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# THE 'DISPOSAL' OF AN 'ASSET' — SECTIONS 160A AND 160M OF PART IIIA OF THE INCOME TAX ASSESSMENT ACT

## 1. INTRODUCTION

The concept of 'assessable income' for the purposes of the Income Tax Assessment Act[1] 1936 (Cth) was dramatically extended by the inclusion of Part IIIA[2] which comprises ss160A to 160ZZU. This Part brings certain capital sums to tax by including them in assessable income.[3] It would be untrue to say that prior to the enactment of Part IIIA capital gains were tax free. The effect of ss25A and 26AAA is to include, in assessable income, certain sums which may be classified as capital gains.[4] They are part of income, however, not because they are capital but because they constitute the profit arising from the sale by the taxpayer of property acquired for the purpose of profit-making by sale[5] or the profit arising from a sale of property less than twelve months after acquisition.[6] In the case of Part IIIA the sums in question become part of assessable income simply because they constitute net capital gains.[7] The basic formula for the determination of capital gains and losses is contained in the following provisions of ss160Z(1):

> 'Subject to this Part, where an asset other than a personal-use asset has been disposed of during the year of income:
> (a) if the consideration in respect of the disposal exceeds the indexed cost base to the taxpayer in respect of the asset — a capital gain equal to the excess shall be deemed for the purposes of this Part to have accrued to the taxpayer during the year of income; or
> (b) if the reduced cost base to the taxpayer in respect of the asset exceeds the consideration in respect of the disposal — a capital loss equal to the excess shall be deemed for the purposes of this Part to have been incurred by the taxpayer during the year of income.'

It is apparent that the legislature has chosen the disposal of an asset or part of an asset[8] as the prerequisite for deriving a capital gain. The retention of an appreciating asset will not lead to the imposition of tax

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1 Hereafter referred to as 'the Act'.

2 By virtue of the Income Tax Assessment Amendment (Capital Gains) Act 1986 (Cth) s19; for a discussion of the extension of the concept of income to include capital gains see Parsons, *Income Taxation: An Institution in Decay* (1986) Fullagar Memorial Lecture, 3.

3 Section 160ZO provides that where a net capital gain accrued to a taxpayer in respect of the year of income, the assessable income of the taxpayer of the year of income includes that net capital gain.

4 Section 25A does not apply in respect of property acquired on or after 20 September 1985 and it only applies to sales after 23 August 1983 and the carrying out of profit making schemes after 25 June 1984. Section 26AAA(2) applies to property purchased after 21 August 1973.

5 ss25A(1).

6 ss26AAA(2).

7 The computation of a net capital gain involves, in certain circumstances, the deduction of capital losses.

8 s160R.

except where the owner ceases to be an Australian resident and is deemed to have disposed of certain assets.[9] A capital gain or loss therefore is any gain or loss, quantified in money,[10] which arises on disposal of an asset provided only that it is determined in accordance with the statutory formula for calculating such a gain or loss. The provision of an indexed cost base in the case of a gain is an endeavour to ensure that the gain is real rather than nominal. This concession is denied in the case of capital losses. Apart from specific exemptions,[11] the boundaries of the capital gains tax imposed in Part IIIA are to be found in the concepts of 'disposal' and 'asset'. I propose to devote this paper to a consideration of the statutory definitions of these terms. Before doing so, however, I would make the following prefatory remarks. There is as yet little judicial elucidation of the provisions of Part IIIA. This situation will obviously change in the course of time. Some assistance is to be gleaned from the judicial interpretation of similar provisions which apply in other jurisdictions although the ground which is gained in this way is not necessarily safe as the Australian legislation is never exactly the same and, in any event, the courts here may be inclined to a different view. The definitions of 'asset' and 'disposal' are to be found in separate sections and it is convenient for the purposes of exposition to consider them separately. They do, however, complement each other in the sense that the definitions of certain disposals or deemed disposals appear to be based on the assumption that the definition of an asset includes certain things which would not be defined *conventionally* as a form of property. It may therefore be arguable that s160M (disposals and acquisitions) augments the definition of an asset contained in s160A.[12] The point may be illustrated as follows: A covenants to restrict in some way his right to earn a living as he pleases and receives a consideration of $10,000. The question arises as to whether he has disposed of an assset. Section 160A defines an asset as 'any form of property' and one may be quick to argue that, legally speaking, 'property' does not include the right to work and therefore the consideration is not assessable. This conclusion begins to lose its plausibility, however, in the light of the following provisions of ss160M(6) and (7):

> '160M(6) [Disposal of asset that did not previously exist] A disposal of an asset that did not exist (either by itself or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset for the purposes of this Part, but the person who so disposes of the asset shall be deemed not to have paid or given any consideration, or incurred any costs or expenditure, referred to in paragraph 160ZH(1)(a), (b), (c) or (d), (2)(a), (b), (c) or (d) or (3)(a), (b), (c) or (d) in respect of the asset.

9 Section 160M(8), discussed more fully below.

10 Sub-section 20(1) of the Act provides that for all the purposes of the Act, income wherever derived and expenses wherever incurred shall be expressed in terms of Austalian currency.

11 These are conveniently condensed by Dominic, *Taxation of Capital Gains in Australia* (1987) ch 7.

12 Lord Porter in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1051 was of the view that when the word 'property' is used in a statute its meaning is to be gathered from its context and from the mischief which the Act is intended to combat.

160M(7) [Entitlement to receive money or other consideration] Without limiting the generality of sub-section (2) but subject to the other provisions of this Part, where—

(a) an act or transaction has taken place in relation to an asset or an event affecting an asset has occurred; and

(b) a person has received, or is entitled to receive, an amount of money or other consideration by reason of the act, transaction or event (whether or not any asset was or will be acquired by the person paying the money or giving the other consideration) including, but not limited to, an amount of money or other consideration—

(i) in the case of an asset being a right — in return for forfeiture or surrender of the right or for refraining from exercising the right; or

(ii) for use or exploitation of the asset,

the act, transaction or event constitutes a disposal by the person who received, or is entitled to receive, the money or other consideration of an asset created by the disposal and, for the purposes of the application of this Part in relation to that disposal—

(c) the money or other consideration constitutes the consideration in respect of the disposal; and

(d) the person shall be deemed not to have paid or given any consideration, or incurred any costs or expenditure, referred to in paragraph 160ZH(1)(a), (b), (c) or (d), (2)(a), (b), (c) or (d) or (3)(a), (b), (c) or (d) in respect of the asset.'

It remains to be seen whether the courts are of the view that in deciding whether the $10,000 forms part of A's assessable income one must, in the first instance, be able to identify an asset in terms of s160A.[13] Perhaps the following comments of Lord Wilberforce in *Aberdeen Construction Group Ltd v IRC*[14] are indicative of the way things will go:

> 'The capital gains tax is of comparatively recent origin. The legislation imposing it, . . . is necessarily complicated, and the detailed provisions, as they affect this or any other case, must of course be looked at with care. But a guiding principle must underline any interpretation of the Act, namely, that its purpose is to tax capital gains and to make allowance for capital losses, each of which ought to be arrived at on normal business principles. No doubt anomalies may occur, but in straightforward situations, such as this, the Courts should hesitate before accepting results which are paradoxical and contrary to business sense. To paraphrase a famous cliche, the capital gains tax is a tax on gains; it is not a tax on arithmetical differences'.

In considering the statutory definitions of 'asset' and 'disposal' I have been mindful of the words of William J in *FC of T v United Aircraft Corporation*[15] that 'In these definitions no attempt is made at technical

13 This approach was rejected by the House of Lords in *O'Brien (Inspector of Taxes) v Benson's Hosiery (Holdings) Ltd* [1979] STC 735.

14 [1978] STC 127, 131, quoted by Dominic, *Taxation of Capital Gains in Australia* (1987) 2.

15 (1943) 68 CLR 525, 544.

legal accuracies'. On that occasion the court was referring to the statutory definitions of 'income from personal exertion' and 'income from property'.

## 2. ASSET

Section 160A of the Act defines an asset as follows:

> 'In this part, unless the contrary intention appears, 'asset' means any form of property and includes—
> (a) an option, a debt, a chose in action, any other right, goodwill and any other form of incorporeal property;
> (b) currency of a foreign country; and
> (c) any form of property created or constructed or otherwise coming to be owned without being acquired,
> but does not include a motor vehicle of a kind mentioned in paragraph 82AF(2)(a).'

In *Jones v Skinner*[16] it was said:

> ' "Property" is the most comprehensive of all terms which can be used, in as much as it is indicative and descriptive of every possible interest that a party can have.'

In *McCaughey v Commissioner of Stamp Duties*[17] 'property' was said to 'denote either objects of proprietary rights, such as pieces of land, domesticated animals and machines or the proprietary rights themselves'. James Barr Ames[18] described 'true property' as 'possession coupled with the unlimited right of possession. If these two elements are vested in different persons there is a divided ownership'. Perfect property (or ownership) in the sense of a union in one person of every conceivable right exercisable in respect of corporeal things is seldom achieved. Such a union is often in conflict with the demands of communal life and is legally prevented in accordance with the social, economic and environmental policies of the day.[19] Viewed in this light, ownership of property is usually used to denote a relative rather than an absolute state. So where I lease my premises to someone, although I have divested myself of the right to use and enjoy the building for the duration of the lease, so that there is in the Amesian sense a divided ownership, I would nevertheless still be called the owner of the building assuming that most of the other rights of ownership remain with me. In the case of incorporeal property the distinction between ownership and the objects of ownership becomes difficult to defend, indeed they are one and the same thing. If this analysis is correct and as s160A specifically includes incorporeal property within the definition of an asset, then 'property' within the context of s160A means ownership and the objects of ownership where tangible property is involved. At this point it is useful to examine the definition of an 'acquisition' and 'disposal'. The basic definition is contained in the provisions of s160M(1) which are:

> 'Subject to this Part, where a change has occurred in the ownership of an asset, the change shall be deemed, for the purposes of the Part, to have effected a disposal of the asset

16 5 LJ Ch 90.
17 (1945) 46 SR (NSW) 192, 201.
18 *Lectures on Legal History* (1913) 193 *in fin* 194.
19 In this regard the chapter 'The Transformation in the Conception of Property' in Horwitz, *The Transformation of American Law 1780-1860* (1977) 31 *et seq* is instructive.

by the person who owned it immediately before the change and an acquisition of the asset by the person who owned it immediately after the change.' Clearly in the context of this sub-section 'ownership' does not bear the technical meaning of 'proprietary rights' but refers to the owners themselves. Technical accuracy may have been better achieved by a reference to a 'change of owners' of an asset.

If 'property' in the sense of ownership consists ultimately of proprietary rights and if an asset is any form of such property, then the scope of the definition of an asset will depend on the answers to two questions. The first is what distinguishes a proprietary right from any other right? It could be argued on the strength of the wording of s160A(a) that the legislature intended, for the purposes of Part IIIA, that there be no distinction at all. The second question is whether each and every proprietary right constitutes an asset or part of an asset?

On the question of the distinguishing characteristics of proprietary rights, the definition of 'property' in *Jowitt's Dictionary of English Law*[19a] includes the following:
'In its largest sense property signifies things and rights considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates and interests in corporeal things, but also rights such as trade marks, copyrights, patents and rights *in personam* capable of transfer or transmission, such as debts.'

As the calculation of a capital gain or capital loss is made by reference to the consideration received in exchange for an asset[20] quantified in domestic currency,[21] we may safely assume that Part IIIA is not concerned with the disposal of something of no market value for no money or money's worth.

The characteristic of transferability or assignability is closely related to the requirement of money value. Indeed the development of the concept of ownership has often been stated to be a prerequisite for the development of a money economy. Any exchange is predicated on the ability of the parties to convey ownership of the objects of the exchange to each other. An asset which is not transferable or, in the case of a right, capable of assignment, can have no money or market value or at least so runs the argument. In *O'Brien (Inspector of Taxes) v Benson's Hosiery (Holdings) Ltd*[22] one of the directors of the taxpayer company had entered into a service agreement with the company. At the request of the director he was released from the obligations of the agreement in return for 50,000 pounds. The taxpayer company was assessed for corporation tax on the basis that the 50,000 pounds constituted a chargeable gain. The British legislation governing the capital gains tax is also based on the disposal of an asset. In terms of s20(1) of the Capital Gains Tax Act 1979 (UK), there is a disposal of assets by their owner

19a Jowitt and Walsh, *Jowitt's Dictionary of English Law* by Burke (2nd edn 1977).
20 See s160Z(1).
21 ss20(1).
22 [1978] 3 WLR 609, CA.

'where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum'. An asset is defined in s19(1) as follows:

> 'All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including:
> (a) options, debts and incorporeal property generally, and
> (b) any currency other than sterling, and
> (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.'

As can be seen, this definition is similar in material respects to that in s160A of the Australian legislation.

In the *Benson's Hosiery* case, the appeal of the taxpayer company was allowed by the special commissioners for the purpose of the income tax. The inspector then successfully prosecuted an appeal by way of a case stated to the High Court. The taxpayer successfully appealed to the Court of Appeal and the inspector finally won the day in the House of Lords.[23] The decision of the commissioners was based on the finding that 'an employer's rights under a bona fide contract for personal services are not property for the purposes of Part III of the Act',[24] or as Lord Russell of Killowen put it,[25] 'the primary question is whether the right of the taxpayer under the contract to require the personal service of Mr Behar was an 'asset' within the 1965 Act'. Two approaches to this question are manifested in the *Benson's Hosiery* decisions. In the Court of Appeal, counsel for the Inspector argued that a notional disposal had taken place and relied on the following provisions of s22(3)(c) of the Finance Act 1965 (UK):

> 'Subject to subsection (b) of this section, and to the exceptions in this part of this Act, there is for the purposes of this Part of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to— . . . (c) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights . . '[26]

These provisions are now contained in s20(1)(c) of the Capital Gains Tax Act 1979. The Australian counterpart, if one may call it that, is to be found in s160M(3) of the Act which provides:

> 'Without limiting the generality of sub-section (2), a change shall be taken to have occurred in the ownership of an asset by— . . . (b) in the case of an asset being a debt, a chose in action or any other right, or an interest or right in or over property — the cancellation, release, discharge, satisfaction, surrender, forfeiture, expiry or abandonment, at law or in equity, of the asset . . '

23 (1979) STC 735.
24 [1978] 3 WLR 609, 614, CA; prior to the enactment of the Capital Gains Tax Act 1979 (UK), the same definition of an asset was contained in s22(1) of Part III of the Finance Act 1965 (UK).
25 (1979) STC 735, 737.
26 [1978] 3 WLR 609, 620D.

The Court of Appeal determined,[27] however, that the provisions relating to a notional disposal can only operate where an asset within the meaning of s22(1) of the Finance Act 1965 (now s19(1) of the Capital Gains Tax Act 1979 quoted above) can be identified. In other words the basic definition of an asset is paramount and not to be extended by reference to other provisions of the Act. Furthermore the asset so identified had to be one to which the following provisions of s44(1) of the Finance Act 1965 could be applied:

> 'Subject to the following subsections, in this Part of this Act 'market value' in relation to any assets means the price which those assets might be reasonably expected to fetch on a sale in the open market.'

If this were not so, so the Court reasoned, those provisions of the legislation providing for a notional consideration in terms of 'market value' where assets are donated or alienated in a transaction not at arms length or where actual consideration cannot be valued, would not be workable.[28] The court found the concept of a market value to be entirely inappropriate to a contract of personal service because the subject matter of such a contract (the employer's rights) is inherently unsaleable.[29] The House of Lords, however, was of quite the opposite view. The contention that the rights of an employer under a contract of service were not property because they could not be assigned to another was rejected by their Lordships as being inconsistent with the language of the statute.[30] The contention that an asset must have a market value for the purposes of the capital gains tax also found no favour.[31] The path then became clear for finding that the requisite disposal of an asset had occurred. The lesson to be learned from the *Benson Hosiery* cases is that although the basic definition of an asset may refer to 'any form of property', the conventional characteristics of 'property', such as money value and transferability, are not an infallible guide to the meaning of 'asset' for the purposes of Part IIIA. The distinction therefore between proprietary rights and other rights is not a significant indicator as to where the capital gains tax begins and ends.[32] If this conclusion is correct then all rights, and not simply proprietary rights, constitute assets for the purposes of Part IIIA. As we have seen,[33] the permanent or temporary sterilisation of such a right would constitute the disposal of an asset. The question of whether the disposer of the right is the owner of the object of the right (if there is one) is irrelevant. This point is illustrated by the provisions of Division 5 in relation to leases. The lessor remains owner, in the traditional sense, of the leased premises or, in the case of a sub lease, the sub lessor is not the owner of the leased premises.[34] In each case nevertheless the grant of the lease constitutes the disposal of an asset.[35]

27 Ibid 620H.
28 The Australian provisions in this regard are to be found in s160ZD(2).
29 [1978] 3 WLR 609, 620 *in fin* 621H.
30 (1979) STC 735, 738 *in fin.*
31 Ibid 739b.
32 This view is consistent with the phrase 'any other right' in s160A(a).
33 See the provisions of ss160M(6), (7).
34 See s160ZR.
35 See ss160ZS(1).

A debt is mentioned in s160A(a) and it would seem that what is meant is the right to receive payment rather than the liability to pay. Where fungibles are loaned and consumed the right to receive a similar amount as to denomination, weight or volume would constitute an asset. Indeed where anything is owed, the right to what is owed would constitute an asset in the hands of the person to whom it is owed. Satisfaction of the debt may or may not give rise to a capital gain or loss eg:

(1) A owes B $100,000; C offers B $70,000 in full and final settlement. B accepts and discharges A. B's discharge of A amounts to a disposal of an asset,[36] in this instance, at a loss. If C had purchased B's right to the $100,000 for $70,000 and then recovered $90,000 from A, C's discharge of A would constitute a disposal, on this occasion, at a nominal gain of $20,000 to C. The question arises as to whether A has made a capital gain in respect of that portion of the debt which he did not pay and which he is no longer obliged to pay. This would depend on whether the language of the legislation can accommodate the notion that A's release from a debt without actual payment constitutes the disposal of an asset at a profit equal to the unpaid debt. Although the legislation is notoriously elastic, it is doubtful whether it can be confidently argued that the definition of an asset includes not only rights but obligations. Where the debt is in respect of the acquisition of an asset, rather than the purchase of services, the pragmatic solution would be to reduce the cost base of the assets to A by that portion of the debt which A has not paid. This is not possible in the case of services and one would have to concede, it is submitted, that an unassessable capital gain has accrued to A.

(2) X lends Y US$100,000. At the time the US$ cost A$140,000. Three years later Y satisfies the debt by paying X A$210,000. There are two ways of looking at this transaction: either X disposed of a debt at a profit of $70,000 or X disposed of foreign currency at a profit of $70,000. The point is academic as both are assets in terms of s160A.[37] If either the debt or the foreign currency was acquired before 20 September 1985 and disposed of after that date then the gain is not assessable.[38] Where A acquired a right to receive money before 20 September 1985 and, after that date, entered into a contract solely for the purpose of eliminating or reducing the risk of his foreign exchange exposure, then any capital gain resulting from such a contract is likewise not assessable.[39] So where A is owed foreign currency before 20 September 1985 and concludes an agreement with his debtor after that date which prescribes a rate of exchange more favourable than the spot rate on due date then the resultant capital gain is not assessable. Where capital losses arise from such agreements they are not deductible if the agreements were concluded after 28 November 1986.[40] Subsection 160ZB(4)(b) provides that any capital gain attributable to a contract concluded for the sole purpose of eliminating or reducing the risk associated with adverse exchange rate fluctuations

36 See ss160M(3)(b).
37 Section 160A(b) refers specifically to foreign currency.
38 s160L(1).
39 s160ZB(4)(a).
40 s160ZB(5).

in relation to a *liability* acquired by the taxpayer to make a payment under another contract, shall not be taken to have accrued to the taxpayer. So where X owes Y US $100,000 and X, anticipating that the Australian dollar will weaken against the American dollar buys forward and saves A$10,000, this reduction of the debt will not constitute an assessable capital gain. If the debt was owed in respect of the acquisition of an asset then the cost base of the asset would be reduced accordingly. The provisions of ss160ZB(4)(b) simply confirm that s160A refers to a debt in the sense of a right to receive payment.

Section 160A(b) includes the currency of a foreign country within the definition of an asset. This is done to cater for the situation where a taxpayer disposes of foreign currency *in specie* at a real net capital gain. Foreign currency held on deposit would constitute a debt. It is of particular interest that s160A does not purport to exclude the domestic currency either *in specie* or in the form of a debt. Section 19(1)(b) of the Capital Gains Tax Act 1979 (UK) includes 'any currency *other than sterling*' (my emphasis). Presumably the legislative intention was to exclude sterling *in specie* only. No such intention on the part of the Australian legislature is apparent.

The fact that Part IIIA endeavours to bring only real net capital gains to tax makes the question as to whether the domestic currency is an asset a rather thorny one.[41] Every acquisition of an asset for money involves the disposal of money either in the form of a debt or *in specie*. Where an asset other than money is acquired in an economic climate of inflation no capital loss can occur for the purposes of Part IIIA because such losses are determined historically and without reference to the erosion of the purchasing power of the domestic unit of account.[42] Where money is acquired for money, unless the amounts are nominally equivalent, an historic capital loss or real capital gain will accrue to the taxpayer disposing of the money provided that the transactions in question have occurred at arms length. The sale of a bad debt and the recovery of a bad debt by the purchaser are examples of where this is likely to occur. A taxpayer, however, will not be able to generate capital losses or gains by disposing of domestic money gratuitously or in exchange for smaller or larger sums. Sub-section 160ZD(2)(c) would operate to deem the consideration received to be equal to market value which in the case of money must be its nominal equivalent. It is submitted that this would be so irrespective of whether the money disposed of was *in specie* or in the form of an encashable debt against a banker.[43] Where the economic climate is one of deflation and the purchasing power of the domestic currency is increasing then every purchase, at least in theory, will generate a real capital gain represented by the difference between the price of the item purchased at the time the money was acquired and the price actually paid. Given the velocity of money in a modern economy one may confidently conclude that it was never intended that such sums be taxed. The administrative obstacles

41 There is case authority for the general view that the Act works on the basis of dollars as such and not on the economic value thereof, see *Case R112 (Milosh v FC of T) (1984) 84 ATC 741, 747 in fin* 748, 749.

42 See s160Z(1).

43 So called *monnaie scripturale*.

to the collection of such a tax would be insurmountable. It would be well nigh impossible to know when monies in a mixed fund were acquired and disposed of and yet such information would be indispensable in the application of Part IIIA to the disposal of domestic currency. There is no disputing, however, that domestic money is a form of property whether it be held in the form of notes and coins (chattels) or as a debt, neither of which have been specifically excluded from the definition of an asset in s160A. The argument that domestic currency *in specie* is impliedly excluded from the definition because specific reference is made to a debt and to foreign currency is untenable because of the use of the open-ended 'includes' in the wording of the definition. Furthermore there would be no merit in concluding that one form of money was an asset and another not. In the result the inference is irresistible that domestic currency is an asset for the purposes of Part IIIA. This conclusion, however, is only of practical significance in relation to the discounting of bad debts and the recovery of discounted bad debts at a premium. It is also of significance where financial assets, such as negotiable certificates of deposit, are sold in the market before maturity.

Section 160A curtails the comprehensiveness of 'property' in one respect only *viz* it excludes motor vehicles of the kind mentioned in ss82AF(2)(a). These are motor vehicles (including four wheel drive vehicles) which are motor cars, station wagons, panel vans, utility trucks or similar vehicles, motor cycles or similar vehicles or other road vehicles designed to carry loads of less than 1 tonne or fewer than 9 passengers. The Legislature was obviously willing to forego the tax chargeable on the disposal of appreciating motor vehicles in this class in order to exclude from the tax base the far greater capital losses which most taxpayers incur on the purchase and sale of a motor vehicle. The result is a tax bonus for the vintage car collector and anyone else who succeeds in disposing of a vehicle described in ss82AF(2)(a) at a profit.

In order to ensure that certain capital losses are offset only against certain capital gains and also to minimise the effect of the pre-20 September 1985 exemption, Part IIIA creates categories of assets such as 'personal use assets', 'listed personal use assets' and 'composite assets'. A consideration of these provisions is beyond the scope of this paper.

## 3. DISPOSAL

Many of the salient features of s160M have, of necessity, already been adverted to in determining the scope of the provisions of s160A. We have seen that the basic definition of a disposal and acquisition contained in ss160M(1) refers to a change of ownership of an asset which is deemed to have effected a disposal of the asset by the person who owned it immediately before the change and an acquisition of the asset by the person who owned it immediately after the change. The simple fact of a change in ownership therefore will trigger a disposal and acquisition regardless of the means by which the change is effected. This conclusion is confirmed by the provisions of ss160M(2). Where a thief steals a chattel and sells it in market overt or negotiates stolen commercial paper to a bona fide holder for value, the true owner has disposed of the asset and not the thief. There would be a similar result where a non-owner transfers property in circumstances where the owner is estopped from alleging his ownership. If the former owner receives compensation or recovers the proceeds of the conversion in circumstances which result in a real capital gain such a gain would be assessable if the asset in

question had been acquired on or after 20 September 1985. It would seem that the capital gains derived by a thief from the successful conversion of the assets of others are not chargeable to tax under Part IIIA. Where an asset is totally or partially lost or destroyed a disposal occurs in accordance with the provisions of s160N. In this instance there is no discernible change of ownership but rather a permanent or temporary loss of ownership. Indeed as one progresses through the other provisions of s160M it becomes apparent that a change of ownership in the conventional sense of that phrase is not a general requirement for a disposal but simply one example of where a disposal will occur. This is demonstrated by the provisions of ss160M(3)(d) which deem a change of ownership to have occurred where the use and enjoyment of an asset is obtained by a person for a period at the end of which the title to the asset will or may pass to that person. Where it transpires that title does not pass a reversal is achieved via the mechanism of ss160M(4). Sub-section 160M(3) further exemplifies a change of ownership by referring to a declaration of trust,[44] the sterilisation of a right by 'cancellation, release, discharge, satisfaction, surrender, forfeiture, expiry or abandonment, at law or in equity'[45] and the redemption or cancellation of a share or debenture.[46] In ss160M(8)(9) and (10) the concept of 'change of ownership' is entirely abandoned and a disposal is deemed to have occurred on cessation of residence in Australia on or after 20 September 1985. Sub-section 160M(8) provides:

> 'Where a taxpayer, being a resident, has, on or after 20 September 1985, ceased to be a resident, the taxpayer shall be deemed for the purposes of this Part —
>
> (a) to have, at the time when the taxpayer ceased to be a resident (in this sub-section referred to as the 'relevant time'), disposed of every asset that was owned by the taxpayer immediately before the relevant time, other than —
>
> (i) a taxable Australian asset;
>
> (ii) any other asset that was acquired by the taxpayer before 20 September 1985; or
>
> (iii) an asset to which sub-section (9), (10) or (11) applies; and
>
> (b) to have so disposed of every such asset for a consideration equal to the market value of the asset at the relevant time.'

There are similar provisions in respect of resident trust estates,[47] resident unit trusts[48] and resident partnerships.[49] The purpose of these provisions would appear to be to prevent resident taxpayers from placing non Australian assets outside the purview of Part IIIA by the device of ceasing to be resident in Australia. But for the provisions of these sub-sections, a taxpayer could legally avoid the tax consequences of Part IIIA by accumulating assets abroad and then forsaking Australian residence when the need arises to dispose of them. The provisions work harshly, however, on those taxpayers who wish to cease being Australian residents

44 ss160M(3)(a).
45 ss160M(3)(b).
46 ss160M(3)(c).
47 ss160M(9).
48 ss160M(10).
49 ss160M(11).

for other purposes. In what appears to be recognition of this fact, the legislature has recently mitigated the effects of ss160M(8) and (11) by enacting ss160M(11A), (11B) and (11C).[50] The nature of the relief which they provide is best illustrated by the relevant provisions themselves:

> '160M(11A) [Limits on deemed disposals] Sub-section (8) or (11) does not deem a taxpayer to have disposed of a particular asset at a time (in this subsection called the 'relevant time') when the taxpayer ceased to be a resident or a partnership ceased to be a resident partnership, as the case may be, if:
> (a) the taxpayer is a natural person;
> (b) during the period of 10 years immediately before the relevant time, the taxpayer was a resident for a total period of less than 5 years; and
> (c) the asset:
> (i) was owned by the taxpayer immediately before the occasion (or last occasion, as the case requires) on which the taxpayer became a resident before the relevant time; or
> (ii) was acquired by the taxpayer as a beneficiary of the estate of a deceased person, or as a survivor of a joint tenancy, and was so acquired after the occasion (or last occasion, as the case requires) on which the taxpayer became a resident before the relevant time.
>
> 160M(11B) [Election re deemed disposal] Where:
> (a) but for this subsection, a taxpayer would be deemed by subsection (8) or (11) to have disposed of a particular asset at a time (in this subsection called the 'relevant time') when the taxpayer ceased to be a resident or a partnership ceased to be a resident partnership, as the case may be;
> (b) the taxpayer is a natural person; and
> (c) the taxpayer has elected that this subsection apply in relation to all assets of the taxpayer to which subsection (8) or (11), as the case may be, would apply at the relevant time;
> the following paragraphs apply:
> (d) subsection (8) or (11) does not deem the taxpayer to have disposed of the asset at the relevant time;
> (e) the asset shall be taken to be a taxable Australian asset until immediately after whichever of the following occurs:
> (i) the taxpayer disposes of the asset;
> (ii) the taxpayer becomes a resident.'

According to the provisions of s160L(1), Part IIIA applies whenever an Australian resident disposes of an asset acquired on or after September 1985, irrespective of whether the asset is situated abroad and was acquired by the taxpayer at a time when he was a non-resident. Now it would seem that residents of less than 5 years standing may remove such assets, in addition to those which they have inherited, from the reach of Part IIIA by ceasing to be residents. The election offered to all other intending non-residents is curious for its creates taxable

50 These sub-sections were inserted by the Taxation Laws Amendment Act (No 3) 1987 (Cth) s23.

Australian assets which are not situated in Australia and which are no longer owned by Australian residents.

## 4. CONCLUSION

This paper proceeded from the premise that the disposal of an asset was a prerequisite for deriving a capital gain. This proposition accords with the letter of the Act. Its spirit, however, is simply to charge to tax all capital gains except those which are specifically exempted for policy reasons. In order for its letter to be brought into line with its spirit, it became necessary to define 'asset' and 'disposal' in a way which bears no relation to the ordinary meaning of those words. Furthermore, resort is made to the disposal of assets which did not exist prior to their disposal, a concept more suited to testing the mental agility of a philosopher than informing the man in the street of his liability to pay tax. Given the legislative intention, one is compelled to ask why it was necessary to link the tax to the disposal of an asset? If the purpose of the legislation was to make the system fairer and restore its progressivity because a dollar is a dollar wherever and however it may be derived,[51] why does the legislation not say just that? The 'disposal of an asset' formula has necessitated that the legislation be complex rather than simple, a result which is undesirable for a number of trite reasons. It would not be unfair to submit that the legislative intention may have been more simply and directly expressed.

51 The considerations which prompted the government to introduce capital gains tax are referred to by Nolan in 'Capital Gains Tax' (1986) 21 Taxation in Australia 215.