FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Miley [2017] FCA 1396

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judge: | **WIGNEY J** |
|  |  |
| Date of judgment: | 28 November 2017 |
|  |  |
| Catchwords: | **TAXATION –** appeal from a decision of the Administrative Appeals Tribunal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) – where Commissioner of Taxation assessed Respondent as not being entitled to small business capital gains tax concessions under subdivision 152-C of the *Income Tax Assessment Act 1977* (Cth) – where Tribunal set aside objection decisions and found that the Respondent satisfied the basic conditions for relief – whether Tribunal erred in so finding – whether Respondent satisfied the minimum net asset value test – proper enquiry for valuing equal third minority shareholding in company – whether value of shares should be discounted for a lack of control**PRACTICE AND PROCEDURE –** notice of objection to competency of appeal – whether appeal raises a question of law within the meaning of s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth)  |
|  |  |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44, 44(3)*Income Tax Assessment Act 1997* (Cth) Divs 104, 152, 855, Subdivs 152-A, 152-C, ss 995-1, 104-10, 108-5, 116-30, 152-10, 152-15, 152-20, 152-205*Federal Court Rules 2011* (Cth) r 33.21  |
|  |  |
| Cases cited: | *Abrahams v Commissioner of Taxation* (1944) 70 CLR 23*Alcan NT Alumina Pty Ltd v Commissioner of Taxation* [2007] NTSC 9; (2007) 208 FLR 159 *Attorney-General of Ceylon v Mackie* [1952] 2 All ER 775*Australian Gas Light Company v Valuer-General (NSW)* (1940) 40 SR (NSW) 126 *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64; (1999) 167 ALR 575 *Byrne v A J Byrne Pty Limited* [2012] NSWSC 667 *Commissioner of Inland Revenue v Crossman* [1937] AC 26; [1936] 1 All ER 762*Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 *Commissioner of Taxation v AP Energy Investments Pty Limited* [2016] FCA 577; (2016) 341 ALR 265*Commonwealth Custodial Services Ltd v Valuer General* [2007] NSWCA 365 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 *Faraday v McKenzie* [2007] FamCA 1626*Federal Commissioner of Taxation v Byrne Hotels Qld Pty Ltd* (2011) 196 FCR 524*Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 *Federal Commissioner of Taxation v Westgarth* (1950) 81 CLR 396*Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315*HTW Valuers (Central QLD) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640*Inez Investments Pty Ltd v Dodd (1979) 26 The Valuer* 501*Inland Revenue Commissioners v Gray* [1994] STC 360 *Inland Revenue Commissioners v Clay* [1914] 3 KB 466*International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea* [2015] NSWCA 363 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494*McCathie v Federal Commissioner of Taxation* (1944) 69 CLR 1 *Minister for Public Works (NSW) v Thistlethwayte* [1954] AC 475 *Mordecai v Mordecai* (1988) 12 NSWLR 58*Promenade Investments Pty Limited v New South Wales* (1992) 26 NSWLR 203 *Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 *Repatriation Commission v Hill* [2002] FCAFC 192; (2002) 69 ALD 581*Rostam Pty Ltd v Valuer General; Shavran Pty Ltd v Valuer General* [2011] NSWLEC 1387*Spencer v The Commonwealth* (1907) 5 CLR 418 *Trocette Property Co Limited v Greater London Council* (1974) 28 P&CR 408  |
|  |  |
| Date of hearing: | 1 September 2016 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 121 |
|  |  |
| Counsel for the Applicant: | Mr A H Slater QC with Mr I Stanley |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | Mr M L Robertson QC with Mr B L Jones |
|  |  |
| Solicitor for the Respondent: | Michael C Smith |
|  |  |

ORDERS

|  |  |
| --- | --- |
|  | NSD 366 of 2016 |
|   |
| BETWEEN: | COMMISSIONER OF TAXATIONApplicant |
| AND: | ANDREW MILEYRespondent |

|  |  |
| --- | --- |
| JUDGE: | WIGNEY J |
| DATE OF ORDER: | 28 NOVEMBER 2017 |

THE COURT ORDERS THAT:

1. The decision of the Administrative Appeals Tribunal made on 15 February 2016 be set aside.
2. The matter be remitted to the Administrative Appeals Tribunal for determination according to law.
3. The respondent pay the applicant’s costs of this proceeding.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. In March 2008, the three equal shareholders in **AJM** Environmental Services Pty Ltd entered into an agreement to sell the entirety of their respective shares to an arm’s length purchaser. Under the terms of the agreement, the purchaser paid a total consideration of $17.7 million, which was divided equally between the three shareholders. The respondent, Mr Andrew **Miley**, was one of those shareholders. This proceeding concerns Mr Miley’s capital gains tax (**CGT**) liability arising from his $5.9 million share of the purchase price. By virtue of holding the shares for more than 12 months, Mr Miley was automatically entitled to a 50% reduction of his net capital gain. However, Mr Miley also claimed the benefit of a small business CGT concession under the *Income Tax* ***Assessment Act*** *1997* (Cth). The effect of that CGT concession was that Mr Miley was entitled to a further 50% reduction of his net capital gain if he had CGT assets with a net value of less than $6 million immediately before the sale. Mr Miley lodged his income tax return for the year ending 30 June 2008 on the basis that he met that condition and that accordingly his CGT liability for the year in question was zero.
2. In June 2013, following an audit of Mr Miley’s tax returns, the **Commissioner** of Taxation issued Mr Miley with an amended income tax assessment for the income year ended 30 June 2008. The Commissioner’s decision to issue the amended assessment was based on the finding that the net value of Mr Miley’s CGT assets immediately before the sale of his AJM shares was slightly more than $6 million. Critical to that finding was a finding that the market value of Mr Miley’s AJM shares just before their sale was $5.9 million. The result was that Mr Miley was not entitled to the further 50% CGT concession. His CGT liability was amended accordingly. The Commissioner also decided to impose an administrative penalty of 25%. Mr Miley lodged objections to the amended assessment and the administrative penalty. Those objections were subsequently disallowed by the Commissioner. Mr Miley then applied to the Administrative Appeals **Tribunal** for review of the Commissioner’s objection decision.
3. The main question for the Tribunal was whether Mr Miley satisfied the maximum net asset value test (**MNAV test**) in subdivision 152-A of the Assessment Act. The answer to that question turned primarily on the determination of the market value of Mr Miley’s AJM shares just before he sold them. The Tribunal found that the market value of Mr Miley’s AJM shares at that time was $4,914,700. In short, the Tribunal arrived at that valuation by effectively taking the consideration of $5.9 million received by Mr Miley as a starting point, and then reducing that amount by 16.7% to take into account the “relative lack of control” that a purchaser of Mr Miley’s parcel of AJM shares would attain. The result of valuing Mr Miley’s AJM shares at $4,914,700 was that the net value of all Mr Miley’s CGT assets just before the sale of the shares did not exceed $6 million. The Tribunal accordingly set aside the objection decision and allowed the objection in full.
4. This proceeding is the Commissioner’s appeal from the Tribunal’s decision pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).
5. The appeal raises two main issues. The first issue, expressed in broad and simple terms, is whether the Tribunal erred in applying a discount for control in arriving at the valuation of Mr Miley’s parcel of AJM shares. The second is whether the first issue raises a question of law as required by s 44 of the AAT Act. A third issue arose in the course of the hearing and was ultimately the basis of a notice of contention filed by Mr Miley. It concerned whether the Tribunal failed to address certain other arguments advanced by Mr Miley about the valuation of his parcel of AJM shares.

# Background and procedural history

1. AJM was registered on 27 August 1999. Immediately prior to 7 March 2008, the 300 issued shares in AJM were owned by three **shareholders**: Mr Miley, Mr Jonathan Perry and Mr Adrian Minshull. Each of the three shareholders held 100 shares in the company.
2. On 7 March 2008, the shareholders executed a Sale and Purchase **Agreement** pursuant to which they each agreed to sell their shares in AJM to **EIMCO** Water Technologies Pty Ltd. It was a condition of the Agreement that EIMCO would buy and acquire all of the shares held by each of the shareholders contemporaneously and that EIMCO was not obliged to purchase and acquire the shares held by one of the shareholders to the exclusion of the shares held by either of the other shareholders. The purchase price and consideration for all the shares was $17.7 million. That purchase price was to be paid by EIMCO paying $4.9 million to each of the shareholders. A further $3 million was to be paid into an escrow account to be held pursuant to an escrow deed. It was not in dispute that each of the shareholders was to receive $1 million from the escrow account. Accordingly, the total consideration received by Mr Miley was $5.9 million. The Agreement separately provided that each of the shareholders was also required to transfer their legal and beneficial interest in shares in a related company, **AJM Property** Holdings Pty Ltd.
3. On 5 June 2009, Mr Miley lodged his income tax return for the income year ended 30 June 2008. In working out his net capital gain for the 2008 income year, Mr Miley applied the CGT concession in calculating the capital gain arising from his sale of his AJM shares. He applied that concession on the basis that he satisfied the MNAV test. The result was that the net capital gain arising from his disposal of the AJM shares was reduced to nil.
4. On 12 June 2013, following an audit of Mr Miley’s tax returns, the Commissioner issued an amended income tax assessment for the 2008 income year. Mr Miley was denied the benefit of the further 50% CGT reduction, and was also issued with an administrative penalty assessed at the rate of 25%. An amended assessment was also issued for the 2010 income year, though the details of that amended assessment are not presently relevant.
5. On 7 August 2013, Mr Miley lodged objections against the amended assessments. On 2 October 2013, a Deputy Commissioner of Taxation, on behalf of the Commissioner, disallowed Mr Miley’s objections to the amended assessments, disallowed his objections to the administrative penalty, and allowed in part his request for remission of the shortfall interest charge. It is perhaps worth noting that the arguments advanced by Mr Miley in support of his objections did not relate to the valuation of his parcel of 100 AJM shares just before their disposal. It would appear that Mr Miley prepared his return, and advanced his objections, on the basis that the value of the shares was $5.9 million. The arguments advanced in respect of his objections concerned the way in which the Commissioner took into account, in applying the MNAV test, Mr Miley’s legal fees, a bank loan and a provision for tax liabilities.
6. On 22 November 2013, Mr Miley applied to the Tribunal for review of the objection decisions. That review application was heard by the Tribunal on 21 September 2016. On 15 February 2016 the Tribunal handed down a decision in which it set aside the objection decisions and allowed Mr Miley’s objections in full.
7. The Commissioner filed a notice of appeal from the Tribunal’s decision on 14 March 2016. On 7 April 2016, the Chief Justice issued a determination under s 44(3) of the AAT Act that the matter be heard and determined by a single judge of the Court. On 9 August 2016, Mr Miley filed a notice of objection to competency.

# statutory framework

1. The small business CGT concession relevant to this matter was contained in Division 152 of the Assessment Act, as in effect at 7 March 2008. Division 152 of the Assessment Act provided for four separate capital gains tax concessions including, relevantly, a 50% reduction on capital gain in Subdivision 152-C. In order to access any of the concessions, a taxpayer was required to satisfy the ‘basic conditions for relief’ in Subdivision 152-A. Relevantly, s 152-205 of the Assessment Act provided that once the basic conditions for relief were satisfied, a taxpayer was automatically entitled to the benefit of the concession in Subdivision 152-C. The other three concessions had additional conditions which were required to be met.
2. Section 152-10 of the Assessment Act set out the basic conditions for relief, and was relevantly in the following terms:

152-10 Basic conditions for relief

1. A capital gain (except a capital gain from CGT event K7) you make may be reduced or disregarded under this Division if the following basic conditions are satisfied for the gain:
2. a CGT event happens in relation to a CGT asset of yours in an income year;
3. the event would (apart from this Division) have resulted in the gain;
4. at least one of the following applies:
5. you are a small business entity for the income year;
6. you satisfy the maximum net asset value test (see section 152‑15);
7. you are a partner in a partnership that is a small business entity for the income year and the CGT asset is an asset of the partnership;
8. the CGT asset satisfies the active asset test (see section 152‑35).
9. If the CGT asset is a share in a company or an interest in a trust (the *object company or trust*), one of these additional basic conditions must be satisfied just before the CGT event:
10. you are a CGT concession stakeholder in the object company or trust; or
11. CGT concession stakeholders in the object company or trust together have a small business participation percentage in you of at least 90%.

(Notes, asterisks and examples omitted. Emphasis in original.)

1. It was not in dispute that Mr Miley satisfied subparagraphs (a), (b) and (d) of s 152-10(1). Further, the Commissioner did not dispute that Mr Miley was a CGT concession stakeholder for the purpose of s 152-10(2)(a). The sole issue, therefore, was whether Mr Miley satisfied the MNAV test and therefore satisfied s 152-10(c)(ii).
2. In respect of the MNAV test, s 152-15 of the Assessment Act relevantly provided:

152‑15 Maximum net asset value test

You satisfy the maximum net asset value test if, just before the CGT event, the sum of the following amounts does not exceed $6,000,000:

1. the net value of the CGT assets of yours;
2. the net value of the CGT assets of any entities connected with you;
3. the net value of the CGT assets of any affiliates of yours or entities connected with your affiliates (not counting any assets already counted under paragraph (b)).

(Note omitted.)

1. Under the Assessment Act, capital gain was defined in s 995-1 as being worked out in the way described by the relevant CGT event. A CGT event, in turn, was defined as any of the CGT events described in Division 104.
2. It was common ground that the relevant CGT event was the disposal of Mr Miley’s shares in AJM, which was a CGT Event A1. In respect of CGT Event A1, s 104-10 of the Assessment Act relevantly provided as follows:

104‑10 Disposal of a CGT asset: CGT event A1

1. CGT event A1 happens if you dispose of a CGT asset.
2. You dispose of a CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur:
3. if you stop being the legal owner of the asset but continue to be its beneficial owner; or
4. merely because of a change of trustee.
5. The time of the event is:
6. when you enter into the contract for the disposal; or
7. if there is no contract—when the change of ownership occurs.
8. You make a capital gain if the capital proceeds from the disposal are more than the asset’s cost base. You make a capital loss if those capital proceeds are less than the asset’s reduced cost base.

…

(Notes, asterisks and examples omitted.)

1. It was also common ground that, for the purposes of the MNAV test in s 152-15, the sale of Mr Miley’s shares in AJM occurred on 7 March 2008. The net value of Mr Miley’s CGT assets was therefore to be assessed “just before” 7 March 2008.
2. CGT asset was defined in s 108-5 of the Assessment Act as any kind of property, or a legal or equitable right that is not property.
3. Finally, for the purpose of the MNAV test, the meaning of ‘net value of the CGT assets’ was set out in s 152-20 of the Assessment Act:

152-20 Meaning of net value of the CGT assets

*Meaning of net value of the CGT assets*

1. The net value of the CGT assets of an entity is the amount (whether positive, negative or nil) obtained by subtracting from the sum of the market values of those assets the sum of:
2. the liabilities of the entity that are related to the assets; and
3. the following provisions made by the entity:
4. provisions for annual leave;
5. provisions for long service leave;
6. provisions for unearned income;
7. provisions for tax liabilities.

*Assets to be disregarded*

1. In working out the net value of the CGT assets of an entity:
2. disregard shares, units or other interests (except debt) in another entity that is connected with the first-mentioned entity or with an \*affiliate of the first-mentioned entity; and
3. if the entity is an individual, disregard:
4. assets being used solely for the personal use and enjoyment of the individual, or the individual’s affiliate (except a dwelling, or an ownership interest in a dwelling, that is the individual’s main residence, including any adjacent land to which the main residence exemption can extend because of section 118-120); and
5. except for an amount included under subsection (2A), the market value of a dwelling, or an ownership interest in a dwelling, that is the individual’s main residence (including any relevant adjacent land); and
6. a right to, or to any part of, any allowance, annuity or capital amount payable out of a superannuation fund or an approved deposit fund; and
7. a right to, or to any part of, an asset of a superannuation fund or of an approved deposit fund; and
8. a policy of insurance on the life of an individual.

…

(Notes, asterisks and examples omitted.)

1. The important point to note from the operation of these provisions and the uncontentious facts is that, for the purposes of the MNAV test, the net value of Mr Miley’s shares in AJM just before 7 March 2008 was to be determined by ascertaining the market value of those shares at the time. The expression “market value” was defined in s 995-1 of the Assessment Act, but that definition only dealt with the incidence of GST.

# Proceedings in the Tribunal

1. It would appear that there was a good deal of documentary evidence before the Tribunal. None of that documentary evidence featured prominently in the Tribunal’s reasons. Most of the documentary evidence was not included in hard copy in the appeal books. The only document of any real importance that was before the Court for the purposes of the appeal was the Agreement.
2. Mr Miley gave evidence and was cross-examined. Nothing appeared to turn on his evidence. Indeed, there appeared to be no material dispute in relation to the primary facts.
3. The main area of dispute in the Tribunal was the market value of Mr Miley’s parcel of 100 shares in AJM just before their sale on 7 March 2008. That was because the question whether Mr Miley was entitled to claim the benefit of the CGT concession in Subdivision 152-C hinged on the valuation of his shares at that time. It was common ground that, in addition to his shares in AJM, Mr Miley had approximately $120,000 in other CGT assets just before the relevant CGT event, his disposal of the AJM shares. It followed that if the value of Mr Miley’s shares in AJM was $5.9 million, being the consideration he received upon the sale of the shares, the net value of Mr Miley’s CGT assets exceeded $6 million and he failed to satisfy the MNAV test. However, if the value of Mr Miley’s shares was less than $5.88 million, Mr Miley satisfied the MNAV test and was entitled to the benefit of the concession.
4. Both Mr Miley and the Commissioner relied on evidence from expert valuers. Mr Miley’s valuer was Mr Brenden **Halligan**. The Commissioner’s valuer was a Mr Tony **Samuel**. The valuers both prepared valuation reports. A copy of part of Mr Halligan’s report dated 14 April 2015 was included in the appeal books. The Court was not provided with a copy of Mr Samuel’s report. It would appear that the valuers gave concurrent oral evidence before the Tribunal. It again does not appear that anything turned on their oral evidence. It was not before the Court for the purpose of the appeal.
5. Neither party advanced any substantive submissions concerning Mr Halligan’s report. A few brief observations should nevertheless be made about it, if only to put the Tribunal’s decision and reasons, and the parties’ competing contentions and submissions, in context.
6. Mr Halligan determined that the market value of Mr Miley’s shareholding in AJM was $3.101 million at the valuation date. Mr Halligan arrived at that valuation in the following way.
7. First, he determined that the market value of all of the equity in AJM at the valuation date was $15.946 million. He arrived at that valuation of all the equity in AJM by starting with the purchase price of $17.7 million for all the AJM shares in the Agreement and then deducting the value of other contractual rights that were part of the Agreement. The value of those other rights were said to be: $12,756 (rounded to $13,000), representing aged book debt; and $1.671 million, representing the value of non-competition agreements. Mr Halligan thereby calculated the effective purchase price of the shares to be $16.016 million. Mr Halligan then took into account the fact that by acquiring the shares in AJM, the purchaser also acquired AJM Property. Mr Halligan determined the market value of AJM Property to be $70,000 having regard to its net assets recorded in its balance sheet. He then deducted $70,000, being the market value of AJM Property, from the purchase price of $16.016 million, which produced the figure $15.946 million.
8. Second, Mr Halligan calculated Mr Miley’s proportionate interest in the equity of AJM, which of course was a one third interest. The market value of Mr Miley’s shares on a pro rata basis was therefore $5.315 million.
9. Third, Mr Halligan applied a discount of 16.7% for the “relative lack of control”. That figure was arrived at on the basis of Mr Halligan’s belief that a premium for control of 20% would be appropriate. Once that discount was applied, the market value of the shares was said to be $4.429 million.
10. It should be noted that no arguments were advanced on the appeal in relation to Mr Halligan’s calculation of the percentage discount that should be applied if a discount for lack of control was appropriate. The issue was whether any discount at all was appropriate. It is also of some importance to note that Mr Halligan did not really explain why it was appropriate, in the particular circumstances applicable to Mr Miley’s AJM shares, to apply a discount for relative lack of control. Rather, his report simply assumed that it was appropriate for a discount to be applied.
11. Fourth, Mr Halligan deducted a discount of 30% for the relative lack of marketability of Mr Miley’s shares to reflect that Mr Miley’s one-third interest would be less marketable than a holding of all the equity. As will be seen, the Tribunal’s decision and reasons did not address whether or not it was appropriate to apply a discount for lack of marketability.
12. Mr Miley’s case in the Tribunal was that the market value of the parcel of shares sold by him was to be derived by reference to what he described as the “*Spencer* hypothesis”. That was a reference to the well-known principle derived from the following statement by Griffith CJ in ***Spencer*** *v The Commonwealth* (1907) 5 CLR 418 at 432:

In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?" It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.

1. Mr Miley also relied on the statement by Williams J in ***Abrahams*** *v Commissioner of Taxation* (1944) 70 CLR 23 at 29 to the effect that, when it is necessary to estimate the value of shares, the court should endeavour to ascertain “the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay for the shares if the vendor and purchaser had got together and agreed on a price in a friendly negotiation”. Mr Miley stressed the importance of the word “hypothetical” in that statement, and submitted that the market value of a CGT asset is to be determined by reference to a hypothetical sale, and was not necessarily equal to the amount paid by the actual purchaser.
2. The Commissioner advanced three main submissions. First, he submitted that s 152-20(1), properly construed, required that the market value of a CGT asset which was the subject of a CGT event be taken to be the amount of the capital proceeds arising from the CGT event unless one of the “market valuation substitution rules” in s 116-30 applied. Second, he submitted that the most reliable evidence of the market value of the parcel of shares sold by Mr Miley was the price that the unrelated purchaser in fact paid for them. Third, he submitted that the valuation report of the expert retained by the Commissioner, Mr Samuel, should be preferred to the expert report prepared by Mr Miley’s valuer, Mr Halligan.

# The Tribunal’s decision and reasons

1. The Tribunal’s decision turned entirely on the issue concerning the valuation of the shares sold by Mr Miley.
2. The Tribunal rejected the Commissioner’s submission based on what he contended was the proper construction of s 152-20(1) of the Assessment Act. It is unnecessary to refer to the Tribunal’s reasons for rejecting that submission. The Commissioner did not challenge this aspect of the Tribunal’s decision and reasons.
3. Having rejected the Commissioner’s case based on the construction of s 152-20(1) of the Assessment Act, the question for the Tribunal to determine was: what was the market value of Mr Miley’s 100 shares in AJM just before Mr Miley sold them? As stated earlier, the Tribunal’s answer to that question was, in short, that the market value of Mr Miley’s shares at that time was $4,914,700.
4. It is worth noting that this valuation amount was different to the valuations of both Mr Halligan and Mr Samuel.
5. The Tribunal’s reasons for valuing the parcel of shares at $4,914,700 were short and to the point. After briefly summarising the different approaches taken by the valuers, Mr Halligan and Mr Samuel (at Reasons [29]-[32]), the Tribunal reasoned as follows (at Reasons [33]-[36]):

33. Mr Halligan’s reasoning appears to me to be sound and logical. Mr Samuel’s reasoning, on the other hand, seems to proceed on an assumption that the enquiry is one directed towards determining the market value of Mr Miley’s shares subject to special circumstances – namely, that the sale of Mr Miley’s shares should contemplate the sale of the shares owned by all the other shareholders. I think that is the wrong enquiry. That is an enquiry that suffers from the problem the High Court warned about in Pioneer Concrete: see [20] of these reasons.

34. I think the correct enquiry is directed towards determining the market value of Mr Miley’s 100 shares alone – not as part of a package comprising the entire 300 shares in the Company.

35. I accept the opinion Mr Halligan expresses in [135] of his report: see [30] of these reasons. I find that the consideration that Mr Miley received for his shares, which formed part of the consideration paid by the Buyer for all the shares in the Company, is more than a hypothetical willing but not anxious purchaser would have paid if it had purchased Mr Miley’s shares alone – and that is the basis on which the market value of Mr Miley’s shares should be determined. Therefore, while the actual consideration received by Mr Miley should not be ignored as an indicator of the market value of his shares just before the time of the CGT event (Inez Investments: [26] of these reasons), it is not determinative of that market value.

36. The market value of Mr Miley’s shares, arrived at by reference to the correct enquiry, is $5,900,000 less 16.7% of that amount, for lack of control. That equates to $4,914,700.

1. The Tribunal’s reference to “special circumstances” in paragraph [33] was a reference to a passage from the judgment of the High Court in *Commissioner of State Revenue v* ***Pioneer Concrete*** *(Vic) Pty Ltd* (2002) 209 CLR 651 at 667 which the Tribunal had extracted earlier in its reasons (Reasons at [20]). More will be said later concerning *Pioneer* and the Tribunal’s reliance on it.
2. The Tribunal’s reference to the opinion expressed by Mr Halligan in [135] of his report was a reference to the following paragraph of Mr Halligan’s report:

All other things being equal, the average price per share of a controlling shareholding will be higher than the average price per share of a non-controlling shareholding because of the value of control.

1. It is clear that the figure of $5,900,000 referred to by the Tribunal at [36] was a reference to the consideration actually received by Mr Miley for the sale of his shares (see Reasons at [29]). It is equally clear that the 16.7% discount adopted by the Tribunal was the discount for relative lack of control that Mr Halligan had considered was appropriate (Reasons at [30]-[31]).
2. It would appear from the Tribunal’s reasons that it determined the value of Mr Miley’s parcel of shares immediately prior to the sale by the following process of reasoning.
3. First, the Tribunal adopted as a starting point the amount of $5.9 million, being the consideration actually received by Mr Miley for the sale of his 100 AJM shares pursuant to the Agreement.
4. Second, despite using the consideration received by Mr Miley as its effective starting point, the Tribunal determined that it was wrong to regard the consideration received by Mr Miley as determinative of the market value of his shares. That was because Mr Miley sold his parcel of shares as part of a package involving the sale of all 300 shares in AJM. The Tribunal reasoned that this was a “special circumstance” of the sort referred to in *Pioneer Concrete* and was therefore extraneous to the purpose for which the market value of Mr Miley’s shares was to be determined. The “correct enquiry”, according to the Tribunal, was to hypothesise that Mr Miley sold his 100 shares alone, and not as part of a package comprising all the shares in AJM.
5. Third, the Tribunal appears to have determined that the consideration received by Mr Miley as part of the “package” sale transaction was more than a hypothetical willing but not anxious purchaser would have paid if it had purchased Mr Miley’s shares alone. A hypothetical purchaser of Mr Miley’s shares alone would pay 16.7% less than the actual purchaser of Mr Miley’s shares because the hypothetical purchaser would take into account the fact that it would not obtain control of the company as a result of the purchase of Mr Miley’s shares alone.
6. Having valued the 100 AJM shares sold by Mr Miley at $4,914,700, the Tribunal concluded that the total net value of his CGT assets just before the CGT event was almost $1 million less than the $6 million maximum prescribed by s 152-15 of the Assessment Act (Reasons at [37]). The Tribunal then noted that “given such a significant reduction in the value of Mr Miley’s CGT assets, it was not necessary … to deal with the other submissions advanced by the parties” (Reasons at [38])
7. The Tribunal found that, contrary to the finding in the objection decision, Mr Miley satisfied the MNAV test and was entitled to the further 50% CGT discount. The result was that the objection decision was set aside and the objections were allowed in full.

# QUESTION OF LAW AND Grounds of appeal

1. The Commissioner’s notice of appeal articulated the question of law raised by the appeal as follows:

Whether, in valuing shares comprising a minority interest in a company “just before” the CGT event comprising a disposal of those shares as part of a disposal of all shares in the company to a single purchaser, a discount for “lack of control” should be applied to the value which would be arrived at if no such discount were to be applied.

1. The Commissioner relied on three grounds of appeal, which were expressed as follows:

[1] The Tribunal erred in law in applying a “discount for lack of control” to the value which would otherwise have been arrived at in circumstances where the shares to be valued were sold by a single transaction to a single purchaser for a price which was not reduced by such a discount.

[2] The Tribunal should have found that the value of the shares was be ascertained without applying such a discount where there was a single purchaser prepared to pay an undiscounted price for all the shares in the company including the shares owned by the Respondent.

[3] The Tribunal should have found that the Respondent did not satisfy the maximum net asset value test for the purposes of sections 152-10 and 152-15 of the *Income Tax Assessment Act 1997* (Cth).

1. In his oral submissions, the Commissioner expanded on his contention that the Tribunal erred in law in applying a discount for lack of control in the circumstances. He contended that the error or errors of law made by the Tribunal in determining the value of Mr Miley’s shares could be characterised in four ways.
2. First, the Tribunal failed to take into account a relevant consideration, that consideration being that there was a willing purchaser in the market who was prepared to purchase Mr Miley’s parcel of shares as part of a package with the shares held by the other two shareholders.
3. Second, the Tribunal took into account an irrelevant consideration, that consideration being that there was a need for a discount for lack of control in the circumstances.
4. Third, the Tribunal misconstrued or misdirected itself in relation to the principle in *Pioneer Concrete*.
5. Fourth, the Tribunal erred in failing to have regard to relevant authority concerning the valuation of an asset where the asset has a special potentiality for a particular buyer or buyers, or where there is a special purchaser who is prepared to pay more for the asset than other potential purchasers.

# Mr Miley’s OBJECTION TO COMPETENCY and submissions

1. Mr Miley contended that the Court did not have jurisdiction to entertain the Commissioner’s appeal because it was not an appeal “on a question of law” as required by s 44 of the AAT Act. He submitted that the value of a property or asset is a matter of fact. He relied, in that regard, on statements to that effect made in *Federal Commissioner of Taxation v Westgarth* (1950) 81 CLR 396 at 407, 408, 411, 412 and 416 and *Federal Commissioner of Taxation v* ***St Helens Farm*** *(ACT) Pty Ltd* (1981) 146 CLR 336 at 383. In Mr Miley’s submission, even if the Tribunal’s finding in relation to the value of the shares was wrong, an incorrect finding of fact is not an error of law and the Court cannot simply substitute its own finding for the finding that was made by the Tribunal.
2. Mr Miley also submitted that, in any event, the Tribunal correctly determined the value of Mr Miley’s shares. In his submission, the Tribunal correctly applied the *Spencer* test in an entirely orthodox way. Mr Miley submitted, relying on ***Faraday*** *v McKenzie* [2007] FamCA 1626 at [221], ***McCathie*** *v Federal Commissioner of Taxation* (1944) 69 CLR 1 at 11, and *Byrne v A J Byrne Pty Limited* [2012] NSWSC 667 at [73], that the Tribunal was correct to value Mr Miley’s parcel of shares on the basis that they did not confer control of the company and that it was therefore appropriate to apply a discount. In Mr Miley’s submission, the Commissioner’s contention that the actual consideration received by Mr Miley was the market value of the shares suffered the “infirmity” identified by the High Court in *Pioneer Concrete* of including special conditions that the actual purchaser stipulated.

# Issue one: jurisdiction and questions of law

1. There can be no doubt that this appeal would not be competent if it was not “on a question of law” as required by s 44 of the AAT Act. In ***Haritos*** *v Federal Commissioner of Taxation* (2015) 233 FCR 315 at [62], the Full Court summarised the relevant principles concerning s 44 of the AAT Act as follows:

We now turn to consider the more general questions raised by the appeal in relation to s 44 of the AAT Act. In summary, our conclusions are as follows:

1. The subject matter of the Court’s jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.
2. The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.
3. The Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.
4. Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the Court by s 44(3) to hear and determine appeals instituted in the Court in accordance with s 44(1), but to the exercise of that jurisdiction.
5. In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.
6. Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.
7. A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.
8. The expression “may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal” in s 44 should not be read as if the words “pure” or “only” qualified “question of law”. Not all so called “mixed questions of fact and law” stand outside an appeal on a question of law.
9. In certain circumstances, a new question of law may be raised on appeal to a Full Court. The exercise of the Court’s discretion will be affected not only by *Coulton v Holcombe* (1986) 162 CLR 1 considerations, but also by considerations specific to the limited nature of the appeal from the Tribunal on a question of law, for example the consideration referred to by Gummow J in *Federal Commissioner of Taxation v Raptis* (1989) 20 ATR 1262 that there is difficulty in finding an “error of law” in the failure in the Tribunal to make a finding first urged in this Court.
10. Earlier decisions of this Court to the extent to which they hold contrary to these conclusions, especially to conclusions (3), (4), (6) and (8), should not be followed to that extent and are overruled. Those cases include *Birdseye v Australian Securities and Investments Commission* (2003) 38 AAR 55; *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290; *Etheridge*; *HBF Health Funds* and *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241.
11. The issue whether the Commissioner’s case that the Tribunal erred in applying a discount for lack of control when valuing Mr Miley’s shares properly raises a question of law for the purposes of s 44 of the AAT Act must accordingly be approached as a matter of substance rather than form. The Court’s jurisdiction is also enlivened even if the errors alleged by the Commissioner only raise a non-jurisdictional question of law or, perhaps, a mixed question of fact and law.
12. As for what may constitute a question of law, one of the earlier authorities concerning s 44 that was cited with approval by the Full Court in *Haritos* was the decision of the Full Court in *Repatriation Commission v Hill* [2002] FCAFC 192; (2002) 69 ALD 581. In that case, the Full Court stated (at [59]):

Plainly enough, before making a finding of this kind, the tribunal must consider all the material before it. Having done so, the question whether the material raises or points to a relevant hypothesis of connection is essentially a matter for the tribunal. As the primary judge emphasised, proof of facts is not in issue at this stage: [*Byrnes v Repatriation Commission* (1993) 177 CLR 564] at CLR 571; ALD 6; ALR 215 and [*Repatriation Commission v Deledio* (1998) 83 FCR 82]at FCR 97–8; ALD 206. The tribunal may conclude that the material does not raise or point to a hypothesis that fits the template of a relevant SoP and that the hypothesis cannot, therefore, be accepted as reasonable. This decision cannot be the subject of an appeal under s 44(1) of the Administrative Appeals Tribunal Act 1975 (Cth) (the AAT Act), unless, in making it, the tribunal has acted otherwise than in accordance with the law. If a tribunal falls into an error of law “which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers”: see *Craig v South Australia* (1995) 184 CLR 163 at 179; 39 ALD 193 at 199; 131 ALR 595 at 602. An error of law of this kind may support an appeal under s 44 of the AAT Act on a question of law: cf *Hospital* *Benefit Fund of Western Australia Inc v Minister for Health, Housing and* *Community Services* (1992) 39 FCR 225 at 231–2; 28 ALD 50 at 56–7; 111 ALR 1 at 8–9 per Wilcox, Burchett and French JJ.

1. It follows that the Court’s jurisdiction is enlivened if the Commissioner’s arguments on appeal in substance raise the question whether the Tribunal acted otherwise than in accordance with law, or fell into an error of law which caused it to ignore relevant material, or rely on irrelevant material.
2. The Full Court in *Haritos* also cited, with apparent approval, the decision in *Australian Gas Light Company v Valuer-General (NSW)* (1940) 40 SR (NSW) 126 at 138 as authority for the proposition that a finding of fact may be vitiated by an error of law, such as where a finding of fact is based on a misdirection of law. It would seem, therefore, that the Court would have jurisdiction under s 44 of the AAT Act where the appeal raised the question whether the Tribunal made factual findings based on a misdirection of law.
3. In that context, it may readily be accepted, as submitted by Mr Miley, that the value of an asset or property is ultimately a question of fact. As Mason J said in *St Helens Farm* at 383, “valuations are estimations involving findings of fact and discretionary judgment made on the evidence given in the individual case and by reference to the circumstances of that case”. It is for that reason that an appellate court will not substitute its own opinion for the opinion of the court below unless it found that the court below acted on a wrong principle of law or otherwise erred in principle: *St Helens Farm* at 364 (Gibbs J) and 381 (Mason J).
4. It may equally be accepted that the Court would not have jurisdiction under s 44 of the AAT Act to entertain an appeal concerning a valuation finding by the Tribunal if, as a matter of substance rather than form, the question or questions raised by the appeal concerned nothing more than the findings of fact or discretionary judgment that underlay the valuation finding. An appeal concerning a valuation which only raised the question whether the Tribunal should have arrived at a different valuation, or the question whether the Tribunal stayed within the “zone of discretion” in fixing the valuation (*cf. Haritos* at [201] referring to *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [43]), would not be an appeal “on a question of law”.
5. Having regard to the principles and authorities referred to in *Haritos*, however, it is clear that the Court does have jurisdiction to entertain an appeal concerning a valuation if the challenge to the Tribunal’s valuation raises questions of legal principle, including whether in fixing the valuation the Tribunal acted on a wrong principle of law, including a wrong principle of law that led it to ignore relevant material, or rely on irrelevant material, in arriving at the valuation.
6. Further support for that proposition is to be found in the decision of McKerracher J in *Commissioner of Taxation v AP Energy Investments Pty Limited* [2016] FCA 577; (2016) 341 ALR 265. That case concerned an appeal under s 44 of the AAT Act which related to the Tribunal’s findings about the market valuation of assets for the purposes of Division 855 of the Assessment Act. The respondent contended that the appeal did not raise questions of law for the purposes of s 44. McKerracher J found (at [58], [59]), however, that the questions raised by the applicant were, in substance, questions of law because they concerned whether the Tribunal had identified the correct approach at law to valuing the relevant assets, or whether the Tribunal failed to adopt an overall approach which conformed with established legal tests.
7. Much the same can be said about the question or questions that the Commissioner contended were raised by this appeal. The Commissioner did not simply contend that the Tribunal should have arrived at a different valuation. Rather, while the question of law set out in the Commissioner’s notice of appeal was expressed in broad terms, in substance it is clear that the questions raised by the appeal concern whether the Tribunal acted on an error or errors of law which led it to ignore relevant material, or rely on irrelevant material, or whether the Tribunal otherwise failed to act in accordance with established legal principles in relation to the valuation of assets.
8. It follows that Mr Miley’s objection to competency is rejected. The Court has jurisdiction to entertain the Commissioner’s appeal because it is “on a question of law” for the purposes of s 44 of the AAT Act.

# ISSUE 2: the Tribunal’S valuATION OF THE SHARES

1. The process of reasoning that led the Tribunal to value Mr Miley’s parcel of 100 shares just before he sold them to EIMCO pursuant to the Agreement was outlined earlier. The question is whether that process of reasoning exposes legal error or errors on the part of the Tribunal.
2. The answer to that question is “yes”. The Tribunal could be said to have erred in law in a number of ways, though the errors all relate in one way or another to the considerations that led the Tribunal to apply a discount for “lack of control” to a value which otherwise represented the amount that Mr Miley actually received as consideration for the sale of the shares.
3. The approach to the valuation of the shares ultimately adopted by the Tribunal was somewhat contradictory, if not schizophrenic. On the one hand, the Tribunal appeared to accept that the consideration received by Mr Miley for the sale of his shares was a reliable indicator, or at least strong evidence, of the value of those shares. That appears to be why its calculation of the value of the shares started at $5.9 million. The Tribunal gave no alternative explanation for why it adopted $5.9 million as the starting point. Indeed, the Tribunal noted (at [29]) that Mr Halligan approached the valuation of Mr Miley’s shares from the starting point of the actual consideration received by Mr Miley ($5.9 million). That was, however, not an entirely correct characterisation of how Mr Halligan approached the valuation.
4. On the other hand, the Tribunal appeared to reason that it would be wrong to value Mr Miley’s shares on the basis of the consideration received by him for the sale of the shares because that sale was “subject to special circumstances”. The special circumstances were said to be that Mr Miley had sold his parcel of shares as part of a package involving the sale of all 300 shares in AJM to EIMCO. The Tribunal reasoned that an “enquiry” directed towards determining the market value of Mr Miley’s shares subject to those special circumstances “would suffer from the problem that the High Court warned about” in *Pioneer Concrete*. The correct approach, according to the Tribunal, was to effectively disregard the actual sale and sale price, and instead determine the value of Mr Miley’s shares on the basis of a hypothesis that the sale transaction involved Mr Miley’s shares alone.
5. The approach taken by the Tribunal was erroneous. In short, the Tribunal misdirected itself in relation to the decision in *Pioneer Concrete*. That misdirection led the Tribunal to ignore a relevant consideration, that consideration being that just before the sale, there was a buyer in the market who was ready and willing to purchase all the shares in AJM, including Mr Miley’s shares, for $17.7 million, and that Mr Miley and the other shareholders were ready and willing to sell all the shares for that price. In ignoring that consideration, the Tribunal also failed to have regard to the principles that have been applied in valuation cases where the asset or property in question has special potential for a particular purchaser.
6. Before explaining how and why the Tribunal erred in principle in some more detail, some of the principles applicable to the valuation of assets should be briefly outlined.

## “Market value”

1. As set out in detail earlier, to determine whether Mr Miley met the basic conditions for relief in s 152-10 of the Assessment Act, the Tribunal was required to determine whether Mr Miley satisfied the MNAV test in s 152-15. That required the Tribunal to determine the net value of Mr Miley’s CGT assets “just before” the relevant CGT event. That in turn required the Tribunal to determine, amongst other things, the market value of those assets.
2. The Assessment Act does not contain a relevant definition of “market value”. The definition of market value in s 995-1 deals only with the incidence of GST. While there is no single definitive definition of market value at general law, it is broadly accepted that the expression market value refers to “what a willing and knowledgeable, but not anxious purchaser would pay a willing and knowledgeable, but not anxious vendor for the assets in question”: *International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea* [2015] NSWCA 363 at [2] (per Bathurst CJ), citing *Spencer* and *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494.
3. Where the relevant asset is one that is of a kind that is regularly bought and sold in a market or exchange, the market value is generally fairly easy to determine. It is generally the current price (*Spencer* at 431) or the amount “actually obtainable in market sales”: *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [37]. The exchange or market brings together buyers and sellers and determines a price, which may generally be taken to be the amount that a willing and knowledgeable, but not anxious purchaser, would pay a willing and knowledgeable, but not anxious vendor. Thus, for example, the market price for shares in a listed public company that are regularly bought and sold on a stock exchange will generally be the current price or amount obtainable in sales for the shares on that exchange on the relevant day.
4. Where, however, there is no ready market for the asset in question, or where there may be no willing purchaser at the time when the valuation is sought or required, the method for valuing the asset generally involves hypothesising that there is a willing and knowledgeable, but not anxious purchaser. The question then becomes what a willing but not anxious vendor could reasonably expect to obtain, and what amount the hypothetical purchaser could reasonably expect to have to pay, if they got together and agreed on a price: *Abrahams* at 29.
5. That is not to say that it is always necessary to employ the hypothesis of a willing seller and purchaser. That hypothesis is merely a useful and conventional method of arriving at a market value: *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64; (1999) 167 ALR 575 at [83] (per Gleeson CJ, citing *Minister for Public Works (NSW) v Thistlethwayte* [1954] AC 475 at 491). Where the asset in question has been the subject of a recent arm’s length sale, it is generally unnecessary to hypothesise. If the recent sale transaction can be said to be one between a willing but not anxious seller, and willing but not anxious buyer, the price that the buyer and seller actually agreed on may generally be taken to be the market price, or at least a reliable indictor, if not the best evidence, of the market price: *Inez Investments Pty Ltd v Dodd (1979) 26 The Valuer* 501 at 505; *Rostam Pty Ltd v Valuer General; Shavran Pty Ltd v Valuer General* [2011] NSWLEC 1387 at [13]; *Commonwealth Custodial Services Ltd v Valuer General* [2007] NSWCA 365 at [106], [115]; *Alcan NT Alumina Pty Ltd v Commissioner of Taxation* [2007] NTSC 9; (2007) 208 FLR 159 at 183.
6. In the case of Mr Miley’s 100 shares in AJM, the bargain struck between Mr Miley, his fellow shareholders in AJM and the prospective purchaser, EIMCO, was effectively akin to a recent sale at arm’s length. There was nothing to suggest that he and the vendors of the other two parcels of 100 shares were not willing and knowledgeable, but not anxious sellers of their shares in AJM. Equally, there was nothing to suggest that the purchaser, EIMCO, was not a willing and knowledgeable, but not anxious, purchaser. There is nothing to suggest that the price that was struck between the parties was not the product of an arm’s length negotiation. The purchase price for the three parcels of 100 shares was $17.7 million, from which Mr Miley was to receive $5.9 million. Why, then, was that not relevantly the market value of the shares?
7. As has already been noted, the Tribunal reasoned that the consideration received by Mr Miley for the sale of his AJM shares to EIMCO was not the “correct enquiry” because that sale transaction was subject to “special circumstances” of the type referred to in *Pioneer Concrete*. The special circumstances were that the sale of Mr Miley’s parcel of shares “should contemplate the sale of the shares owned by all the other shareholders”. The correct enquiry, according to the Tribunal, involved the determination of the market value of Mr Miley’s shares alone, not as part of a “package” comprising all the shares in the company.
8. To determine whether the Tribunal was correct in finding that an enquiry directed to the purchase price received by Mr Miley was not the correct enquiry, it is necessary to first consider what, if any, relevant principles are established by *Pioneer Concrete* and whether those principles effectively compelled the Tribunal to disregard the actual sale price and proceed instead on the basis of a hypothesis that the sale transaction involved Mr Miley’s shares alone. It is then necessary to consider some authorities that have addressed the approach that should be taken to valuing assets that may have special potential for a particular purchaser.

## The decision in *Pioneer Concrete*

1. The facts in *Pioneer Concrete* concerned the sale of land which contained a partly worked-out quarry. The contract for the sale of the land included a clause the effect of which was that the vendor company retained the right to continue to extract sand from, and tip waste on, the quarry. By a separate contract, the vendor assigned the tipping rights to a company associated with the purchaser. The vendor and purchaser executed an instrument which was necessary to transfer the property. The instrument described the property to be transferred as “all the estate in fee simple” and stated that the consideration was the purchase price in the contract of sale. It did not refer to the tipping rights or the separate assignment of those rights.
2. Under the relevant stamp duty legislation at the time, it was necessary to determine the amount for which the real property might reasonably have been sold if it had been sold free from encumbrances in the open market on the date of the sale. Ultimately, the matter proceeded in court at first instance by way of preliminary questions of law. The critical question turned out to be whether, in determining the amount for which the relevant real property might reasonably have been sold free of encumbrances in the open market on the date of the sale, the property in the transfer was to be treated as subject to the reservation to the vendor of the tipping rights. The High Court ultimately found that the answer to that question was “no”. It is, however, important to understand exactly why that was the case.
3. In short terms, there were three significant considerations that compelled the negative answer to the question that had been posed. First, the relevant duty provision imposed duty on instruments, not transactions. Second, the instrument in question, the transfer, described the estate or interest in the real property that was conveyed as all the estate in fee simple. There was no reference to any exception or reservation of any kind. Third, the tipping rights rested in contract alone. When the land was transferred, the provisions of the contract for sale subjected the purchaser to contractual obligations, but did not create any proprietary interest which qualified the purchaser’s title to the land.
4. Having regard to those three considerations, the plurality concluded as follows (at [44]):

Once it is accepted that the real property to be valued is an estate in fee simple in the land referred to in the relevant certificates of title, unqualified by any exception or reservation, or any other outstanding proprietary interest, then it follows that the exercise required by par (B) is a determination of the amount for which such an estate might reasonably have been sold if it had been sold, free from encumbrances, in the open market on the date of the sale. The determination of such an amount is a familiar task, to be carried out in accordance with the principles stated in *Spencer v The Commonwealth*. The subject of the valuation is the unencumbered estate in fee simple. In determining the value there is no warrant, either in the language of the statute or in principle, for departing from the hypothetical inquiry as to the point at which a desirous purchaser and a not unwilling vendor would come together. The purpose of making the inquiry hypothetical is to isolate the value of the estate or interest to be transferred from factors that are extraneous to the purpose for which such a value is to be ascertained. To introduce into the exercise a special condition for which, on a particular occasion, a particular vendor chose to stipulate, and to which a particular purchaser chose to agree, is to depart from the statutory requirement, which is to determine the value of that which was transferred. It is, rather, to value the net benefit which the transaction conferred upon the purchaser. It is to treat stamp duty as a tax on a transaction.

1. Mr Miley relied on part of this passage in support of the contention that the market value of his shares was required to be determined by what he called the *Spencer* hypothesis and was not equal to the consideration received by Mr Miley from the actual sale transaction. The Tribunal accepted that submission: Reasons at [20], [33]. It found, in effect, that *Pioneer Concrete* compelled it to approach the valuation of Mr Miley’s shares on the hypothetical basis that they were sold alone, and not part of a package including all the other issued shares. It reasoned that to value Mr Miley’s shares on the basis of an actual sale would be to erroneously value the shares having regard to special circumstances, being that they were sold as part of a package. It was that consideration that led the Tribunal to effectively disregard the consideration received by Mr Miley, at least to the extent that the Tribunal applied a discount for “lack of control” to that consideration.
2. It is, however, tolerably clear that the facts and circumstances in *Pioneer Concrete* were significantly different to the facts and circumstances surrounding the valuation of Mr Miley’s shares. Indeed, *Pioneer Concrete* was not a valuation case as such, which perhaps explains why, apart from the brief reference to *Spencer* in the passage just extracted, there is virtually no discussion concerning the applicable valuation principles. The question in *Pioneer Concrete* concerned exactly what was being valued, which was the estate in fee simple described in the instrument of transfer. The contractual tipping rights were disregarded because they were not a proprietary interest in the land and were not referred to in the transfer.
3. In the present case, there was no question about what was being valued. The asset being valued was Mr Miley’s 100 shares in AJM. Those shares were sold pursuant to the Agreement. There was no separate or collateral contract as there was in *Pioneer Concrete*. The Agreement also provided for the sale of the AJM shares held by the other shareholders and that those shares were to be sold contemporaneously. That aspect of the Agreement, even if it could be said to be a “special condition”, could not in any relevant sense be said to be a factor that was extraneous to the purpose for which Mr Miley’s shares were to be valued.
4. Nothing said in *Pioneer Concrete* warranted or justified the approach taken by the Tribunal to the valuation of Mr Miley’s shares. The Tribunal misdirected itself in relation to what was decided in *Pioneer Concrete* and its relevance to the issues that were before it. That error of law led the tribunal to disregard what was otherwise a relevant consideration: the fact that just before the sale, there was a buyer in the market who was ready and willing to purchase all the shares in AJM, including Mr Miley’s shares, for $17.7 million, and that Mr Miley and the other shareholders were ready and willing to sell all their shares for that price. That was not a special circumstance. It was the reality of the market. Once that was accepted, there was no occasion to apply a discount for lack of control.

## Valuing assets with special potentialities

1. Putting *Pioneer Concrete* to one side, there is another basis for concluding that the Tribunal erred in law in applying a discount for lack of control to the consideration actually received by Mr Miley. That error was to ignore or disregard the principles that should be applied in valuing an asset in respect of which there is a ready and willing buyer who, for some particular reason, may be willing to buy the property for more than other prospective purchasers.
2. Even if the valuation of an asset is to be approached on the basis of hypothetical buyers and sellers, it is necessary to have regard to the realities of the market: “although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place”: *Inland Revenue Commissioners v Gray* [1994] STC 360 at 372. If there is, or is likely to be, a particular buyer who is likely to be willing to pay more for the asset in question than others because they are in a better position to exploit the particular attributes or potentialities of the asset, that buyer should not be excluded in considering the relevant market or market value.
3. In *Inland Revenue Commissioners v* ***Clay*** [1914] 3 KB 466, it was necessary to value a residential property as at 30 April 1909. The evidence suggested that the value of the property solely as a residence for private occupation was £750. In 1910, however, the property had been sold for £1,000 to the trustees of an adjoining nursing home who wanted the house for the purpose of extending their nursing home. In support of the proposition that the house should have been valued at £750, not £1,000, it was argued that the fact that the trustees were prepared to pay more for the property than other purchasers should have been disregarded. In rejecting that argument, Cozens-Hardy MR said (at 472):

I can see no ground for excluding from consideration the fact that the property is so situate that to one or more persons it presents greater attractions than to anybody else. The house or the land may immediately adjoin one or more landowners likely to offer more than the property would be worth to anybody else. This is a fact that cannot be disregarded … To say that a small farm in the middle of a wealthy landowner’s estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely by reference to its ordinary agricultural value, seems to me to be absurd. If the landowner does not at the moment buy, land brokers or speculators will give more than its purely agricultural value with a view to reselling it at a profit to the landowner.

1. The decision in *Clay* was referred to with approval in *Raja Vyricherla Narayana* ***Gajapatiraju*** *v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 at 317. The issue in that case was the valuation of land compulsorily acquired by the local harbour authorities. The land had unusual features or potentialities, though the only possible purchaser of the potentialities was the authority that had compulsorily acquired the land. It was held that the land was nonetheless to be valued having regard to those potentialities.
2. *Gajapatiraju* was referred to with approval in ***Mordecai*** *v Mordecai* (1988) 12 NSWLR 58, where Hope JA (with whom Samuels and Priestley JJA agreed) said (at 70):

It is well established that if a property has some special potentiality which only one person would buy, it is to be valued on the basis of a notional sale to that person. The property is not valueless or diminished in value because there would be no other buyers.

1. The principles that emerge from *Clay*, *Gajapatiraju* and *Mordecai* are relevant to the approach that should have been taken to the valuation of Mr Miley’s shares. The purchaser of Mr Miley’s shares, EIMCO, was a company for which Mr Miley’s shares presented greater attractions or potentialities than a prospective purchaser who was willing to buy Mr Miley’s shares alone. That was because EIMCO had also secured the agreement of the other two shareholders in AJM to sell their shareholdings in the company to it. By purchasing Mr Miley’s shares, along with the shares of the other shareholders, EIMCO was able to secure control of the company. There could be little doubt that EIMCO, or indeed any other prospective purchaser that was able to put itself in the same position as EIMCO, would be prepared to pay more for Mr Miley’s shares than a hypothetical purchaser who was only willing or able to secure the purchase of Mr Miley’s minority shareholding, and nothing more. EIMCO was in effectively the same position as the trustees in *Clay*. There was no reason for the Tribunal to exclude that fact from consideration, as it effectively did.
2. The reality of the market for Mr Miley’s shares at the relevant time was that all of the three shareholders in AJM were ready and willing to sell their shares to a single purchaser, and there was a single purchaser who was ready and willing to purchase the shares from each shareholder in a single transaction. That was hardly surprising. There could be little doubt that each of the shareholders, including Mr Miley, were likely to have known that they would obtain a greater price for their shares if they were sold in that way. Indeed, they might well have had difficulty selling their individual parcels of shares at all if they were not sold as part of such a package. The hypothesis upon which the Tribunal acted – that Mr Miley would sell his shares individually to a hypothetical purchaser who would take a minority interest in the company – was not only unrealistic, but contrary to what in fact happened.
3. This analysis is also supported, to a certain extent, by the so called “marriage value” principle that may be applied where it is necessary to value a leasehold interest in land. That principle was explained by Sheller JA (with whom Mahoney and Meagher JJA relevantly agreed) in *Promenade Investments Pty Ltd v State of New South Wales* (1992) 26 NSWLR 203 at 228C-E:

Where, as in this case, it is necessary to value a leasehold interest in land and it can be shown that if the interests of the lessee and the freehold owner were merged the value of the two interests so merged would be substantially greater than the sum of the values of the two interests if they were treated as continuing to be separate and where such difference is explained by the difference between the use of the land possible by the holder of either interest inhibited by the existence of the other and the best use of the land if the interests were merged, it is reasonable to suppose that a potential purchaser of the leasehold interest would be prepared to pay something to take account of the probability of such a merger brought about either by the lessee surrendering its lease for value or the freeholder extending the term of the lease. A valuation of the leasehold interest in such circumstances should reflect the probability of merger.

1. In *Trocette Property Co Limtied v Greater London Council* (1974) 72 LGR 701; 28 P & CR 408, Megaw LJ (at 414) explained the principle in the following terms:

The “marriage value” arises because it would sensibly be anticipated that the value of the two interests, merged, would be substantially greater than the sum of the values of the two if each had to be treated as continuing to be separate….So in their common commercial interest the owners of the two interests, the freeholder and the leaseholder, or persons having purchased their respective interests, would be expected to make arrangements with one another to enable the combined interests, with the resultant “marriage value”, to be exploited in a commercially sensible way, with each of the two taking his appropriate share of the resulting added value.

1. While the analogy may not be perfect, it could be said that the valuation of Mr Miley’s 100 shares should be approached on the basis that it would sensibly be anticipated that Mr Miley and the other two AJM shareholders would act in a commercially sensible way and sell their shares at the same time to a single purchaser. They could, in that way, take advantage of the resultant “marriage value” of the entire shareholding in AJM.
2. A similar approach was taken to the valuation of shares by the Privy Council in *Attorney-General of Ceylon v* ***Mackie*** [1952] 2 All ER 775. In that case, it was necessary to value management shares in a company. The articles of the company gave the holders of 90% of the share capital the right to compulsorily acquire the remaining shares. Lord Reid said (at 777):

It was admitted for the appellant that no purchaser would have paid anything like Rs 250 per share for the management shares in face of the company’s articles unless he could buy at the same time a large block of the preference shares and so have a majority of the votes. But the appellant contends that the respondent must be supposed to have taken the course which would get the largest price for the combined holding of management and preference shares and to have offered for sale together with the management shares the whole or at least the greater part of the preference shares owned by the deceased. In their Lordships’ judgment this contention is correct.

1. The analogy is again not perfect, because *Mackie* concerned two different types of shares offered by one vendor, whereas this case concerns three vendors. Nevertheless, *Mackie* again shows that it is necessary to approach the valuation of an asset by supposing that the asset will be exploited in the most commercially sensible way. Here, the most commercially sensible way for MR Miley to exploit his 100 shares in AJM was to do exactly what he did do: sell them to the one purchaser as part of a package along with the shares held by the other shareholders.
2. Mr Miley’s answer to the principles referred to in *Clay* and *Gajapatiraju* was twofold. First, he relied on the decision in *Commissioner of Inland Revenue v* ***Crossman*** [1937] AC 26; [1936] 1 All ER 762, which in his submission ran counter to *Clay* and *Gajapatiraju. Crossman* concerned the valuation of shares in a private company. The question was whether, in valuing the shares, it was necessary to take into account the fact that the articles of association of the company contained rigid restrictions upon the alienation of the shares in the company, such that the company could refuse to register any transfer. The House of Lords held that the shares should be valued on the basis that the purchaser would be entitled to be registered, and to be regarded as the holder of the shares, but would take and hold the shares subject to the provisions of the articles.
3. Mr Miley relied on a passage from the judgement of Viscount Hailsham LC in *Crossman* which dealt with a finding by the trial judge that concerned the question whether it was relevant to have regard to the fact that a particular trust company was willing to pay more than the market price for the shares because of “certain particular attractions which the prospect of getting upon the share register would hold out for such a company”. Viscount Hailsham LC said, in relation to that issue (at AC 44):

On the other hand, I think it is a fair construction to put upon the learned judge’s judgment that the extra sum which could be obtained from the Trust Companies was not an element of the value in the open market, but rather a particular price beyond the ordinary market price which a Trust company would give for special reasons of its own. I do not think that it would be right to appreciate the value of the shares because of this special demand for a special purpose from a particular buyer.

1. There are three difficulties with Mr Miley’s reliance on that statement. First, it is undoubtedly *obiter dicta*. Second, there is no indication that any of the other judges agreed with either the trial judge or Viscount Hailsham in relation to the issue concerning the trust company. And third, the *obiter* observation of Viscount Hailsham is in any event inconsistent with, and was essentially overtaken by, what was later said in *Gajapatiraju.*
2. Second, Mr Miley contended that *Clay* and *Gajapatiraju* were distinguishable because they both relate to valuing real property with particular inherent features, not assets such as shares which have no peculiar features. That submission is rejected. While it is true that both *Clay* and *Gajapatiraju* concerned real property, the principles referred to in them were not said to peculiarly apply to real property. Nor is there any reason to suppose that the principles should be so restricted. And while the AJM shares in question here had no particular or peculiar features, the point remains that, as in *Clay*, there was a particular purchaser who was willing to pay more for Mr Miley’s 100 shares than other purchasers might have been. In *Clay,* the trustees were prepared to pay more, not because of any inherent features of the land in question, but because they owned the adjoining property. Here, EIMCO was prepared to pay more because it had managed to put itself in the position where it had secured the agreement of all three of the shareholders to sell their shares to it. It was therefore able to secure control of the company. That was not a circumstance that should have been disregarded, just as the fact that the trustees in *Clay* were prepared to pay more because they owned the adjoining property was not to be disregarded.
3. Mr Miley also submitted that the actual contract that was entered into by Mr Miley should be ignored because s 152-15 of the Assessment Act required a valuation “just before” the CGT event. Mr Miley submitted that the words “just before” compelled the conclusion that the valuation must be determined on the basis of a hypothetical sale, not an actual sale. He submitted, in effect, that the Agreement should be disregarded because it was not in existence “just before” the sale.
4. That submission is rejected. The words “just before” indicate that the legislature intended to exclude from the MNAV test the effect of the CGT event itself: *Federal Commissioner of Taxation v* ***Byrne Hotels*** *Qld Pty Ltd* (2011) 196 FCR 524 at [56]. For example, where the CGT event is the sale of shares, the taxpayer’s CGT assets must be valued on the basis that the shares had not in fact been disposed of. It is, however, completely unrealistic to suggest that it follows that the terms and circumstances of the sale itself should be ignored.
5. In any event, in the circumstances of this case, the time “just before” the CGT event was the “time when one party has already signed the contract and the other party has picked up his pen and is about to sign [and] there was no real uncertainty that the contracts for sale would be entered into”: cf. *Byrne Hotels* at [61]. In the case of the sale of the AJM shares, at that time there was, and was known to be, a purchaser willing to pay $5.9 million for Mr Miley’s shares on the basis that the other shareholders were also willing to sell their shares to it, and the purchaser was willing to purchase all the shares. There was no uncertainty that the contract would be entered into. It should also be noted in this context that Mr Miley’s expert valuer, Mr Halligan, valued AJM on the basis of the exchange effected by the Agreement because “it [the Agreement] was negotiated, and its terms set, before the valuation date” (see [95] of Mr Halligans’s report).
6. The upshot is that, even putting aside its erroneous reliance on *Pioneer Concrete*, the Tribunal erred in law in approaching the valuation on the basis of an unrealistic hypothesis of a sale of Mr Miley’s minority shareholder to a purchaser who was not willing or able to purchase the shares held by the other shareholders. It was on the basis of that hypothesis that the Tribunal applied the discount for lack of control. The Tribunal erroneously ignored or disregarded the fact that each of the three shareholders in AJM, including Mr Miley, were willing to sell their shares to a single purchaser, EIMCO, and that EIMCO was willing to purchase the shares at a price higher than the price that other purchasers would have been prepared to pay if they were only purchasing a minority shareholding. The approach taken by the Tribunal was contrary to *Clay*, *Gajapatiraju,* and cases in Australia, such as *Mordacai*, that have approved and applied those cases.

## Appropriateness of a discount for control

1. The final submission that it is necessary to briefly consider is Mr Miley’s reliance on cases, such as *Faraday* and *McCathie,* which recognise the appropriateness of applying a discount when valuing a minority shareholding in a company. Two brief points may be made in response to that submission.
2. First, the cases where it has been accepted that such a discount is appropriate are all cases where the circumstances are such that the holder or purchaser of the shares was unable to acquire the remaining shares in the company, or at least further shares that would convert the holding into a controlling holding. This was not such a case. At the time the AJM shares were to be valued, an agreement had been struck between each of the shareholders and a purchaser who was willing and able to purchase all the shares in the company. That was the basis upon which the sale price was negotiated. There was no warrant to apply a discount to that sale price. There was no question of EIMCO ever being in the position of a minority shareholder.
3. Second, a discount is ordinarily applied in circumstances where the valuation methodology adopted involves, in very simple terms, valuing the net assets of the company and then apportioning the net assets pro rata to the shareholders. That was not the valuation method adopted by Tribunal in the case of the AJM shares. Rather, the Tribunal effectively valued the company on the basis of the consideration received on the sale of all its shares. That price, it may be inferred, already had factored into it all relevant market factors, including factors relating to control. It was wrong to apply a discount to that amount, or the part of it that was referable to Mr Miley’s shares.

##  Conclusion in relation to the Tribunal’s valuation

1. The Tribunal erred in law in its valuation of Mr Miley’s shares. It misdirected itself in relation to the relevant law, ignored or disregarded relevant considerations, and failed to have regard to relevant legal principles in approaching the valuation exercise. In terms of the question posed in the Commissioner’s notice of appeal, in valuing Mr Miley’s parcel of 100 shares in AJM just before his disposal of those shares, a discount for “lack of control” should not have been applied to what was otherwise the market value of those shares, being the price that had been agreed between a willing but not anxious seller (Mr Miley and the other two shareholders) and a willing but not anxious buyer (EIMCO).

# MR MILEY’S NOTICE OF CONTENTION

1. At the hearing, Mr Miley submitted that, even if the Tribunal erred in law in applying the discount for lack of control, its decision should be affirmed on other grounds. He contended that the Tribunal failed to address various other arguments he had advanced in support of the proposition that the shares in AJM held by Mr Miley just before the CGT event should be valued at less than $5.9 million, and that he otherwise satisfied the MNAV test. The Commissioner rightly pointed out that, in order to advance those submissions, a notice of contention was required under r 33.21 of the *Federal Court Rules 2011* (Cth). Mr Miley had not filed a notice of contention prior to the hearing. At the hearing, Mr Miley sought leave to file a notice of contention. As that course was not opposed by the Commissioner, leave was subsequently granted.
2. The grounds in the notice of contention were as follows:
3. The Tribunal ought to have considered and to have held that the Respondent satisfied the Maximum Net Asset Value Test under s.152-15 of the Income Tax Assessment Act 1997 (Cth) because:
4. The value of his 100 shares in AJM Environmental Services Pty Ltd was to be determined, in addition to a discount for lack of control, on the basis that:
5. the consideration received by the vendors under the share sale agreement that gave rise to the CGT event was additionally for the grant of valuable restrictive covenants, being assets that did not exist at the valuation time; and
6. a discount for lack of marketability applied to the Respondent's shareholding; and
7. The Respondent had a provision for tax liabilities that reduced the Respondent's Net Asset Value below the statutory amount.
8. The Commissioner rightly conceded that the Tribunal did not address the issues or arguments identified in the notice of contention. That is clear, in any event, from the Tribunal’s reasons: Reasons at [38]. The difficulty, however, is that the Court was in no position to determine those issues or arguments at the hearing of the appeal. The arguments appear to be based on Mr Halligan’s report. The Court was provided with a copy of Mr Halligan’s report, however Mr Miley did not advance any substantive submissions in relation to those parts of the report that concerned the issues identified in the notice of contention. The Commissioner also did not make any substantive submissions in relation to the issues in the notice of contention. That was perhaps understandable, given that those issues were raised for the first time towards the very end of the hearing. The Court was also not provided with a copy of Mr Samuel’s valuation report.
9. It is regrettable that the Tribunal did not deal with all the parties’ submissions. It is equally regrettable that Mr Miley did not file a notice of contention before the hearing, or otherwise raise the issues in the notice of contention in a substantive way at the hearing. In the circumstances, the Court has little alternative but to remit the matter to the Tribunal for it to be determined according to law.

# CONCLUSION AND DISPOSITION

1. The Commissioner successfully demonstrated that the Tribunal erred in law in valuing Mr Miley’s shares in AJM just before the CGT event in question. The Tribunal’s decision is accordingly set aside. As there are remaining issues to be determined by the Tribunal, it is appropriate to order that the matter be remitted to the Tribunal for determination according to law. It is also appropriate for Mr Miley to pay the Commissioner’s costs of this proceeding.

|  |
| --- |
| I certify that the preceding one hundred and twenty-one (121) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 28 November 2017