interpretation NOW!

Episode 3 – 14 August 2015

Australian Government
Australian Taxation Office

Gordon has passed me the pen for Episode 3 (Rebecca Smith next month). One point resonating from Episode 2 is that interpretation usually involves selecting the best answer from among 'constructional choices'. Computers cannot do that, nor can mathematical algorithms – not yet anyway. On the production front, we now have business line input on tone and content. One thing we are working on, however, is penetration into the business lines – Matt Bambrick is helping here. Please enjoy!

Michelle Janczarski guest editor, Tax Counsel Network

Singular & plural

Plaintiff B15a v Minister [2015] HCA 24

If words of an Act are in the singular, they are presumed to include the plural (and vice versa) unless a contrary intention appears – see s 23 of the *Acts Interpretation Act 1901*[1].

In this High Court case, however, Kiefel J (at [8]) rejected the idea that 'a parent' should be read only in the plural (that is, as 'both parents'). The singular/plural presumption cannot be used to exclude the form used in the Act.

iTip 1 – use this presumption to broaden the scope of nouns in statutes, not to reduce them.
iTip 2 – it will be a rare case where the presumption is denied due to contrary intention.

Interpretation of DTAs

Task Technology v FCT [2014] FCAFC 113

This case, which is about software royalties under the Canadian double tax agreement, makes 4 key points – (1) take a 'holistic' approach to DTA interpretation[2]; (2) give primacy to the written text; (3) context, object and purpose 'must also be considered'[3]; and (4) the OECD commentary and related materials should always be consulted[4].

In short, we should interpret DTAs a bit more liberally than domestic tax legislation[5]. **iTip** – a good place to start in determining the domestic effect of a DTA is to understand the deeper trans-national principles on which it is based.

Same word, same meaning?

Carroll v Secretary [2015] VSCA 156

Does a word used many times in an Act always have the same meaning? Not necessarily. The presumption that words are used consistently depends on context[6]. In this case (at [22]) the presumption was applied, consistent with the clear meaning of the text and its structure.

The presumption is given less weight in frequently amended Acts, and in those which have to deal with a range of different subjects and policy settings (like tax laws)[7]. In tax situations, however, many terms are also defined in the Act itself – see the dictionary in ITAA97, s 995-1, for example. **iTip** – don't assume a word *always* has the same meaning, and remember to check if your term is defined somewhere in the Act (whether it has an * or not).

Black letter approaches

In Episode 2, we emphasised that interpretation must always start with the text. However, black letter approaches [that is – narrow, acontextual or literalistic ones] are inconsistent with the purposive approach required by parliament[8] and the High Court since 1981. Changes made at that time sounded the death knell for the black letter literalism of the Barwick era[9]. A steady flow of High Court cases ever since[10] now means that black letter interpretation is out in this country.

Instead, we are to read statutes broadly on a 'text-context-text' basis – see Episode 2 for more detail. This means it is not open to Chris Jordan to adopt black letter approaches in his administration of tax laws. **iTip** – context is the key to interpretation in the modern era.

- Writers – Gordon Brysland, Rebecca Smith and Michelle Janczarski.

[1] Pearce & Geddes (at [6.39]), *Messenger Press* [2013] FCAFC 77 (at [57]).
[2] *Applicant A* (1997) 190 CLR 225 (at 231), *TR 2001/13* (at [92]).
[3] Arts 31 & 32 of the *Vienna Convention on the Law of Treaties* [1974] ATS 2.
[4] *Thiel* [1990] HCA 37 (at [9]), *Resource Capital* [2014] FCAFC 37 (at [25]).
[5] *Morrison* [2002] HCA 44 (at [16]), *Li v Zhou* [2014] NSWCA 176 (at [24-25]).
[6] *Murphy v Farmer* [1988] HCA 31 (at [7]) (meaning of 'false').
[7] Pearce & Geddes (at [4.7]), *Clyne* [1981] HCA 40 (at [11]).
[8] s 15AA of the *Acts Interpretation Act 1901* (amended in 2011).
[9] Sir Garfield Barwick was CJ of the High Court 1964-1981. His tax work was called 'a study in the failure of the new legalism' – Lehmann (1983).
[10] *Project Blue Sky* [1998] HCA 28 (at [69]), *CIC Insurance* (1997) 187 CLR 384 (at 408), *Unit Trend Services* [2013] HCA 16 (at [47]).

Episode 4 – text then context; use of regulations; changes in language; deeming provisions