case the provider of the service or intellectual property rights may retain ownership of the equipment, rather than sell it to the consumer, because the equipment provides the effective technical protection against piracy by other persons or the cost of the equipment would be disproportionate to the value of the service provided or because legislation regulating the arrangements requires it.

In the first category there is really no doubt that the arrangement should be characterised as one for the use of goods. In the second category the incidental or ancillary nature of the use of goods raises two difficult questions:

- Is the use of the goods so insignificant in relation to the essential nature of the arrangement that it should be characterised purely as an arrangement for the provision of services?

- If the use of goods is sufficiently significant to require recognition in characterising the arrangement, should the goods be regarded as being used by the service provider or by the consumer or by both parties?

In all walks of economic activity the exploitation of intellectual property and information technology has assumed a much greater significance. Financial institutions and, in particular, banks, have not been immune from this development. According to the *Australian Financial Review* of 23 May banks are currently spending approximately 33% more on information technology than other financial institutions. The computerisation of banking systems and the development of electronic banking services have involved banks as both consumers and providers of intellectual property and information technology. For example, the computer systems used by a bank for the keeping of its voluminous records might well involve the grant to the bank of a licence to use computer software which incorporates a licence to exploit the copyright in the software and an agreement for the furnishing of information. In such a case the bank is a consumer. The banking and funds transfer services offered by banks to the commercial community (eg EFTPOS or credit or debit cards) may well involve a bank as a provider of intellectual property rights or information technology.

From a legal perspective arrangements of the kind under consideration are generally characterised as involving a provision of services or dealings with intangible property (recognising that information does not constitute property at law). However, two recent decisions of the Victorian Supreme Court focus attention upon the extent to which such arrangements

might involve a use of goods by a person other than the owner of such goods. The cases are *Roadshow Distributors Pty Limited v Commissioner of State Revenue (Vic)*[1] and *Taxiway Pty Limited v Commissioner of State Revenue (Vic)*.[2]

The need to characterise arrangements in terms of a use of goods arises as a result of the revenue law implications. The stamp duties legislation of all Australian jurisdictions (other than the ACT) creates liabilities for stamp duty in respect of arrangements for the use by one person of goods owned by another ("hiring arrangement duty") or the conduct of a business involving the use by one party of goods owned by another ("rental business duty"). Furthermore, the Australian income tax legislation has attached and continues to attach significance to the question. For example, income properly characterised as a receipt from the grant of rights to use goods might be treated as a royalty having a different source from income characterised as receipts from the provision of services. At various times a deduction for the investment allowance in respect of eligible plant or equipment would, subject to certain exceptions, have been denied to a taxpayer who granted rights to use the equipment to another person.

Stamp Duty

In all Australian jurisdictions, other than the Australian Capital Territory, the stamp duties legislation imposes a liability for ad valorem duty by reference to certain arrangements whereby goods are used by a person other than the owner of those goods and a payment is made for or in relation to the use of the goods. Although there are differences, the stamp duties legislation in Victoria, Western Australia, South Australia, Queensland and Tasmania follows a pattern of requiring a person who carries on a business of leasing or otherwise giving rights to use goods (having a relevant connection with the jurisdiction concerned) to register in that jurisdiction and to pay stamp duty by periodic return. The duty is calculated by reference to the amounts received in respect of that business for or in relation to the use of the goods. The rate of duty varies from 0.43% to 2% depending upon the jurisdiction and, in the case of Victoria and Tasmania, the total duty payable for the use of goods which may not be replaced or substituted by other goods is subject to a cap.

The stamp duties legislation in New South Wales and the Northern Territory differs from that applicable in the other jurisdictions in that it imposes a hiring arrangement duty in respect of any arrangement involving the grant of rights to use goods (having a relevant connection with the jurisdiction concerned) irrespective of whether the arrangement is a one-off arrangement or whether it forms part of a business. Furthermore, it is not obligatory for the person granting the rights to use the goods to register with the stamp duty authority, but certain commercial and stamp duty incentives encourage such persons to do so. The hiring arrangement duty is imposed at the rate of 1.5% by reference to the amounts paid under the hiring arrangement and in both jurisdictions there is a cap on the total duty payable where the goods concerned may not be replaced or substituted by other goods.

The jurisdictions of New South Wales, Victoria, Australian Capital Territory, Tasmania and South Australia are involved in a process of substantially rewriting the stamp duties legislation with a view to achieving greater uniformity and simplicity. It is unlikely that any reformed legislation will commence prior to 1 January 1997. To date Queensland has not participated along with the other jurisdictions in that process and it has separately been undertaking a major rewrite of its stamp duties legislation. However, following the recent change of government in Queensland there is a real prospect that Queensland will join with the other jurisdictions in the rewrite process. On the basis of the draft legislation released for discussion purposes by the five participating jurisdictions, there will continue to be a liability for duty in respect of payments made for the use of goods by a person other than the owner under the reformed legislation. On the basis that the

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1 95 ATC 4663.

2 95 ATC 4667.

reformed legislation finally enacted does not depart in material respects from the Exposure Draft, the issues under consideration will remain relevant under the reformed legislation enacted.

Threshold Characterisation

In a case where the use of the goods is incidental or ancillary to the essential nature of the arrangement, the parties are faced with a threshold issue. The question is whether or not the use of the goods should be expressly recognised and a consideration for the use of the goods (eg licence fee or rental payment) expressly attributed to the use of the goods. A person providing services or intellectual property rights which involved a use of that person's goods may take the view that the arrangement should be characterised purely as a provision of services or intellectual property rights and that to recognise any part of the fee paid as relating to the use of goods would be to distort the true nature of the arrangement.

The risk associated with that approach is that a stamp duty authority may take a contrary view that the arrangement should be characterised as involving a use of goods. In that case the stamp duty authority may also consider that the whole of the payments received under the arrangement should be characterised as payments for the use of the goods. If the parties to the arrangement had **not** expressly apportioned the fee as between the provision of the services or intellectual property rights and the use of the goods, the stamp duty authority may seek to levy rental business duty or hiring arrangement duty upon the whole of the fee. By allocating a part of the service fee expressly to the use of the goods, it would (prior to the decision in the *Roadshow* and *Taxiway Cases*) **in practice** have been much more likely that the stamp duty authority would simply levy the duty by reference to the expressly allocated consideration. This would particularly have been so if the consideration allocated reflected a reasonable arm's-length appraisal of the respective value of the service provided and the use of the goods. In a case where the use of the goods was fairly regarded as ancillary or incidental to the essential nature of the arrangement, it should have been accepted as reasonable to allocate a relatively small proportion of the total fee to the use of the goods.

In practice it was not always the case that the stamp duty authority would levy duty by reference to the whole of the fee where no apportionment of the consideration referable to the use of the goods had been made. On some occasions the stamp duty authority in some jurisdictions have adopted a pragmatic approach to determining the base for the imposition of hiring arrangement duty or rental business duty where no such allocation had been made. For example, in several instances the stamp duty authority of two Australian jurisdictions accepted that an undissected fee for the provision of services should be apportioned between the services and the use of equipment on the basis that the owner of the equipment would expect to recover its original cost over its effective economic life together with a commercial return approximating an average rate of interest. An amount calculated in this fashion was treated as consideration for the use of the goods and the balance of the fee was recognised as referable to the provision of the services However, the stamp duty authorities have not always been so accommodating as the decisions in the cases of *Roadshow Distributors* and *Taxiway* demonstrate.

The Roadshow Case

Roadshow entered into distribution agreements with head distributors (such as Warner Bros (Australia) Pty Ltd) which conferred upon Roadshow intellectual property rights in respect of films. The rights generally entitled Roadshow to exhibit the artistic work for reward in certain locations. Roadshow in turn entered into simple form agreements with exhibitors expressed in terms of a grant of a licence to screen a film in public. Roadshow would provide the distributor with a print of the film for exhibition. The exhibitor was obliged to pay a fee for the rights granted and a delivery charge of a specified sum in respect of each film.

Roadshow asserted that:

- The true subject of the agreement between it and the exhibitors was the intellectual property and that the arrangement should not be characterised as a leasing or giving of rights to goods.

- From a commercial point of view the dominant aspect of its business was to derive profit, not from the celluloid upon which the film was recorded, but from the images and sound track on the film.

- The celluloid film was simply a vehicle for achieving this predominant commercial objective and its value was insignificant by comparison with the artistic work.

The Victorian Commissioner of State Revenue argued that:

- The celluloid film should not be seen as an insignificant aspect of Roadshow's commercial activity.

- The cost to Roadshow for the prints of films represented a significant proportion of the gross revenue which Roadshow earned from the films distributed to exhibitors.

- The true nature of the business of Roadshow comprised the granting of rights to use goods comprising the prints of the film with the attendant right to the copyright.

Byrne J of the Victorian Supreme Court on appeal characterised the business of Roadshow as one of letting or bailing the celluloid films to exhibitors and giving to exhibitors the right to use those films including the right to use the images and sound track on the films. According to the court this comprised a rental business. It followed in the court's view that, with the exception of the delivery fee, the whole of the consideration received by Roadshow comprised receipts in respect of rental business attracting rental business duty.

It appears from the judgment that the principal factor leading to this conclusion was that the intellectual property rights vested in Roadshow and conferred upon the exhibitors could not be exploited except through the use of the celluloid film. Accordingly, the intellectual property rights were of no value from the perspective of Roadshow or the exhibitor without the celluloid film.

An appeal has been lodged against the decision of Byrne J.

The Taxiway Case

Taxiway was the owner of a number of licensed taxis. Taxiway entered into agreements entitled "Driver Leasing Agreements" with licensed taxi drivers pursuant to which Taxiway leased the vehicle to the driver. In return the driver/lessee agree to pay to Taxiway as rent for the leasing of the taxi **and** of the taxi licences an amount comprising a percentage of the gross revenue received by the driver/lessee from the hiring of the vehicle. The percentage of the gross revenue was expressly apportioned as to 20% for the rental of the taxi and 80% for rental of the licence. The issue before the court was whether Taxiway conducted a rental business and whether rental business duty was payable by reference to 100% of the fee paid by the driver/lessee or only 20% of that amount which had been expressly apportioned to the use of the taxi (as distinct from the taxi licence).

Taxiway asserted that:

- Its activities should not be characterised as a business of letting, bailing or otherwise giving rights to the use of goods (ie taxis) but, rather, that of conducting a taxi business in a common enterprise with the drivers.

- Alternatively the business of Taxiway should be characterised as that of renting choses in action (being the taxi licences) to which the taxi vehicle was purely an incidental adjunct.

The Victorian Commissioner asserted that the activities of Taxiway should be characterised as a business of letting, bailing or giving rights to the use of goods (comprising the taxis) and that the whole of the amount paid by the driver to Taxiway comprised an amount received in respect of that rental business for or in relation to the use of the goods. Accordingly, the Commissioner asserted that the whole of the fee paid by the driver to Taxiway attracted rental business duty.

The court concluded that the proper characterisation of the business of Taxiway comprised granting to drivers the rights to use licensed vehicles. Accordingly, that business comprised a rental business. Furthermore, since the court characterised the subject matter of the agreement as licensed taxis as a composite whole, the court considered that 100% of the amount paid by the driver was referable to the use of the licensed taxis and attracted hiring arrangement duty.

The judgment in the *Taxiway Case* was delivered by the same judge as decided the *Roadshow Case* and judgment was handed down on the same day. It is hardly surprising then that the court adopted a similar process of reasoning to that adopted in the *Roadshow Case*. The factor which appears to have been most significant in the reasoning of the court was that it would be commercially and practically impossible to use the taxi vehicle without the taxi licence. In other words the taxi had no practical value without the taxi licence associated. Accordingly, it was not realistic to sever the taxi licence from the taxi for the purposes of characterising the business carried on by Taxiway or the nature of the consideration received by Taxiway.

Implications of the Decisions

In the *Taxiway Case* the agreement between Taxiway and the driver purported to allocate the fee paid by the driver as between the taxi vehicle and the taxi licence. In the *Roadshow Case* the agreement between Roadshow and exhibitors did not purport to apportion the consideration paid by the exhibitor as between the copyright sub-licence and the use of the celluloid film (although a separate delivery fee was charged). In the *Taxiway Case* the apportionment of the fee paid by the driver as between the use of the taxi vehicle and the use of the taxi licence was **not** accepted by the court as effective in restricting the imposition of rental business duty to that proportion attributed to the use of the goods. The reasoning of the court was that the taxi vehicle could not be used without the associated taxi licence and that it was not realistic to sever the licence from the vehicle. In the *Roadshow Case*, when characterising the nature of the business conducted by Roadshow, the judge expressly found that the intellectual property rights could not be separated from the right to use the celluloid film print since it would in practice be impossible for exhibitors to take advantage of the copyright licence without using the celluloid print. Accordingly, it seems highly likely that, even if there had been an express apportionment of consideration as between the right to use the celluloid film and the copyright sub-licence, the court would have found the apportionment ineffective to restrict the rental business duty to that proportion of the fee referable to the use of the celluloid film.

In the course of the judgment in the *Taxiway Case* the court acknowledged that "in the appropriate case" an arrangement involving the use of goods which was purely an incidental adjunct to the true business would not be characterised as rental business. The court made reference to the decision in *ANI Corporation Ltd v Commissioner of State Taxation (WA)*[3] in which it was accepted that the business of a hirer of plant and equipment could not be transformed into that of a retailer of petrol or other goods simply because such items were sold as a by-product of the rental activity.

In both cases there is no doubt that the major factor taken into account by the court was that the rights to use property other than goods (ie copyright or taxi licences) could not in practice be

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3 90 ATC 4714.

exploited without the use of goods (ie the celluloid film or the taxi vehicle). This conclusion would equally be reached in most of the circumstances in which the fundamental issue of characterisation arises. Consider, for example, a provider of banking services who makes the services available to the consumer through equipment which remains the property of the service provider. In such a case the use of the equipment is the fundamental prerequisite to obtaining the service. In a practical and commercial sense the service has no value and cannot be obtained without the use of the equipment. Even if the agreement between the service provider and the consumer expressly apportioned the fee as between the provision of the service and the use of the equipment, the approach taken by the Victorian Commissioner and the Victorian Supreme Court in the two cases suggests that rental business duty may be imposed upon the whole of the fee.

To the extent that the stamp duties legislation in a number of other Australian jurisdictions is materially similar to the Victorian provisions, the possibility is raised that the same approach would in future be adopted by the stamp duty authorities in those other jurisdictions. In the case of New South Wales it is revealing to note that the outcome of the decision in the *Taxiway Case* was anticipated by the New South Wales Commissioner in Revenue Ruling SD 53. That revenue ruling dealt with the circumstances in which hiring arrangement duty would be payable and described a number of differing circumstances. In relation to arrangements for the lease of a taxi plate the ruling indicates that hiring arrangement duty would be payable in respect of the fee for such a lease since the taxi plate comprises an "inseparable component of hiring arrangement as far as use of goods (taxi-cab) is concerned. Without registration plates the goods are unusable." This would suggest strongly the possibility that the New South Wales Office of State Revenue would take an identical approach to the Victorian authority in the same circumstances. That prospect is reinforced by Revenue Ruling SD 226 where it is asserted that hiring arrangement duty would be assessed on the total amount payable under an arrangement for the use of a complete computer system comprising both hardware (goods) and software (non goods).

Through the auspices of the Law Society - Office of State Revenue Liaison Committee, the author raised with the New South Wales Office of State Revenue the question of the implications of the two Victorian decisions for the practice of the New South Wales Commissioner of Stamp Duties. A recent response from the Office of State Revenue indicates that the decisions of the Victorian Supreme Court in the two cases are consistent with the current practice adopted by the New South Wales Commissioner. In particular the response indicated that in such cases a purported apportionment of consideration as between the use of goods, on the one hand, and the other rights provided, on the other hand, would be disregarded and hiring arrangement duty would be calculated upon the total amount payable under the arrangement. However, the response also indicated that there may be a case where the use of goods is incidental to the arrangement and the goods are provided without charge or without any separate allocation of consideration. In such a case it was acknowledged that no hiring arrangement duty would be payable in respect of the use of the goods.

The response from the Office of State Revenue does not provide any guidance to taxpayers as to the circumstances in which a use of goods would be regarded as incidental such that no hiring arrangement duty would be payable. That is understandable given the difficulty often involved in characterising the arrangements and the extent to which a particular characterisation would depend upon particular facts. However, more significantly, the response expressly addresses the two situations where duty is payable by reference to 100% of the consideration paid under the arrangement (irrespective of a purported apportionment of consideration) or where duty is payable by reference to no part of the consideration. The response does not address and seemingly does not recognise the possibility that there would be an arm's-length apportionment of consideration as between the use of the goods and the other rights or services provided on an arm's-length basis between the parties. It is submitted that where the parties to an arrangement on an arm's-length basis recognise the value of the goods used through an express apportionment of consideration, hiring arrangement or rental business duty should be calculated only by reference to the amount apportioned to the use of the goods. If that possibility is not admitted by the stamp duty authorities, it means that taxpayers are faced with an all or nothing outcome depending upon the question of characterisation. If the use of goods is characterised as incidental to the arrangement, no hiring arrangement duty would be payable. However, if the arrangements were not characterised in that fashion, hiring arrangement duty would be computed

by reference to the total consideration paid and this would be so irrespective of a purported apportionment of the consideration.

It may be the case that the stamp duty authorities are concerned that even unrelated parties to an arrangement might apportion the consideration between the use of goods and the provision of other services or rights on a non arm's-length basis with a view to minimising stamp duty and that the stamp duties legislation does not permit them to substitute an arm's-length consideration. If that is so, the legislation should be amended to confer that power.

Response by Taxpayers

It is submitted that the conclusions reached by the Victorian Supreme Court in the *Roadshow* and *Taxiway Cases* are questionable. However, the decisions represent the law for the time being although the appeal in the *Roadshow Case* may alter the position. As a practical matter it would be preferable for taxpayers to avoid disputes with the stamp duty authorities and the need to contest assessments of stamp duty through the objection and appeal processes. The response from the New South Wales Office of State Revenue suggesting an all or nothing approach underlines the risks involved in such a dispute. Taxpayers concerned about their position could consider alternative ways of structuring their agreements and arrangements so that the issue does not arise. For example, consideration could be given to altering arrangements so that property in the goods passes to the consumer of the services or rights but the provider retains effective control. Alternatively, consideration could be given to structuring arrangements so that the goods were owned and furnished by a company other than the company providing the services or intellectual property rights. In that event there would be technical difficulties for a stamp duty authority purporting to treat the consideration paid for the provision of services or intellectual property rights to one company as part of the consideration paid for the use of goods to a separate company.

It may be the case that such alternative approaches would not be commercially practicable or acceptable. Furthermore, on any view of it such restructuring of commercial arrangements should not be necessary. It is submitted that the far preferable outcome would be for the stamp duty authorities to accept that any duty payable would be calculated by reference to the consideration allocated to the use of the goods under an arm's-length apportionment. Such an outcome would provide certainty for taxpayers rather than leaving it to the lottery of characterisation. Furthermore, such an outcome appears to be consistent with the apparent policy underlying a duty directed to the use of goods.

D. FINANCIAL INSTITUTIONS DUTY REVIEW

In January 1996 the various FID authorities invited peak industry representatives to a "Consultative Forum" to discuss current issues concerning financial institutions duty (FID). The stated objectives of the Forum were:

- to provide all parties interested in FID reform with an opportunity to express views about the issues to be addressed by governments in the interests of greater legislative harmony, reduction in compliance costs for taxpayers and appropriate protection of revenue bases;
- to identify the priorities for the development and discussion of reform options; and
- to settle a manageable process for reform ensuring maximum consultation.

The invitation appears to have been a response to a general groundswell of dissatisfaction about the operation of the FID legislation and to a number of detailed submissions by bodies such as the Australian Bankers Association and the Australian Society of Corporate Treasurers.

The Forum was duly held in Melbourne on 31 January. The vast majority of industry representatives, including the Australian Bankers Association, expressed the view that FID should be abolished immediately and that it would not be productive to undertake the major

exercise of attempting to remedy a fatally flawed tax. However, the FID authorities responded that their brief from the Treasuries in the various jurisdictions did not extend to the abolition option and that submissions to that effect should be directed to the Treasuries.

It was recognised by industry representatives that there was no certainty that Treasury would support abolition and that participation in the reform process would at least provide an opportunity to remedy some of the fundamental problems. On that basis much of the proceedings were devoted to identifying the areas requiring attention as a matter of priority. Four areas were identified and working groups comprising representatives from industry and the FID authorities were established to prepare recommendations for submission back to the Forum before 30 June 1996. The four areas were as follows:

- electronic payment systems (including stored value cards, home and computer banking, netting, liability for aggregated electronic transactions) and real time settlement systems and clearing house mechanisms;
- basic definitions and concepts;
- interjurisdictional funds transfers;
- short term dealings.

Once those matters had been addressed by the Forum attention would be directed to a range of other matters over the ensuing eighteen months.

Each of the working groups has held a number of meetings and prepared draft papers which are to be finalised and circulated to the Forum participants within the next few weeks. The present indications are that the papers produced by the working groups will recommend significant changes to the current position in a number of the areas under consideration. Only time will tell the extent to which the proposals are acceptable to the Forum participants.

The potential obstacles to consensus are significant. In addition to the traditional differences of perspective on the part of taxpayers and revenue collectors, there may well be tensions between representatives of the financial institutions who see themselves as unpaid and unappreciated tax collectors and non-financial institutions who only indirectly bear the burden of FID through the obligation to reimburse the financial institutions with which they deal. There may also be a difference in response on the part of those participants with a significant existing investment in information gathering and FID payment systems which would be significantly affected by change and those participants without such an investment. Counteracting such tensions will be a universal recognition that the existing provisions give rise to major problems from the perspective of taxpayer and revenue alike and that the FID provisions in the different jurisdictions should be as uniform or harmonised as possible. It remains to be seen whether the interests all participants have in common outweigh their various differences.