SUPREME COURT OF QUEENSLAND

CITATION:	*Orica IC Assets Pty Ltd & Anor v Commissioner of State Revenue* [2011] QSC 1
PARTIES:	**ORICA IC ASSETS PTY LTD** ACN 010 767 263 (First Appellant) **and** **INCITEC FERTILIZERS LIMITED** ACN 103 709 155 (Second Appellant) **v** **COMMISSIONER OF STATE REVENUE** (Respondent)
FILE NO:	BS 6428 of 2009
DIVISION:	Trial Division
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 January 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22-24 November 2010
JUDGE:	McMurdo J
ORDER:	**Each appeal is dismissed.**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – EXEMPTIONS – QUEENSLAND – where the Incitec group had a fertiliser business and a chemicals business – where several companies within the group sold property used in the fertiliser business to the first appellant – where the first appellant then sold property, including that acquired by it under the first transaction, to the second appellant in exchange for all of the shares in the second appellant – where the first appellant then sold its shares in the second appellant to an entity outside the group, Pivot, in consideration of an issue of what became 70% of the shares in Pivot – whether the first two transactions were part of a corporate reconstruction as defined by s 398 of the *Duties Act 2001* (Qld) – whether those transactions were made under an arrangement under which the consideration was either provided by a person other than a group company or was disposed of to a person other than a group company.

TAXES AND DUTIES – STAMP DUTIES – EXEMPTIONS – QUEENSLAND – where the second appellant issued redeemable preference shares after the subject transactions but before the merger with Pivot – where the majority of the preference shares were taken up by Westpac Securities, the underwriter of the preference shares, and the remainder were taken up by investors who were approached by either Westpac Securities or Grange Securities Limited, a sub-underwriter – whether the redeemable preference shares were offered and sold to the public so as to engage s 412(4) of the *Duties Act 2001* (Qld).
TAXES AND DUTIES – STAMP DUTIES – ASSESSMENT AND AMOUNT PAYABLE INCLUDING FINES – OTHER CASES – QUEENSLAND – where the Commissioner originally assessed the subject transactions as exempt from duty but later issued a reassessment in relation to each transaction under which they were subject to transfer duty and penalty tax in the amount of 75% of the transfer duty, as required by s 58(2) of the *Taxation Administration Act 2001* (Qld) – whether the Commissioner should have exercised his discretion under s 60 of the Act to remit all or part of the penalty tax.

Acts Interpretation Act 1954 (Qld) s 14B
Companies (South Australia) Code s 5(4)
Corporations Act 2001 (Qld) s 82
Duties Act 2001 (Qld) ss 10(1), 398, 400, 402, 406, 411, 412, 413
Income Tax Assessment Act 1936 (Cth) s 51
Judicial Review Act 1991 (Qld)
Taxation Administration Act 2001 (Qld) ss 22(3), 58, 60, 63, 69, 73, 75, 76, 77
Taxation Administration Regulation 2002 (Qld) s 6

Corporate Affairs Commission (SA) v Australian Central Credit Union (1985) 157 CLR 201
Hurst v Vestcorp Ltd (1988) 12 NSWLR 394
Lee v Evans (1964) 112 CLR 276
Lunney v FC of T; *Hayley v FC of T* (1958) 100 CLR 478
Magna Alloys and Research Pty Ltd v Federal Commissioner of Taxation (1980) 33 ALR 213
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24
News Limited v South Sydney District Rugby League Football Club Limited (2003) 215 CLR 563
Newton v Federal Commissioner of Taxation (1958) 98 CLR 1
Quetel Pty Limited v Commissioner of Stamp Duties [1993] 2 Qd R 57
Shore and Store Developments Ltd v Commissioners of Inland Revenue [1967] 1 AC 472
The Collector of Stamp Revenue v Arrowtown Assets Limited [2003] HKCFA 52

COUNSEL:	D Russell QC with D Marks for the appellants J McKenna SC with A Pomerenke for the respondent
SOLICITORS:	Tucker and Cowen Solicitors as town agents for Arnold Bloch Leibler for the appellants Treasury Department for the respondent

[1] Until 2003 a number of companies within the Incitec Group conducted businesses involving the supply of fertilisers. Those businesses, or more precisely the property used in them, were the subject of two transactions which occurred on 1 April 2003. In the first transaction, several companies within the group transferred the property to the first appellant, to which I will refer by its then name Incitec Limited. The property sold included the assets of such of the businesses as were conducted from Queensland, which assets were thereby dutiable property as defined by s 10(1) of the *Duties Act 2001* (Qld) ("the Act"). Under this first transaction, described as the Tier One asset sale, dutiable property was sold for a total consideration of $20,949,037.

[2] Under the second transaction, described as the Tier Two asset sale, Incitec Limited sold property (including that acquired by it under the first transaction) to the second appellant, which I will call IFL. The agreed consideration for the transfer of dutiable property included in this transaction was $211,537,411, to be provided by the issue to Incitec Limited of 23,635,465 ordinary shares in IFL at $8.95 per share.

[3] In consequence of these two transactions, the assets which had been used in the Incitec fertiliser businesses became the property of IFL as a wholly-owned subsidiary of Incitec Limited.

[4] In each transaction, there was a distinct contract of sale for the Queensland businesses, which thereby recorded the specific consideration for the transfer of dutiable property under the Act, and which I will call "the sale agreements".

[5] In so far as those transactions involved a transfer of dutiable property, each was subject to transfer duty under the Act, unless exempt from duty, under Chapter 10 Part 1 of the Act, as a transfer of property within a corporate group.

[6] On 30 April 2003, the appellants, through their solicitors Arnold Bloch Leibler ("the solicitors"), wrote to the respondent Commissioner, enclosing copies of the sale agreements and claiming that the transactions were exempt from duty. On or about 18 June 2003, the Commissioner assessed them as exempt. However on 7 May 2004 the Commissioner issued a reassessment in relation to the Tier Two sale agreement. He assessed that transaction for transfer duty of $7,929,881.25, together with penalty tax of $1,982,470.25 and unpaid tax interest of $805,767.35. The solicitors lodged an objection on behalf of the appellants and thereafter the Commissioner advised that the matter was being referred to his Investigations Division.

[7] The outcome was that on 25 February 2008, the Commissioner issued reassessments for both transactions. In relation to the Tier One sale agreement, there was an assessment of $782,816.25 of transfer duty, $587,112.18 of penalty tax (being 75% of the transfer duty) and $221,067.20 for unpaid tax interest. In relation to the Tier Two sale agreement, the previous assessment of transfer duty stood, but the amount

of the penalty tax was increased to $5,947,410.93 (again 75% of the transfer duty) and the unpaid tax interest was increased to $1,590,846.19.

[8] For each transaction the amount of the interest was calculated on the amount of the transfer duty at the rates fixed by s 6 of the *Taxation Administration Regulation 2002* (Qld) and for the period from 22 July 2003 to 25 February 2008, reduced by the Commissioner's discretionary remission to exclude 903 days of interest.

[9] Each of these sales was between companies which were then undoubtedly members of the same corporate group. But what also happened was that Incitec Limited sold the ordinary shares in IFL to an entity outside the group, Pivot Limited (Pivot), in consideration of an issue of what became 70% of the shares in Pivot. This was done in order to merge the Incitec fertiliser business with the fertiliser business of Pivot. It is this merger with Pivot which, the Commissioner says, has denied the two transactions an exemption from duty.

[10] The appellants challenge each reassessment. They say that each transaction was exempt. Alternatively, they challenge the amount of the penalty tax, saying that there should have been no penalty or at least something far short of the 75% which was imposed. Their appeals are pursuant to s 69 of the *Taxation Administration Act 2001* (Qld), which confers a right of appeal without specifying the nature of that appeal. It is common ground, however, that in all respects this appeal should be conducted as a hearing *de novo*. Section 73 of the *Taxation Administration Act* permits evidence to be admitted on the appeal which was not before the respondent, subject to the qualification that if that evidence is admitted, the Court must adjourn the hearing of the appeal and direct the Commissioner to reconsider the objection having regard to that new evidence unless the Commissioner asks the Court to continue the hearing. Some new evidence was tendered here, but the Commissioner asked the Court to continue the hearing without his reconsidering the objections. As to the assessment of penalty tax, again it is common ground that this is to be considered *de novo*, in that the Court should exercise the discretion which is involved in deciding the amount of penalty tax (if any), rather than being limited to a consideration of whether there was some error in the way in which the Commissioner exercised that discretion.

[11] The appeals raise both factual and legal questions, the latter involving the proper construction of some of the provisions within Chapter 10 Part 1 of the Act. Before going to those questions, it is convenient to set out the uncontroversial facts.

Events towards the Pivot merger

[12] Until early 2003, Incitec Limited was a listed public company owned as to about 77% by Orica Limited, as to about 20% by Futuris Corporation Limited and the balance by other shareholders. Incitec Limited conducted its operations through a group of wholly-owned subsidiaries. In essence, the Incitec group had three businesses or divisions. There was an agricultural chemical business, called Crop Care, which both Incitec Limited and Orica Limited wished to sell because it was relatively unsuccessful. There was Incitec Industrial Chemicals, a division which manufactured and distributed products such as explosives and acids. The major customer of this division was Orica Limited. And there was the fertilisers business, which by 2002, Incitec wished to expand by merging it with the fertiliser business then conducted by Pivot.

[13] By November 2002, there was a proposal by Orica which involved these steps: a de-merger of the chemicals and fertilisers businesses by a scheme of arrangement, a reduction of the capital of the entity holding the chemicals business by payments to shareholders other than Orica with the effect of making Orica the sole owner of that entity, and a merger of the fertilisers entity or entities with Pivot by another scheme of arrangement.

[14] However, Futuris did not support that proposal. Consequently there was litigation in which Futuris claimed that Incitec was being improperly controlled by Orica only for its benefit. Ultimately, this original proposal did not proceed, but it is still necessary to consider it because, as is submitted for the Commissioner, it provides the context for the transactions which did occur.

[15] On 31 May 2002, Incitec caused to be incorporated as a wholly-owned subsidiary a company later renamed as Industrial Chemicals Limited, for the purpose of facilitating the de-merger of the chemicals and fertiliser businesses. On 23 August 2002, the board of Incitec Limited resolved to proceed with this de-merger and the subsequent merger with Pivot. The minutes record that discussions with Pivot had then reached the point where "all matters of substance had been agreed", including the ownership of the entity to conduct the fertiliser business, which was to be as to 70% by Incitec and as to 30% by Pivot. The minutes also record that it was the view of the directors that, in effect, the de-merger of the chemicals and fertiliser businesses should proceed whether or not the merger with Pivot was to go ahead. But of course, that de-merger was necessary for the proposal involving Pivot and there was advice to the board, recorded in those minutes, that the Pivot merger would provide a further reason for the de-merger of the chemicals business and its acquisition by Orica Limited. The minutes also record that terms had been agreed for the sale of the Crop Care business.

[16] Several agreements were signed between 27 and 29 August 2002, between Incitec Limited, Orica Limited and others to give effect to this original proposal. On 29 August 2002, Incitec Limited made an announcement to the ASX, in which it explained the reasons for the de-merger and the subsequent Pivot merger. The stated reasons for the de-merger centred upon the fact that Incitec's main customer in this business was Orica, such that "it [was] a logical step for the Incitec operations to move to total Orica ownership". They also stated that the de-merger would allow "the fertiliser business to participate in an exciting development for the Australian industry". Further as to the merger with Pivot, it was said that "[s]hareholders will hold shares in an organisation formed through the combination of substantial resources and, importantly, expertise, which will be totally focused on the fertiliser market" and that the merger would eliminate duplication and achieve economies of scale in purchasing, shipping and distribution of fertilisers in the circumstances of the presence of Incitec in Queensland and New South Wales and the presence of Pivot in Victoria, SA and Tasmania.

[17] Futuris's opposition to this original proposal resulted in a decision by the board of Incitec Limited not to proceed to seek court approval of the proposed scheme of arrangement for the severance of the chemicals business. On 6 November 2002, Incitec Limited announced to the ASX that it had decided to revise its proposal. Part of that announcement was as follows:

> "For Incitec, the goal of the current demerger scheme has always been and continues to be the merger with Pivot. The Pivot merger offers substantial benefits to Pivot and Incitec shareholders as a

> whole. In that context, the board of Incitec was concerned that the current Court proceedings may adversely affect Incitec's prospects of completing the Pivot merger."

[18] Similarly on 14 November 2002, Incitec Limited wrote to its shareholders in those terms:

> "As the goal of the demerger scheme has always been, and continues to be, unlocking for shareholders the substantial benefits of the Pivot merger, the Directors were concerned that the court proceedings would adversely affect the prospects of completing the Pivot merger to the detriment of all shareholders.
>
> Accordingly, the Board determined not to proceed with the application for Court approval of the demerger scheme in favour of a revised scheme that does not involve the acquisition by Orica of full control of Industrial Chemicals Limited. In effect, where the initial scheme involved three steps (the de-merger, the Industrial Chemicals Buy Out and the Incitec/Pivot merger), the revised scheme will involve only the first and third steps. …
>
> Your directors believe that the new demerger scheme is the best option now available by which Incitec shareholders can participate in the benefits of fertilizer industry rationalisation and, at the same time, retain an investment in the industrial chemicals business. …"

[19] On 19 November 2002, the Incitec board resolved to appoint a subcommittee to "oversee the total processes of the demerger and merger" and approved the engagement of an independent chartered accountant, Mr Korda, to be the subcommittee's chairman.

[20] On 27 November 2002, there was a meeting between representatives of Pivot and Incitec to consider certain alternative proposals, each of them being to the end of a linking of their respective fertiliser businesses. The alternatives were set out in a document prepared by advisers to Pivot, Challenger International Group. One alternative was substantially the same as that which did occur in 2003. It was for Incitec to transfer its fertiliser business to a new subsidiary, to be followed by the acquisition of that company's shares by Pivot in exchange for 70% of the shares in Pivot.

[21] On the following day the solicitors prepared a document entitled "Outline of the steps required for the proposed merger of the Incitec fertiliser business with Pivot Limited". They summarised what they described was the new proposal as involving steps which included the transfer of the fertiliser business to this new entity, a transaction which they said "may be able to be structured as a corporate reconstruction so as to be exempt from stamp duty".

[22] On 3 December 2002, Mr Korda wrote to Orica setting out a table describing alternative proposals, including one which was to the effect of what did occur: for the incorporation of a new company, there described as "Fertco", as a wholly-owned subsidiary of Incitec Limited and the transfer of the fertiliser business to it, followed by the transfer by Incitec of the shares in Fertco to Pivot in consideration for the issue of shares by Pivot.

[23] There followed correspondence and meetings involving Orica, Incitec and Pivot. In particular, there was a meeting on 7 January 2003 between representatives of Incitec and Pivot for which Challenger prepared an options paper, referring to what subsequently occurred as option 2. On 10 January 2003, Challenger wrote to Mr Korda saying that its recommendation to Pivot was to pursue that second option. On 14 January 2003, Mr Korda replied, saying that the solicitors would redraft the documents in accordance with that preferred option. He added that despite Challenger's misgivings about the matter, Incitec Limited also intended to include another element in the overall proposal. It was that the "Fertco" would make an issue of preference shares ahead of the sale of the ordinary shares in "Fertco" to Pivot. Mr Korda described the purpose of the preference share issue as follows:

> "The purpose of this issue will be to ensure that Incitec will have no intercompany debt at the time of sale of the 'Fertco' shares. 'Fertco' net debt would be no higher and the cost to Pivot shareholders would be net no higher than if the borrowings were provided by way of intercompany arrangements. This will have an additional benefit of saving Pivot new facility fees on putting in place expensive alternative facilities to enable it to repay Incitec funds advanced to 'Fertco'."

[24] On 24 January 2003, Orica announced to the ASX that it had reached an agreement in principle with Futuris, as a result of which Orica would make a takeover offer for Incitec. It said that its offer would "simplify the ownership of Incitec and assist to effect the planned merger of Incitec's fertiliser business with Pivot". Orica made that offer on 10 February 2003. At the same time Incitec was pursuing the merger of its fertiliser business with that of Pivot by the "Fertco" proposal. On 13 February 2003, Fertco was incorporated as IFL, a wholly-owned subsidiary of Incitec Limited. On the following day Futuris accepted Orica's offer for its shares in Incitec Limited.

The Pivot merger is agreed

[25] On 21 February 2003, some eight instruments were executed. Some were for the expressed purpose of terminating the operation of the documents which had been signed in late August 2002 (under what I have described as the original proposal). Others were to provide for what had by then become the intended course of dealings. Most importantly, Incitec, Pivot and Orica executed a document entitled Merger Implementation Deed ("the MID").

[26] The MID recited as follows:

> "A Incitec proposes to separate the Industrial Chemicals Business from the Incitec Fertiliser Business by transferring the ownership of the Incitec Fertiliser Business to Fertco, a wholly-owned newly incorporated subsidiary of Incitec and procuring other parties to enter into collateral agreements necessary for that purpose (the 'Incitec Fertiliser Separation Proposal').
>
> B Following completion of the transfer of the Incitec Fertiliser Business to Fertco and subject to any required shareholder approval, Incitec proposes to transfer all of the issued shares that Incitec owns in Fertco to Pivot and, in consideration of

> the transfer, Pivot proposes to issue Pivot Ordinary Shares to Incitec (the 'Merger Proposal').
>
> C Incitec has agreed to implement the Incitec Fertiliser Separation Proposal, and Incitec and Pivot have agreed to implement the Merger Proposal, on and subject to the terms and conditions of this Deed."

The company referred to as "Fertco" in those recitals, and elsewhere within the deed, was IFL. In essence, the two transactions the subject of these appeals gave effect to the proposal described in Recital A.

[27] The MID contained covenants to pursue the proposals identified in recitals A and B. Clause 2.4 provided for the sale of the fertiliser business to IFL as follows:

> "(a) Subject to clause 2.2, and any necessary shareholder approval, as soon as practicable after the date of this Deed and subject to the Effective Date occurring, Incitec agrees to enter into, and to procure that Fertco enters into, the Incitec Fertiliser Business Sale Agreement to give effect to the Incitec Fertiliser Business Sale.
>
> (b) The Incitec Fertiliser Business Sale will be structured as a transfer of all of the assets owned by the entities that conduct the Incitec Fertiliser Business and which are used to conduct the Incitec Fertiliser Business and a transfer of all of the liabilities of those entities relating to the Incitec Fertiliser Business. Incitec agrees to procure that those of its subsidiaries that own assets used in the Incitec Fertiliser Business or that are otherwise involved in the conduct of that business will be parties to the Incitec Fertiliser Business Sale Agreement."

The "Incitec Fertiliser Business Sale Agreement" was defined to mean:

> "… the agreements to be made between Fertco and Incitec (and those of Incitec's subsidiaries that own assets used in the Incitec Fertiliser Business), to give effect to the Incitec Fertiliser Business Sale, such agreements to be substantially on the same terms as those set out in Annexure A …"

Annexure A consisted of several draft sale agreements, so that there would be separate forms of agreement for each State, including ones for the Tier One and Tier Two sales of assets used in the Queensland business.

[28] The MID contained a covenant (cl 3.1) by Incitec to cause IFL, as soon as practicable after completion of the sale of the fertiliser business to IFL and again "subject to the Effective Date occurring", to make an offer to the public to issue redeemable preference shares on certain terms and to do everything necessary to seek the admission of IFL on the Official List of Newcastle Stock Exchange (NSX) and the quotation there of the Redeemable Preference Shares. And by cl 3.2 of the MID, Incitec and Pivot agreed to enter into an agreement for the sale of the ordinary shares in IFL, to be structured "so that after completion of [that] sale, Pivot owns all of the shares in the company that owns and conducts the Incitec Fertiliser Business". This so called Fertco Share Sale Agreement was to be entered into

following the issue by Fertco of the preference shares and (again) subject to the occurrence of "the Effective Date".

[29] The "Effective Date" was defined in the MID as follows:

> "Effective Date means the date that is the later of:
>
> (a) if required to seek shareholder approval of the matters the subject of the Incitec Resolution, the date that the Incitec Resolution is approved by Incitec Shareholders in accordance with the requirements of the ASX Listing Rules; and
>
> (b) the date that the Pivot Resolutions are approved by Pivot Shareholders in accordance with the requirements of the Corporations Act."

Paragraph (a) did not become relevant, so that the Effective Date became the date of the requisite approvals by Pivot's shareholders.

[30] On 24 February 2003, Incitec Limited announced to the ASX that agreement had been reached to merge its fertiliser business with Pivot on "substantially the terms agreed between the parties in August 2002" and that the merger was expected to be effective "in late May 2003".

[31] Some matters may be noted at this point. The first is that each of the various proposals for the transfer of the assets constituting the fertiliser business or businesses of Incitec companies had always involved the merger of that Incitec business with the Pivot business. There is no evidence of any proposal that, absent a merger of the Incitec and Pivot fertiliser businesses, something should be done to affect the particular ownership structure within the Incitec group of the fertiliser business. More specifically, there is nothing to suggest that Incitec considered that the transfer of the fertiliser business to IFL was a worthy end in itself. Secondly, the proposals for the so-called de-merger of the chemical and fertiliser businesses of Incitec had been not only to the end that the chemical business became effectively owned by Orica, but also so that the fertiliser business would be merged with Pivot's business. There was no proposal to simply restructure within the existing Incitec group the ownership of the chemical and fertiliser businesses without more. At least to this point in time, the transfer of the fertiliser business to a distinctive entity (IFL as it became) was a step in a process to culminate in the merger of that business with the Pivot business. Hence the proposed sale of the fertiliser businesses to "Fertco", as provided for by cl 2.4 of the MID, was also made subject to the approval by the Pivot shareholders of the Pivot merger (by its being made subject to the occurrence of the Effective Date)

[32] On 21 March 2003, Pivot issued an Explanatory Statement and convened a meeting of its shareholders for 29 April 2003, to consider the proposed merger.

The subject transactions

[33] On 27 March 2003, the boards of directors of Incitec Limited and IFL resolved to execute the necessary agreements for the transfers of assets under the Tier One and Tier Two sales. The resolutions of the board of Incitec Limited was, in part, as follows:

> "Directors noted that to facilitate implementation of fertilizer industry rationalisation proposals, as reflected in Merger Implementation Deed between the company, Pivot Limited and Orica Limited dated 21 February 2003, the company is required to:
>
> …
>
> (b) (i) Enter into agreements with subsidiary companies in respect of those assets within the group wholly or dominantly engaged in the fertilizer business of the company; …"

The resolution of the IFL board was in similar terms.

[34] The agreements for the Tier One and Tier Two asset sales were signed on 1 April 2003. The executed agreements were in substantially the same terms as the drafts which were within the MID. But at this point the Pivot shareholders had not met, so that the Effective Date, as defined in the MID, had not been reached. Therefore, there was no obligation upon the Incitec companies to execute the asset sale agreements when they were executed.

[35] Each agreement provided for completion on a certain date "or such other date as the parties may agree", so that it was open to them to defer completion until after the meeting of Pivot shareholders. But, as the Commissioner admits, they did not do so and completion took place on the same day: 1 April 2003. The fact that these assets were transferred before the Pivot meeting is now relied upon by the appellants in arguing that the purpose of these sale transactions was simply to reorganise the structure of the fertiliser business or businesses within the Incitec group, rather than to effect a merger of those businesses with Pivot.

Subsequent events

[36] In April 2003, steps were taken to progress the issue of preference shares by IFL. Mr Korda's affidavit contained this explanation for the issue of the preference shares:

> "23 If IFL was to be transferred to Pivot and Pivot was to be listed, Incitec's preference was to clear up the intercompany loan accounts on the transfer of IFL to Pivot. This meant the loans would have to be repaid. Given the cyclical nature of the fertilizer business it was estimated that by June 2003, the loan accounts would be in the order of $55 million. Neither Pivot nor IFL had sufficient cash to repay the loans.
>
> 24 If the debt was converted into equity or repaid from the proceeds of a fresh issue of ordinary shares to Incitec prior to the merger, the respective values of the businesses would alter and the 70:30 ratio would not be maintained.
>
> 25 Some form of debt facility was therefore required. If IFL were to become a wholly owned subsidiary of Pivot, there was no point in IFL arranging its own banking facilities. Pivot had not then obtained banking facilities that could be drawn on to enable the repayment of the intercompany

> loans. The Sub-committee considered an alternative method, which was to raise the funds by way of a relatively short term redeemable preference share issue. Those shares would remain on issue for 18 months, by which time alternative funding arrangements could be put in place. The redeemable preference shares would constitute somewhat more than 10% in value of the share capital of IFL and have the voting rights usually attaching to redeemable preference shares."

That explanation corresponds with what Mr Korda wrote in his letter to Challenger of 14 January 2003.[1] However, in cross-examination it was suggested to Mr Korda that in truth, the preference shares had a stamp duty objective, which was to bring these transactions within certain provisions of the Act which are now relied upon by the appellants. For the moment however, the point to be noted is that the appellants tendered this evidence that the purpose of the issue of preference shares was to facilitate the merger with Pivot, and that this occurred prior to the Pivot meeting. There is no indication that anything had arisen to divert the appellants from the course agreed within the MID.

[37] On 29 April 2003, the shareholders of Pivot passed the resolutions required to permit the merger to proceed.

[38] By 30 April 2003, Westpac Securities Limited, as the proposed underwriter of the issue of the preference shares by IFL, had received signed pre-commitments sufficient to ensure the successful issue of the shares. At that point, when effectively all of the necessary commitments of parties outside the Incitec group were in place, the Tier One and Tier Two agreements were lodged with the Commissioner for assessment, with an application that they be assessed as exempt from duty under s 406. I will return to the matter of what was and was not then disclosed to the Commissioner, which is relevant to the question of penalty.

[39] IFL issued 11,000 redeemable preference shares at $5,000 each, on 27 May 2003. Each preference share had one vote on a show of hands and 5,000 votes on a poll. The capital of IFL otherwise consisted of the ordinary shares which had been issued to Incitec Limited, being a total of 40,796,719 ordinary shares with one vote each on a show of hands and nine votes each on a poll. After the issue of the preference shares, the holders of those shares held less than 10% of the capital of IFL, but (on a poll) about 13% of the votes. This meant that Incitec Limited no longer had "voting control" as that term is defined in Schedule 6 of the *Duties Act*. Schedule 6 defines "voting control" as follows:

> "***voting control***, for a company, means being in a position to cast, or control the casting of, 90% or more of the maximum votes that can be cast at a general meeting of the company other than under a debenture or trust deed securing the issue of a debenture."

It is common ground that upon issue of the preference shares, IFL and Incitec Limited ceased to be group companies as that term is defined for Chapter 10 Part 1 of the Act. Whilst IFL was a "subsidiary" of Incitec, the companies were group companies: s 400(1). But IFL ceased to be its subsidiary once Incitec lost the "voting control" in IFL. Section 402 defines a "subsidiary" as follows:

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[1] Referred to above at [23].

> "A company (the *first company*) is a *subsidiary* of another company if at least 90% of the issued shares in the first company are owned, other than as trustee, and voting control of the first company is held, by 1 or more of the following companies –
>
> (a) the other company;
>
> (b) 1 or more other subsidiaries of the other company;
>
> (c) the other company and 1 or more other subsidiaries of the other company."

On 28 May 2003, the IFL preference shares began to be quoted on the Newcastle Stock Exchange.

[40] It is common ground that at some time prior to 1 June 2003, Incitec Limited and Pivot entered into an agreement for the sale of the ordinary shares in IFL, as required by the MID and that this sale which was completed on 1 June 2003, thereby effecting the Pivot merger. Pivot then held all of the ordinary shares in IFL and Incitec Limited held 70% of the issued capital of Pivot.

[41] On 18 June 2003, the Tier One and Tier Two sale agreements were assessed as being exempt from duty pursuant to Chapter 10 Part 1. I will come to the evidence of what information by that time had been provided to the Commissioner and what was subsequently provided.

The *Duties Act*

[42] Section 406(1) provides as follows:

> "(1) Transfer duty or vehicle registration duty is not imposed on a transfer, or agreement for the transfer, of dutiable property carried out for a corporate reconstruction if the conditions in subsection (2) are complied with."

The term "corporate reconstruction" is defined by s 398 as follows:

> "**398 What is a *corporate reconstruction***
>
> (1) A ***corporate reconstruction*** happens if –
>
> (a) through a transaction or series of transactions, property is transferred, or agreed to be transferred, for the purpose of changing a corporate structure to make internal adjustments to corporate arrangements; and
>
> (b) the transaction or each transaction is necessary to give effect to the purpose and is not undertaken for any other purpose; and
>
> (c) the transfer, or agreement for the transfer, of the property is not part of an arrangement under which any company

involved with any of the transactions ceases to belong to the same corporate group other than in the circumstances mentioned in section 412(4).

(2) For subsection (1)(b), a transaction that is 1 in a series of transactions is taken to be necessary to give effect to the purpose if it is necessary for an exemption to apply to the transaction."

[43] If these transactions (the transfers under the Tier One and Tier Two agreements) were carried out for a "corporate reconstruction", then at the time they occurred they were exempt transfers, subject to satisfaction of the conditions in s 406(2), which are as follows:

"(2) For subsection (1), the conditions are as follows –

(a) the transferor did not hold, and the transferee will not hold, the property as trustee;

(b) the transferor and transferee of the property are group companies;

(c) the dutiable transaction has not been made under an arrangement under which –

(i) part or all of the consideration for the dutiable transaction has or is to be provided or received, directly or indirectly by a person other than a group company; or

(ii) a group company is to be enabled to provide any of the consideration by a person other than as mentioned in subsection (3); or

(iii) a group company is to dispose of any of the consideration through a payment or other disposition –

(A) to a person other than a group company; or

(B) to a person other than by way of loan on ordinary commercial terms;

(d) the property transferred is, at the time of the transfer, group property under section 407."

Section 406(3) provides:

"(3) For subsection (2)(c)(ii), consideration may be provided –

(a) by a financial institution by way of loan on ordinary commercial terms; or

(b) by a group company; or

(c) under an offer and sale of shares to the public in the circumstances mentioned in section 412(4)(b)."

[44] Section 412 provides that in certain circumstances, subsequent events might deprive a transaction of the exemption from duty which it originally enjoyed. And s 412(4) is also relevant, in some cases, to the liability of a transaction to duty at the outset, because of the references to it in s 398 and s 406. Section 412 provides, in part, as follows:

"**412 Reassessment – exemption for intra-group transfers of property, trustees and land rich duty**

(1) This section applies if –

(a) duty is assessed on a dutiable transaction or relevant acquisition on the basis of an exemption under section 406, 408 or 409; and

(b) within 3 years after the transaction or acquisition –

(i) the transferor or transferee has ceased to belong to the same corporate group; or

(ii) part or all of the consideration for the transaction or acquisition is provided or received other than as permitted by section 406(2)(c)(ii) or (iii).

(2) The commissioner must make a reassessment to impose duty on the dutiable transaction or relevant acquisition as if the exemption from duty had never applied.

(3) …

(4) However, subsection (2) does not apply –

(a) if the transferor or transferee ceases to exist, other than under an arrangement, a significant purpose of which was to avoid the requirement that the transferor and transferee belong to the same corporate group for the 3 years mentioned in subsection (1); or

(b) if –

(i) the transferor or transferee ceases to be a group company in the corporate group because its shares, or the shares of a new parent company interposed between the transferor and transferee, are offered and sold to the public; and

(ii) the shares are quoted on the market operated by a recognised stock exchange within 1 year after the offer to the public; or

(c) if less than 5% of the value of the property held, directly or indirectly, by the company that ceases to be a group company is dutiable property.

(5) …"

Dutiable or exempt?

[45] According to the respective arguments, the question of whether these transactions, or either of them, was and remained exempt from duty involves the following issues:

(1) In terms of s 398(1)(a), was property transferred for the purpose of changing a corporate structure to make internal adjustments to corporate arrangements?

(2) In terms of s 398(1)(b), was the transaction both necessary to give effect to that purpose and also not undertaken for any other purpose?

(3) In terms of s 398(1)(c), were the transfers, or agreements for the transfers, of the assets not part of an arrangement under which IFL ceased to belong to the group?

(4) In terms of s 398(1)(c), if the transaction was part of an arrangement by which IFL would cease to belong to the group, was the arrangement for it to do so in the circumstances mentioned in s 412(4)?

(5) In terms of s 406(2)(c)(i), was the dutiable transaction made under an arrangement under which part or all of the consideration for that transaction was to be provided by a person other than a group company, namely Pivot?

(6) In terms of s 406(2)(c)(iii), was the dutiable transaction made under an arrangement under which a group company (namely Incitec Limited) was to dispose of any of the consideration to a person other than a group company (namely Pivot)?

(7) If a transaction here was exempt, did it become liable for reassessment under s 412(2), because, in terms of s 412(4)(b)(i), IFL ceased to be a group company by its shares (being its preference shares) being offered and sold, but not to the public? The issue here, as well as issue (4), concerns whether the offer of the preference shares, made as it was to a certain group of potential shareholders, constituted an offer to the public.

[46] Section 398 refers to the purpose of a transaction. The arguments have raised differing interpretations of what is meant by "purpose" in this context. But before

going to them, it is necessary to deal with a factual question. The appellants, upon whom the onus of proof lies, argue that these asset sales were made ultimately because Incitec Limited decided to change the corporate structure of its fertiliser business, regardless of whether the merger with Pivot went ahead. The Commissioner disputes this, arguing that the sales occurred only to the ultimate end of the Pivot merger.

[47] The terms of the MID and all of the events which preceded it, all point the same way on this question. As already noted, all of that evidence shows that Incitec Limited had not decided simply to reorganise the group's structure for the fertiliser business as an end in itself. The proposed reorganisation within the group, ultimately formulated as the transfer of the fertiliser businesses into "Fertco", was to facilitate the merger of the fertiliser business with that of Pivot. And the terms of the MID demonstrate that at least on the day of its execution, this remained the intention of the Incitec parties.

[48] But the appellants say that the most telling fact is that Incitec Limited decided to effect the asset sales within the group without waiting for the so-called Effective Date, that is to say without waiting for the approval of the Pivot merger by Pivot's shareholders. Had they not approved the merger, the assets could have been transferred back within the group, and without a liability to duty. But the fact that the Incitec companies acted when they did, ahead of the Pivot meeting of shareholders, is said to prove that the internal restructuring of the fertiliser business had become a sufficient end in itself.

[49] I am asked to draw this inference in favour of the appellants without any evidence from the persons who were the decision-makers within Incitec Limited. And there is no explanation from the evidence of why the sales were made when they were made, rather than after the Effective Date. Rather, from the terms of the resolutions of Incitec's directors, as set out above at [33], it appears that the asset sales were made "to facilitate implementation of fertilizer industry rationalisation proposals, as reflected in the Merger Implementation Deed", by which "the company [was] required to enter into [these] agreements". These resolutions of the directors of the appellants are irreconcilable with the appellants' argument.

[50] Despite their timing, I cannot accept that these transactions took place because Incitec Limited considered that a restructure within the group of the fertiliser business was a worthwhile end in itself. The evidence demonstrates that over many months, the sales were proposed in order to facilitate the merger with Pivot. There is no indication of any perceived benefit from them, absent the facilitation of the Pivot merger. The appellants were content to undertake these transactions ahead of the Pivot meeting and with the possibility that the Pivot merger would not proceed. It may also be the case that the directors signed the agreements when they did with an imperfect understanding of the appellants' then obligations under the MID. But these matters do not contradict the fact, as I find it to be, that the reason for this internal restructure of the fertiliser business was to facilitate the proposed Pivot merger. Upon that premise, the operation of s 398 must be considered.

[51] It was submitted for the Commissioner that the purpose of these transactions, in the context of s 398, should be identified objectively. The submission cited the judgment of Brennan J, sitting in the Full Court of the Federal Court, in *Magna*

Alloys and Research Pty Ltd v Federal Commissioner of Taxation.[2] That case involved s 51 of the *Income Tax Assessment Act 1936* (Cth) and the so-called second limb of s 51(1) which imposed a criterion of deductibility in terms of whether the expenditure had been "necessarily incurred in carrying on a business for the purpose of gaining or producing such income". As Brennan J noted, the purpose there mentioned was "the purpose of the business in the carrying on of which the deductible expenditure is incurred"[3] and not the purpose of the incurring of the particular expenditure. The case concerned what constituted the required connection between the expenditure and the carrying of the taxpayer's business. Brennan J held that the connection was to be assessed objectively, by reference to "the essential character of the expenditure itself".[4] It was in that context that Brennan J distinguished between subjective and objective purposes as follows:[5]

> "Motive means … the reason why a taxpayer decides to incur the expenditure. Purpose may be either a subjective purpose – the taxpayer's purpose – or it means the object which the taxpayer intends to achieve by incurring the expenditure; or it may be an objective purpose, meaning the object which the incurring of the expenditure is apt to achieve. Both motive and subject purpose are states of mind and they are to be distinguished from objective purpose, which is an attribute of a transaction. An objective purpose is attributed to a transaction by reference to all the known circumstances; whereas subjective purpose and motive, being states of mind, are susceptible of proof not by inference alone but also by direct evidence, for a state of mind may be proved by the testimony of him whose state of mind is relevant to a fact in issue."

[52] The argument for the Commissioner is that the term "purpose" is used in s 398(1)(a) and (b) in the sense of that objective purpose described by Brennan J, meaning in this context the object which the transaction or series of transactions is apt to achieve. But of course it is the words of s 398 which must be construed, and the objective test employed by Brennan J in that other context is not so obviously applicable. Section 398(1)(a) specifies the condition of a purpose. Section 398(1)(b) imposes two further conditions, one of which is that each transaction be "necessary to give effect to the purpose". The fact or otherwise of that necessity is to be objectively assessed. But the purpose, which must be the same thing between subparagraphs (a) and (b), is in my view an actual purpose in the sense of this meaning of "purpose" from the *Oxford English Dictionary*: "that which a person sets out to do or attain; an object in view; a determined intention or aim". Thus subparagraph (a) is satisfied according to what the parties to the transaction in fact meant to achieve and subparagraph (b) imposes, in its first limb, a condition of an actual necessity of the transaction in order to give effect to that purpose (as distinct from whatever the parties thought was necessary). The second limb of subparagraph (b), which is that the transaction not be "undertaken for any other purpose", again refers to what the parties did or did not have in mind. It requires that the purpose of changing a corporate structure to make internal adjustments to corporate arrangements be in fact all that the parties meant to achieve.

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2 (1980) 33 ALR 213.

3 Ibid at 216.

4 Ibid at 217 quoting from *Lunney v FC of T*; *Hayley v FC of T* (1958) 100 CLR 478 at 497 per Williams, Kitto and Taylor JJ.

5 Ibid at 215.

[53] Each of the arguments distinguishes between purpose and motive, the purpose being said to be the object or end and the motive being the reasons for wanting to achieve it. But as the respective arguments demonstrate, this distinction is able to be applied in the present context with varying outcomes. The immediate object of these transactions was to change the corporate structure by making internal adjustments to the arrangements by which these assets were held within the group. That was all which could have been and was achieved by the transactions, without anything else occurring. The appellants say that the reason or motive for that restructure was a different matter, not involving its purpose. But for the Commissioner, it is argued that because the corporate restructure was not an end in itself, but was to the end of a merger with Pivot, it is the Pivot merger which was the purpose of the transactions, or at least one of their purposes.

[54] Each of those characterisations of the purpose or purposes of the transactions may fairly be made as a statement of fact, divorced from the terms of Chapter 10. But the task is to characterise the purpose of the transaction in the application of the statute. In *News Limited v South Sydney District Rugby League Football Club Limited*,[6] Gleeson CJ explained the necessity to consider the legislative context:

> "The appropriate description or characterisation of the end sought to be accomplished (purpose), as distinct from the reason for seeking that end (motive), may depend upon the legislative or other context in which the task is undertaken. Thus, for example, in describing, for the application of a law relating to tax avoidance, the purpose of an individual, or of an arrangement, it will be necessary to look at what is sought to be achieved that is of fiscal consequence, not at a more remote, but fiscally irrelevant, object, such as increasing a taxpayer's disposal income. Similarly, in the context of competition law, it is necessary to identify purpose by describing what is sought to be achieved by reference to what is relevant in market terms."

[55] It seems to be common ground that there is an ambiguity in the term "purpose" so as to permit recourse to the Explanatory Statement.[7] The Explanatory Statement said this about what is now sections 398, 406 and 412:

> "Clause 398 provides a definition of 'corporate reconstruction'. This term is defined so as to relate to a series of transactions, which viewed as a whole, change a corporate structure to make internal adjustments to corporate arrangements. The transactions must not be for an extraneous purpose, or be part of an arrangement where any company involved in the reconstruction ceases to be a member of the group.
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> …
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> Clause 406 exempts the transfer, or agreement for the transfer, of dutiable property carried out for a corporate reconstruction from the imposition of transfer duty and vehicle registration duty. Clause 406(2) sets out the conditions that must be complied with to obtain the benefit of the exemption. These conditions are the gatekeeper to the availability of the exemption. Recognition is given in clause 406(2)(c)(ii) and (3) that funds for payment of the consideration may

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6 (2003) 215 CLR 563 at 573.

7 *Acts Interpretation Act 1954* (Qld) s 14B(1)(a)

be obtained from a financial institution on ordinary commercial terms or under an offer and sale of shares to the public in the circumstances mentioned in 412(4)(b).

The condition contained in clause 406(2)(d) requires that the property transferred under the transaction be, at the time of the transfer, group property.

…

Clause 412 sets out the circumstances in which a transaction that has been assessed on the basis of an exemption under Part 1 will be reassessed. A reassessment will occur if the relevant companies have ceased to remain group companies for 3 years or any part of the consideration for the transaction has been provided or received in contravention of the conditions set out in clause 406.

Exceptions to reassessment apply where:

- one of the companies has been deregistered under the Corporations Act. However, if the deregistration has occurred under an arrangement to avoid the 3 year association test, a reassessment will still occur;

- one of the companies, or a new parent company interposed between the transferee and transferor, has been floated to the public and listed on a recognised stock exchange within 1 year after the public offer; or

- less than 5% of the property of the company that has ceased to be a group company is dutiable property.

These limitations on reassessments recognise that in these circumstances, the transfers are occurring for genuine commercial reasons rather than to minimise transfer duty on the disposal of property outside of the group."

[56] More generally, the Explanatory Statement said this as to the intended exemption for corporate reconstructions:

"Transfer duty applies, with limited exceptions, to transfers of property from one person to another. In cases of transfers between members of a corporate group, the transfers are often undertaken for the purpose of re-organisations within the corporate group. The most common reasons for undertaking a corporate reconstruction include to:

- align business operations to the relevant legal entity;

- improve the balance sheet of a subsidiary seeking finance;

- respond to structural changes by a foreign parent;

- remove expensive antiquated structures in complex groups;

- merge business operations and legal entities following a takeover; and

- facilitate disposal of an asset or business.

Chapter 10, Part 1 provides relief from transfer duty on transfers of shares and certain property upon a corporate reconstruction. However, relief is not provided where the purpose of the corporate reconstruction is to facilitate the disposal of a particular asset or business."

[57] An apparent and logical distinction which is employed within Chapter 10 Part 1 is between transactions undertaken to the ultimate end of the relevant property being owned outside the group and those where the property is to remain within the group. The purpose defined by s 398(1)(a) is not only one of "changing a corporate structure". It is the changing of that structure "to make internal adjustments to corporate arrangements". Thus not every transfer of property for the purpose of changing a corporate structure is to be exempt. A change in the corporate structure, but as a step towards the disposition of the property from the group, would not be for the purpose merely of making internal adjustments to corporate arrangements.

[58] Subparagraph (b) of s 398(1) is to make it clear that "the purpose" referred to in subparagraph (a) must be the sole purpose of the transaction. The evident purpose of subparagraph of (c) of s 398(1) is to limit the exemption to cases where the ownership of property within the group changes whilst the group itself, at least as it comprises those companies involved in the transaction, remains unchanged. The legislative evident concern there is that arrangements could be made with the apparent purpose of making internal adjustments to corporate arrangements, but to the true end of disposing of property from the group by changing the structure of the group itself. In turn, the exception within subparagraph (c), being cases within s 412(4), reflects an understanding that such a potential for the misuse of Chapter 10, Part 1 would not exist where a company leaves the group by its is sold to the public.

[59] The Explanatory Statement confirms this interpretation of s 398, especially by its note[8] that "relief is not provided where the purpose of the corporate reconstruction is to facilitate the disposal of a particular asset or business". The present is just such a case. I have rejected the claim that the change of ownership of the fertiliser businesses within the Incitec group was an end in itself. In fact, the purpose of these transactions was to change the corporate structure but not to make, or only to make, internal adjustments to corporate arrangements. The parties to the transactions meant to have the property held by IFL so that the Pivot merger could occur, and more particularly, so that the property would become owned by a company which itself would be owned only as to 70% by Incitec Limited. In my conclusion, the transactions were not exempt, at least because this was not a corporate reconstruction as defined by s 398. At least for this reason the Commissioner's assessment of duty on each transaction must be upheld.

[60] To be exempt, each transaction had to satisfy also the conditions in s 406(2). The Commissioner contends that each transaction fails to satisfy either of the conditions respectively in s 406(2)(c)(i) and (iii).

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[8] Referred to at [56] above.

[61] Each of those conditions requires the identification of what was "the consideration for the dutiable transaction" in the relevant sense. They are the words used in s 406(2)(c)(i) and it is common ground that the consideration referred to in s 406(2)(c)(iii) is the same thing.

[62] The Commissioner contends that each transaction was made under an arrangement which included the Pivot merger. Upon that basis he says that part of the consideration for each transaction was that provided by Pivot, which was the issue of 70% of its shares, thereby engaging s 406(2)(c)(i). Alternatively, it is argued that part of the consideration provided was the rights provided to Incitec Limited in respect of the Pivot shares.

[63] The appellants contend that no consideration for either dutiable transaction was provided by anyone outside the group, including Pivot. Their case is that the consideration for the Tier One asset sale was cash (paid by Incitec Limited to the other Incitec companies) and that the consideration for the Tier Two asset sale comprised only the shares in IFL which it issued to Incitec Limited.

[64] It is common ground that an "arrangement" in this sense might include any kind of "concerted action by which persons may arrange their affairs for a particular purpose or to produce a particular result", as Mackenzie J described the term, in the context of an identical provision within the previous statute,[9] in *Quetel Pty Limited v Commissioner of Stamp Duties*.[10] Mackenzie J there cited Lord Denning in *Newton v Federal Commissioner of Taxation*,[11] who said that the word "arrangement" was "apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons – a plan arranged between them which may not be enforceable at law".

[65] The arrangement here is clearly evidenced by the MID. As I have found, in essence that arrangement was not departed from although the Incitec companies chose to effect these two transactions prior to the approval of the merger by Pivot's shareholders. The arrangement remained one under which these transactions were undertaken with the intention that the IFL shares would then be transferred to Pivot in return for shares in Pivot. In that way there was an arrangement under which something was to be provided by an outsider, Pivot. But the question under s 406(2)(c)(i) is whether the Pivot shares, or the rights given to Incitec Limited in relation to the Pivot shares, constituted at least some of the consideration for the subject transactions.

[66] At one point at least, the appellants appeared to argue that the term "consideration for the dutiable transaction" means the consideration from which the duty would be calculated, were the transaction not exempt. That submission could not be accepted. In respect of an identical provision considered in *Quetel*, the unanimous view of the Full Court was that consideration in this context means something more than consideration in the contractual sense.[12] Within s 406(2), the consideration is something which may be provided or received by an outsider to the group and may be provided or received directly or indirectly.[13] Further, the consideration is

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[9] *Stamp Act 1894* (Qld) s 49C(2).

[10] [1993] 2 Qd R 57 at 80.

[11] (1958) 98 CLR 1 at 7.

[12] *Quetel Pty Limited v Commissioner of Stamp Duties* [1993] 2 Qd R 57 at 60 (Demack J), 63 (Thomas J) and 81-86 (Mackenzie J).

[13] s 406(2)(c)(i).

something which, once received, may be disposed of by a group company.[14] Accordingly, where the dutiable transaction involves a contract, it must have a meaning which goes beyond the consideration supporting that contract, because a contractual consideration would have to move from the promissee, it could not be provided "indirectly" and consisting of an act or a promise, could not be "disposed of" by the promisor. Those observations were made in relation to a similar provision by Lord Millett, sitting in the Court of Final Appeal of Hong Kong, in *The Collector of Stamp Revenue v Arrowtown Assets Limited*.[15]

[67] In *Quetel* there was extensive discussion of the decision of the House of Lords in *Shop and Store Developments Ltd v Commissioners of Inland Revenue*,[16] which concerned a similar provision within a regime exempting transfers within a corporate group. The relevant "arrangement" was as follows. There were two companies in a group, referred to as the clothing company and the property company. The clothing company sold certain property to the property company, for which it gave to the clothing company renounceable letters of allotment for new shares in the property company. Pursuant to the arrangement, this was followed by a sale of some of the allotment letters to underwriters for a cash sum. The outcome of the arrangement, once it had been fully effected, was that the clothing company had parted with some of its property, but it had acquired some shares in the property company, which had become a public company, as well as that cash sum. The question was whether the instrument conveying the property was exempt from stamp duty, which turned upon whether, under a provision corresponding with s 406(2)(c)(i), the consideration for the transfer included a cash sum or was limited to the letters of allotment. The majority held that it was the latter so that the transfer was exempt. Lord Morris of Borth-y-Gest said:

> "But when all this is recognised and stated the question still has to be asked and answered: What was the consideration for the transfer or conveyance of the properties which the clothing company transferred or conveyed? This is not the same as the question: How would they stand when the whole arrangement was completed? … What the clothing company received or what they got when they transferred or conveyed their properties to the property company was shares in the property company. … Those facts are not changed by the circumstances that in a different and separate transaction they sold some of the shares to someone else. … There is all the difference between what the clothing company got and what they did with what they got."[17]

Lord Reid, in the minority, reasoned as follows:[18]

> "So we must determine what was the consideration under the arrangement for the transfer. The appellant says that it was the allotment letters of 2,920,000 shares. The respondents say that it was that which under the arrangement the transferor received and kept as a result of the transfer of its property. The case for the appellant is that we must isolate that part or stage of the arrangement which consisted of the sale of the property and see what the transferor got at

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14 s 406(2)(c)(iii).
15 [2003] HKCFA 52 at [88]
16 [1967] 1 AC 472.
17 [1967] 1 AC 472 at 495.
18 [1967] 1 AC 472 at 489-490.

> that stage. The case for the respondents is that we must take the arrangement as a whole and see what the transferor got as a result of the transfer, when the arrangement was completed. …
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> Turning to the words of the section and bearing in mind that consideration has no technical meaning here but merely means what the transferor got, the question is – what under the arrangement did the transferor get for the transfer? I do not think that it involves any stretching of the language to hold that the transferor got shares and money. On the other hand it would, I think, be an unreasonable result if we had to hold that all depended on the stage of the arrangement at which the outside money came to the transferor. If it came at the stage of the transfer of the property then it would admittedly destroy the exemption but if it came at the next stage it would not. I would only accept that if the words were not reasonably capable of any other meaning. I do not think that the words 'for the transfer' are so rigid and compelling as to require that result. In my view it is a natural use of ordinary language to say that under this arrangement the transferor company got the shares and the money 'for' the transfer of its property."

It was in consequence of the majority view that a provision corresponding with s 406(2)(c)(iii) was inserted in the United Kingdom statute.

[68] In *Quetel*, Thomas J said that the view of Lord Reid was to be preferred in the context of what was then the Queensland provision.[19] Accordingly, the Commissioner contends, the present arrangement must be considered as a whole to see what the parties to these transactions got as a result of them, once the arrangement was completed.

[69] In *Quetel*, there were contracts of sale made and settled on the same date, by which Castlemaine Tooheys Ltd transferred to Quetel a large number of hotels. They were then companies within the same group. The transfers were made coincidentally with an unsecured loan by Castlemaine to Quetel for the whole of the price. Three days later, an entity outside the group advanced to Quetel sufficient funds to enable the debt to Castlemaine to be repaid in full. Within the same arrangement was a plan to have Quetel disassociated from Castlemaine. But at the time of the transfer of the hotels they were group companies. The unanimous view of the Full Court was that the consideration for the transfers was what was actually paid to Castlemaine, rather than, as Quetel had argued, its promise to pay Castlemaine. In fact the contracts of sale had provided for the transfers to be made in consideration for the payment of a sum of money, rather than for the undertaking of an obligation to pay that sum, but the parties chose to complete the contracts and effect the transfers upon a mere promise to pay the agreed price. Overall that was a stronger case for the Commissioner's argument.

[70] It is necessary to consider each of these transactions distinctly, although they were part of the same arrangement. The present question is what constituted the consideration for the dutiable transaction. Accepting that this must be considered in the context of the arrangement of which the transaction was part, and from the perspective of the completion of all which was proposed by the arrangement, it

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[19] [1993] 2 Qd R 57 at 63.

remains the consideration for the dutiable transaction itself which must be identified.

[71] Under the Tier One asset sale, what did the sellers ultimately get for parting with their property? In the final result, what they received was the cash, which was the agreed consideration under their contract. Accordingly, in my view, this transaction would have satisfied the condition in s 406(2)(c)(i).

[72] The Tier Two asset sale presents facts which are quite similar to those in *Shop and Store Developments Ltd v Commissioners of Inland Revenue*. It would seem to be more consistent with the reasoning of Lord Reid to say that the (ultimate) consideration under this transaction was the shareholding in Pivot. When Incitec Limited acquired the IFL shares, it was bound to deal with them only according to the MID. The ultimate benefit which Incitec Limited was to receive was the shareholding in Pivot. But it is unnecessary to decide that fine question (quite apart from my conclusion that this was not a corporate reconstruction as defined). This is because of the operation of s 406(2)(c)(iii). If the consideration for the dutiable transaction consisted only of the IFL shares, still the transaction was made under an arrangement by which Incitec Limited was to dispose of that consideration to an outsider (Pivot). Either way then the result would be that the Tier Two asset sale could not have satisfied the conditions in s 406(2).

Section 412(4)

[73] If these transactions were exempt, s 412(2) required that they be reassessed, as if the exemption from duty had never applied, unless the circumstances were within s 412(4). The appellants' case is that they were within s 412(4)(b). That required the appellants to prove that IFL ceased to be a group company because "its shares … [were] offered and sold to the public".

[74] On one view, that reference to "its shares" suggests that this provision is engaged only where all of the shares of the relevant company are offered and sold to the public. However, that was not argued for the Commissioner. As the matter was argued, the question is whether the 11,000 redeemable preference shares were offered and sold to the public. As already noted, it is common ground that upon the issue of these shares, IFL ceased to be a group company.

[75] By mid-April 2003, the appellants had requested Westpac Securities Limited to manage and underwrite the issue of the preference shares and it had effectively agreed to do so, although it had not then made a formal contract with IFL. As to the purpose of the issue of these shares, I have referred already to Mr Korda's evidence that it was to provide funding in the short term, by those shares remaining on issue for 18 months, because of the expected need for working capital. Mr Korda was not involved after January 2003. But in some of the documents passing between Incitec Limited and Westpac in March and April 2003, there are references to this need for working capital being the reason for the proposed issue. At the same time, it is clear from contemporaneous documents that the particular form of this transaction was adopted because of the potential impact upon an exemption from duty for the subject transactions. Thus, whilst I would accept that IFL was minded to raise working capital by some means, regardless of considerations of the relevant exemption from duty, the decision to do so by the issue of these preferences shares, to be listed upon the Newcastle Stock Exchange, was made in order to engage s 412(4). Ultimately however, the question here is whether s 412(4) was engaged.

[76] The same funds could have been raised simply from Westpac Banking Corporation alone. In a draft email of 24 March 2003 by Mr Lindner of Westpac, he recorded that fact, which he confirmed in his oral evidence. As he then wrote, "raising the $ is not at issue. Achieving the spread … is vital". By "the spread", Mr Lindner was referring to the requirement of the Newcastle Stock Exchange that there be at least 25 holders of the preference shares. Westpac nevertheless decided to and did take most of the preference shares. It took 7,600 of the 11,000 shares which were issued, amounting to $38 million of the $55 million so raised.

[77] The remaining $17 million was raised as follows. Westpac set out to raise half of that from institutional investors which it approached. The other $8.5 million was to be raised from investors approached by an independent entity called Grange Securities, which would sub-underwrite that part of the issue. The strategy was that each of these groups would contribute $8.5 million through 16 investors, thereby providing a "spread" of 32 investors (as well as Westpac itself). Each investor had to take at least $500,000 worth of shares. By mid-April 2003, Grange Securities had advised Westpac that it would be able to place $8.5 million with a minimum of 15 investors. By then also, Westpac Securities Limited had advised IFL that it would underwrite the preference share issue provided that it could get what were called pre-commitments from at least 24 investors (which with Westpac would provide the minimum spread of 25 investors for the purposes of the NSX).

[78] On 28 April 2003, Westpac Securities forwarded letters to 35 prospective investors. The letter offered to pay the investor a fee in consideration for a promise by the investor to apply for a certain number of preference shares. At this stage, the Pivot shareholders were yet to meet (on 29 April) and IFL's constitution had not been amended to allow for preference shares.

[79] By 30 April 2003, Westpac Securities had received signed acceptances of this pre-commitment proposal, for parcels totalling all of the $17 million which was not to be raised from Westpac itself. Each of these pre-committing investors ultimately applied for and received that number of shares.

[80] On 2 May 2003, the constitution of IFL was amended to provide for the preference shares. On 5 May 2003, the underwriting agreement between IFL and Westpac Securities was signed. It was a term of that agreement that IFL was to accept all valid applications submitted, provided or lodged with IFL by or on behalf of Westpac Securities. On 7 May 2003, Westpac Securities issued an Information Memorandum in relation to the proposed issue. It provided that Westpac Securities would have a discretion to decline to accept applications. As it happened, the only successful applicants were those who had pre-committed to apply for their shares. The preference shares were issued by IFL on 27 May 2003. On the following day the shares were quoted on the Newcastle Stock Exchange.

[81] The arguments have addressed whether the 11,000 preference shares were offered and sold to the public. But it could not be said that most of them were so offered and sold, because they were taken up by Westpac itself. Therefore, the appellants' case is effectively that s 412(4) was engaged by the disposition of a parcel of shares which, of itself, would not have caused IFL to cease to be a group company. The 3,400 shares sold to the "pre-commitment" investors involved less than 10% of the number of shares and the voting power in IFL. It was only by the issue of both those 3,400 shares and other preference shares that the (ordinary) shares held by

Incitec Limited came to constitute less than 90% of the voting power in IFL, resulting in the departure of IFL from the group for relevant purposes.

[82] So even upon the premise that all of those 3,400 shares were offered and sold to the public, it is far from clear that IFL ceased to be a group company *because* that part of its shares was sold and offered to the public. But in case it should matter to the outcome of these appeals, it is necessary to make a finding in relation to those shares.

[83] The appellants' argument is that the determination of this question is assisted by a consideration of s 82 of the *Corporations Act 2001* (Cth), by which a reference in that Act to the making of an offer to the public is to be construed as including a reference to the making of an offer to any section of the public. That cannot be accepted, because the *Duties Act* contains no equivalent provision.

[84] The appellants also say that there was what their argument describes as a marketing campaign undertaken by Westpac and Grange Securities Limited. That tends to overstate what occurred here. Within a space of days, or perhaps a week or so, Westpac and Grange Securities were able to find the required investors. The exact number of people whom they contacted is unknown. But it would be wrong to describe this as some extensive marketing campaign. The evidence is consistent with the position being that they had to contact no more than two people for every one who took up the invitation. On Westpac's list were institutional investors and the Grange Securities list was made up of what were described as high net worth retail investors. None on either list seems to have had any particular previous connection with the Incitec group or Pivot. They were chosen because they would be likely to accept the pre-commitment proposal. I accept, as the appellants argue, that the process of the offer and sale of the shares, in this context, should be viewed as effectively one process beginning with the approaches to potential investors to sign the pre-commitment agreement. In other words, it would not be appropriate to look only at the steps which occurred after those agreements had been signed.

[85] In *Lee v Evans*,[20] the High Court considered what was meant by "any invitation to the public … to deposit money with or lend money to [a] firm, individual or corporation" in the context of a statute which proscribed that conduct where it occurred by reference to a business name which was not registered. There was no provision of that statute which extended the meaning of "the public" to a section of the public. So where some persons had been asked to deposit money, the question was whether this had involved an invitation to the public. Barwick CJ said that:

> "The basic concept is that the invitation, though maybe not universal, is general; that it is an invitation to all and sundry of some segment of the community at large. This does not mean that it must be an invitation to all the public either everywhere, or in any particular community. How large a section of the public must be addressed in a general invitation for it to be an invitation to the public in the relevant connexion must depend on the context of each particular enactment and the circumstances of each case. But within that sufficient area of the community the invitation must be general in the sense spoken of by Viscount Sumner in *Nash v Lynde*, by Warrington J in *Sherwell's Case*, 'An offer of shares to anyone who should choose to come in', and by Jordan CJ in *Ex parte Lovell; Re*

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20 (1964) 112 CLR 276.

> *Buckley*, 'made to the public generally and capable therefore of being acted upon by any member of the public'".[21]

In the same case, Kitto J said:[22]

> "I think it is going too far to say that proof of an invitation given to a person as a member of the public is necessarily proof of an invitation to the public. If a person, wishing to obtain a loan, makes his request to a stranger whom he picks at random in the street, it remains, I think a question of fact whether his invitation is to the public or to the selected individual only. In many cases the answer may be easy, but that does not mean that the question is not there to be answered; and in considering the answer the distinction must not be overlooked between the case of an invitation which itself is open to acceptance by any member of the public who may be interested and the case of an invitation which itself is open to acceptance by a specific individual only but, if declined by him, is likely to be followed by similar invitations to other specific individuals in succession until an acceptor is found. The first of these is a case of an invitation to the public; the second, in my opinion, is not."

[86] In *Corporate Affairs Commission (SA) v Australian Central Credit Union*,[23] Mason ACJ, Wilson, Deane and Dawson JJ distinguished *Lee v Evans* because the statute then being considered, being s 5(4) of the *Companies (South Australia) Code*, contained the more expansive definition of an offer to the public (so as to include any section of the public) as now appears in s 82 of the *Corporations Act*. They said that the outcome might have been different, according to *Lee v Evans*, but for that expanded definition. But in that case, where the offer was made to a group comprising the members of a credit union, it was difficult to characterise it as an offer to the public (absent that expanded definition) because it was impossible for a person outside that distinct group to take up the offer.

[87] On the other hand the present case does not appear to be as strong a case for this being a public offer as that decided by the New South Wales Court of Appeal in *Hurst v Vestcorp Ltd*,[24] where letters inviting investment in film production, with certain tax advantages for the investor, were sent by an accountant who had formulated the tax scheme, not only to his clients but to a wider group, and the accountant addressed meetings of potential investors to which there was effectively no restriction upon entry, or more generally, upon taking up the investment on offer.

[88] The Commissioner's argument points to, amongst others, these circumstances which, in my view, together suggest that these shares were not offered and sold to the public. Firstly, the offer did not extend beyond existing clients of Westpac Securities and Grange Securities. Secondly, the number of potential investors approached does not appear to have been high. Thirdly and importantly, there was no practical possibility of the offer being taken up by any member of the public, particularly where there was no publicity surrounding the process. Westpac and Grange Securities not surprisingly chose to approach investors known to them, whom they expected would be likely to take up the offer and then to comply with

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21. Ibid at 285-286.
22. Ibid at 287.
23. (1985) 157 CLR 201 at 207.
24. (1988) 12 NSWLR 394.

their obligations. Overall, I am not persuaded that any part of the redeemable preference shares were offered and sold to the public. Accordingly, the appellants' case in reliance upon s 412(4) must be rejected. It also follows that if (contrary to my conclusion) what occurred here did satisfy the conditions in s 398(1)(a) and (b), it did not satisfy the condition of s 398(1)(c).

Penalty tax

[89] In each case penalty tax was imposed pursuant to s 58 of the *Taxation Administration Act 2001* (Qld) which then provided, in part, as follows:

> "**58 Liability for penalty tax**
>
> (1) A taxpayer is liable for an amount *(penalty tax)* if -
>
> …
>
> (c) the primary tax assessed on a reassessment, other than under a reassessment mentioned in paragraph (b), is more than the primary tax assessed on the original assessment.
>
> (2) Penalty tax must be assessed as follows -
>
> …
>
> (c) if subsection (1)(c) applies - an amount equal to 75% of the increase in primary tax.
>
> (3) The commissioner may increase the amount of the penalty tax by not more than 20% of the penalty tax under subsection (2) if the commissioner is satisfied the taxpayer -
>
> (a) has not complied with section 28; or
>
> (b) has hindered or prevented the commissioner from becoming aware of the nature and extent of the taxpayer's liability for tax.
>
> (4) If penalty tax was payable under the previous assessment and a reassessment of primary tax is made-
>
> (a) penalty tax must be recalculated on the reassessed primary tax on the basis for assessing the penalty tax on the previous assessment; and
>
> (b) penalty tax included in the reassessment replaces any previously assessed penalty tax."

The Commissioner did not increase the amount of the penalty tax under s 58(3). In each case, he acted according to s 58(2) which, by providing that penalty tax *must* be assessed, required the assessments of penalty tax which were made.

[90] Thus the appellants cannot challenge those assessments of penalty tax, if the reassessments of primary tax stand. What they challenge is the Commissioner's decision not to remit any of the penalty tax, in exercise of the discretionary power given to him by s 60 of the *Taxation Administration Act*. Section 60 provides as follows:

> "**60 When commissioner may remit unpaid tax interest and penalty tax**
>
> (1) The commissioner may remit the whole or part of unpaid tax interest or penalty tax.
>
> (2) The remission of assessed interest or penalty tax must be made by assessment.
>
> (3) Despite section 26(1), the commissioner is not required to give an assessment notice for the assessment if, after the remission and the application of payments received by the commissioner for the taxpayer's assessment liability, the taxpayer has no assessment liability."

[91] It is common ground that this challenge can be made by the process of an appeal, and in particular an appeal by the hearing *de novo*, just as in the case of the challenge to the assessments or reassessments of primary tax. But in my view, it is far from clear that this is the position. Objections and appeals are processes and remedies which have their basis in Part 6 of the *Taxation Administration Act*. The right to object, which is conferred by s 63, is a right to object against an original assessment[25] or reassessment.[26] The right of appeal, which is conferred by s 69, exists where a taxpayer is dissatisfied with "the commissioner's decision on the taxpayer's objection". It is not a right of appeal against any other type of decision by the Commissioner. Where assessed interest or penalty tax is remitted under s 60, the remission must be made by an assessment: s 60(2). But there has been no such assessment here, of course, because the Commissioner has declined to remit any of the penalty tax.

[92] Accordingly, the position would appear to be that the refusal to exercise the power under s 60 is not itself subject to the processes of objection and appeal. That is not to say that it is not reviewable at all, and in particular under the *Judicial Review Act 1991* (Qld). Such a decision would not be a "non-reviewable decision",[27] as that term is used in the *Taxation Administration Act*, for which any review, including under the *Judicial Review Act*, is excluded by s 76. Nor is such a decision, refusing remission under s 60, within a category for which relief under the *Judicial Review Act* is excluded by s 77 of the *Taxation Administration Act*. The Commissioner's decision to remit this penalty tax, in whole or in part, apparently is, or at least was, susceptible to review under the *Judicial Review Act*, rather than by way of an

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[25] s 63(1).

[26] s 63(2),(3).

[27] Defined by s 75(1) as a decision or determination that, under a provision of that Act, is declared to be such; there is no such declaration for a refusal to remit penalty tax.

appeal. But ultimately it is unnecessary to resolve this question, because upon the premise that the decisions are reviewable within these appeals, and upon a hearing *de novo* in which the Court could exercise its own discretion under s 60, I would not be persuaded to remit any of the penalty tax, for the following reasons.

[93] Within the *Taxation Administration Act*, there are no expressed considerations for the exercise of the discretion under s 60. The relevant considerations are confined only by the subject-matter, scope and purpose of the relevant legislation.[28] The respective arguments agree that it is relevant and indeed necessary to consider the facts and circumstances which contributed to an assessment which had to be the subject of a reassessment. If the fault had been completely that of the Commissioner, there would be the strongest case for remission. If the taxpayer was at fault, by misstating the facts or not stating all of the relevant facts up to the time of the original assessment, then the case for remission would be weaker. In turn, it would be relevant to consider whether that misstatement or non-disclosure was made knowingly, or was instead inadvertent. It would also be relevant to consider whether it was made by the taxpayer in reasonable reliance upon professional advice. All of those considerations could be relevant because the apparent purpose of s 58 of the *Taxation Administration Act* is to strongly encourage taxpayers and their advisers to provide the Commissioner with such information and explanation of the relevant facts and circumstances as might be required by the Commissioner in order to accurately assess the primary tax. In the specific context here, there was the obligation upon the appellants which was imposed by s 411(2) of the *Duties Act*, which provides that an application for an exemption from duty must be "… supported by enough information to enable the commissioner to make an assessment".

[94] The arguments in relation to penalty tax then focussed on these factual questions of the appellants' conduct, and in particular whether the appellants knowingly misled or failed to inform the Commissioner when applying for the exemption. There is also some difference between the arguments as to what should be the impact, in relation to the remission of penalty tax, if there was some misrepresentation or non-disclosure to the Commissioner, albeit inadvertently.

[95] The first of the reassessments was in relation to the Tier Two sale agreement and was made on 7 May 2004. As already noted, the Commissioner reassessed that transaction, removing the exemption and imposing transfer duty together with penalty tax. But the penalty tax was not assessed at 75% of the primary tax, but instead at 25%. In doing so the Commissioner referred to Revenue Ruling TA 2.1, the terms of which indicate that the Commissioner then took the view that the exemption for that transaction had ceased to be available because of the operation of s 412(2) but where the appellants were not then considered to have intentionally disregarded the statute. In his letter of 7 May 2004 to the solicitors, he wrote that s 412(4)(b) had no application because their redeemable preference shares did not constitute the entirety of the shares of IFL.

[96] But upon reassessing both transactions in 2008, penalty tax of 75% was imposed in each case. The Commissioner then wrote that there should be no remission of penalty tax in these cases, because they involved "deliberate tax default" as that term was defined in s 22(3) of the *Taxation Administration Act*. Section 22 permitted a reassessment to be made at any time if the Commissioner believed that

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[28] *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40 per Mason J.

there had been a deliberate tax default in that there had been "fraud or evasion of tax" or that the taxpayer or a person acting for the taxpayer had knowingly misled the Commissioner, or caused the Commissioner to be misled, about the taxpayer's liability for tax, including, for example, by giving, omitting or changing information or documents.[29] The Commissioner then wrote that there had been a default of this kind by the appellants, applying for the exemption by their solicitors' letter of 30 April 2003 in terms which misstated the purpose of the separation of Incitec's chemical and fertiliser businesses. In that letter, the solicitors had written:

> "This separation enables each business to be conducted independently of the other, free from any liabilities associated with the other business, thus assisting in future risk management."

The letter made no mention whatsoever of Pivot. It gave no indication that the de-merger of the chemical and fertiliser business was undertaken for the purpose of the Pivot merger. As the Commissioner wrote in 2008, that information was relevant to the question of purpose in s 398(1). He wrote that because this had caused him to be misled about the taxpayer's liability for primary tax, there was no basis for remission of penalty tax.

[97] Before going to the solicitors' letter, and the explanation which was given in evidence by its author for the omission of any reference to Pivot or the Pivot merger, it is necessary to say something about the advice which the solicitors had provided to the appellants in relation to the availability of this exemption. In January 2003, the solicitors received some advice from counsel on that and other tax matters concerning the Pivot proposal. For a conference on 16 January 2003, they briefed counsel with a draft letter of advice. There was no written opinion provided by counsel but Ms Sheridan, a partner of Arnold Bloch Leibler and the leading solicitor engaged in this transaction, gave evidence to the effect that counsel had substantially agreed with the terms of the draft. The letter of advice subsequently written by the solicitors to the appellants, dated 30 January 2003, is in evidence. It is probably the most reliable evidence as to what counsel had advised. More importantly, it is the advice which the appellants received.

[98] The letter of advice consisted of a two page summary followed by a more extensive analysis. The summary recorded that the solicitors had been "requested to advise on the tax and stamp duty implications of implementing the proposed merger". It advised that the "implementation of the merger proposal … should be eligible for stamp duty exemption pursuant to the corporate reconstruction relief provisions on the transfer of the fertiliser business assets in QLD, NSW and VIC … and … should not be subject to claw-back of the corporate reconstruction relief in these States upon the break up of the corporate group for stamp duty purposes". The attachment to the letter gave this advice as to stamp duty on the asset sales:

> "The transfer of the fertiliser business assets and liabilities should be eligible for stamp duty relief pursuant to the Corporate Reconstruction Relief ("CRR") provisions in QLD, NSW and VIC.
>
> Broadly, the CRR provisions can apply to exempt from stamp duty transfers of property that occur between members of the same corporate group. The definition of a corporate group is basically the same for all jurisdictions and can be generally expressed to mean:

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[29] *Taxation Administration Act 2001* (Qld) s 22(3).

> - a corporate parent and subsidiary that is at least 90% beneficially owned, either directly or indirectly, by the parent; and
> - of which the parent or other subsidiaries have at least 90% voting control.
>
> Therefore, as Incitec owns 100% of its subsidiaries and will own 100% of Fertco, these entities form a "corporate group" for the purposes of the CRR provisions.
>
> …
>
> In QLD, the transfer of the fertiliser business to Fertco from Incitec will qualify for CRR, as will the transfer of assets from the Incitec subsidiaries to Incitec. CRR would not have been available if the business assets were transferred from the Incitec subsidiaries to Fertco."

The attachment went on to describe the subsequent steps in the overall proposal, one of which was the issue of redeemable preference shares in the company which became IFL, and which was there described as Fertco. The solicitors advised that the issue of those shares "by way of an offer to the public, will result in Fertco and Incitec ceasing to be part of the same corporate group for stamp duty purposes". On that basis, they advised, there would be no "claw-back", a reference to s 412(2).

[99] The attachment further advised that this transaction should not engage the anti-avoidance provisions of Chapter 11 of the *Duties Act 2001* (Qld).[30] In that respect, the solicitors wrote:

> "As outlined earlier, there are commercial reasons for implementing the relevant steps. The transfer of the assets and liabilities to Incitec by the Incitec subsidiaries was undertaken to consolidate the fertiliser business before transfer and to allow Fertco to seek warranties from one company of substance. The issue of redeemable preference shares by Fertco was desirable in order to raise the finance required to extinguish intercompany loans in Fertco before its acquisition by Pivot and to raise capital to run the fertiliser business."

[100] In the appellants' favour, it can be said that they applied for this exemption, through the solicitors, having been advised that they were entitled to it. It can also be said that at least within that letter of advice, they were not directed to the particular difficulty in these transactions being exempt that came from the fact that the purpose of the transfers of assets was to facilitate the Pivot merger.

[101] The other observation to be made about this letter of advice is that the opinion as to the "claw-back" (the operation of s 412) was premised upon the redeemable preference shares being offered and sold to the public but with no explanation of what had to be done in that respect.

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[30] These provisions have not been relied upon by the Commissioner.

[102] I come then to the solicitors' letter to the Commissioner dated 30 April 2003 and its enclosures, by which the exemptions were originally obtained. The solicitors then wrote to the Commissioner as follows:

> "We act for Incitec Limited ('Incitec') and Incitec Fertilizers Ltd ('IFL').
>
> For many years, Incitec conducted both a fertilizers business and an industrial chemicals business. In conducting the fertilizers business, Incitec used both its own assets and certain assets owned by wholly owned subsidiaries of Incitec.
>
> As part of a corporate reorganisation, Incitec resolved to separate its fertilizers and its industrial chemical business. This separation involved the incorporation of a new wholly owned subsidiary, namely IFL, to conduct the fertilizers business. Incitec would continue to conduct the industrial chemicals business. This separation enables each business to be conducted independently of the other, free from any liabilities associated with the other business, thus assisting in future risk management.
>
> The reorganisation and separation occurred, with effect from 1 April 2003, in a two stage process. Stage 1 involved the transfer of those assets not owned by Incitec but used by Incitec in the fertilizers business from the relevant wholly owned subsidiaries to Incitec. Stage 2 involved the transfer of the fertilizer business, including all relevant assets, from Incitec to IFL. As the Incitec's fertilizer business operates in Queensland, New South Wales, Victoria and South Australia, separate asset sale agreements were prepared for each state relating to the transfer of assets located in that state.
>
> Both of these transfers of assets located in Queensland come within the definition of a 'corporate reconstruction' in section 398 of the Duties Act. Further, the transfers of property satisfy the conditions of section 406(2) in relation to the exemption for intra-group transfers of property.
>
> In respect of the Stage 1 transfer, Incitec and the wholly owned subsidiaries from whom assets were acquired are group companies and none of them held the assets the subject of the transfer as trustee. No consideration was provided from a person other than a group company for the transfer. The assets the subject of the transfer, were at the time of the transfer, group property under section 407.
>
> In respect of the Stage 2 transfer, Incitec and IFL are group companies and neither of them held or holds the assets the subject of the transfer as trustee. No consideration was provided from a person other than a group company for the transfer. The assets the subject of the transfer, were at the time of the transfer, group property under section 407."

[103] The letter said nothing about Pivot or the Pivot merger. As can be seen in the above passage, the solicitors represented that what was being done was simply to separate the chemical and fertilisers business for the sole purpose of enabling the businesses

to be conducted independently from each other so that the liabilities of one would not burden the other "thus assisting in future risk management". That was misleading for several reasons. There is no indication, in any of the evidence, of a view within Incitec that the businesses should be separated lest one become an undue burden upon the other. Both were successful businesses. Secondly, by representing that there was this concern, the solicitors represented that the intention was to have the two businesses remain within the same corporate group. Thirdly, it represented that this was not only a purpose, but the only purpose of the transactions. Coupled with the omission of any reference to Pivot and the Pivot merger, this was a seriously misleading statement which was critical to the grant of the exemption which was being sought.

[104] When challenged about this in cross-examination, Ms Sheridan could explain the letter only in this way. She said that she understood that Incitec had decided that the de-merger of the chemicals and fertiliser businesses was a good thing to do in its own right, because the asset sale agreements had been signed and apparently performed on 1 April 2003, prior to the meeting of Pivot's shareholders. Of course, her letter was written following that meeting. By that stage the Pivot merger was certain to proceed. But her evidence was that this letter was drafted prior to the Pivot meeting, although sent on the day after it. Upon the understanding which Ms Sheridan says that she then had, the documents could have been lodged earlier. Instead they were lodged, it would appear, on the final day allowed which was 1 May 2003. That appears from exhibit 9, which is a letter Ms Sheridan wrote to the in-house solicitor of Incitec Limited of 30 April 2003 enclosing "the documents for lodgement with the Stamps Office tomorrow".

[105] There is no evidence of any letter, email or other means of instruction to the solicitors which is to the effect that, in truth, her clients had decided to de-merge these two businesses, irrespective of the MID and more generally the Pivot proposal.

[106] It is also difficult to reconcile Ms Sheridan's evidence with the letter which she wrote to Westpac on 17 April 2003,[31] about the proposed issue of preference shares. Ms Sheridan's "summary of the background" to the offer of those shares began with an explanation of the Pivot merger. She there wrote:

> "Pivot Limited (Pivot), Incitec Limited (Incitec) and Orica Limited (Orica) entered into a Merger Implemention Deed on 21 February 2003 pursuant to which the parties agreed on the terms and conditions on which to implement a merger of Pivot and the fertiliser manufacturing and distribution business conducted by Incitec (Merger Proposal).
>
> One of the terms of the Merger Proposal was the separation of Incitec's fertiliser manufacturing and distribution business (Incitec Fertilizer Business) from Incitec's industrial chemicals business. This was achieved through the creation of IFL. On 1 April 2003 IFL received a transfer from Incitec of all of the assets used to conduct, and all of the liabilities relating to, the Incitec Fertilizer Business."

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31 As a copy of the letter appears at JCS-5 to her affidavit which is exhibit 4, the letter is dated 8 November 2005, but in her evidence she agreed that the proper date was 17 April 2003.

That letter went on to explain that an application would be made for an exemption from duty but the exemption might be lost subsequently unless the departure of IFL from the group was, as the parties had proposed, by the issue of these preference shares. Importantly, in this letter, written as it was well after 1 April 2003, Ms Sheridan seemed to be in no doubt that the purpose of the transactions was to facilitate the Pivot merger, rather than the purpose of "risk management" which was conveyed in her letter to the Commissioner.

[107] The redeemable preference shares were the subject of an Information Memorandum dated 5 May 2003. It described the Pivot merger, referring to the Merger Implementation Deed and an expectation that the merger would be implemented on or about 2 June 2003. In paragraph 2.1, the Information Memorandum contained this:

> "Incitec had historically held its fertilizer business (Incitec Fertilizer Business) in a number of corporate entities, some of which also included Incitec's industrial chemicals business. In order to facilitate the merger of the Incitec Fertilizer Business with Pivot, Incitec needed to separate its fertilizer business from its industrial chemicals business."

[108] On 27 May 2003, the solicitors wrote to the Australian Securities and Investments Commission, seeking relief from certain reporting requirements for IFL once it had left the Incitec group. Ms Sheridan agreed that the letter was sent under her supervision. It included this description of the background:

> "On 21 February 2003, Pivot Limited (Pivot) and Incitec entered into a Merger Implementation Deed pursuant to which the parties agreed to merge their respective fertilizer and manufacturing businesses (Merger Proposal).
>
> …
>
> To implement the Merger Proposal, Incitec was required to separate its fertilizer and manufacturing business (Incitec Fertilizer Business) from its industrial chemicals business. As a result, on 1 April 2003, IFL received a transfer from Incitec of all of the assets used to conduct, and all of the liabilities relating to, the Incitec Fertilizer Business. …"

[109] At another point in her cross-examination, Ms Sheridan suggested that she had not really given any thought to the *purpose* of these transactions, when drafting her letter to the Commissioner, but was concerned to set out the *effect* of each transaction as she understood it.[32] That is difficult to accept, although it has some support from the fact that the solicitors' letter of advice to Incitec, as already noted, had not addressed the particular question of purpose under s 398. Nevertheless, she offered a particular purpose in her letter.

[110] The letter dated 30 April 2003 to the Commissioner enclosed two documents, one for each of the transactions, in the required form of an application for an exemption. Each was signed by a director of Incitec Limited and dated 30 April 2003. The form was completed by answering a number of questions which were directed to the various provisions of Chapter 10. The questions included the following:

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[32] Transcript 2-10 – 2-11.

> "Has the dutiable transaction been made under an arrangement under which:
>
> (a) Part/all of the consideration for the dutiable transaction has/is to be provided or received, directly or indirectly by a person other than a group or company?
>
> …
>
> (c) A group company is to dispose of any of the consideration through a payment or other disposition by a person other than a group company by way of loan on ordinary commercial terms?"

[111] In each case the question was answered "no". The director signed a declaration, within each form, that the transaction was "for the purpose of changing the corporate structure to make internal adjustments to corporate arrangements" and that it was "not undertaken for any other purpose". He further declared that the transfer of the property was not part of an arrangement under which any company involved ceased to belong to the same corporate group other than in the circumstances mentioned in s 412(4). This director was not called as a witness.

[112] The form lodged by IFL in respect of the Tier Two sale offered this further information:

> "As outlined briefly in the covering letter [an apparent reference to the solicitors' covering letter], the Incitec corporate group operates two businesses, an Industrial Chemicals business and a Fertilizer business. The Incitec corporate group wishes to re-organise its asset ownership such that the Industrial Chemicals and Fertilizer business assets would be held in separate entities. This would enable the Fertilizer and the Industrial Chemicals businesses to operate with independence from each other. … The Incitec corporate group considers that [the sale to IFL] is necessary as part of its re-organisation as it ensures that the Fertilizers business can operate into the future free from any liabilities or history of the Industrial Chemicals business by placing it into a new operating company."

The same director signed the two forms for the two transactions. In this way the appellants were directly involved in the misrepresentations which were made to the Commissioner.

[113] The appellants did not attempt to explain away this letter dated 30 April and its enclosures, upon the basis that they, as the clients, had not received proper advice as to Chapter 10. Nor was there evidence that what the director had stated within the form lodged by IFL was the result of some mistake. The conclusion that this was a deliberate misstatement is unavoidable, where all of the evidence is that these transactions were undertaken only for the Pivot merger and there is no mention of this "risk management" in the directors' resolutions to sign these agreements of sale. This letter and its enclosures were a serious misrepresentation of several critical matters. One was in relation to the purpose of the transaction, thereby affecting the operation of s 398 but there were also misrepresentations as to there being no relevant arrangement. In substance, the Commissioner was right to

conclude, as he did in 2008 when imposing this penalty tax, that he had been deliberately misled.

[114] It was Mr Page, then employed in the Office of State Revenue, who initially assessed each transaction as exempt under Chapter 10, Part 1, on 18 June 2003. I accept his evidence that he relied upon the solicitors' letter of 30 April 2003 and each of the forms lodged by the appellants with that letter in granting those exemptions.

[115] On 30 May 2003, a solicitor working under Ms Sheridan's supervision wrote to the Office of State Revenue enclosing the originals of two forms, one for each transaction. Those forms referred to the documents which had accompanied the letter of 30 April. In that way the appellants confirmed the misrepresentations. Again the forms were signed by the same director.

[116] On 24 June 2003, the solicitors wrote to Mr Page informing him of the issue and listing of the preference shares. They provided a Form 10.3 – "Reassessment – Corporate Reconstruction" as apparently required by s 413 of the *Duties Act*. The letter was sent by fax and by post. First it was sent by fax under cover of this:

> "To follow is a letter and Form 10.3 (with attachments other than the Information Memorandum) in relation to the corporate reconstruction relief previously granted to Incitec Fertilizers Limited.
>
> The original letter and Form 10.3 (with all attachments) are being sent by overnight post. …"

The fax included the solicitors' letter of 24 June and the Form 10.3. That letter included the following:

> "On 27 May 2003, as a result of an issue of shares by IFL, Incitec ceased to have voting control (as defined in Schedule 6 of the *Duties Act*) of IFL, as its maximum percentage voting power at general meetings was reduced from 100% to below 90%. Therefore, on 27 May 2003, IFL ceased to be a member of the same corporate group as Incitec. …"

The enclosed Form 10.3 stated that the issue of shares had followed an offer to the public. It also advised that on 28 May 2003, IFL had been listed on the NSX and the preference shares were quoted for trading on that exchange. It claimed that the circumstances were within s 412(4)(b). This fax and its enclosures revealed nothing about Pivot and in particular the Pivot merger. As already noted, it is common ground that the Pivot merger had been effected by 1 June 2003.

[117] However, in the posted letter of 24 June 2003, there was enclosed a copy of the Information Memorandum which had been issued to potential subscribers for the preference shares. That document did refer to the Pivot merger. Ultimately, the appellants now argue that in this way they disclosed the Pivot merger to the Commissioner. At least it can be said that they did not withhold the Information Memorandum from the Commissioner. But it can hardly be suggested that they meant to inform the Commissioner of the Pivot merger, in case he thought that it was relevant.

[118] I infer that the appellants and the solicitors intended that they would have two relevant dealings with the Commissioner: the first by which they would obtain an

exemption for the transactions (as sought on 30 April 2003) and the second by this notification of IFL leaving the group, in which they would rely upon s 412(4), but that in neither case would they bring the Pivot merger to the Commissioner's attention.

[119] What next happened was that Mr Page read a newspaper article reporting on the listing of the newly merged entity which was Incitec Pivot. He read in the Courier Mail, on about 11 July 2003, that this company had been formed "through the recent merger of Incitec Fertilizers and Pivot". I accept his evidence that this caused him concern about the true purpose of the transactions and made him write, as he did, to the solicitors on 21 July 2003, putting a number of questions about the Pivot merger. He then wrote:

> "1. Why was the Commissioner not informed of the intention to float some of the shares in IFL, resulting in Incitec ceasing to have voting control of IFL, at the time of your application for Corporate Reconstruction Relief of 30 April 2003?
>
> 2. Was it always the intention of IFL to offer and sell its shares to the public?
>
> 3. Advise the date that IFL merged with Pivot as per the recent article in the Courier Mail, Business Section (dated 11 July at page 37).
>
> 4. Was the Corporate Reconstruction undertaken with the object of IFL merging with Pivot?
>
> Please provide documentation in support of your responses in the form of company minutes or Statutory Declarations by the relevant parties."

[120] Remarkably, the appellants did not respond to that letter until 2004. By then, Mr Page had written again to the solicitors, on 15 September 2003, requesting a response by 30 September 2003. And on 2 December 2003, the solicitors lodged a number of lease transfers relating to these transactions for assessment, requesting that they be stamped as non-dutiable pursuant to the exemption for corporate reconstruction which had been granted. Yet still they said nothing in response to Mr Page's correspondence.

[121] Finally, the solicitors responded, by a letter dated 9 February 2004. Their letter confirmed that IFL had merged with Pivot on 1 June 2003. In this letter, in answer to the fourth of Mr Page's questions, Ms Sheridan wrote:

> "The corporate reconstruction was undertaken with the object of separating the Incitec fertilizer business from the Incitec chemicals business. As you may be aware, Orica Limited had made a successful takeover offer for the shares in Incitec in February 2003. Orica conducted its own chemicals business and it was intended that the Incitec chemicals business would be integrated with the Orica business. The corporate reconstruction facilitated that integration.
>
> While the corporate reconstruction was undertaken during the period while the merger was under contemplation, it was always contemplated that if the merger was to proceed, IFL would make a

> public offer of shares and seek listing prior to the merger occurring, in the manner referred to in section 398(1)(c) and permitted by section 412(4)(b). The corporate reconstruction was not dependent on, and occurred prior to, the public offer of shares in IFL. Similarly, the corporate reconstruction was not dependent on, and occurred prior to, the approval of Pivot shareholders being obtained and the merger proceeding."

This was not a proper response to Mr Page's question. It did not directly answer his enquiry, which was whether the reconstruction was undertaken with the object of IFL merging with Pivot. But it suggested that it was not undertaken with that object. It suggested that the true object was to facilitate the integration of the Incitec chemicals business with Orica's business. It sought to have Mr Page understand that this was the only object of the corporate reconstruction. It stopped short of expressing a negative answer to his question, I infer, because it was appreciated that such answer would have been false. Overall, the letter of 9 February 2004 does not serve the appellants' present purposes well. It continued to mislead the Commissioner.

[122] On 7 May 2004, there was the reassessment of duty upon the Second Tier sale, on the basis of s 412(2). As already discussed, after an objection against that reassessment the Commissioner conducted further enquiries. These included the inspection of relevant records of the Incitec companies. Ultimately, there were the reassessments of 2008.

[123] Throughout all of this the truth, which was that at least one purpose of the transactions was to facilitate the Pivot merger, was not offered to the Commissioner. This might have been gleaned from reading the Information Memorandum, which had been posted with the solicitors' letter of 24 June 2003. However, Mr Page's attention was not drawn to those parts of the document. I accept that he did not notice them. In fact his potential consideration of that material was overtaken by his learning of the Pivot merger from a newspaper.

[124] Overall, there has been a course of serious misrepresentation and non-disclosure. Upon those findings, it is difficult to see why the *prima facie* position, according to s 58 of the *Taxation Administration Act*, should have been displaced by some remission of penalty tax. I did not understand the appellants' argument to be that if such findings were made, there should be some remission.

Orders

[125] The outcome is that the appellants have failed in all respects. Each appeal will be dismissed. I will hear the parties as to further orders, including costs.