

v. *D.P.P.*,<sup>1</sup> and a differently constituted court in *Scott v. Metropolitan Police Commissioner*<sup>2</sup> no mention is made of the analogous debate in the context of the law relating to larceny at common law, or theft under the Theft Act. The parallels are, in fact, quite striking.

One can forgive the omission of any reference to the important case of *R. v. Mitchell*<sup>3</sup> in dealing with the topic headed 'Order of Verdicts' (p. 202). However any author who purports to deal with the ancient common law doctrine that where two or more persons are charged with conspiracy with each other, and with no-one else, if one is acquitted, then all must be acquitted, and omits any mention of the leading binding authority on the subject, must be regarded as having failed in his professed aim of accurate exposition. The decision in question is that of the Privy Council in *Dharmasena v. R.*<sup>4</sup> The author relies instead upon conflicting minority dicta in the House of Lords in *D.P.P. v. Shannon*,<sup>5</sup> a case which turned largely upon whether the *Dharmasena* doctrine should continue to be followed in England.

Matters of style deserve mention as well. Is it really necessary for the reader to be told in some detail on no less than eleven occasions that their Lordships in *D.P.P. v. Withers*<sup>6</sup> rejected the existence of a common law offence of conspiracy to effect a public mischief? Such repetition is tedious in the extreme. The proof reading has not been done as carefully as one might wish. Ignoring the numerous typing errors, one matter of moment is the mistake on page 151 where the reference to the offence of conspiracy to corrupt public morals should clearly have been to the offence of conspiracy to effect a public mischief.

In summary, Gillies has written a book which undeniably makes a useful, albeit flawed, contribution to the understanding of a difficult subject.

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*The Taxation of Property Transactions — including land and share dealings* by Lilian Horler (Butterworths, Australia, 1981), pp. x, 1-161. ISBN 0 409 300330. Price \$27.50. (hard).

I found this an interesting and in parts thought-provoking little book. The author's principal concern, as is obvious from the title of the book, is to analyse the income tax consequences flowing from the acquisition and disposal of various types of property. This involves a detailed examination of ss. 25(1), 26(a), 26AAA and 52 of The Income Tax Assessment Act 1936 (the Act) in particular.

One of the difficulties facing anyone writing on the subject of Australian income tax law today is that it is highly likely that before their work is off the printing press, or at least before a reviewer has had a chance to read it, significant changes in the law will have been brought about by legislative enactment and/or judicial decisions. This book is no exception and thus anyone consulting it must be careful to check for subsequent developments. Thus, for example, the discussion of the deductibility of rent for home offices (para. [211]) must be read subject to the High Court decisions in *Federal Commissioner of Taxation v. Forsyth*<sup>1</sup> and *Handley v. Federal Commissioner of Taxation*;<sup>2</sup> the interpretation of s. 26AAA(5)(a) adopted by the Board of Review in Case 28 as discussed in para. [411] has been doubted by Campbell J. in the

<sup>1</sup> [1961] A.C. 103.

<sup>2</sup> [1975] A.C. 819.

<sup>3</sup> [1971] V.R. 46.

<sup>4</sup> [1951] A.C. 1.

<sup>5</sup> [1975] A.C. 717.

<sup>6</sup> [1975] A.C. 842.

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<sup>1</sup> (1981) 81 A.T.C. 4157.

<sup>2</sup> (1981) 81 A.T.C. 4165.

Queensland Supreme Court in *Federal Commissioner of Taxation v. Mullins*<sup>3</sup> the reasoning in the Board of Review decisions discussed in para. [416] that s. 52 does not entitle a taxpayer to a deduction in respect of a loss incurred in circumstances when if he had derived a profit it would have been assessable under s. 26AAA, has, subject to the condition of him having given the requisite notice, been rejected by Hunt J. in *Black & Baer Pty Ltd v. Federal Commissioner of Taxation*<sup>4</sup>; and of course the enactment of the new general anti-avoidance provisions contained in the new Part IVA of the Act (s. 177A-G) requires a reconsideration of the matters dealt with in Chapter 11, entitled 'Tax Avoidance and Property Transactions', and further examination, in the light of these new provisions, of the various situations which are referred to throughout the book as not giving rise to a liability to tax.

Although not directly within the scope of the author's topic, for the sake of completeness, she has included a brief discussion of the impact of income tax on investment income from property in Chapter 2. In her endeavour to state the relevant principles briefly, she inevitably was forced to oversimplify and to omit reference to some of the often fine, but important distinctions drawn by the authorities. This could have been overcome to some extent by including references to some of the more important cases, thereby directing the reader to further sources of inquiry. Thus, reference could usefully have been made, in relation to interest, to *Lomax v. Peter Dixon & Son*<sup>5</sup> in which the difficult distinctions between discounts, interest and premiums are explained; to *Federal Commissioner of Taxation v. Munro*<sup>6</sup> and *Federal Commissioner of Taxation v. Total Holdings (Australia) Pty Ltd*<sup>7</sup> (which now must be compared with the recent decision in *Ure v. Federal Commissioner of Taxation*<sup>8</sup>) which deal with the deductibility of interest payments; and in relation to royalties to the important distinction between the nature of the payments in *Stanton v. Federal Commissioner of Taxation*<sup>9</sup> and *McCauley v. Federal Commissioner of Taxation*<sup>10</sup>. More surprising is the absence of any reference to annuities, and the leading cases such as *Egerton — Warburton v. Federal Commissioner of Taxation*,<sup>11</sup> which are normally dealt with as income from property, although some theoretical arguments may be raised against this classification.

Chapter 3 contains a useful analysis of what constitutes a business and an interesting discussion of *London Australia Investment Co. Ltd v. Federal Commissioner of Taxation*<sup>12</sup> and the other relevant authorities dealing with the question of when the organized switching of investments by an investor constitutes a part of the business of investing thereby generating revenue gains and losses.

Chapter 4 deals with short term property sales and focusses on s. 26AAA of the Act which includes in the assessable income any profit derived from the sale of property within twelve months from the date of its acquisition. There have been a few Board of Review cases dealing with this provision but the first Court decision in *Federal Commissioner of Taxation v. Mullins*<sup>13</sup> was not handed down until after the publication date of the book. The section has generated less interest and attention than was anticipated on its enactment and as the author explains, this may well be because in many instances it is avoided by the retention of property beyond the twelve months' time limit. The section does raise a number of interesting questions referred to by the author which have not as yet been resolved. One such question to which she does not refer is the potential application of the section to distributions in specie of trust property by a trustee to beneficiaries.

<sup>3</sup> (1981) 11 A.T.R. 779.

<sup>4</sup> (1980) 11 A.T.R. 255.

<sup>5</sup> [1943] 1 K.B. 671.

<sup>6</sup> (1926) 38 C.L.R. 153.

<sup>7</sup> (1979) 79 A.T.C. 4279.

<sup>8</sup> (1981) 81 A.T.C. 4100.

<sup>9</sup> (1955) 92 C.L.R. 630.

<sup>10</sup> (1944) 69 C.L.R. 235.

<sup>11</sup> (1934) 51 C.L.R. 568.

<sup>12</sup> (1974) 74 A.T.C. 4213.

<sup>13</sup> *Supra*.

Chapters 5 to 8 deal with the position prior to, and after the enactment of, s. 26(a) of the Act and were the chapters which I found most interesting and thought-provoking. This provision includes in the assessable income profits derived from the sale of property acquired by the taxpayer with the purpose of profit-making by sale or from the carrying on or carrying out of any profit-making undertaking or scheme. The section is notorious for the voluminous case law it has generated in respect of both questions of legal interpretation and of evidence. Rather than simply presenting a chronological examination of the authorities the author has sought to critically analyse the frequently conflicting judicial interpretations of the section. She has developed a valuable reconciliation and explanation of the authorities and has courageously dismissed certain judgments as plainly incorrect. She is, in my view, justifiably critical of the numerous limitations which the courts have read into the provision thereby cutting down its scope of operation and to some extent, distorting the ordinary concept of income.

After a brief chapter on losses from property realisations (Chapter 9), the author deals in Chapter 10 with some interesting points on tax accounting. Again, she explains that a number of important questions in this area have not yet been clearly resolved by the Courts.

The final chapter entitled 'Tax Avoidance and Property Transactions', after a short discussion of the old s. 260, outlines briefly various forms of tax avoidance schemes and the legislative measures which have been designed to combat them. Many of the schemes are highly complex and intricate and both the schemes themselves and the countering legislation require detailed study before they can be properly appreciated. However, most of these schemes are now largely only of historical interest and thus their cursory treatment is justified. Of course the impact of the countering legislation is of great and wider significance but to date there has been no judicial consideration of most of it. It is perhaps surprising that although two and a half pages are devoted to dividend stripping there is little more than a mention of trust stripping and no discussion of the difficult s. 100A designed to counter it. Moreover, as I mentioned earlier, the whole question of avoidance has now taken on a new dimension in view of the recently enacted Part IVA of the Act.

The book concludes with an Appendix containing summaries of all Court and Board decisions since 1970 dealing with the taxation of property realisations. This is no doubt a useful addition but readers must always be careful to resist relying on such concise summaries as more than a general guide.

Inevitably there are the usual odd typographical errors.<sup>14</sup> The author's style is relaxed and easy to read though the excessive cross-referencing becomes somewhat distracting at times. The book is designed primarily for practitioners and my impression is that it will be best appreciated by those who already have some familiarity with the relevant case law. Although this book does not purport to deal directly with questions of tax policy, despite a number of telling asides from the author on various points, it does highlight the anomalies and inequities that may arise under a system which taxes income and not capital.

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*Cases and Materials on Real Property* by P. J. Butt, G. L. Certoma, C. M. Sappideen and R. J. Stein (Law Book Co. Ltd, Australia, 1980). ISBN 455 20044 0.

*Property Law, Cases and Materials* by Ronald Sackville and Marcia Neave (3rd edition, Butterworths, Australia, 1981), pp. lxxi, 1-913, Index

<sup>14</sup> See e.g. paras. [404], [608], [1013].

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