

AUSTRALIAN TAX REVIEW

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EDITORIAL

Nuclear deterrents, snipers, shotguns and more	133
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ARTICLES

The nature of income: The intersection of tax, legal and accounting concepts – *AH Slater QC*

“Income” is a concept fundamental to the “common law” of income tax and to the operation of the Income Tax Assessment Acts. But it is a term whose usage has developed from two quite different sources: in legal reasoning, on the one hand, and in commercial and accountancy reasoning on the other. Australian legislation, and consequently the language of Australian judgments, has conflated the ideas inherent in these usages, with confusing results. The problems resulting from the mixture of different streams of reasoning can also be seen elsewhere in the Acts and their interpretation. This article seeks to identify some of the resultant problems and to offer a way forward. 138

Trying to make sense of TOFA – *Graeme S Cooper*

The proposed regime for the taxation of financial arrangements (TOFA) is presented as a unified coherent regime based upon, and executed by, reference to certain principles. These principles leave much important detail to be inferred, with sometimes unpredictable consequences. Moreover, the drafters have chosen to construct TOFA as a parallel regime alongside existing rules, rather than as a substitute for them where it is triggered. This deliberate duplication then requires adjustment rules to manage the overlap between existing law and TOFA. This design choice – to insert a duplicate regime and then manage the overlap by a subtraction process – is used elsewhere in tax legislation and creates well-known difficulties. The decision to repeat this system for TOFA re-creates many of the same kinds of difficulties for no obvious benefit. 160

International tax arbitration – *Chloe Burnett*

Cross-border tax disputes are usually channelled through the “mutual agreement procedure”, an informal negotiation between the tax authorities of the states involved. Arbitration has been suggested as an alternative, and is starting to be instituted. Arbitration will probably be a good “stick” against over-long mutual agreements, but it also seems to exhibit “carrot” features, such as finality, independence and greater taxpayer support. This article describes the developments and analyses the options that countries face. In the Australian context, the transfer pricing litigation environment and the FIN 48 accounting standard are considered, and the author calls on the Australian government to invite submissions on the prospect of arbitration clauses in Australia’s tax treaties. 173

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