

FEDERAL COURT OF AUSTRALIA

Cusack v Commissioner of Taxation [2002] FCA 1012

INCOME TAX - Assessable income - liability to taxation - default notices of assessment - whether notices void for uncertainty - where applicant claims existence of two distinct forms of currency with different exchange values in Australia - where applicant claims option to have income expressed in and assessment made in high value Australian dollars which reduces numerical expression of assessable income and liability to pay tax.

Administrative Appeals Tribunal Act (1975) (Cth)

Currency Act 1965 (Cth)

Reserve Bank Act 1959 (Cth)

Income Tax Assessment Act 1936 (Cth)

Bonython v The Commonwealth of Australia (1948) 75 CLR 589 Appl

Stanwell Park Hotel Co Ltd v Leslie (1952) 85 CLR 189 Cited

CA Parsons & Co Ltd v Electricity Trust (SA) (1976) 16 SASR 93 Cited

Electricity Trust (SA) v CA Parsons & Co Ltd (1978) 18 ALR 225 Cited

Commissioner of Taxation v Energy Resources of Australia Ltd (1995) 54 FCR 25 (FC) Cited

Deputy Federal Commissioner of Taxation v Conley (1998) 98 ATC 5090 (FC) Cited

Payne v Federal Commissioner of Taxation (1934) 51 CLR 197 affirmed on appeal in the Privy Council (1936) 55 CLR 158; [1936] AC 497 Cited

Treseder-Griffin v Co-Operative Insurance Society Ltd [1956] 2 QB 127 (CA) Cited

Californian Copper Syndicate Ltd v Harris (1904) 5 TC 159 Cited

Jenkins v Horn (Inspector of Taxes) [1979] 2 All ER 1141 Cited

**PATRICK LEO CUSACK v COMMISSIONER OF TAXATION
Q186 OF 2001**

**COOPER J
BRISBANE
13 AUGUST 2002**

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

Q186 OF 2001

**BETWEEN: PATRICK LEO CUSACK
 APPLICANT**

**AND: COMMISSIONER OF TAXATION
 RESPONDENT**

JUDGE: COOPER J

DATE OF ORDER: 13 AUGUST 2002

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The application to extend time to apply for review of the decision of the Administrative Appeals Tribunal given on 16 March 2001 is dismissed.
2. The applicant pay the respondent's costs, including reserved costs, to be taxed if not agreed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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**AND: COMMISSIONER OF TAXATION
 RESPONDENT**

JUDGE: COOPER J

DATE: 13 AUGUST 2002

PLACE: BRISBANE

REASONS FOR JUDGMENT

BACKGROUND

1 The applicant is a taxpayer. The respondent is the Commissioner of Taxation.

2 On 3 August 1998, the respondent issued default notices of assessment of income tax in respect of the financial years ended 30 June 1992, 1993, 1994, 1995, 1996 and 1997. The applicant lodged a notice of objection in respect of each assessment which objections were disallowed by the respondent. The applicant applied for review of the respondent's decision to the Administrative Appeals Tribunal ("the AAT"). The AAT affirmed the decision of the respondent on 16 March 2001.

3 On 27 August 2001, the applicant filed an application in this Court for an extension of time to appeal pursuant to s 44 of the *Administrative Appeals Tribunal Act (1975)* (Cth) ("the AAT Act") for review of the AAT decision. The time for initiating an appeal expired twenty-eight days from delivery of the AAT decision.

4 The applicant filed material explaining the delay. The reasons given were not disputed by the respondent. However, the respondent opposed the granting of the extension as, it submitted, the appeal was bound to fail as the grounds relied upon were totally without merit. In the result, the grounds which would be relied upon if an extension was granted have

been fully argued.

THE APPLICANT'S CONTENTION

5 The applicant contends that there are two distinct forms of Australian currency; “noble” metal coins being one form, and all other forms of currency constituting the second form. The applicant’s contentions are founded upon s 14A(1) of the *Currency Act 1965* (Cth) (“the CA”) which he contends creates a form of Australian currency different to Australian currency in other forms (base metal coinage issued under the CA and notes issued under s 34 of the *Reserve Bank Act 1959* (Cth) (“the RBA”)), and, having an ascertainable value capable of measurement in currency issued under the RBA.

6 As between the two forms he contends that there is an “internal exchange rate”. That exchange rate, he contends, is expressed as the ratio between the face value of Australian currency which may be used to purchase a gold coin at the issue price of the gold coin fixed in accordance with s 14A(1) of the CA, and, the face value of that coin itself. For the purposes of the matters in issue in these proceedings, he contends the exchange rate was somewhere around 5:1. The unit of account of each form of currency is called a “dollar”, although in one form it is a “high value” dollar and in the other a “low value” dollar.

7 The respondent contends that because there is a different exchange value for Australian currency, depending upon which type of currency is under consideration, monetary obligations may, at the option of parties to the obligation, be converted from an obligation expressed in one form of Australian currency to an obligation expressed in the other form of Australian currency. Thus, an obligation of \$500 can be converted to an obligation of \$100 by stipulating for payment in Australian currency in gold coins.

8 The consequence which flows from the existence of two types of Australian dollar with different exchange values, the applicant contends, is that the respondent is unable to make an assessment which unambiguously expresses in a sum certain in Australian currency the assessable income of the taxpayer, or the obligation to pay tax unless the assessment is done on the basis of the money value of the stated consideration and not merely on the numerical quantum of dollars expressed. Thus, the applicant submits, the assessments are bad or void for uncertainty and thereby excessive. Alternatively, the applicant contends he has the option to have the income expressed in, and the assessment made in, high value

Australian dollars which reduce the numerical expression of his assessable income, and liability to pay tax, if any, by a factor of 5:1. Thus, he submits the assessments are excessive by a factor of 5:1 and ought for that reason to be set aside.

CONCLUSION ON APPLICATION

9 The CA, so far as presently relevant, provides :

“8.(1) The monetary unit, or unit of currency, of Australia is the dollar.

(2) The denominations of money in the currency of Australia are the dollar and the cent.

(3) A cent is one-hundredth part of a dollar.

...
9.(1) Subject to this section, every sale, every bill of exchange or promissory note, every security for money, and every other contract, agreement, deed, instrument, transaction, dealing, matter or thing relating to money, or involving the payment of, or a liability to pay, money, that is made, executed, entered into or done, shall, unless it is made, executed, entered into or done according to the currency of some country other than Australia, be made, executed, entered into or done according to the currency of Australia provided for by this Act.

...
14.(1) The Treasurer may cause to be made and issued coins of the denominations of money specified, or taken to be specified, in the Schedule.

(2) A coin so made and issued:

(a) must be of a standard composition specified, or taken to be specified, in the Schedule in relation to that coin; and

(b) must be of a standard weight, and of a design and dimensions, determined, by signed instrument, by the Treasurer.

(3) Despite subsection (2), in the making of a coin, a variation from a standard weight applicable to the coin is allowable as determined, by signed instrument, by the Treasurer.

14A(1) Coins

(a) of a denomination of \$5 or more; or

(b) whose standard composition consists of, or includes, gold, silver or platinum;

shall be issued at prices:

(c) determined, in writing, by the Treasurer; or

- (d) *calculated in accordance with a method determined, in writing, by the Treasurer.*

...
16.(1) *A tender of payment of money is a legal tender if it is made in coins that are made and issued under this Act and are of current weight:*

- (a) *in the case of coins of the denomination of Five cents, Ten cents, Twenty cents or Fifty cents or coins of 2 or more of those denominations - for payment of an amount not exceeding \$5 but for no greater amount;*
 - (b) *in the case of coins of the denomination of One cent or Two cents or coins of both of those denominations - for payment of an amount not exceeding 20 cents but for no greater amount;*
 - (c) *in the case of coins of a denomination greater than Fifty cents but less than Ten dollars - for payment of an amount not exceeding 10 times the face value of a coin of the denomination concerned but for no greater amount;*
 - (d) *in the case of coins of the denomination of Ten dollars - for payment of an amount not exceeding \$100 but for no greater amount; and*
 - (e) *in the case of coins of another denomination - for payment of any amount.*
- (2) *For the purposes of subsection (1), a coin shall be deemed to be not of current weight if it has become diminished in weight by wear or otherwise so as to be of less weight than the weight prescribed as the least current weight of that coin."*

10 Australian notes, as distinct from Australian coinage, are issued under Part V of the RBA. That Part, so far as is presently relevant, provides :

"34.(1) Subject to this Act, the Bank may:

- (a) *issue Australian notes;*
 - (b) *re-issue Australian notes; and*
 - (c) *cancel Australian notes.*
- (2) *Australian notes shall be printed by, or under the authority of, the Bank.*

35. *Australian notes may be issued in any of the following denominations, namely, One dollar, Two dollars, Five dollars, Ten dollars, Twenty dollars or Fifty dollars or in any other denomination that the Treasurer, by instrument in writing published in the Gazette, determines.*

36.(1) Australian notes are a legal tender throughout Australia.

...

43. The Bank shall not issue bills or notes (other than Australian notes) intended for circulation as money.”

11 There is a distinction in law between money as the expression of a standard or unit of value as the means of measuring an obligation, and money which forms the means or instrument of discharging the obligation. In the former case money is used as a unit of account. In the latter case money is used as currency.

12 The use of money in the former sense, as a standard or unit of value, underlies the provisions of ss 8 and 9 of the CA. The use of money as currency by which money obligations are discharged is reflected in ss 11(1) and 16 of the CA and ss 35, 36 and 43 of the RBA.

13 The concept of “money of account” as an expression of a monetary obligation involves the application of the nominalistic principle. That principle provides, as explained by FA Mann in “The Legal Aspect of Money” (5th Ed Oxf 1992) at 90 :

“The extent of monetary obligations cannot be determined otherwise than by the adoption of nominalism. The nominalistic principle means that a monetary obligation involves the payment of so many chattels being legal tender at the time of payment, as, if added together according to the nominal value indicated thereon, produce a sum equal to the debt. In other words, the obligation to pay £10 is discharged if the creditor receives what at the time of performance are £10, regardless of both their intrinsic and functional value. It follows that a monetary obligation has no other value than that which it expresses.”

14 The application of the principle was recognised by Dixon J, with whom McTiernan J agreed in *Bonython v The Commonwealth of Australia* (1948) 75 CLR 589 at 620 - 622 :

“... The expression ‘money of account’ now appears to be recognized in English law. Indeed the expression was used in a statute as early as 1826. For 6 Geo. IV. c.79 spoke of ‘assimilation of the currencies and monies of account throughout the United Kingdom of Great Britain and Ireland.’ When the world passed away from metallic money and the conception of money as a commodity chosen for its intrinsic value and bearing the imprimatur of the State, it was doubtless inevitable that the courts should adopt the distinction drawn by economists between currency and money as a unit of account. For it became more apparent that the distinction was reflected in practical consequences that could not be ignored. Plainly a monetary expression could

not be considered a numerical reference to metallic currency or coins, concrete things. The conception, so familiar to economists, of money as a description of a standard or measure of value, as a unit in which debts and therefore prices might be calculated or expressed, was found to be one that was needed for some of the purposes of the law. For it is involved in the not unimportant legal proposition that the obligation to which a contract to pay a sum of money gives rise is to pay, in whatever the law regards as legal tender at the time when payment is made, as many of the units of currency as amount to the sum. This proposition lay at the foundation of the decision of the Supreme Court of the United States in the Legal Tender Cases (1871) 79 U.S. 382 [20 Law Ed 287] that the Legal Tender Acts did not impair the obligation of contracts. The Court acknowledged that in consequence of the Acts a debt contracted before they were passed might be discharged with the notes the Acts authorized instead of the gold or silver coins forming legal tender when the debt was incurred. But the Court denied that this impaired the obligation of a contract to pay money generally as distinguished from some defined species of money. 'It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. ... But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made' - per Strong J (1871) 79 U.S., at p.548 [20 Law Ed, at p.311]. The distinction between money as the expression of a standard or unit of value, as the means of measuring an obligation, and the money which forms the means or instrument of discharging the obligation, the legal tender or the representative money by which it is paid, has another importance for the law. For where two or more countries are involved in a transaction, as apparently is thought to be the case here, the court may be called upon to decide what is the money that the obligor or debtor owes.

In deciding such a question the distinction enables the law to avoid a confusion between the money which the parties intended to use for the purpose of expressing the obligation, the money of account which serves to measure the obligation, and the money in which the debt so ascertained is to be discharged. ..."

Statements to similar effect are to be found in *Stanwell Park Hotel Co Ltd v Leslie* (1952) 85 CLR 189 at 200 - 201.

15 Parties must be understood to contract, and Parliament to legislate, with reference to the nominal value of the money concerned as expressed by whatever is legal tender at the time of payment: *Mann* at p 91; *CA Parsons & Co Ltd v Electricity Trust (SA)* (1976) 16 SASR 93 at 100 - 101; *Electricity Trust (SA) v CA Parsons & Co Ltd* (1978) 18 ALR 225 at 233; *Bonython v The Commonwealth* at 622; *Commissioner of Taxation v Energy Resources of Australia Ltd* (1995) 54 FCR 25 (FC) at 37. The presumption is given statutory effect in ss 9, 10, 11, 12 and 16 of the CA and ss 35 and 36 of the RBA.

16 Australian currency, whether notes or coin, including gold coin, when being used as legal tender to discharge monetary obligations is valued at its face value without regard to its intrinsic worth, if any, and without regard to any applicable issue price determined pursuant to s 14A of the CA. There is thus only one value of gold coins when used as currency and that is the face value of the coin. The contention that there are two forms of Australian currency with different values is fallacious. Gold and other coins made of “noble” metal only have a value different to the face value of the coin when the coin is **not** being used as currency for any purpose and is regarded simply as a commodity.

17 Section 20(1) of the *Income Tax Assessment Act 1936* (Cth) (“the ITAA”) provides :

“For all the purposes of this Act, income wherever derived and any expenses wherever incurred shall be expressed in terms of Australian currency.”

18 This means that money, for the purposes of the ITAA, must be expressed in units of account which are the units of account in terms of Australian currency. Assessments of income to taxation are made in Australian currency and the tax liability under the ITAA is measured in units of Australian currency and discharged by payment in Australian currency: *Deputy Federal Commissioner of Taxation v Conley* (1998) 98 ATC 5090 (FC) at 5091, 5092, 5095 - 5096. Section 20(1) of the ITAA gives effect in statutory form to the decision of Gavan Duffy CJ and Evatt and McTiernan JJ in *Payne v Federal Commissioner of Taxation* (1934) 51 CLR 197 at 207, which was affirmed on appeal in the Privy Council (1936) 55 CLR 158 at 163 - 164, 165; [1936] AC 497 at 508 - 509, 510 that “income”, whenever used in the *Income Tax Assessment Act 1922 - 1931* (Cth) meant income expressed in Australian currency: *Commissioner of Taxation v Energy Resources of Australia Ltd* at 49 - 50, 60 - 61.

19 It follows that in the financial years in question the income of the applicant, for the purpose of assessing his liability, if any, to the payment of tax, was to be ascertained and expressed in monetary units expressed as dollars: s 20(1) of the ITAA and s 8(1) and (2) of the CA.

20 The issue price or inherent value of “noble” metal coins issued under authority of s 14 of the CA is irrelevant for the purposes of the ITAA unless the coins themselves are used, not as currency as legal tender to discharge a monetary obligation, but, as commodities or objects

of exchange. When used as commodities, such coins have a value which is ascertainable in the market for such commodities. That value is measured and expressed in monetary units which in Australian currency are called dollars. The value may or may not be different to the face value of the coins, depending upon the interaction of supply and demand in that market: see for example, the discussion of the treatment of gold coins as commodities, as opposed to currency, in *Treseder-Griffin v Co-Operative Insurance Society Ltd* [1956] 2 QB 127 (CA) at 146ff.

21 Where the income of a taxpayer is earned by the receipt of “noble” metal coins as commodities, the intrinsic or market value of the coins as income is to be expressed for the purposes of the ITAA in terms of Australian currency. That is, the value of the coins is to be expressed in monetary units of Australian currency as provided for in s 8 of the CA: s 21(1) ITAA; *Californian Copper Syndicate Ltd v Harris* (1904) 5 TC 159; *Commissioner of Taxation v Energy Resources* at 61. The taxpayer is not to be assessed to taxation on the nominal value of the coins as currency: in this respect there is no difference in approach under the ITAA and under the *Income and Corporation Taxes Act 1970* (UK) in respect of which a similar argument to that made by the applicant on this application was rejected in *Jenkins v Horn (Inspector of Taxes)* [1979] 2 All ER 1141.

22 The AAT made no legal error in its decision given on 16 March 2001 to affirm the decision of the respondent before it for review. The grounds which the applicant wishes to advance, if an extension of time to apply under s 44 of the AAT Act is granted, are without merit and any application would fail. The application is in consequence dismissed.

23 There is, in my view, no reason why the ordinary situation should not apply with costs following the disposition of the event.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cooper.

Associate:

Dated: 13 August 2002

Applicant appeared in person:	Mr PL Cusack
Counsel for the Respondent:	Mr B Porter
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	4 February 2002
Date of Judgment:	13 August 2002