Commissioner of Taxation v Desalination Technology Pty Limited [2014] FCA 1120 (21 October 2014)

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FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Desalination Technology Pty Limited [2014] FCA 1120

Citation:	Commissioner of Taxation v Desalination Technology Pty Limited [2014] FCA 1120
Appeal from:	Desalination Technology Pty Ltd v Commissioner of Taxation [2013] AATA 846
Parties:	**COMMISSIONER OF TAXATION v DESALINATION TECHNOLOGY PTY LIMITED**
File number:	NSD 2571 of 2013
Judge:	**PERRAM J**
Date of judgment:	21 October 2014
Catchwords:	**TAXATION** – claim for research and development offset – whether research and development expenditure had been 'incurred' by taxpayer – whether taxpayer was definitively committed to the expenditure – whether payment of invoice for expenditure was subject to uncertain contingencies
Legislation:	*Income Tax Assessment Act 1936* (Cth) ss 73B, 73I, 73J *Income Tax Assessment Act 1997* (Cth) s 8-1
Cases cited:	*Coles Myer Finance Ltd v Commissioner of Taxation* [1993] HCA 29; (1993) 176 CLR 640 cited *Commissioner of Taxation v CityLink Melbourne Ltd* [2006] HCA 35; (2006) 228 CLR 1 cited *Hooker Rex Pty Ltd v Commissioner of Taxation* (1988) 79 ALR 181 cited *McGraw-Hinds (Aust) Pty Ltd v Smith* [1979] HCA 19;(1979) 144 CLR 633 cited *Messenger Press Pty Ltd v Commissioner of Taxation* (2012) 90 ATR 69 cited *Vision Intelligence Pty Ltd v Commissioner of Taxation*[2013] AATA 527 cited Charles Proctor (ed), *Goode on Payment Obligations in Commercial and Financial Transactions* (Sweet & Maxwell, 2nd ed, 2009)
Date of hearing:	4 July 2014
Place:	Sydney
Division:	GENERAL DIVISION

Category:	Catchwords
Number of paragraphs:	46
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2571 of 2013**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN:	**COMMISSIONER OF TAXATION** **Applicant**
AND:	**DESALINATION TECHNOLOGY PTY LIMITED** **Respondent**
JUDGE:	**PERRAM J**
DATE OF ORDER:	**21 OCTOBER 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

1. Introduction

1. This appeal by the Commissioner of Taxation from the Administrative Appeals Tribunal's decision in *Desalination Technology Pty Ltd v Commissioner of Taxation* [2013] AATA 846 should be dismissed with costs. It concerns the position of a taxpayer who pays an invoice by debiting a running account in favour of a supplier in circumstances where that account does not have to be settled until:

(a) the taxpayer is in a position to do so; and

(b) the taxpayer regards it as prudent to do so.

2. The question is whether such a taxpayer has 'incurred' expenditure within the meaning of the general deduction provision of the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997'), s 8-1. The competing views are that:

(a) the expenditure was 'incurred' because the taxpayer was definitively committed to paying the *invoice.* On this view, the fact that repayment of the running account was subject to the two contingencies referred to in (a) and (b) above does not alter that analysis; or

(b) the expenditure was not 'incurred' because the taxpayer's obligation to settle the running account was subject to sufficiently uncertain contingencies that it could not be said definitively to have committed itself to the expenditure reflective in the invoice.

3. The Tribunal preferred the former view and it was right to do so.

2. The issues more precisely described

4. The formal issue between the parties is whether the taxpayer was entitled to claim a refundable research and development ('R&D') offset of $363,281 in the 2009

year. There was a policy reflected in the *Income Tax Assessment Act 1936* (Cth) ('ITAA 1936') to provide tax incentives to encourage R&D activity. This was achieved, putting the matter at a high level of generality, by allowing a 125% deduction in respect of expenditure upon R&D activity. That is to say, for every dollar spent upon R&D activity a taxpayer could deduct $1.25 from its assessable income.

5. The provisions which achieved this outcome were contained in Part III Division 3 of the ITAA 1936. They do not apply after 1 July 2011. For present purposes however, attention may be confined to s 73B(14) of the ITAA 1936 which provided:

'(14) Subject to this section, where:

(a) an eligible company incurs research and development expenditure (other than contracted expenditure) during a year of income; and
(b) the aggregate research and development amount in relation to the company in relation to the year of income is greater than $20,000;
the amount of that expenditure multiplied by 1.25 is allowable as a deduction from the assessable income of the company of the year of income.'

6. The parties agree, and I accept, that the word 'incur' in s 73B(14) should be given the same meaning it bears in the general deduction provision in s 8-1 of the ITAA 1997. This is because there is a rebuttable presumption that Parliament intended to use its language consistently; because the ITAA 1936 and ITAA 1997 are to be treated as cognate legislation and because there is nothing which suggests any sensible reason for giving a different meaning in s 73B(14) to the word 'incurs' to that which it bears in the balance of the two statutes. Authority for the first proposition may be found in *McGraw-Hinds (Aust) Pty Ltd v Smith* [1979] HCA 19; (1979) 144 CLR 633 at 643 per Gibbs J. The Tribunal itself has previously reached the same conclusion about the meaning of the word 'incur' in s 73B(14), with respect correctly, in *Vision Intelligence Pty Ltd v Commissioner of Taxation* [2013] AATA 527 at [35] and [43].

7. Frequently those involved in R&D activity will have no income against which a deduction might be claimed under s 73B and instead only an expectation of profit lying in the future. This reality is reflected in a set of provisions which provide for immediate tax relief in the form of an offset against the tax (not the income) which would otherwise be due. This was achieved, relevantly for this case, by s 73J(1) of the ITAA 1936 which provided:

'(1) An eligible company is eligible to choose the tax offset for the tax offset year if:

(a) it could, apart from subsection 73I(4), deduct an amount under section 73B (except subsection 73B(14C)), 73BA, 73BH or 73QA for that year; and
(b) either:

(i) all or part of the amount that the company could, apart from subsection 73I(4), have deducted is contracted expenditure; or
(ii) its aggregate research and development amount for the tax offset year exceeds $20,000; and

(c) the aggregate research and development amount for the tax offset year of the company and of persons with which it is grouped (while they are grouped in that year) is not more than $1,000,000; and
(d) the R&D group turnover of the company for that year is less than $5,000,000.'

8. By force of s 73I(3) the offset was fixed at 30 cents for each dollar of expenditure. In practice, the operation of s 73B(14) and s 73J(1) was to provide a taxpayer who incurred R&D expenditure a choice between claiming a 125% deduction against its assessable income or a 30% offset against its tax liability. Plainly enough, a taxpayer

making little or no income would usually take the latter course and in those cases where a taxpayer's liability to pay income tax in a year of income is less than the offset it will receive a refund. Indeed, in those years in which a taxpayer has no liability to pay income tax at all it will receive a refund equal to the offset. The generosity of this arrangement will be apparent.

9. It is a necessary incident of a taxpayer's entitlement to claim such an offset that it meet the requirements set out in s 73B(14) by establishing an entitlement to a deduction under that provision. The text of s 73B(14) (above at [5]) will require the taxpayer to prove, first, that it is an 'eligible company'; secondly, that the expenditure in question is properly classified as 'research and development expenditure'; thirdly, that it exceeds $20,000; and fourthly, that the expenditure has been incurred.

10. In this case there is no debate about the first three matters. The expenditure by the taxpayer in the amount of $968,750 is accepted by the Commissioner to be R&D expenditure and is plainly more than $20,000. Likewise, the Commissioner does not dispute that the taxpayer was an 'eligible company'. The simple question then is whether the taxpayer incurred the expenditure within the meaning of s 73B(14)(a).

3. The taxpayer

11. The taxpayer is part of a group of companies involved in R&D activities. This group is the result of a collaboration between a Mr Davey, who the Tribunal thought was best described as an inventor, and a Mr Kofoed who is an accountant and tax agent. For a time both were directors of the taxpayer. In the relevant year, Mr Davey was a director and Mr Kofoed was an alternate director of the taxpayer.

12. Mr Davey's interest in invention is longstanding. As the Tribunal observed, he has been involved in R&D activities for over 45 years and in that time has explored and developed new technologies in relation to diesel engines, power generators and the transportation of large equipment.

13. Such was the number and complexity of Mr Davey's inventive activities that from 1996 onwards it became necessary for him to have access to very expensive computers and other equipment to assist him in his endeavours. In order to facilitate the financing of these various ventures he sought to separate the assets involved in the research from the various companies conducting it. Although this involves some oversimplification, each invention was pursued by means of a separate company. This was to facilitate investment by external parties in particular inventions.

14. Following consultation with Mr Kofoed, the basic structure was this: a new company would be established as the project manager for all the various projects being undertaken within the group. This company – Innovative Design Technologies Group Pty Ltd – was registered in 2007 ('IDTG'). It was to provide labour and equipment to other members of the group who wished to carry out R&D activities.

15. This appeal concerns the tax consequences of Mr Davey's efforts, through the vehicle of the taxpayer, to develop a flash evaporator desalination unit for the purpose of combating salinity problems in the Murray Darling Basin (and elsewhere, too). The development of this device was pursued by the taxpayer who, on 7 June 2007, applied for the grant of a patent in respect of it.

4. The agreement between the taxpayer and IDTG

16. On 16 July 2007, the directors of the taxpayer met and resolved to use IDTG to carry out the R&D work on the taxpayer's behalf. This was not surprising since this was

what IDTG had been created to do. Both were companies associated with Mr Davey and Mr Kofoed, and indeed, the taxpayer and IDTG held shares in each other. The minutes of the meeting of directors held on 16 July 2007 are as follows:

'It was noted that a new company Innovative Design Technology Group Pty Ltd had been created to facilitate and co ordinate and finance Research and Development for the group.

It was noted that IDTG would render Monthly invoices to each member of the group for R & D work carried out on their behalf.

It was further noted that cash flow for the company would be uncertain for the foreseeable future with funds incoming from R & D tax offsets and investors being received on an uncertain and irregular basis.

It was further noted that to simply treat invoices from IDTG as trade creditors would reflect badly to potential investors and lenders as no normal trading terms could be adhered to with any certainty.

It was therefore resolved that any invoice received from IDTG, after verification, be charged to a come and go loan account with that company. The invoices will be treated as fully paid as at the date it is rendered and the payment due to IDTG be more properly treated as a longer term borrowing for financing purposes. Investors and financiers would be therefore [sic] of the nature of funding received, and the company would avoid the risk of being considered insolvent due to its inability to meet trade credit commitments.

Funds received from investors and R & D tax offsets will be paid to IDTG in reduction of the loan account balance until exploitation of the technology enables payment in full.

[signed as a correct record by Garth Davey.]'

17. It is apparent that the intent of this arrangement was to transform the terms upon which the services were provided by IDTG to the taxpayer from ordinary trade terms to a long term debt account of uncertain duration for which, unless the flash evaporator desalination unit was a commercial success, there was very little chance of it ever being settled.

18. Pursuant to this arrangement IDTG invoiced the taxpayer on a monthly basis in the relevant year for some $1,065,625 and from that amounts totalling $149,964 were paid but, as contemplated in the directors' minute, the remaining balance was paid by then debiting the running account between the taxpayer and IDTG. As at the date of the hearing, that balance remained outstanding.

19. In 2010 a written service agreement was entered into between IDTG and the taxpayer purporting to set out the terms of the relationship. As the Tribunal correctly observed, its terms were not materially different for present purposes to those contained in the minutes of the directors' meeting. It may, therefore, be put aside and with it the question of whether such a subsequent document can have more than evidentiary effect for tax purposes.

5. The Tribunal's reasoning

20. The Tribunal concluded that the timing of the payments by the taxpayer to IDTG was subject to two contingencies. The first, which emerged from the terms of the agreement between the taxpayer and IDTG, was that the taxpayer should first receive

funds from investors, lenders and other sources before paying IDTG. The second was that the taxpayer should itself consider it prudent to make any such payment. This finding flowed from the Tribunal's analysis of the agreement as well as the cross-examination of Mr Davey and Mr Kofoed who both conceded as much.

21. There were two ways in which what had occurred might have been analysed. The first, which for reasons to which I will return seems to me preferable, was to characterise the debt arising from the delivery of each invoice as being created pursuant to the agreement under which the services were provided to the taxpayer by IDTG. On this view, this first debt was then discharged by the taxpayer incurring a second debt liability to IDTG which was added to the running account. Whilst the original invoice and the subsequent running account resulted in debts which were identical in amount, the terms under which those debts were owed were different; in particular, the debt arising under the invoice was an ordinary trade creditor's debt and, therefore, as I understood the argument, payable within a reasonable time. The quantum-identical debt due under the running account was, by contrast, subject to the two contingencies to which reference has already been made and might, in fact, never be repaid.

22. If this perspective were established as the fact, the Commissioner would be bound to fail because the taxpayer would always have been definitively committed to paying the invoice.

23. An alternate view, which I do not share, is that the debts arising under the invoice and the running account were all part of the same transaction so that whatever the contingencies to which the latter was subjected were applied to the former too. The reason I do not share this view is that it elides what appears to me to be two distinct transactions – incurring a trade debt and debiting a running account – into one.

24. The Tribunal's approach to this issue was perhaps a trifle ambiguous in that separate parts of its reasons are arguably consistent with both of these views. Thus, at [24], for example, it appeared to accept that the invoices themselves had been paid (i.e. the first view):

'24. The Service Agreement, entered into on 14 May 2010 but said to reflect "the agreement between the parties which has been understood and operating between the parties since the inception of the project", is consistent with the directors' minute. While it is not the most tightly drafted agreement of its kind, it acknowledges that IDTG will "finance" the R&D work. In context, that can only mean that DST has a debt to IDTG for the value of the R&D work invoiced – IDTG has "financed" the work by lending the invoiced amount to DST so that the invoices are not outstanding. The balance sheet for DST as at 30 June 2009 shows an inter-company loan of just over $1 million to IDTG, which is a proper reflection of the situation as documented in the directors' minute and the Service Agreement.'

25. However, at other parts of its reasons it appeared to embrace the idea that the original debt obligation arising from the invoices was subject to the same contingencies as the loan account (i.e. the second view). Thus at [26] it reasoned this way:

'26. It seems to me, however, that DST's liability to IDTG was *created* during the 2009 income year (in the sense that DST was definitively committed and had completely subjected itself to the expenditure), notwithstanding the fact that there were conditions affecting the timing of the discharge of that liability. I do not read the directors' minute and the Service Agreement as leaving in any sense "contingent" the obligation placed on DST to pay the amounts that were invoiced to it. As Crennan J said in *Citylink Melbourne* at 228 CLR [sic] pages 40-41 [137]:

... *A condition affecting the timing of the discharge of a liability (but not the creation of the liability) does not render the liability contingent in any business or commercial sense.* (Footnote omitted)'

[emphasis in the original]

26. The quotation from *Commissioner of Taxation v CityLink Melbourne Ltd* [2006] HCA 35; (2006) 228 CLR 1 might suggest that the Tribunal had concluded that the obligation to pay the invoices was subject to the two timing contingencies. However, the balance of its reasoning does not cohere with that view. Paragraphs 24 and 26 seem to me to be saying that the invoice was immediately payable because it was intended to be paid forthwith by debiting the running account. I do not think, therefore, that on balance the Tribunal was eliding the two transactions into one. In effect, I read the last part of [26] as an alternative and additional suggestion by the Tribunal that, even assuming that the payment of the invoice was to be subject to the same contingencies as the running account, the same result would nevertheless ensue. Any other reading of the last part of [26] renders the Tribunal's reasons internally inconsistent which I do not believe them to be.

6. Was the arrangement proven?

27. So much for the two potential views of what took place. What did the facts actually show? Here the Tribunal accepted the taxpayer's case on the facts. Although the minutes of the meeting of the directors of the taxpayer revealed only the taxpayer's directors' view of the transaction and did not directly reveal whether IDTG had also, in fact, so agreed, the Tribunal was content to proceed on the factual basis that there was such an agreement. It did this because the minutes were signed by Mr Davey who was a director of IDTG as well.

28. The Commissioner challenged the capacity of the Tribunal to reach this conclusion submitting instead that the minute was 'insufficient to conclude that by signing the minute [Mr Davey] bound both companies to a loan agreement'. That might well be so but this was not what the Tribunal was saying. The burden of its observation was not that Mr Davey had bound both companies to an agreement by signing the minute. Rather, its point was instead that there was in fact an agreement by both parties which could itself be inferred from:

(a) the minute of the taxpayer; and

(b) the fact that Mr Davey was a director of both the taxpayer and IDTG.

29. In my opinion, given the structure of Mr Davey's group of companies (of which the taxpayer was but one) this inference was available as a matter of fact. As such, there can be no challenge to it in this Court where the grounds are limited to questions of law.

7. The appeal

30. The Commissioner had four points on the appeal. First, so he submits, the Tribunal had erred in law in concluding that the taxpayer was definitively committed to the expenditure when it had found at [22] that it was subject to the two contingencies to which reference has already been made. It is true, as the Commissioner correctly pointed out, that the Tribunal did say (at [22]):

'22. True it is that the timing of the payments by DST to IDTG is conditional on two things – first, that DST receives funds from investors, lenders or other sources; and second, that even if it has the funds, DST considers it "prudent" to make a payment to IDTG. Mr Davey conceded as much

in cross-examination. But the truth of that proposition does not render impossible the entirely different proposition that DST was definitively committed to IDTG in respect to the R&D expenditure.'

[footnotes omitted]

31. It is also true that the first sentence of this is arguably consistent with a reading under which it is assumed that the original obligations arising from the invoices were subject to the two contingencies. This is a little difficult to reconcile, however, with the last sentence of [22] and even more difficult to reconcile with the passage at [24] which I have quoted above. On balance, therefore, I do not think that the Tribunal actually found that the payment of the invoices was subject to the two contingencies. Instead, what I think is being referred to in the first line of [22] are repayments of the running account.

32. That being so, the Tribunal's conclusion in the last sentence of [22] that the taxpayer was definitively committed to paying for the R&D expenditure makes perfect sense. Once the Tribunal found as a fact that the taxpayer was thus committed then the application of established (and not disputed) principle inevitably led to the conclusion that the R&D expenditure had been 'incurred' and hence was deductible. Once it was found that the transactions constituted by the issue of the invoice and the debiting of the running account were separate transactions then the issue of contingencies became irrelevant. Whilst it is true as Sweeney and Gummow JJ explained in *Hooker Rex Pty Ltd v Commissioner of Taxation* (1988) 79 ALR 181 at 191 that a future outgoing which is 'no more than contingent, pending, threatened or expected' is not incurred the fact, in this case, that it might be possible to say that the running account was not an expenditure which had been incurred did not matter since the taxpayer was not suggesting that it was. The Commissioner's argument impermissibly ignores the separate nature of the transactions. Nor is that separate nature to be glossed over by asking what, as a 'practical matter', the taxpayer was required to do (c.f., *CityLink Melbourne* at 37 [125]). That test no doubt requires a realistic assessment of the nature of any contingency involved but it is not a licence to ignore the legal form of the transactions.

33. The Commissioner submitted that this conclusion could have unsavoury consequences. It was said, for example, that it would mean that a taxpayer could automatically generate tax refunds without ever needing to make an underlying payment. And it may be accepted, I think, that the facts of this case lend at least initial credence to that notion. Here the taxpayer has not 'paid' IDTG in the sense of having transferred to it a net amount of cash or cash equivalent. But the attractiveness of this submission decreases the more closely it is analysed. It is not true, for example, that the taxpayer has not paid IDTG any money as a matter of law. The monetary obligation which existed upon the issue of IDTG's invoice was discharged by the taxpayer tendering, and IDTG accepting, the debiting of the running account as the performance by the taxpayer of that monetary obligation. At law, this is a payment: see Charles Proctor (ed), *Goode on Payment Obligations in Commercial and Financial Transactions* (Sweet & Maxwell, 2nd ed, 2009) at [1-09]; applied in my own decision of *Messenger Press Pty Ltd v Commissioner of Taxation* (2012) 90 ATR 69 at 105 [132] (affirmed on appeal: *Commissioner of Taxation v Messenger Press Pty Ltd* [2013] FCAFC 77; (2013) 212 FCR 298).

34. The Tribunal did not find that the issuing of the invoice and the debiting of the running account were a single transaction. In any event, it would have been very difficult for it to do so conceptually. Furthermore, the Commissioner does not allege that the transactions were part of a scheme to avoid tax or a sham not intended to take effect in

accordance with its terms. That being so, it seems to me that the Commissioner must accept the legal realities of what took place.

35. I do not accept, therefore, that the Commissioner's concerns provide a good reason to depart from what appears to me to be the Tribunal's correct treatment of the matter.

36. The Commissioner's second point had, I think, more force. Whilst accepting, as *CityLink Melbourne* suggests one must, that a contingency as to the timing of a payment does not mean that expenditure has not been incurred, the Commissioner submitted that the two contingencies did not bear that character. In this I think the Commissioner was correct. Under the agreement the taxpayer was not bound to repay IDTG unless it came into funds to do so and, even then, only if it regarded it as prudent so to do. As the Commissioner correctly pointed out, with a company devoted to R&D activities there was no future certainty that either of these events, still less both of them, would occur. It was not correct to describe the contingencies in this case, therefore, as being about timing. They went instead to the very existence of the obligation to discharge the running account.

37. Unless the desalinator was a commercial success most of the running account would never be paid. There was, however, no finding by the Tribunal as to the likelihood of the invention succeeding. There is no dispute at the level of principle that a condition that gives rise to a theoretical contingency can be treated as certain to be satisfied. So much is established by authority: *Coles Myer Finance Ltd v Commissioner of Taxation* [1993] HCA 29; (1993) 176 CLR 640 at 670 per Deane J; *CityLink Melbourne* at 37-38 [125].

38. What did the Tribunal do? It was only at [26] (above) in its reasons that the Tribunal seemed to reach a view on what kind of contingencies were involved, concluding that they were contingencies as to timing. I cannot agree. The contingencies were not theoretical in any way and were not about timing. In a very real sense it was quite possible that the desalinator might not succeed and the running account might never be paid off.

39. For that reason I am inclined not to accept the correctness of the very last part of the analysis at [26] set out above.

40. However, as I have endeavoured to explain, I regard that part of [26] as an alternative argument. The Tribunal's dispositive reasoning was that the obligation to pay *the invoice* was one of definitive commitment (see the last sentence of [22] and [24]). Thus it is not to the point that it reached an alternate (but erroneous) conclusion that the contingencies to which the repayment of the *running account* was subjected were insufficient to mean that the taxpayer was not definitely committed to the payment of the invoices.

41. The Commissioner's third point was that the Tribunal erred in finding at [24] that the statement that IDTG would 'finance' the R&D work 'can only mean that [the taxpayer] has a debt to IDTG for the value of the R&D work invoiced'. The submission was that 'an undertaking that one party will finance work is not an agreement that the other party will pay the first party the "financed" amount'.

42. The resolution of that submission acutely depends on the facts of the particular financing. The Commissioner, for example, would be correct if the financing took the form of a forbearance by IDTG from the enforcement of its invoices. In such a scenario, the invoices would remain unpaid. Further, it is not difficult to imagine a situation where IDTG agreed with the taxpayer that it would forbear from requiring payment of the invoices unless the taxpayer was in a position to pay and regarded it as prudent to do so (that is, the two nominated contingencies in this case). On such facts one might well say that the taxpayer was not definitively committed to paying the invoiced amounts.

43. But that is not what the Tribunal found the facts of this financing to be. IDTG did not forbear from the enforcement of its invoices. Under the agreement which the Tribunal found to exist the taxpayer was immediately bound to pay the invoices and did so by means, in effect, of supplier finance. The submission therefore fails on the facts.

44. The Commissioner's fourth point concerned the Tribunal's treatment of the taxpayer's balance sheet. The accounts for the 2009 year recorded the existence of an intercompany loan of just over $1 million. At [24] the Tribunal recorded the view that this was 'a proper reflection of the situation as documented in the directors' minute and the Service Agreement'.

45. The Commissioner submitted that the accounts themselves could not alter the legal realities of the situation. This, of course, is true. There is, however, a distinction between the question, on the one hand, of whether the account was sufficiently contingent so that, as a matter of accounting principle, it should not have appeared as a loan in the accounts and, on the other, the question of whether the invoice generated a liability to which the taxpayer was definitely committed. It is the second question which matters. The first question is not altogether irrelevant because it provides additional circumstantial evidence of the agreement alleged by the taxpayer (although that hardly matters in an appeal such as the present). Whether the accounting treatment of the running account is correct and whether, perhaps, it should have appeared in the accounts as a contingent liability has no impact, however, on the legal characterisation of the effect of the invoices as found by the Tribunal. The Commissioner's arguments should, therefore, be rejected.

8. Conclusion

46. The appeal must be dismissed with costs. In view of the result, it is not necessary for me to deal with the taxpayer's notice of objection as to the competency of the appeal. Even if the point was sound I would not have regarded it as a sufficient basis to award indemnity costs which was its asserted principal relevance.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:
Dated: 21 October 2014