

Practical Deliberation in Taxation

Andrew Simester *

The civil law monitors acts. Even regulations governing transactions can be configured in terms of acts and their results, since it is the act of entering into a transaction which imports legal consequences.

This article explores some fundamental distinctions about reasons for acting, and applies them to s 65(2)(e) of the Income Tax Act 1976. It is structured in two parts. The first section outlines the theory: what are the differences between the intentions surrounding an act, its purposes and its motives? The second section draws upon both that theory and case law to analyse what it is to "acquire for the purpose of selling", a source of taxation liability in s 65(2)(e).

Intention, Purpose and Motive

Reasons for Acting

A STRUCTURE FOR EVALUATIVE REASONING

Davidson,¹ amongst others, has suggested that reasoning behind intentional action is explicable through pairs of premises about acts. A prima facie conclusion about some act A might be drawn from the following pair of premises:

1. Any act of mine is desirable insofar as it fulfils my desire for some state Y;² and

* BCom, LLB (Hons)

¹ *Essays on Actions and Events* (1980). A detailed discussion of this field is beyond the scope of this article.

² This is not to say anything about the desirability of that act qua act; only qua the ability of that act to satisfy the particular goal.

2. The act A is a means to achieve Y.

The first premise is a prima facie evaluative proposition, embodying a desire for, or pro-attitude towards, the state Y. The second premise is simply a belief proposition. Given these two premises, the actor concludes, by some process of practical inference (believed by him to be rational), that A is a desirable act. She implements her conclusion when she then intentionally performs A.³

Clearly this is not a complete explanation of intentional acts. The putative conclusion of such reasoning is itself only a prima facie inference: relative to Y, A is a desirable act. Moreover, examination of premise (1) suggests that premise (2) should be expounded, and the conclusion qualified, by the extent to which A will satisfy Y; relative to its ability to satisfy Y, A is a desirable act.

But it is submitted that this also is incomplete, and that in fact the syllogism representation is inadequate generally. Deliberation as a source of intention is not only a backward-oriented process from some primary goal, but also looks forward from prospective acts to assess their attractiveness. At these stages the actor will need to be aware of the existence of other goals and pro-attitudes which may be relevant to the act being assessed,⁴ and of possible alternative acts which might prove more satisfactory either to the primary goals or in the overall context of all of the actor's pro-attitudes (which may not all be consistent). Thus there are multiple practical "propositions" to be evaluated, each of which is complex, since the pro-attitude premise must contain all relevant goals. Moreover, the consequences of act A itself (or of its alternatives) may be uncertain, often because of uncertainty about the exact nature of the surrounding world, which provides the context in which that act is to be performed. Thus each act may need to be evaluated for the alternative scenarios that it could lead to (and which must be contained in a complex belief premise); the overall satisfactoriness of

³ A prima facie reason might be sufficient reason to act, but does not necessitate any decision to so act unless it remains undefeated by prima facie reasons to perform different acts. After deliberation, the remaining undefeated conclusion becomes an "all things considered" reason. The appropriate step from prima facie to all things considered reason to act is instead provided by the condition that the reason is undefeated by any other consideration the actor is aware of, and that further enquiry as to the existence of other considerations is unreasonable in the circumstances.

⁴ And from which similar practical conclusions can be drawn: for example, that relative to Y_2 , A is not desirable. Here we might give an approximate algebraic representation of the evaluative premises in their simplest form. A favourable pro-attitude toward some goal Y might be represented as $\delta_Y > 0$; where " δ_X " is a predicate representing one's evaluative pro-attitude towards a goal X, ">" expresses a relationship of evaluative preference, and 0 is a numerical representation of neutrality (thus $\delta_Y < 0$ expresses an evaluative dislike for Y, and $\delta_{Y_1} > \delta_{Y_2}$ expresses an evaluative preference for Y_1 over Y_2). The belief premise is then represented as $A(C_0) \rightarrow C_1 \supset Y^\lambda$. Here, " $A(C_0)$ " is the performing of act A in the context of the world C_0 ; " \rightarrow " means yields, causes or leads to; " C_1 " is another state of the world, which includes (" \supset ") Y^λ ; where " Y^λ " is satisfaction of the goal state Y to some extent λ . From this we infer that act A is prima facie desirable, $\delta_A > 0$.

that act will depend upon the attractiveness and likelihood of its various possible effects.⁵

It seems therefore that the requirements of practical deliberation are, in essence, the following:

- (1) Belief about the range of possible outcomes of any contemplated act, together with their likelihood – importing the need for a full appreciation of the surrounding world in which the act is to be performed;
- (2) Awareness of the possible alternative acts available to the actor; and
- (3) The ability to assess possible outcomes of any given act with respect to all relevant pro-attitudes of the actor, given beliefs about the extent to which a given outcome will satisfy the various (given) states towards which the actor has a pro-attitude.

EVALUATIVE REASONS FOR ACTING

Consider requirement (3) above. It imports a further consideration of the types of goals the actor has and the manner in which they will be satisfied by a given act. It seems that there are three possible ways in which an act may be desirable:⁶

- (1) The act may be desired for its own sake (that is, in itself);
- (2) The act may be desired as a means to an end (that is, for what it conduces to); or
- (3) The act may be desired as an instantiation of a more general goal. The act in itself satisfies a goal which was capable of being satisfied in other ways.

I shall refer to these alternatives as cases (1), (2) and (3). They can equivalently be stated in terms of satisfying a goal, Y. The act A might satisfy a desire for Y either inherently, or as a means to achieve Y, or as an instantiated form of Y.

⁵ To complete the algebraic picture of some act A: the pro-attitude premise is now a set of propositions about $\delta_{Y_1}, \delta_{Y_2}, \dots, \delta_{Y_n}$. The actor's beliefs are contained in the propositional set $A(C_0) \rightarrow \{C_1[\pi_1] \supset (Y_1^{\lambda 11}, Y_2^{\lambda 12}, \dots, Y_n^{\lambda 1n}); C_2[\pi_2] \supset (Y_1^{\lambda 21}, Y_2^{\lambda 22}, \dots, Y_n^{\lambda 2n}); \dots; C_k[\pi_k] \supset (Y_1^{\lambda k1}, Y_2^{\lambda k2}, \dots, Y_n^{\lambda kn})\}$, where π_i is the likelihood that $A(C_0)$ will lead to the state of the world C_i . From these we accord an evaluative desirability to A, δ_A . This gives us (something like) the requirements of a formal rational decision-model suggested by Von Neumann and Morgenstern in *Theory of Games and Economic Behaviour* (3rd ed, 1953) at 617-632, containing (i) sets of alternatives and outcomes including chance events; and (ii) relations, expressing preferences amongst outcomes, and expressing probability judgments between the chance events.

Note that in reality, we often limit the practical evaluative proposition to include little more than the immediate result of the act, impliedly assuming that C_1 will be otherwise unchanged from C_0 .

⁶ Evans, *Statutory Interpretation* (1988) 54-56.

PURPOSES AND ACCOMPANYING INTENTS

Purpose can mean one of two things. The first is implicit in the concept of doing something "on purpose": deliberately and intentionally.⁷ In this case, the relevant intention is simply to implement an evaluative conclusion. The second meaning of purpose, and the one with which we shall be concerned, is an evaluative reason for acting. One does some act A for the purpose of thereby doing B.

It will be recognised that all cases of purpose are also cases of *accompanying intent*; if one does A for the purpose of B, one also intends B. But the obverse does not hold: cases of doing A with intent to thereby do B are not necessarily also cases of doing A for the purpose of doing B.⁸ For example, I may practise law because I enjoy it, while at the same time I intend to earn money by doing so.

In many cases the actor must intervene after the first act in order to attain a goal. Indeed, most acts can be thought of in this way under different descriptions.⁹ For example, the act of cooling the room by opening the window can be described as a sequence of acts: the act of going over to the window, followed by the act of pushing it open. In order to distinguish it from accompanying intent, I term this case *future intent*. This situation may arise as an instance of case (2), where in general the act will conduce to one's goal by enabling one's future-intended act to then be performed in a particular context. Typically, the immediate purpose of the act will be to enable one to then do the future-intended act. Of course, a future intent may be completely unrelated to one's present actions.

An example may elucidate. My act of opening the window is performed above with the accompanying (but not future) intent, and with the purpose, of cooling the room. Described differently, my act of going over to the window is performed with the future (but not accompanying) intent of then pushing it open, and with the purposes of enabling me to push it open and, ultimately, of cooling the room.

TYPES OF PURPOSEFUL ACTS

Consider first an intentional act. There are a number of possible types. If some result A is wanted for itself (as in case (1) above), then the doing of A is intentional simpliciter. There is no further purpose to the act. By contrast, if one acts deliberately, one acts after evaluative deliberation, and in general one acts for a purpose (being either case (2) or (3)). That is, there is a further reason, distinct from the act itself, for acting.

⁷ "'Purpose' connotes an intention by some person to achieve a result desired by him." *Sweet v Parsley* [1969] 1 All ER 347, 363-364.

⁸ This is an error made by KPMG Peat Marwick, *The Tax Practitioner* (1990) 7-17.

⁹ Kenny, "Intention and Purpose in Law" in Summers (ed), *Essays in Legal Philosophy* (1968) 146-163.

If, as in case (2), some act A is desired because it conduces to some consequence B, then we say that A is performed intentionally, but that the purpose of performing A is B. B itself, of course, may be wanted for any of the three reasons above. If B is only desired as a means to a further consequence C, then B is only an intermediate purpose. If C is then desired for its own sake (case (1)), then C is the ultimate purpose of doing A. If B and C are in fact brought about by the doing of A, then B and C are both, of course, done intentionally.

If A is done because it is an instance of some desired goal B (case (3)), then both A and B are done intentionally and B is the purpose of doing A.

If, as in case (3), an act is desired as an instance of some more general end, then nothing beyond the raw performance¹⁰ of that act itself need be intended (or even contemplated). The performance is intentional under two descriptions, one of which is an aspect, and the purpose, of the second. It is important to note that the more general end will be part of the result of the act. For instance, the purpose of having a good holiday is also an aspect of the result of the act of having a good holiday on the Coromandel.¹¹ If the act is desired for its conduction to some further goal (case (2)), then the (usually causal) process by which that goal is to be achieved must be contemplated and intended. Again, however, only the one consequence need be contemplated; any concomitants of the goal may well be inadvertent.

Nevertheless, purposes and accompanying intentions may exist in respect of the incidental effects of one's actions. This occurs frequently in cases of normative involuntariness (or "Hobson's choice"), where one deliberately chooses the "lesser evil" amongst alternative actions which perform the same act.

Suppose, alternatively, that one does some act A advertently but not intentionally. This type of act, if unreasonable, is traditionally described as "reckless" by the criminal law.¹² In this case, one may have a purpose for doing A, although it cannot have been relevant to one's decision to act and will normally be considered incidental.¹³ One may not do A with an accompanying intent to do B, since an advertent consequence cannot be intended. One may however intend to do B if A occurs, but this future intent can only be contingent, since A itself is done advertently and not intentionally.

¹⁰ Or, as Mackie terms it, the "action": "The Grounds of Responsibility" in Hacker and Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (1977) 175-188.

¹¹ The example is adapted from Evans, *supra* at note 6. For an elucidation of acts and results, see Kenny, *supra* at note 9.

¹² *R v Cunningham* [1957] 2 All ER 412. Advertence to A generally arises when one sets out to do C, realising but not desiring that the doing of C may lead to A.

¹³ Thus one may have a further purpose beyond one's "ultimate" purpose. Alternatively, this may be a case of weak will, where the particular purpose formed part of one's evaluative conclusion to act, but did not motivate one to act: such purposes are advertent but incidental.

From Reasons To Acts

Purposes, then, relate to evaluative reasons. Where there is an intentional act, there must also be a motive. If the act is not intentional, then it is not in itself motivated, and can only be a consequence of another motivated act. The concept of motive, and its distinction from that of purpose, is therefore crucial to our general discussion.

A STRUCTURE FOR MOTIVATIONAL REASONING

What exactly is the nature of an evaluative conclusion? On different occasions, an all things considered evaluative preference¹⁴ may be manifested as an act, an intention to act, or simply as a deontic statement that the actor ought to act.¹⁵ It is submitted that the differences can be explained by reference to the distinction between evaluative and motivational reasons as causes of action.

A motivational conclusion is exactly a volition to act: *we only act when motivated to do so*. Any such conclusion can be represented as the outcome of premises very similar to those underlying an evaluative preference: the two most important differences are that the process of making a motivational "inference" is never one of reflective deliberation (and need not be putatively logical); and that various pro-attitudes in the first premise may well have a motivational force quite unrelated to their significance in evaluative deliberation. In an evaluative context, I might decide that I should perform act X, and that its expected effect is to be sought after. Nevertheless I might find myself drawn to the prospect of another act and its consequences; I simply would rather do Y, despite knowledge of the havoc I will wreak in doing so. Here, motivational pro-attitudes reflect my desires simpliciter; whereas my evaluative pro-attitudes include values which I consider to be good, and which I believe I ought to have.

What then is the role of evaluative conclusions in the explanation of action? The answer¹⁶ is that an evaluative decision is of itself a motivational reason to act, not least because we like to believe that we act rationally for reasons that we approve of.¹⁷ Where there is a difference between a motivational preference that leads to some act A and the actor's evaluative conclusion that the best act to perform is B, that evaluative conclusion has no more effect than a deontic statement that the actor ought to perform B. This is one species of the phenomenon we loosely describe as weakness of the will,

¹⁴ For the best practical proposition.

¹⁵ Cf Raz (ed), *Practical Reasoning* (1978) 5.

¹⁶ Ibid, 134. As Raz suggests, it is also an exclusionary reason, to not deliberate further, in the evaluative context (since it embodies the closing condition implying that further deliberation is unreasonable).

¹⁷ We may well not approve of all our motivational impulses, describing them as our "foibles" or "weaknesses". An evaluative decision will however always be deprived of absolute motivational force because of the presence of the closure condition.

allowing an evaluative preference to be ineffective in the face of sufficiently strong contrary desires.¹⁸

MOTIVES AND PURPOSES

The judiciary has often had difficulty ascertaining the difference between purpose and motive:¹⁹

The word [purpose] can be used to designate either the main object which a man wants or hopes to achieve by the contemplated act, or it can be used to designate those objects which he knows will probably be achieved by the act, whether he wants them or not. . . . In the former sense it cannot in practice be distinguished from motive. . . .

Some judges have been less troubled:²⁰

If the purpose was in fact prejudicial, the offence is committed, no matter how benevolent the motives of the spy or saboteur that led him to essay the purpose.

But as Richardson J has recently opined, the distinction is not a simple one to draw, for "the ideas conveyed by the respective words merge into each other without a clear line of differentiation".²¹

As I have already intimated, a purpose is any goal which underlies one's evaluative conclusion regarding some act to be performed. One's motive is simply the desire underlying a motivational conclusion regarding that act. Clearly, not all intentional acts are purposeful: acts belonging to case (1) earlier are examples. Since motivational inferences are non-reflective, it is quite possible to act without evaluative deliberation at all: "I did it because I felt like it".

Purpose can only be ascribed to acts where they are consistent with an evaluative conclusion. An important such case occurs where some act A is done advertently (by doing B intentionally). The act cannot be motivated by a desire for A, else A would then be done intentionally, although it will be motivated by a desire connected with B. It follows, in this special case, that although one may have a purpose for doing A, it cannot be relevant to one's decision to act and can only be incidental.

Section 65(2)(e)

Section 65(2)(e) of the Income Tax Act 1976 provides that assessable income shall be deemed to include:

All profits or gains derived from the sale or other disposition of any personal property or any interest therein . . . if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of selling or otherwise disposing of it, and all

¹⁸ Or perhaps due to inadequately supportive motivating impulses. In this sense "will" is not a separate entity, but rather a process of giving an evaluative decision motivational force.

¹⁹ *Chandler v DPP* [1962] 3 All ER 142 per Devlin LJ.

²⁰ *Ibid*, 160 per Pearce LJ.

²¹ *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346, 6,350.

profits or gains derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit.

In this discussion I am concerned only with the second limb of s 65(2)(e), which makes taxable any profits on sale of property where "the property was acquired for the purpose of selling".²² We shall consider a number of issues which arise upon an application of that test.

Passive Acquisition and Purpose

The first problem occurs where the property that was subsequently sold was passively "acquired". An example is where the acquisition is by means of a bequest. In these cases the taxpayer takes no positive steps to obtain the property, which is subsequently sold at a profit. Although it is thought that an acquisition by gift may be an "acquisition" within the terms of s 65(2)(e), it seems clear that where the taxpayer's acts are merely passive those acts are hardly likely to be "for the purpose of selling".²³

[I]t is not inaccurate to describe [the taxpayer] as acquiring the land through the bounty of the testator. On that footing it would be quite inappropriate to say of the [taxpayer] that she acquired the land through the bounty of the testator "for the purpose of profit-making by sale".

The opinion of Gibbs J, in *FCT v Williams*, expresses the same sentiment, if not with the same accuracy:²⁴

If a donee . . . can be said to acquire that property within [s 65(2)(e)] (which is doubtful), the main or dominant purpose with which he acquires that property . . . is simply to accept the bounty of the donor.

Gibbs J's conclusion is correct, but it is submitted that his reasoning is not. First, one acquires property when one becomes the owner of it, regardless of the manner in which one does so: according to *The Shorter Oxford English Dictionary*, to acquire is (inter alia) "[t]o receive, to come into possession of".²⁵ Second, and more significantly, it is submitted that his Honour's statement of the associated purpose is incorrect. Where the taxpayer is not causally responsible for the acquisition, then the taxpayer can only acquire with a future intention (which, if it exists in a particular case, may be to resell). Although by deliberately doing nothing one may still act "for a purpose", in the instant example the acquisition is not (or is unlikely to be) related to one's passivity. His Honour errs in two further respects. The first is in supposing that an accompanying purpose, "with" which the taxpayer acts, is relevant; it is not. As will be discussed further below, the only purposes which

²² Prior to the introduction of a capital gains tax, the Australian equivalent of the second limb was found in s 26(a) of the Income Tax Assessment Act. Australian cases will be cited frequently in this article, since they are directly relevant to New Zealand law.

²³ *McClelland v FCT* (1970) 120 CLR 487, 493.

²⁴ (1972) 127 CLR 226, 248.

²⁵ (3rd ed) revised 1973, 18.

matter are those "for" which one acts, accompanying, perhaps incidental, purposes are not significant.²⁶ Additionally, and in any case, it is not true to say that one's purpose of acquisition is to "accept the bounty of the donor", since the latter is exactly the same thing as the former. The act of acquisition is performed equivalently as the act of acceptance; thus to claim that the latter description was the purpose of the former is absurd. This is a case where the act is done for its own sake (under either or both of the possible descriptions), and is not done for any further purpose at all.

With respect to his Honour, his subsequent statement in *Steinberg v FCT* is to be preferred:²⁷

The section does not require that the acquisition should have been effected by any particular method – it is not limited, for example, to acquisition by purchase. It is the purpose, not the mode, of the acquisition that is specified in [s 65(2)(e)]. Because the acquisition must have been for the purpose stated, it follows that if the taxpayer was a passive recipient of the property . . . it will, generally speaking, be impossible to say that it was acquired for the purpose of . . . sale.

SPECIAL CASES

A number of alternative arguments and situations should be considered in order to elucidate my contentions.

The first is an interesting argument that the relevant act to be tested is the taxpayer's act of not disclaiming a gift or bequest. This may be done for the purpose of enabling an acquisition and later resale. But that does not mean that the acquisition itself was accomplished for the purpose of resale. The operative cause of the acquisition is *not* the act of not disclaiming; rather, it is the act of gifting by the benefactor. No purpose of the recipient can be attributed to the act of the benefactor.

One may receive property through gift with a future intent to dispose of it. But one cannot have a reason which causes one to acquire property by gift. The purpose for which the gift is made belongs to the benefactor, not the recipient.

The only possible exception to the above arises if the recipient's conditional purpose of resale, should the gift be made, is what inspires the benefactor to make the gift. In this case, the gift is at least in one sense acquired because of a purpose of resale. But the statute says "for"; it implicitly requires that the evaluative reason for deliberately choosing to acquire the property be the taxpayer's. Here, as in the above example, the taxpayer did not choose to acquire the property. It was therefore not "acquired for a purpose" of the taxpayer. Rather, it was acquired because of the taxpayer's future intention.

The donor in such an instance did, it may be argued, gift for the purpose of enabling a resale. However, it is only the purpose of the acquisition which is

²⁶ *Plimmer v CIR* [1958] NZLR 147, 151. See text, *infra* at page 401.

²⁷ (1975) 134 CLR 640, 695.

to be tested, not that of the gift; and this purpose must be in the mind of the taxpayer personally.²⁸

A greater difficulty arises in the case of directly solicited gifts, where the property is solicited for resale purposes. In *FCT v Williams*,²⁹ the High Court of Australia made its comments in the context only of "unsolicited" gifts, and did not consider the possibilities of the alternative situation.

The distinction to be made in this case is one of causation. While the directly operative cause of the acquisition is still the benefactor's act of gifting, the operative cause of this decision may in turn be the taxpayer's act of solicitation, and *that* act may be done for the purpose of enabling the taxpayer to later resell.

Such a distinction turns upon descriptions of the taxpayer's act: can the act of soliciting be, in a wider context, an act of acquisition? It is submitted that it can. This is a case of an actor intentionally performing one act in order to bring about a consequence.³⁰ If the consequence comes about, then the actor has also performed the act of bringing about that consequence intentionally, and the latter act may properly be attributed to the actor.³¹

The counter argument is that the independent donor, by exercising a choice to gift, breaks the causal chain between the soliciting and the acquisition of the gift. Thus the acquisition is still not properly attributable to the taxpayer. This perhaps depends upon the extent of influence that the taxpayer brought to bear upon the donor's decision.

A further scenario is provided by *Tikva Investments Pty Ltd v FCT*.³² In that case the donor, Krasnostein, transferred an interest in land to the family investment company, Tikva. The latter, however, was more than a purely passive recipient.³³

By the deed of gift it expressly accepted the transfer and assignment of the interest in the land and in the syndicate and covenanted both to pay Mr Krasnostein's due proportion of the then unpaid balance of purchase money payable to the Glassons, amounting to \$1,250 together with interest, and also to comply with the syndicate agreement, keeping Mr Krasnostein indemnified against all claims and liabilities in respect of it.

Hence it may easily be said that the act of acquisition was an intentional act by Tikva. The purpose of entering into the deed of gift, and of undertaking the obligations therein, was to acquire the land. It was found that this was in turn done for the purpose of resale. The taxpayer's latter purpose could be

²⁸ *Harkness v CIR* (1975) 2 NZTC 61,017. See also *Davis v CIR* [1959] NZLR 635, 642.

²⁹ *Supra* at note 24, at 241 per Barwick CJ; 248 per Gibbs J.

³⁰ Thus, under one description, the taxpayer's act of entreating the donor is performed for the purpose of acquiring the gifted property.

³¹ Under a new description. See Kenny, *supra* at note 9, and accompanying text. Provided there is a sufficient causative link between the importuning and the gift, then the taxpayer may be said to have acquired the gift by means of the persuasion.

³² (1972) 3 ATR 458.

³³ *Ibid*, 466.

attached to the acquisition because the acquisition itself could be an intentional act of the taxpayer.

AN APPLICATION

The most important situation analogous to gifts of property arises when a shareholder becomes entitled, under a renounceable rights issue, to subscribe for shares in the company at a favourable price. The New South Wales Supreme Court has twice held that the taxpayer who assigns such rights is not liable to be taxed upon the consideration received for doing so.³⁴ The future intention to sell or assign, with which the rights were acquired, "cannot be said to be the purpose *actuating* the acquisition".³⁵

Prebble³⁶ analyses these cases on the ground that what was disposed of was not "acquired" as that word is used in s 65(2)(e). It is submitted, for the reasons advanced above, that this is not the correct basis for the decisions. That particular question was expressly left open by Rath J in *FCT v Miranda*.³⁷ Further, although Prebble's proposition was apparently concurred with by David Hunt J in *Palmarc Investments Pty Ltd v FCT*,³⁸ in the same paragraph his Honour qualifies himself by saying that the taxpayer was not "selling property which he has acquired in the relevant sense"; presumably, that is, with the relevant purpose.

It may well be, however, that if a shareholding was acquired solely with an expectation of a rights issue announcement, then the rights may be said to have been acquired intentionally, and, in appropriate cases, for the purpose of resale. As in the example of a solicited gift, the acquisitive act is intentional under a wider description.

Similarly, in *Steinberg v FCT*,³⁹ the taxpayers acquired a company owning land. The company was then wound up and its land distributed in specie to the shareholders. It was held that the acquisition of the company was in order to obtain a distribution of land, which was itself ultimately acquired for resale, and that therefore the taxpayers could properly be said to have acquired the property for resale. The intermediate and alternative description of their actions was irrelevant.⁴⁰

Material Purpose of Selling

In order to incur liability under the second limb of s 65(2)(e) there must be

³⁴ *FCT v Miranda* (1976) 6 ATR 367, 380-381; *Palmarc Investments Pty Ltd v FCT* (1985) 16 ATR 671, 675.

³⁵ *Ibid*, 380.

³⁶ *The Taxation of Property Transactions* (1986) 20.

³⁷ *Supra* at note 34, at 380.

³⁸ *Supra* at note 34, at 675.

³⁹ *Supra* at note 27.

⁴⁰ *Ibid*, per Gibbs J, agreeing with Mason J at first instance. This analysis was not seen by Kennon, in his note "Trusts and Section 26(A)" (1980) 9 A Tax Rev 71, 71-72.

an actual purpose of selling. This requirement is twofold: first, there must be an actual, crystallised purpose; second, that purpose must be to resell.

As to the first, the purpose of selling must be more than a mere vague expectation. Thus a purpose of holding property in the knowledge that it might have to be sold at some time in the future cannot be a "purpose" within the terms of the section.⁴¹ This, of course, follows from our discussion of evaluative reasoning, where it was established that mere advertence is insufficient for purpose (in any more than an incidental sense); the latter requires an accommodation of one or more evaluative goals. The courts have explicitly accepted that people may indeed purchase property for no purpose at all: simply for the sake of having bought it.⁴² Alternatively, there may be no particular crystallised purpose. In *Mitchell v CIR*⁴³ the taxpayers acquiesced in their father's wish that they buy a horse from him. They did so simply with a view to seeing what, if anything, might come of it. The Court held that at that time they had no materialised purpose of resale, and were therefore not liable to taxation upon profits subsequently made from the horse. Similarly, in *G Williams v FCT*⁴⁴ it was held that one may acquire property with no particular purpose at all where one does so merely with a vague general hope that it will be a good investment.⁴⁵

It should, however, be noted that the onus of proof is on a taxpayer to show that her purpose is not one of resale. This onus is more difficult to discharge where the taxpayer can point to no alternative crystallised purpose. Thus, in *Harkness v CIR*,⁴⁶ the taxpayer was able to show in respect of one block of land that he did not have any particular crystallised purpose for buying at all (and hence no purpose of resale), and that personal use was prominent in his concerns. However, liability was imposed for a second block of land, as the taxpayer was unable to point to any other reason for its purchase apart from subdivision and resale.

The second requirement, that the purpose be one of resale, raises questions about purposes which might involve sale. A taxpayer does not, it

⁴¹ *Anzamco Ltd (in liq) v CIR* (1983) 6 NZTC 61,522: the farm was purchased in the knowledge of a then government requirement that half the property be resold within 25 years.

⁴² *Williams Property Developments Ltd v CIR* [1980] 1 NZLR 280, 283-284; citing *Pascoe v FCT* (1956) 6 AITR 315, 320 and *RG Williams v FCT* (1974) 4 ATR 676, 690. See text, supra at page 391.

⁴³ (1987) 9 NZTC 6,033.

⁴⁴ (1974) 74 ATC 4237.

⁴⁵ See also *Smithfield Pastoral Co Pty Ltd v FCT* (1966) 10 AITR 9, 12: "It would be, however, to take a long step to say that, because a purchaser expects an increase in the value of property which he is thinking of buying, it should be inferred that his purpose in buying is to resell at a profit." Later, at 21: "But while, as I have already said, I infer that [the taxpayer] anticipated that land values around Smithfield would rise, [I do not] conclude that the company's purpose in buying the Smithfield land was to resell it at a profit."

⁴⁶ Supra at note 28.

has been held, have a purpose of resale when she acquires property as a long term hedge against inflation.⁴⁷ As Barwick CJ put it:⁴⁸

The purchase of land as a long term investment, or as a hedge against the depreciating value of money does not, in my opinion, come under [s 65(2)(e)].

In *National Distributors Ltd v CIR*⁴⁹ property was acquired as part of ongoing management of a portfolio designed to protect against inflation. Management of the portfolio required sale from time to time of selected stocks as appropriate. The High Court held that acquisition of the property was not for the purpose of resale. This, apparently, will be the case even though the benefit of the property, as a hedge against inflation, cannot be obtained without reselling the property in due course:⁵⁰

That the increased value may only be realised by sale does not deny that the purpose of its acquisition was investment or establish that the purpose of its acquisition was to use it as a subject of trade by reselling it at a profit.

Why is this? The distinction has been criticised as not rationally justifiable,⁵¹ and indeed *National Distributors* has now been overturned by the Court of Appeal.⁵² But it is submitted that it is in fact supportable. Before we can say that one has an intention or purpose with regard to some goal, one must to some extent have focussed upon that goal. Thus purpose, under s 65(2)(e), must turn upon conceptions about one's future acts. In the present discussion, it will be recognised that a taxpayer might well conceive of hedging against inflation as simply involving the "holding" of property, excluding from that conception the act of eventually selling, particularly in view of its likely temporal distance from the taxpayer at the moment of acquisition. In such cases the taxpayer's conception of her purpose will not include resale. Thus resale will not, subjectively, be the taxpayer's purpose for acquisition.

I do not mean by this to question the decision by the Court of Appeal in *CIR v National Distributors*. The appellate majority made it clear that the instant case was not, in fact, one where property was held simply as a hedge without thought or purpose of selling. The leading judgment, delivered by Richardson J, accepts that:⁵³

There may be other cases where the dominant purpose is retention of the asset not for the intermediate income it will afford, but . . . simply to secure the real value of the taxpayer's money in the long term.

⁴⁷ Nor, of course, when the taxpayer acquires property as a source of income: see for example *Case K6* [1978] ATC 66; also *Bates v CIR* (1955) 11 ATD 96, 102.

⁴⁸ *Gauci v FCT* (1975) 135 CLR 81, 87. Also *McClelland v FCT*, supra at note 23, at 495.

⁴⁹ (1987) 9 NZTC 6,135.

⁵⁰ Supra at note 27, at 686.

⁵¹ By Prebble, supra at note 36, at 20-21; and by Grbich, "Section 22(a) in the Judicial Melting Pot", in O'Neill (ed), *Tax Essays Vol I* (1979) 148, 166-168.

⁵² *CIR v National Distributors Ltd*, supra at note 21.

⁵³ *Ibid*, 6,351-6,352.

In the High Court, Quilliam J had concluded that "the shares were regarded as a long term investment".⁵⁴ Richardson J demurred: "I am unable to agree that it is appropriate to characterise shares held for an average of 19 months as long term investments."⁵⁵ In this respect, then, the case turned upon a different view of the facts. Quilliam J had considered that the taxpayer had set out to hedge against inflation by holding shares as long term investments. Richardson and Casey JJ held that its purpose was in fact to resell (and thus to implement a "hedge" by realising gains). But whatever the facts, the law upon this point is undisturbed.

Whose Purpose? Inadvertence and Acquiescence

The purpose of resale must actually be in the mind of the taxpayer. It is not enough that such would have been the purpose of a reasonable acquirer of the property. Thus the test of purpose is subjective and not objective.⁵⁶

Correspondingly, the purpose of resale must be in the mind of the taxpayer rather than anyone else. In *FCT v NF Williams*⁵⁷ the taxpayer's husband acquired land for the purpose of resale. He later gifted the land to the taxpayer, who did solicit the gift. She sold the land some seven years later. The High Court of Australia held that the taxpayer was not liable for tax upon her gains from the sale. She had not acquired the land for a purpose of resale, and her husband's purpose could not be attributed to her. A similar decision is that in *Harkness v CIR*.⁵⁸ There the taxpayer's father arranged for the purchase of land in the name of the taxpayer. It was found that, although the father proposed to sell the land (as eventually was done), the taxpayer himself had no such plans and indeed considered the land suitable for farming when he returned from overseas.

By contrast, a taxpayer may acquiesce in the purpose of another, which purpose will then be imputed to the taxpayer.⁵⁹ An interesting example is *Maritime Trust v CIR*,⁶⁰ where O transferred an interest in land to a family trust. The trust was held to have adopted O's original purpose for acquiring the land. It was thereby not liable to taxation, because the land had been acquired for use rather than resale.

Clearly, such purposes cannot be imputed to, nor adopted by, a taxpayer who is unaware of either the purpose or the transaction itself. The sole exception would seem to be where the usual principles of a general agency

⁵⁴ *Supra* at note 49, at 6,142.

⁵⁵ *Supra* at note 21, at 6,353.

⁵⁶ *Davis v CIR* *supra* at note 28; impliedly accepted in *Adelaide Olive Co Pty Ltd v FCT* (1974) 4 ATR 252.

⁵⁷ (1972) 72 ATC 4188.

⁵⁸ *Supra* at note 28.

⁵⁹ *Tilley v FCT* (1977) 7 ATR 139. Contrast *Mitchell v CIR* *supra* at note 43, where the taxpayers' acquiescence was only as to the transaction, not as to his purpose.

⁶⁰ (1983) 6 NZTC 61,537.

apply, provided that the taxpaying principal does not have a purpose of his own, in which case the agent's purpose need not be considered.⁶¹

The foregoing creates an interesting opportunity for tax avoidance. If a company already owns land, which was not acquired for the purpose of resale, then individual taxpayers who wish to buy and resell that land would be better to purchase the company itself, which will not be liable to taxation upon its profit from resale.⁶²

Multiple Purposes

There may not be a unique purpose for the acquisition of a particular item of property. Where there is more than one purpose for a purchase of property, it is now settled law that a taxpayer will only be tested upon his *dominant* purpose.⁶³

The purpose of which [s 65(2)(e)] speaks is the dominant purpose actuating the acquisition of the assets.

The "dominant" purpose is that purpose most important in the taxpayer's decision to acquire.⁶⁴ Two points arise for discussion.

We saw earlier that a purposeful act is an evaluatively deliberative act, and that one acts for a purpose when one's act is attributable to an evaluative desire to thereby achieve some further end.⁶⁵ We also noted that performances of acts are in fact only brought about by motivational desires.⁶⁶ The connection between this dichotomy is that, in the case of purposeful acts, one is motivated to act by a wilful decision to implement an evaluative conclusion.⁶⁷ Thus, if s 65(2)(e) tests the purpose for which one acts, it effectively tests the evaluative proposition which (together with the closure condition) motivates the taxpayer to act. The legislature has therefore imposed a test, in most cases, of motivating purpose: what was the taxpayer's motive for buying?

This, however, is only its practical effect. It is not the actual test to be applied in the few instances where motive and purpose diverge. An illustrative case is *Holden & Meneer v CIR*.⁶⁸ The appellants in that case desired to transfer sterling funds from England to New Zealand. To that end, they purchased United Kingdom stocks and resold them immediately in New Zealand for New Zealand pounds. The issue of their taxation liability went to

⁶¹ Cf *Tilley v FCT* supra at note 59, at 140.

⁶² Cf *FCT v Whitfords Beach Pty Ltd* (1982) 12 ATR 692. However a distribution of such profits might now be taxable in the hands of the taxpayers as shareholders.

⁶³ *Evans v Deputy FCT(SA)* (1936) 55 CLR 80, 99. See also *Pascoe v FCT* supra at note 42; *Buckland v FCT* (1960) 12 ATD 166, 169; *CIR v Walker* [1963] NZLR 339.

⁶⁴ Contrast s 67(4)(a), in regard to real property.

⁶⁵ Per the discussion of "Reasons for Acting", see text, supra at page 387.

⁶⁶ "From Reasons to Acts", see text, supra at page 392.

⁶⁷ See text, supra at page 392.

⁶⁸ [1974] 2 NZLR 52; also *CIR v Hunter* [1970] NZLR 116.

the Privy Council, inter alia upon the question of whether their dominant purpose for purchasing the stocks was resale. The taxpayers contended that their dominant purpose for acquisition was the transfer of funds to New Zealand, and that they simply intended to resell the stocks in order to achieve that purpose.

The Privy Council, however, thought otherwise. Although the transfer of funds may have been the motive for the transactions, it was not the immediate purpose actuating the acquisition:⁶⁹

There can be only one answer to the question for what purpose the securities were bought, and the fact that the purchase and sale were part of a wider objective cannot affect that answer.

In doing so, the Judicial Committee approved the earlier, similar case of *CIR v Hunter*, where Turner J had held:⁷⁰

The motive which inspired these transactions was no doubt that they provided an advantageous method of remitting funds from England to New Zealand; but I think that there can be no doubt but that the words of the section are literally complied with in this case, and that in acquiring the conversion stock the respondent is plainly demonstrated to have done so for the very purpose of selling that stock again, and immediately.

Nevertheless, analysis of these cases leaves us with a difficulty. The "ultimate object" here could equally be said to be a purpose. And, if it was the ultimate purpose for acting, why then was it not the dominant purpose: the purpose most important to the taxpayer's decision to act.

The cases, and the writers, have not clearly distinguished two different classes of multiple purposes.⁷¹ The first such class arises when one has two or more disparate purposes, which are not linked in any particular way except by being contemporaneously in the mind of the taxpayer. This is the standard class of cases, and here it can be proper to examine only one (the dominant and motivating) purpose, and to ignore others:⁷²

[W]hen a man invests money in the purchase of any kind of property it will generally be either with a view to holding it and deriving income from it, or with a view to realising sooner or later an enhanced capital value. And while logically these "purposes" are not mutually exclusive it will generally be possible to say that the one or the other is predominant at the time when the purchase is made.

But in the second class of multiple purpose case, the purposes are not disparate. These are instances where a taxpayer may possess one or more *intermediate* purpose together with a final purpose. The possibility of such "chains" of purposes has already been considered.⁷³ *Holden & Meneer* fits into this second type. The purposes for buying the stock were intermediately to

⁶⁹ Ibid, 54.

⁷⁰ Supra at note 68, at 125.

⁷¹ With a recent exception in *CIR v National Distributors Ltd*, supra at note 21. See the further discussion of this in text, infra at page 413.

⁷² *Pascoe v FCT* supra at note 42.

⁷³ See text, supra at page 391; also Evans, supra at note 6.

enable a resale in New Zealand, and ultimately to *thereby* effect a transfer of funds into New Zealand currency.

These were the purposes for which the stock was bought, and neither can properly be said to be "dominant" over the other. The taxpayer ought to be liable, given the decisions in *Hunter* and *Holden & Meneer*,⁷⁴ if either is a purpose of resale. In this type of case, all intermediate purposes necessary to achieve the motivating, ultimate purpose for the taxpayer's transactions should be examined, in addition, of course, to the ultimate purpose itself. It is simply inappropriate to seek a dominant purpose in these cases, just as it is inapt to describe the associated purposes as incidental.

Contingent Purpose

The fact that a purpose is contingent is irrelevant. Most goals are to some extent conditional upon a probability, and the test remains whether, despite the uncertainty surrounding any given purpose, that purpose nevertheless dominates the decision to acquire property. In *Williams Property Developments Ltd v CIR*, it was noted by Richmond P that:⁷⁵

If a person buys a piece of land because he believes that it will go up in price and that he will then be able to resell it at a profit then it seems open to regard resale at a profit as his dominant purpose even though his ability to fulfil that purpose depends on the contingency of a rise in value.

Cooke J (as he then was) completed the dichotomy:⁷⁶

Of course it by no means follows that the contingent purpose will always be the dominant one.

Both Judges are, with respect, quite clearly correct. Recall the discussion of evaluative propositions. The consequences of any act are likely to be contingent upon the precise nature of the present and future environments in which the taxpayer acts.⁷⁷ In reality, of course, we generally assume that the future will not be unusually different from the present.⁷⁸ But it remains the case that our purposes and our future intentions are conditioned upon expectations about the world.

Moreover, the extent of any contingency is relevant only to our selection of the optimal evaluative proposition; a probability might in itself affect which act we decide to perform and for what purpose, but whichever purpose moves

⁷⁴ This is, of course, a matter simply of statutory construction. If the statute examined one's motivating purpose simpliciter, then the taxpayer would only be liable if the ultimate purpose (being the purpose actuating all transactions in the scheme) was one of resale.

⁷⁵ *Supra* at note 42, at 288.

⁷⁶ *Ibid*, 290-291. Another example of a dominant contingent purpose is provided by *Maritime Trust v CIR*, *supra* at note 60, at 61,539, where it was held that "the dominant purpose of the purchase . . . was to retain the land to be available for the benefit of the group, *if required*, and not for the purpose of selling or otherwise disposing of it" (Emphasis added).

⁷⁷ See text, *supra* at page 389.

⁷⁸ And thus some events are widely described as unforeseen, or even unforeseeable.

us to act will be the dominant purpose, regardless of its objective probability.

For example, if I have \$1, I can invest it for one year and come out with (say) \$1.10, contingent only upon the bank's continued solvency. Alternatively, I can gamble it and hope to win another dollar immediately, with perhaps a fifty percent chance of doing so. If I choose the latter, then my dominant purpose for acting is to make a one dollar gain, notwithstanding that it is contingent upon winning the gamble.

Description of the Transactions

The second limb taxes "profits or gains derived from the sale . . . of any personal property or any interest therein . . . if *the property* was acquired for the purpose of selling or otherwise disposing of it". McGregor J thought:⁷⁹

"The property" when last used in the passage mentioned must, to my mind, mean the same property as that from which the profit or gain has been derived by means of sale.

It therefore becomes essential to link the property acquired to that which is sold. There are three types of difficulty here, which we shall consider in turn.

PHYSICAL IDENTITY

The first difficulty occurs when the legal description of what was sold is the same as that which was bought, but the physical characteristics of the property are now substantially different. An example is provided by *Moruben Gardens Pty Ltd v FCT*.⁸⁰ The taxpayer in that case purchased land with a house on it, demolished the house, erected a residential flat building and sold the flats with strata titles. It argued that what was sold was a flat unit building in strata titles, which was not what had been acquired. Rejecting this argument, Mason J held that there was no need for:⁸¹

[A]n essential identity or correspondence between the physical condition of the land at the time of its acquisition and at the time of its sale.

The common law and of the law of taxation have always tended to prefer form over substance. Here it works to defeat the taxpayer. Although the purpose for acquiring specific property might not apply to subsequent building thereon, any such claim is circumvented by the property law rule of annexation:⁸²

The property which the taxpayer acquired in this case was an estate in fee simple in the land known as 21 Moruben Road [together with any buildings upon it] and that was the estate which it sold.

⁷⁹ *Bedford Investments Ltd v CIR* [1955] NZLR 978, 982.

⁸⁰ (1972) 3 ATR 225.

⁸¹ *Ibid*, 234. See also *RO Slacke Ltd v IRC (NZ)* (1970) 1 ATR 696, 699-700, where Quilliam J expressed doubt that such a physical identity might be required by s 65(2)(c).

⁸² *Ibid*. In the context of personal property, the various doctrines of accession, accretion, adjunction, confusion, commixtion and specification are perhaps more relevant than annexation.

LEGAL IDENTITY

It appears from a perusal of the case that the taxpayer's argument in *Moruben Gardens Pty Ltd v FCT* was presented in the wrong manner. Mason J makes an important assumption:⁸³

In this respect I have regarded the sale of all the units comprised in the plan registered under the Conveyancing (Strata Titles) Act 1961 as constituting a disposition of the entire estate in fee simple in the land, an assumption not challenged by the taxpayer.

It is submitted that this assumption is incorrect. Strata titles are analogous to subdivided freehold lots. Thus the legal description of what was sold is no longer identical to the title acquired.

The second and third types of difficulty are concerned with cases in which the legal description by which the property was sold does not equate to that by which it was bought. There are four such cases:

1. Where the taxpayer buys property, and sells a lesser interest in that which was bought;
2. Where the taxpayer buys an interest in property, which then merges with an existing interest (owned by the taxpayer) in that property. The property is then sold as a whole;
3. Where the taxpayer buys property as a whole, divides it, and sells a portion thereof;
4. Where the taxpayer buys property and sells both that and other property in a single, entire transaction.

Different Interests

Cases 1 and 2 represent the second type of difficulty. This difficulty is one of non-identity of legal interests in the same property. It arises when the *interest* which is acquired in that estate is not the same as the interest which is sold, even though the relevant legal estate may be the same in both transactions.

Within this type, it is submitted that the subsumption of any particular case within s 65(2)(e) will turn upon the wording of the section itself. The reason lies in basic rules of property law. Where (as in case (2)) an estate is acquired through the merger of two interests therein, those two interests simply cease to exist. It is inappropriate to speak of the sale of that estate as the sale of the two interests, since any such description wrongly presupposes the continued description of those interests. Similarly, if the taxpayer (in case (1)) purchases an absolute title in some property and subsequently sells an interest therein, it is also inappropriate to speak of the taxpayer's "purchase" of that interest (and of his purpose for doing so). That interest did not exist when the taxpayer acquired the property; it was *created* only when it was sold.

Taxation liability can therefore only be imposed by supplementary wording

⁸³ Ibid.

in s 65(2)(e) itself. This is provided solely in respect of case (1). The section captures:

[P]rofits or gains derived from the sale or other disposition of any personal property or any interest therein . . . if the property was acquired for the purpose of selling.

The section does not say:⁸⁴

[I]f the property or any interest therein was acquired for the purpose of selling.

Therefore case (b) is not captured.

The only New Zealand authority on the latter point is found, by analogy, in *Neil v IRC (NZ)*.⁸⁵ In that case Wilde CJ held that the phrase "any trading stock" does not include a partial interest in trading stock. The phrase "disposition of any personal property" does not, presumably, include the disposition of an interest in such property.

In Australia this point has been considered by a number of cases. In *FCT v McClelland*⁸⁶ the taxpayer, who already held an undivided half share in a block of land, bought the other share from her brother. She then subdivided the land into three portions and sold one such portion ("portion 5"). It was held by Windeyer J, in the High Court of Australia in its original jurisdiction, that what was sold was "different in kind" from that which the taxpayer had originally acquired. To be taxable, what was sold must be contained within the property acquired; that is, it must be the property acquired or an interest therein. Thus, according to Windeyer J, the second limb:⁸⁷

[A]pplies to a transaction whereby a taxpayer sells any property he acquired for the purpose of sale. It applies whether he sells that property as a whole or in parts. . . . But, as I read it, it does not apply when what is sold is essentially different in kind from the thing acquired. . . . I cannot accept the proposition . . . that when [the taxpayer] sold portion 5 she sold two separate shares in it, hers and her brother's. She did not. She was not selling separate shares. The shares had disappeared into a unity. She sold an entirety.

In *McGuinness v FCT*,⁸⁸ however, Walsh J declined to follow Windeyer J. On analogous facts, his Honour held that the case fell within the section. It should be noted, moreover, that his Honour's refusal to follow Windeyer J was strictly necessary to the finding that the taxpayers in *McGuinness* were liable, whereas the decision in *McClelland* was supportable on other grounds. Nevertheless subsequent authority in Australia, albeit open to the same distinction, appears to have settled the law on this matter. In *Cowan v FCT*⁸⁹

⁸⁴ Cf Molloy, *Molloy on Income Tax* (1976) 87.

⁸⁵ (1967) 10 AITR 407. This issue was not raised in *West v CIR* (1976) 1 TRNZ 564, where a taxpayer lessee subsequently acquired the reversion. The taxpayer won on other grounds.

⁸⁶ (1969) 118 CLR 353; affirmed by PC, supra at note 23. Appeals to the Full Court and to the Privy Council were argued on different grounds, but Barwick CJ (at 370) and Kitto J (at 376, Menzies and Owen JJ concurring) appeared to approve the view of Windeyer J at first instance.

⁸⁷ Ibid, 359.

⁸⁸ (1972) 3 ATR 22.

⁸⁹ (1972) 3 ATR 474.

the taxpayer had an interest in property as an unpaid vendor. He repossessed the property for non-payment of the sale price, and resold it. Gowans J held, following Windeyer J, that s 65(2)(e) did not apply since (inter alia) the interest sold was not the same as the interest acquired by repossession. In his Honour's words, "I do not hold a view that a sale of an entirety is a sale of an undivided half share."⁹⁰ Declining to follow *McGuinness*, his Honour suggested that Walsh J did not decide the matter, and merely expressed certain views while at the same time calling for further submissions.⁹¹ This, it is submitted, was something of a misrepresentation. Walsh J did decide the matter; the submissions he called for were as to the amount of profit made from the taxable portion of the property sold, in order that the taxpayer's liability could be quantified.

The majority of the High Court of Australia in *AL Hamblin Equipment Pty Ltd v FCT*⁹² have since clarified the law. The taxpayer was a lessee of certain machinery. On two occasions it purchased machinery at a "pay out" amount provided for in the lease contract, and then traded that machinery in at a higher value. Barwick CJ spoke for the majority when he stated:⁹³

In my opinion, the possessory right of the lessee, as I have said, not being surrendered but on the contrary being retained, is sufficient to deny the proposition that that which the taxpayer as lessee acquired from the lessor was what precisely he used as a trade-in. . . . In my opinion, the application of [s 65(2)(e)] to each of the two instances produces the same result. In each case, it seems to me that that which was got in was not that which was traded-in.

Although there were, again, other grounds for the majority decision, such an unambiguous statement is unlikely to be derogated from in Australia, nor is there any reason to suspect that it will be in New Zealand.

This then seems to be the law, and it is supportable upon the grounds stated earlier. McKay,⁹⁴ however, has set out a number of arguments to the contrary. I shall not traverse these here, except to note that they are not fully convincing. If, after purchasing two half interests, one sells only an entirety, it is not a "logical corollary" that when two joint tenants combine to convey an entirety they do not sell their respective shares. It is not quite accurate to describe the joint tenants as having combined. They each simultaneously sell, and convey, their share as separate entities, but the purchaser buys an entirety.

Nevertheless there is a powerful argument, not yet put by academics nor argued before a court, against the existing legal position. If the decision in *McGuinness* is wrong, and if what was acquired as an undivided share of the

⁹⁰ *Ibid*, 489.

⁹¹ *Ibid*.

⁹² [1975] 5 ATR 16.

⁹³ *Ibid*, 19.

⁹⁴ "Changes in Property for the Purpose of Section 26(A)" (1974) 3 A Tax Rev 32.

property has ceased to exist, then so has the existing, already owned, undivided share; and the taxpayer has, through merger of the interests, *acquired the entirety*.

The acquisition is, of course, in two steps, and the dominant purpose may not always be of resale; but if the acquisition of the entirety was completed in order to resell, it is submitted that any such resale might well fall within s 65(2)(e). Certainly it should do so where each part-interest was bought for the purpose of resale.

Divided Portions

Cases (c) and (d) fall into the third type of difficulty. This difficulty arises where the physical and legal boundaries of the property bought do not coincide with those of the estate sold. Case (c), it will be recalled, is that of buying a whole and selling a subdivided portion. Case (d) consists of buying property and selling it, together with other property, in a single transaction.

In respect of the portions of resold property that were originally acquired for resale, it is settled law that both cases will be caught by the second limb. In case (c) the court will simply look at the purpose for buying the part that was sold,⁹⁵ since s 65(2)(e) captures:

[T]he sale or other disposition of any personal property . . . if *the property* was acquired for the purpose of selling.

The justification for such reasoning is that the description of either transaction can appropriately be divided. The division may be made physically and legally, and therefore also conceptually. It is thus reasonable to describe the acquisition and resale of property in terms of the acquisition and resale of portions thereof. It is also apt to speak of purposes as applicable to those portions.

Intention, Purpose and Motive

We have seen that a future intention is not a purpose. Although a taxpayer may intend to resell property acquired, this may not be the taxpayer's purpose of acquisition. As Barrowclough CJ stated in *Plimmer v CIR*:⁹⁶

A man's purpose is usually, and more naturally, understood as the object which he has in view. . . . [I]n ordinary language, "purpose" connotes something added to "intention", and the two words are not ordinarily regarded as synonymous. Though "purpose" may sometimes mean "intention", the Court should hesitate to adopt that more restricted meaning unless the statute clearly evidences such an intention.

Nor is a motive necessarily a purpose, although it was noted earlier that most dominant purposes will also be motivating purposes. It is to the taxpayer's

⁹⁵ *Bedford Investments Ltd v CIR* supra at note 79; approved *CIR v Walker* supra at note 63, at 366. See also *Plimmer v CIR* supra at note 26; *Harkness v CIR* supra at note 28.

⁹⁶ *Supra* at note 26, at 151.

purpose that the court must look when considering liability under s 65(2)(e).

The difficult situations arise when the property that is sold was purchased as part of a wider transaction. It has been stated above that the court will look to the purpose for acquiring that part of the property which was later sold. There are a number of scenarios in this regard, which I shall set out and consider in turn.

- (a) There may be no purpose for buying that portion of the property. Although the remainder of the transaction may be entered into for a particular purpose, the relevant portion later sold may simply be acquired for the sake (in itself) of doing so.⁹⁷

The possibility of a lack of purpose has been contemplated earlier in this article.⁹⁸ In such an instance, there may be a future intention relevant to that portion, provided only that such an intention does not provide the reason for the acquisition. This case falls outside the second limb of s 65(2)(e).

- (b) Alternatively, there may be no *distinct* purpose for acquiring that portion of the transaction.

In this case, the relevant portion is acquired simply as part of the overall transaction, and for the same general purpose, which may or may not be to resell. For example, if a parcel of ordinary shares in a listed company is acquired by way of investment, there is no distinct purpose, other than the general purpose of investment, for acquiring any particular share in that parcel.

- (c) There may be a distinct purpose, for acquiring that portion, within the overall transaction.

If the property is not required to be bought together with other property in the transaction, then such a distinct purpose is likely to be the dominant purpose for the acquisition of that property.⁹⁹

- (d) A variation on (c) arises where the taxpayer does not particularly wish to acquire that portion at all, but is required to do so because the vendor will not sell the rest of the property separately. The unwanted portion in this scenario may be bought either for no purpose at all, or for the purpose merely of facilitating the overall transaction.

It will not in such a case be acquired for the purpose of resale, and hence will fall outside the ambit of s 65(2)(e), although there may be a future intention to dispose of the unwanted property.

⁹⁷ Cf Evans, *supra* at note 6.

⁹⁸ See text, *supra* at page 398.

⁹⁹ *Harkness v CIR* *supra* at note 28; *Digby-Benneu v FCT* (1973) 4 ATR 166.

There is substantial case law on this point. In *Plimmer v CIR*,¹⁰⁰ the taxpayers wished to purchase all the ordinary shares in a company. The vendor required them also to purchase preference shares in the company. The taxpayers did not want the preference shares and intended to sell them immediately. It was held that the profit made by the taxpayers on resale of the preference shares was not taxable. Although they were bought with the future intention of resale, the purpose of buying was to secure a purchase of the ordinary shares. Similarly, in *Land Projects Ltd v CIR*¹⁰¹ the taxpayer wished to purchase part of a farm for subdivisational purposes. In order to do so it was forced to acquire the entire farm, including livestock which it immediately resold. Barrowclough CJ held that although acquired with the intention of reselling, the livestock was not bought for that purpose. Rather, it was acquired for the purpose of enabling the taxpayer to obtain the desired land.

The Court of Appeal accepted the existence of case (d) in *CIR v Walker*.¹⁰² In that case the taxpayer bought 63 acres of land in order to extend his farm. Three of the 63 acres were zoned for urban use. The taxpayer had always intended to subdivide and sell these three acres, and did so. The Court of Appeal held, however, that the resale did not fall within s 65(2)(e). The three acres had not been acquired for the purpose of resale. Instead, they were acquired simply because the 63 acres were offered for sale as one lot, and the taxpayer desired the other 60 acres for his farm. There was no distinct purpose, independent of the wider transaction, for which the extra three acres had been bought.¹⁰³

[T]he respondent's dominant purpose in purchasing the city sections was the acquisition of the block as a whole as an addition to the existing farming venture, and not the later sale of the city sections to advantage.

It has been suggested that the Court of Appeal in this case made "no attempt to dichotomise the taxpayer's purpose . . . with respect to different parts of the property acquired."¹⁰⁴ This suggestion is incorrect, as the above extract and even a brief perusal of the decision will show.¹⁰⁵

(e) There may, however, be a distinct purpose, apart from facilitating the general transaction, for buying that portion of property, even though the taxpayer is required to do so as part of the entire transaction.

That this is possible is acknowledged by Barrowclough CJ in *Plimmer v*

¹⁰⁰ Supra at note 26.

¹⁰¹ [1964] NZLR 723. Other decisions include *Davis v CIR* supra at note 28; *Jansse v IRC (NZ)* (1970) 2 ATR 224; *Railway Timber Co Ltd v CIR* [1977] 1 NZLR 655.

¹⁰² Supra at note 63.

¹⁰³ Ibid, 366.

¹⁰⁴ Commerce Clearing House, *Income Tax Law and Practice* Vol 1 (as at 31/5/90) 10-550. The error is repeated at 10-600.

¹⁰⁵ Supra at note 63, at 356 per Gresson P; 362 per North J; 366 per Turner J.

CIR:¹⁰⁶

I think it not impossible in law that the preference shares might have been purchased for the purpose of selling them even though the larger purpose of the whole transaction was merely to acquire control of the company.

In such an instance the dominant purpose for acquisition of that portion will be an arguable matter. Ascertaining a dominant purpose will, of course, turn on the facts of each case, but it would seem that if the decision to enter into the overall transaction was induced (or motivated) by the existence of a specific purpose in respect of that portion, then that specific purpose will be dominant vis-à-vis the supplementary property acquired.

What is clear, however, is that the "involuntariness" of an extra acquisition in a larger transaction is merely evidential. If a supplementary purchase is required by the vendor, it is simply more likely that the purchase falls within (d) above, rather than within the present case (e). Prebble's test of whether the property was acquired "voluntarily"¹⁰⁷ is therefore inadequate to decide whether a taxpayer in fact possesses the dominant purpose of resale.

It was noted in *CIR v Walker* that the taxpayer might possibly have had a purpose of resale in respect of the three acres,¹⁰⁸ although the majority held that if so it was not the dominant purpose. A case where that purpose was found to be dominant, on the facts, is *Chapman v FCT*.¹⁰⁹ The taxpayers in that case attempted to purchase a 17 acre block of land as a home and small farm from the owners of a 44 acre property. Upon being rebuffed, they learned that the remaining 27 acres were subdivisible and purchased the entire area. The High Court of Australia, in its original jurisdiction, held that the taxpayers had developed a separate purpose in respect of the 27 acres; which were acquired not simply as an incident of acquiring the 17 acres, but indeed for a dominant purpose of their own. The distinction between this case and *Walker* is that *Walker* would have been happy to buy only the 60 acres if it had been offered as such.¹¹⁰ He did not (apparently) acquire the balance in order to reduce the cost of the farm land; the Chapmans, whatever their original plans, ultimately purchased each area with an independent objective.

- (f) The final case is an extension of cases (c), (d) and (e). It arises whether or not it was necessary to the broader transaction that the taxpayer should acquire the surplus property. This is the case where the purpose for acquiring that portion of property is to resell *in order to* facilitate or enable the general transaction. Case (f) falls within s 65(2)(e).

Indeed, it is possible that this is the correct rationale for the decision in

¹⁰⁶ *Supra* at note 26, at 150.

¹⁰⁷ *Supra* at note 36, at 28-31.

¹⁰⁸ *Supra* at note 63, at 356 and 367.

¹⁰⁹ (1968) 117 CLR 167.

¹¹⁰ Similarly *Plimmer v CIR*, *supra* at note 26.

Chapman v FCT:¹¹¹

Had [the taxpayers] had the finance to do so they might have considered retaining the whole area. . . . [T]hey intended, when they acquired the land, to resell so much of it as was necessary to enable them to pay back the money borrowed and develop a small farm . . . [and] to enable them to achieve the sort of property they wanted.

This variety of multiple purpose has been discussed above.¹¹² As in *Holden & Meneer v CIR*¹¹³ these are cases where the property sold was acquired for the intermediate purpose of resale, in order to satisfy a further, motivating purpose. In *Holden & Meneer* that purpose was to transfer funds to New Zealand. In *Chapman* it was to develop a farm on the 17 acres retained. An important case of this sort is *Bedford Investments Ltd v CIR*.¹¹⁴ The taxpayer purchased nine allotments of property with the expressed intention of reselling eight allotments to enable it to retain the ninth "as a cheap investment". Although the motivating (and ultimate) purpose of the transaction was to retain one lot as an investment, it was nevertheless held that resale of the other eight lots was taxable under the second limb of s 65(2)(e). The intermediate purpose of resale was necessary and not incidental to the entire transaction, and thus was a purpose for which the eight lots were acquired.

These decisions are surely correct. Although there are two purposes for the acquisitions in each case, it is inappropriate to speak of the further and motivating purpose as "dominant", since the purposes are not alternative.

Furthermore, these decisions are in no way inconsistent with those of *CIR v Walker*¹¹⁵ and *Plimmer v CIR*¹¹⁶ in case (d) above, for it will be recognised that these are simply different cases. Such a distinction has not, however, been made as yet by academic writers, nor has it been drawn explicitly in the cases. Prebble, for instance, argues that in *Holden & Meneer* the Privy Council focussed simply upon the immediate, rather than the underlying, purpose for acquisition as the one to be tested in all s 65(2)(e) cases.¹¹⁷ He suggests that in *Walker* the Court of Appeal, by contrast, focussed upon the underlying purpose for acquiring the 63 acres as a whole. In his opinion:¹¹⁸

[T]he better view must be that even cases like *Plimmer v CIR* where the property sold was unavoidably acquired are impliedly overruled.

¹¹¹ Supra at note 109, at 169.

¹¹² See text supra at and following note 68.

¹¹³ Supra at note 68.

¹¹⁴ Supra at note 79.

¹¹⁵ Supra at note 63.

¹¹⁶ Supra at note 26.

¹¹⁷ Supra at note 36, at 30.

¹¹⁸ *Ibid*, 32. Prebble's confusion may in part be due to a distinction made by Lord Wilberforce in *Holden & Meneer v CIR*, supra at note 68, at 54, when he opined that the transfer of funds was a "wider objective" rather than a purpose. Cooke J (as then he was), in *Williams Property Developments v CIR*, supra at note 42, at 290 was not misled: "Lord Wilberforce fastened on the only immediate purpose as distinct from a wider and more essential purpose."

Prebble considers that:¹¹⁹

The question is whether "purpose" refers to the taxpayer's direct intention in respect of the property in question or to his ultimate motive.

It is submitted that this is not the question at all. The taxpayer's intention is entirely irrelevant. The taxpayer's motivating purpose for acting is the purpose that has been consistently examined by all the cases cited above. It is subject only to the distinction that arises for purposes intermediate to the ultimate and motivating purpose. This distinction has been obscured to date by an unwarranted fixation upon the concept of an independent and "dominant" purpose for every transaction.

The distinction was missed most recently by Williams,¹²⁰ in a note reviewing *CIR v National Distributors*.¹²¹ Williams depicts *Holden & Meneer* and *Walker* as "alternative" views regarding the test of purpose. This is certainly the opinion of Doogue J who, in dissent, rejected the conclusion in *Holden & Meneer* as "fallacious".¹²² But implicit in the decisions of the majority is the understanding that those two cases are not in conflict. Casey J provides a useful summary of their views:¹²³

Unless the taxpayer can show [as he did in *Walker*] that the main or dominant purpose which led him or her to acquire the property was not to sell or otherwise dispose of it, then the profits or gains will be taxable. It matters not that the purpose of buying shares to sell them later was arrived at . . . to provide a hedge against inflation. These are merely the motives or wider objectives which give rise to the purposeful buying of shares for resale.

Conclusion

It may well be true that "semantic analysis"¹²⁴ cannot solve all the difficulties of applying legal rules. But those difficulties will be better understood by properly comprehending the rules themselves. If we know more precisely why we need to make choices, and if we better understand the ramifications of those decisions, then our choosing will surely be wiser.

¹¹⁹ Ibid.

¹²⁰ [1990] NZ Recent Law Review 60, 61-63.

¹²¹ Supra at note 52.

¹²² Ibid, 6,360-6,361. It is submitted that Doogue J is incorrect, for the reasons advanced in this article.

¹²³ Ibid, 6,355.

¹²⁴ Prebble, supra at note 36, at 32.