CASE LAW

JOHN v *FEDERAL COMMISSIONER OF TAXATION:* THE UNEASY DEATH OF CURRAN (1989) A.T.C. 1

Professor Parsons, commenting upon such as *I.M.F.* and *Curran*,[1] observes: "The lesson may be that damage done by courts to basic principles must be repaired by courts: it is beyond repair by statute."[2] *John* v. *FCT*,[3] in overruling the decision in *Curran*, may at first sight be viewed as an instance of such judicial "repair" of a previous bad decision by the High Court. But the same case has, ironically, resurrected and reaffirmed the equally bad decision in *IMF*, which until now may have seemed otiose.[4]

The *Curran* decision allowed share traders to attribute a cost base to issued bonus shares, in order to generate large deductions without "real" financial outlay.[5] The Federal Full Court, bound by *Curran*, had avoided its effect by deciding that the relevant issue of bonus shares was not a part of the taxpayer's business.[6] This reasoning has been criticised by commentators[7] and was ignored by the High Court, which considered that *Curran* was wrongly decided.

The High Court decision in *John* has been welcomed by the Commissioner as a "death knell" for tax avoidance schemes;[8] and true it is that Curran schemes will no longer be available to share traders. But while commentators have praised the Court's rejection of the *Curran*

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[1] *Investment and Merchant Finance* v. *FCT* (1971) 125 C.L.R. 249; *Curran* v. *FCT* (1974) 131 C.L.R. 409, hereafter respectively *IMF* and *Curran*.

[2] R. W. Parsons, *Income Taxation in Australia*, Sydney, 1985, para 2.451.

[3] (1989) 20 A.T.R. 1, hereafter *John*.

[4] See the approach to *I.M.F.* in the Federal Court decision of Rogers J. in *Dean & Croker* v. *FCT* (1982) 12 A.T.R. 796. See *infra* p. 13.

[5] For a detailed discussion of the decision see (1975) 49 A.L.J. 240.

[6] For a discussion of the Federal Court decision see Sweeney Q.C. (1987) 61 A.L.J. 742. See also (1989) 12 S.L.R. 253.

[7] See Sweeney *ibid.*

[8] Australian Tax Office *Media Release* No. 89/3, 8 February 1989.

reasoning,[9] little attention has been paid to the problematic aspects of the decision, which are the focus of this paper.

Firstly, the attitude of the joint Judges to the reasoning employed by Gibbs J. in *Curran*, is unclear. But the view expressed by Brennan J. in *John* seems to threaten fundamental principles of tax accounting, by refusing to allow a cost base, even when a gift is brought to account. Secondly, the significance of a taxpayer's *de facto* motive or purpose in obtaining a deduction under s. 51(1) remains abstruse after *John*. Thirdly, the Court's endorsement of *IMF* suggests that the purpose of obtaining a tax advantage does not preclude the characterisation of a transaction as within the ordinary course of business. Finally, the joint judgment seems to adopt a "form" approach to tax avoidance schemes, rejecting considerations of "substance". It also embraces a legalistic approach to statutory interpretation and the characterisation of expenditure by a taxpayer, reminiscent of the jurisprudence practised by the Barwick High Court.

A close reading makes it difficult to view either of the judgments in this case as a victory for the Commissioner, or as an example of judicial "repair" of basic principles. In fact, the decision may leave the future of the anti-avoidance provisions in Pt IV of the *Income Tax Assessment Act* in doubt.

Mrs John became a partner in a partnership of 19 people formed for the purpose of share trading during the period 14 April 1977 to 30 June 1977. Shares were purchased and sold and investment management subcommittee meetings were held in a businesslike manner, in order to create the impression that the partnership was a *bona fide* share trader. The actual purpose of the partnership was to obtain a tax advantage pursuant to a scheme of the type made possible by the decision in *Curran*, by generating a tax loss. The partnership eventually acquired shareholdings in the Compinge group. On the next day, each of the companies declared dividends, payment of which was satisfied by issue of bonus shares. A loss was then generated by the sale of both the original and bonus shares. The FCT disallowed the taxpayer's claim to a deduction for the cost of issued bonus shares. The taxpayer appealed to the Supreme Court on the authority of *Curran*.

Yeldham J in the Supreme Court of New South Wales found for John.[10] The Commissioner's appeal to the Full Court of the Federal Court was allowed.[11] The High Court (Mason C.J., Wilson, Dawson, Toohey and Gaudron JJ. in a joint judgment and Brennan J. alone) dismissed the taxpayer's appeal. The High Court overruled *Curran*, holding that there was no loss or outgoing within the meaning of s. 51(1) in the books

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[9] *Ibid.*; see also (1989) 8 Butterworth's Tax Bulletin 124.

[10] (1986) 18 A.T.R. 728.

[11] (1987) 19 A.T.R. 150.

of the partnership, and no share of such loss was deductible by the taxpayer as a member of the partnership. The court also considered deductions under ss. 51(1) and 51(2) of the Act, the application of s. 260, and the principle of fiscal nullity.

The main elements of the decision will be analysed in turn.

THE REASONING IN *CURRAN*

In *Curran*, the judgments of Barwick C.J. and Menzies J. on the one hand, and Gibbs J. on the other reveal two discrete lines of reasoning. The full High Court in *John* overruled the majority decision,[12] but the Court's attitude to this reasoning is ambiguous.

1. The Barwick View

Barwick C.J. engaged in a two-step analysis. Firstly, he considered that the bonus shares were income derived from property—the original shares. But his Honour thought that s. 44(2) had the effect of making this income exempt. Unless the shares were then attributed a cost base equal to the exempt income, this exempt income would be taxed on disposal. Having decided to give the shares a cost base, he proceeded to his second step—the valuation exercise. Barwick C.J. treated the value at which the bonus shares had been accounted as exempt income as a deduction, as a cost of the shares which were trading stock.[13]

2. The Gibbs View

According to Gibbs J. in *Curran*, where property, acquired outside the process of income derivation, is subsequently "taken into" that process, a cost base of its value must be allowed. This is necessary, otherwise property analogous to a gift would be taxable. His Honour discovered such a cost base by regarding the bonus shares acquired by Curran to be trading stock, which could be brought to account in his trading account, as though they had been purchased. The attitude of the High Court in *John* to these two approaches in *Curran* must be examined.

The majority in *John* show some deference to the *first* step in Barwick C.J.'s reasoning:

> "The notion of cost is not restricted to expenditure in the sense of the price actually paid for an outgoing actually incurred in an acquisition. It is apt to include that foregone in exchange for that which was acquired;" and "unless the reduction in value of the original shares is brought to false account a false picture is created. That was the view taken by Stephen J. in *Curran* and it is correct."[14]

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[12] (1989) 20 A.T.R. 1.

[13] Per s. 28 *Income Tax Assessment Act.*

[14] (1989) 20 A.T.R. 1 at p. 12.

The flaw in Barwick C.J.'s analysis is that it is based on a wrong interpretation of the effect of s. 44(2). This section, as interpreted in *Gibb*, does not have the effect of making the relevant income exempt.[15] This was clearly the view of Stephen J., dissenting, in *Curran*[16] but more interestingly, of Barwick himself in *Gibb*.[17] The joint judges in *John* do not expressly base their rejection of Barwick C.J.'s reasoning in these terms, though the better view is that this is implied. True it is that their Honours specifically reject the reasoning behind the "appeal to the alleged equity of the situation" which Stephen J. had rejected:

> "The purchase price of the original shares would take account of any liability to tax which the purchaser would have to bear if he were to obtain the benefit . . . by payment of a dividend not within s. 44(2)."[18]

But in *Curran*, this reasoning was directed to the contingency that the bonus shares were not within s. 44(2). Barwick C.J.'s assumption was that s. 44(2) did apply and that it had the effect of making the relevant income exempt. The joint judges in *John* do not specifically reject this aspect of the Chief Justice's view, but it is submitted that their support for Stephen J.'s dissent implies its full rejection.

Their Honours also consider the second step in Barwick C.J.'s reasoning where his Honour engaged in the valuation exercise. He treated the shares as paid for by means of credit given by the company. The amount credited he regarded as the cost of the shares issued, and this he treated either as an outgoing or as something taken into account in calculating profit or loss.[19]

The full court in *John* reject this reasoning (it is submitted, correctly) on the basis that nothing was foregone in exchange for something else:

> "We are unable to accept that, merely by reason of an amount being credited in payment of bonus shares, the amount so credited is or is properly to be regarded as the cost of the same."[20]

Brennan J., in *John*, does reject this aspect of the Barwick view. But he is merely content to embrace Stephen J.'s dissenting opinion, without explaining his basis for so doing.

More problematic is the High Court's attitude in *John* to Gibbs J.'s reasoning in *Curran*. Gibbs J. analogised the situation in *Curran* with that of a gratuitous gift received by a trader, of trading stock, the value

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[15] (1966) 118 C.L.R. 628; see Parsons para 7.24; 12.76.

[16] (1974) 131 C.L.R. 409 at p. 424.

[17] (1966) 118 C.L.R. 628 at p. 635.

[18] (1989) 20 A.T.R at p. 13.

[19] Menzies J. concurred in this reasoning.

[20] (1989) 20 A.T.R at p. 12.

of which must be brought into account if a true result is to be obtained. The joint judges in *John* seem to agree with this reasoning:

> "It must be accepted that in some situations there is a cost involved in the appropriation of bonus shares to trading stock in the same way as there is a cost involved in the appropriation of a gift to trading stock, and that a value must be ascribed on appropriation if the taxpayer's accounts are to reveal a 'substantially correct reflex of the taxpayer's true income.' "[21]

But at the same time, they fail to clarify those situations where such an account is appropriate. The joint-judgment, though unclear, can perhaps be explained as saying that Gibbs J.'s analogy, is inappropriately applied in the *Curran* context, where the bonus share issue merely restates the taxpayer's position: no "gift" was gained at all. But for the purposes of determining tax liability in other situations under the Act, it *is* relevant.

Brennan J. in *John* rejects Gibbs J.'s reasoning, on the basis that it is "inconsistent with the scheme of the Act to construct an account containing unallowable deductions and to take the resultant profit or loss as a measure of the taxpayer's liability [and] there is no warrant for bringing into account the value of bonus shares except in conformity with Subdiv B and then only at a value fixed in accordance with one or other of the prescribed bases—not at par value."[22]

His Honour's view ignores the conceptual merits which underlie Gibbs J.'s approach. Brennan J. envisages no situation in which the Act would permit the value of a gift to be set off against the receipt of the sale price to arrive at taxable income derived from the carrying on of the business. It may be true that in the particular context of *Curran*, the construction of a cost base was inappropriate, but Brennan J.'s extension of this principle to *all* situations where property is "taken into" a process of income derivation, is an unwarranted interference with principles of tax accounting. His Honour considered that, "it is by no means clear that a tax liability arising from the sale of trading stock acquired without cost to the trader would be inappropriate."[23] This view cannot be correct since it would mean that gifts would be taxable under general principles.

The attitude of the joint judges to Gibbs J.'s reasoning lacks clarity, but it is preferable to the approach adopted by Brennan J. While their Honours imply that Gibbs J.'s reasoning is wrongly applied in the *Curran* context, (presumably because the issue of bonus shares here was nothing like a gift) they do not specifically reject it. They do, however, reject the Barwick approach. With respect, despite the above ambiguities, the

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[21] At p. 12.
[22] At pp. 19-20.
[23] At p. 20.

John decision is to be applauded in as much as it overrules the decision in *Curran.*

That case has been viewed as a judicial sanction of numerous tax avoidance schemes and has been criticised for its deleterious effect on basic taxation and accounting principles.[24] Parliament has attempted to overcome the decision by enacting s. 6BA. The decision in *John* will preclude a reliance upon *Curran* in respect of transactions made prior to the enactment of the section. Taxpayers otherwise excluded under s. 6BA(4) from the effect of ss. (2) of the section may also be affected by the decision. Section 6BA(4) applies where bonus shares are included in assessable income and the taxpayer is a "special taxpayer" (s. 6BA(6)). It seems that only Brennan J. would now deny a cost base to such a taxpayer. Section 6BA(3) allows an apportionment of the original share cost over the original and bonus shares. The decision in *John* would deny a cost base altogether in such cases. Thus there may be some incentive to repeal this section, since its effect is relatively favourable to taxpayers, assuming that only bonus shares are sold. In this sense, the decision is a triumph for the Commissioner. But the route by which the joint judges arrive at this welcome result may not be similarly welcomed, as the following analysis reveals.

DEDUCTIONS UNDER s. 51

The joint judges, in rejecting *Curran*, asserted that a share trader is not entitled to offset the dividend credited in payment for bonus shares which become trading stock, even if the dividend is not assessable income. But this analysis is preceded by a discussion of whether, *assuming* there is a loss, (and assuming that *Curran* is correct) the loss is deductible under s. 51.

Oddly, Brennan J. did not consider it necessary to analyse deductibility under s. 51. Rather, he simply considered whether *Curran* was correctly decided. Clearly, the analytical method of the joint judges more closely conforms with basic taxation principles. But while their methodology may be preferable, their conclusions—that *IMF* is correct and that *Gwynvill*[25] is wrong—cannot be a victory for the Commissioner.

Section 51(1)

The headnote states that the joint judgment decided that "motive or purpose is not necessarily relevant to a consideration of whether a loss or outgoing was incurred under s. 51(1)."[26] If this statement of the holding is correct, then the decision on this point sheds little light on this recondite area of the law. But it is possible to construe the joint judgment narrowly.

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[24] See Parsons para. 2.451; 16.60.

[25] *Gwynvill Properties Pty Ltd* (1985) 85 A.T.C. 4046.

[26] (1989) 20 A.T.R. 1.

(a) *Background: Motive and Purpose*

"Purpose" does not appear within the terms of s. 51(1), except in the second limb, with respect to "producing accessable income" in carrying on a business. Some cases suggest, however, that "purpose" is useful in determining the relevance of a deduction. But there has been uncertainty as to the meaning of purpose in this context, and as to the relevance of "subjective purpose" in determining deductibility.[27]

In situations where the taxpayer's motives in incurring expenditure are tainted with a purpose other than producing income, the courts have demonstrated contrasting approaches.

One approach, evident for example in *Cecil Bros Pty Ltd* v. *FCT*,[28] is for the court to ignore potentially *de facto* purposes and to focus merely on the legal status of an expense, rather than on its commercial effect. This "non-interventionist" approach to the question of whether a loss is incurred under s. 51(1) really involves the displacement of both subjective and objective purpose, in favour of a strict, legalistic determination of the rights and obligations of the taxpayer. The effect of such an approach to s. 51(1), is to sanction the deduction of expenditure which is clearly outside the scope and purpose of the section.

A second approach is demonstrated in *Ure* v. *FCT*, for example, where Dean and Sheppard JJ., considered that in situations where the nexus test is not obviously satisfied, recourse to the taxpayer's subjective motivation is possible.[29]

In *FCT* v. *Gwynvill*,[30] the Federal Court took this reasoning further. The Court considered that, even if the nexus test is apparently satisfied, the objective circumstances of the case (including the taxpayer's knowledge and motivation) could indicate that the relevant deduction did not satisfy the positive limb of s. 51(1). Their Honours found that: "the outgoings appear reasonably capable only of being seen as an attempt to obtain a large tax deduction for the borrower . . . [they were] simply incurred in seeking to gain an allowable deduction". Their Honours adopted a "purposive" approach which seems to allow the taxpayer's subjective motivation to be used to *verify* the finding of a nexus.[31]

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[27] See for example, Dixon C.J. in *Finn* (1961) 106 C.L.R. 60.

[28] (1964) 111 C.L.R. 430.

[29] (1981) 50 F.L.R. 219. Their Honours observe: "Such objects form part of the relevant circumstances by reference to which the problem of characterisation must be resolved. There is no rigid principle which can be applied in determining what, if any, weight should be given to them."

[30] (1986) 13 F.L.R. 138.

[31] Spry Q.C. describes as "heresy" the view in *Gwynvill* that a purpose or motive in obtaining a deduction negates the right to a deduction itself. He laments that "the High Court has not shown sufficient strength or independence in recent years in regard to cases where the emotive expression "tax avoidance" has been raised, and has commonly found it expedient either to refuse special leave or to hold in favour of the Commissioner." (1986) 15 A.T.R. 203. Presumably Dr Spry would applaud the joint judgment in *John's Case*, in that it rejects the *Gwynvill* "heresy".

(b) *The Joint Judgment*

Their Honours in *John* refer to Toohey J.'s statement in *Ilbery*[32] that "purpose may stamp the outgoing as one having no relevant connection with the gaining or producing of assessable income". While their Honours do not reject this statement of principle, neither do they embrace it. In fact, in the following paragraph they restate the fundamental principle in *Ronpibon Tin*,[33] that the test of deductibility is that "it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if no income is produced, would be expected to produce assessable income."[34] Their Honours state that "a consideration of the purpose for which the expenditure was outlaid might not be wholly irrelevant", where no income is produced. Further, purpose *may* "evidence a sufficient relationship with the income earning process." They further state:

> "The cost of a step in the process of gaining or producing income must be regarded as an outgoing or taken into account in calculating the loss (if any) incurred, whatever purpose or motive may have attended all or any of the steps involved."[35]

Perhaps these words are best construed as embracing the approach in *Ure*. That is, motive or purpose may be relevant to whether a nexus between the expenditure and the gaining of assessable income is established. But once the relevant nexus is established, considerations of motive or purpose are irrelevant. While their Honours' language does not clearly favour such a construction, it is submitted that this view is to be preferred.

On another reading, however, their Honours may be asserting the "legal obligation" analysis, demonstrated by such cases as *Europa*.[36] On this view, any consideration of motive in determining deductibility under s. 51(11) would be totally irrelevant. Support for this construction is possibly gleaned from their Honours' reassertion of the principle in *Ronpibon Tin*. Such a reading of the judgment goes beyond the interpretation in the head note, but it is consistent with the policy approach demonstrated in other aspects of the case, especially with respect to the holding in *IMF*.

Despite the uncertainties of the joint judgment on this issue, one thing is clear: the High Court has *not* embraced the purposive approach adopted by the Federal Court in recent cases such as *Gwynvill* and even *John* itself. The Commissioner is hardly entitled to claim the rejection of this liberal approach to s. 51 as a victory.

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[32] (1981) 81 A.T.C. 4661.

[33] *Ronpibon Tin N.L.* (1949) 78 C.L.R. 47.

[34] *Ibid.*

[35] (1989) 20 A.T.R. 1 at p. 6.

[36] [1976] 1 All E.R. 503.

(c) Other findings

Their Honours' discussion of s. 51(1) also considers the final negative limbs of the section, and proceeds on the basis that they are to be read cumulatively with the positive limbs. Assuming that the dividends in question are to be treated as the cost of their acquisition, and given that the nexus test is established under the first limb, they raise the issue of whether the negative limbs of s. 51(1) make the loss or outgoing "non-deductible". They observe that s. 51(2) precludes the purchase of trading stock being treated as capital in nature, but that the section is silent as to whether such an outgoing may nevertheless be characterised as private or domestic in nature. Their Honours conclude on this point that:

> "there is a necessary antipathy between a loss or outgoing incurred in the acquisition of stock for the purpose of sale . . . and a loss or outgoing of a private nature. The purpose of its acquisition and the fact of its sale . . . must serve to deny the possibility that the loss or outgoing is essentially private in nature".[37]

In *Handley*, Mason J. observed that, "outgoings incurred in gaining or producing assessable income and outgoings of a capital or domestic nature are not mutually exclusive. Whether the same is true of outgoings of a private nature is a question that may be left to some future occasion."[38] The joint judges in *John* conclude that an outgoing characterised as trading stock cannot then be characterised as private in nature and thus excluded. This view seems to accord with the approach adopted by commentators such as Parsons.[39]

Section 51(2)

The first step in their Honours' enquiry into whether the relevant dividends were trading stock, is to consider whether John's partnership was engaged in the business of share trading, since this is presupposed by the s. 6(1) definition.

This question, the joint judges observe, is one of fact and:

> "If trading has commenced and the activities reveal a discernible trading pattern, then . . . the motive for undertaking the activities or for undertaking a particular transaction cannot serve to characterise the person engaging in those activities as a non-trader."[40]

In support of their holding that the purpose of obtaining a private tax advantage does not prevent the bonus shares from being "trading stock"

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[37] (1989) 20 A.T.R. 1 at p. 9.

[38] (1981) 148 C.L.R. 182 at p. 194.

[39] Parsons para. 8.8.

[40] (1989) 20 A.T.R. 1 at p. 8.

nor characterise the taxpayer as a non-trader, their Honours cite, with apparent approval *Investment and Merchant Finance Ltd* v. *FCT, FCT* v. *Patcorp Investments Ltd* and *FCT* v. *Westraders Pty Ltd.*[41]

(a) IMF Case

The irony inherent in the Commissioner's claim that *John* "sounds the death knell of all paper avoidance schemes"[42] is highlighted by Parsons' comment that, "IMF is one of the most unfortunate decisions in Australian tax law . . . [which] led to tax avoidance on a major scale".[43]

On general principles, a continuing business involves numerous transactions which are repetitive, systematic and motivated by overall purpose to profit.[44] *IMF* decided that, "neither the attainment of profit nor the expectation of it is essential for a particular commercial transaction to form part of the business of dealing."[45] Prior to this decision, the purpose of obtaining a tax advantage would not have been relevant to ordinary usage notions of income, sufficient to allow such a transaction to be considered within the ordinary course of business.[46]

The approach in *IMF*, which was a clear judicial sanction of dividend stripping schemes, was reaffirmed by the High Court in *Patcorp* and *Westraders*. In both cases, the Court refused to overrule its previous decision because it saw the role of law reformer as Parliament's, not as the Judiciary's. Parliament has attempted to mitigate the decision through amendments to ss. 46A and 46B, though as Parsons asserts, the "appropriate response ought to have been, and ought still to be, the overruling by the High Court."[47]

The approach to *IMF* in inferior courts, bound by the decision, has been to avoid its effect. In *Dean* and *Croker*[48] for example, it was held that on the facts, the loss was not incurred in the course of carrying on the business of share trading, though Rogers J. expressed a willingness to decide, if necessary, that the transaction in question was outside the mainstream of transactions. Though his Honour felt bound both by *Curran* and *IMF*, he avoided their effect by deciding that the taxpayers were not in the business of share trading. A similar approach is evident in the Federal Court decision in *John*.

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[41] (1971) 125 C.L.R. 249; (1976) 140 C.L.R. 247; (1980) 144 C.L.R. 55.

[42] *Op. cit.* note 5.

[43] Parsons para. 2.415.

[44] *Ibid.*, para. 2.438.

[45] (1971) 125 C.L.R. 249, per Barwick C.J.

[46] See Parsons para. 16.42.

[47] *Ibid.*

[48] *Dean & Croker* (1982) 12 A.T.R. 796.

(b) The Joint Judgment: restoring IMF

Their Honours' reaffirmation of the *IMF* decision is interesting for a number of reasons. Firstly, it must be viewed as an attempt to circumvent the reasoning employed in the Federal Court, which was clearly influenced by the taxpayer's motive of avoidance.[49] Their Honours' approach will have implications in future situations where a court is characterising a continuing business: the absence of a profit motive will not preclude a finding of a continuing business.

Secondly, given the widely-held view that *IMF* is damaging to basic principles, it is strange that the opportunity of overruling the decision was once again avoided. This is especially so when it is considered that the Court was prepared to overrule the equally bad decision in *Curran.*

Thirdly, the reasoning manifests a deference to form over substance, and demonstrates a legalistic style of analysis which is also evident in the *Myer Case.*[50] The decision, finally, will be construed as a further judicial sanction of tax avoidance schemes. Once again, it would be absurd for the Commissioner to claim this aspect of the decision as a victory.

SECTION 260 & FISCAL NULLITY

Their Honours refused to apply s. 260 to the facts in *John.* They asserted that for s. 260 to operate in this case, it would be necessary to treat the shares as having been sold at the price at which the original shares and the bonus shares were sold, and that this sort of hypothetical reconstruction is not authorised by s. 260. Further, the application of the section would extinguish assessable income produced by the sale of the shares and the words of the section do not warrant this.[51]

In the past, the approach of Australian Courts to this section was to read in limitations which negatived its effect as an anti-avoidance provision. *Cecil Bros Pty Ltd*[52] for example, construed the section as authorising only the destruction, not the reconstruction of hypothetical transactions to reveal income. The approach in *John* is along the same lines. But the decision in *FCT* v. *Gulland; Watson* v. *FCT; Pincus* v. *FCT*,[53] seemed to qualify these limited interpretations of s. 260, possibly suggesting that anti-avoidance provisions would, in future, be interpreted more liberally. But the narrow reading of s. 260 in *John* makes it difficult to imagine any situation where the section could be used to defeat a deduction. The interpretation manifests a legalistic approach reminiscent of the jurisprudence of the Barwick High Court.[54]

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[49] See commentaries in (1987) 61 A.L.J. 742; (1989) 12 S.L.R. 253.

[50] (1987) 18 A.T.R. 693.

[51] (1989) 20 A.T.R. 1 at p. 10.

[52] (1964) 111 C.L.R. 430.

[53] (1985) 85 A.T.C. 4765.

[54] See G. Lehmann, "Judicial & Statutory Tax Avoidance" in R. Krever (ed) *Australian Taxation: Principles & Practice*, p. 293.

Their Honours also considered that the "fiscal nullity"[55] principle has no application in Australia, because s. 260 "excludes any implication of a further limitation upon that which a taxpayer may or may not do for the purpose of obtaining a taxation advantage".[56] This aspect of the decision is a confirmation of the view expressed by the Federal Full Court in *Oakey Abattoir Pty Ltd* v. *F.C.T.*[57] Though their Honours rejected the Commissioner's submissions on this point, it is possible that the decision may nevertheless be a victory. The FCT may have played Devil's advocate in resorting to the fiscal nullity principle, in order to preclude its future use as a vehicle for avoiding the penalties imposed by Pt IVA. The principle could, previously, have been used to argue that the common law struck down a tax avoidance scheme prior to and independent of Pt IVA. The severe penalties of the provisions could thus have been avoided.

Perhaps the lesson of the decision for the Commissioner, in future applications of the largely untested Pt IVA provisions, is that the court will give them a narrow, legalistic interpretation.[58] It now seems doubtful that the liberal interpretation of Pt IVA adopted in *IT Ruling 2456* will be endorsed by this court.[59] Further, the Commissioner may expect that a "form" over "substance" approach to the characterisation of transactions will be adopted.[60]

CONCLUSION

Viewed superficially, this case may be regarded as the laudable "restoration of sound structure by a High Court reversal of *Curran*", which commentators such as Parsons considered mandatory.[61] The Commissioner's claim that the case is a victory manifests such a view.

But the joint judges have endorsed a legalistic mode of statutory interpretation. They have rejected a "substance" approach to the characterisation of transactions. They have affirmed the decision in *I.M.F.* They have rejected the "purposive" approach to expenditure characterisation under s. 51(1), demonstrated recently in the Federal Court.

Even if *John's Case* does "sound the death knell for Curran schemes", a closer reading of the decision prompts the question, "where is the victory?"

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[55] See *W. T. Ramsay Ltd* v. *I.R.C.* [1982] A.C. 300; *Furniss* v. *Dawson* [1984] 2 W.L.R. 226.

[56] (1989) 20 A.T.R. 1 at p. 10.

[57] (1984) 84 A.T.C. 4718.

[58] See Parsons para. 16.23.

[59] But see G. Lehmann, "Curran overruled—a nail in whose coffin?" (1989) 8 Butterworths Weekly Tax Bulletin [124] at 112.

[60] See Parsons discussion of "form blinkers" at para. 2.420-4428.

[61] Parsons para. 16.60.