



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

**BETWEEN:**

**Commissioner of Taxation**

Appellant

**Natalie Carter**

First Respondent

**Alisha Caratti**

Second Respondent

**Nicole Caratti**

Third Respondent

**RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS**

20    **Part I:       Certification**

This outline of oral submissions is in a form suitable for publication on the internet.

**Part II:       Outline of oral propositions**

*The nature of disclaimer*

1. Assent by a donee is necessary for a valid gift. There is a presumption or inference that the donee assents to a gift, but that may be rebutted: Respondents' Submissions (RS) [10].
2. Disclaimer does not devest a vested gift. Rather, it negatives the presumption of assent such that there never was a valid gift at all because one of the necessary elements for a valid gift was at all times missing: RS [11], [13], [20]-[28].

30    *The ability to accept a gift*

3. The Commissioner's argument that present entitlement is satisfied by a donee's ability to accept a gift, as discussed in *In re Parsons; Parsons v Attorney-General* [1943] Ch 12 and *In re Stratton's Disclaimer; Stratton v Inland Revenue Commissioners* [1958] 1

Ch 42, suffers from two difficulties.

4. The first is that it neglects the requirement for present entitlement that “the beneficiary has an interest in the income which is both vested in interest and vested in possession” (*Harmer v FCT* (1991) 173 CLR 264 at 271; *FCT v Whiting* (1943) 68 CLR 199 at 216, 219; *Taylor v FCT* (1970) 119 CLR 444 at 451, 452): RS [35]-[37].
5. The second is that that ability is not a “right to demand and receive payment of the income” (*Harmer v FCT* (1991) 173 CLR 264 at 271). The donee’s ability to accept a gift is necessarily prior to, and different from, such a right to demand and receive payment of income: RS [31]-[32], [38].

10           ***Section 97 takes the general law as it finds it***

6. The reference to “income of the trust estate” in s 97 of the *Income Tax Assessment Act 1936* (Cth) is to that concept as used in trust law: RS [40].
7. In picking up that general law concept, s 97 takes the general law as it finds it: RS [41]-[45].
8. Where a statute uses a general law concept as its criterion for operation and that general law concept is affected by a retrospectively operating legal principle, the statute picks up that general law concept as affected by that retrospectively operating legal principle, absent some contrary indication in the statute: RS [47]-[55].
9. Nothing in the text of s 97 evinces such a contrary intention: RS [56]-[66].
- 20       10. Nothing in the *Income Tax Act 1986* (Cth) evinces such a contrary intention either. Under s 4 of that Act, the *Income Tax Assessment Act 1936* is incorporated into and read as one with that Act. Various provisions of the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* (Cth) permit or require conduct occurring after the end of the income year to be taken into account in computing a taxpayer’s income tax liability for that income year. That income tax is an annual impost does not prevent conduct occurring after the end of the income year from affecting a taxpayer’s income tax liability for that income year (*Oates v FCT* (1990) 27 FCR 289 at 300-301 per Hill J): RS [67]-[80].

***Consequences***

- 30       11. As the effect of a disclaimer is to negative assent to a putative gift, there never was a valid gift to the Respondents and they never had any vested interest in the income of the

trust estate. However, if there was a gift that was avoided *ab initio*, s 97 picks up the general law concept of trust income, including to the extent that that is affected by retrospectively operating legal principles: RS [81].

Dated 8 November 2021



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