FEDERAL COURT OF AUSTRALIA

N & M Martin Holdings Pty Ltd v Commissioner of Taxation [2020] FCA 1186

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| File numbers: | NSD 1495 of 2019  NSD 1498 of 2019  NSD 1499 of 2019 |
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| Judge: | **STEWARD J** |
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| Date of judgment: | 18 August 2020 |
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| Catchwords: | **TAXATION –** notices of appeal against appealable objection decisions under s. 14ZZ of the *Taxation Administration Act 1953* (Cth.)**–** where assessments issued to trustee of resident discretionary trust and a non-resident discretionary beneficiary of that trust for the 2013 and 2014 years of income – where trustee made capital gains on disposal of shares in each of those years – where shares disposed of were not ‘taxable Australian property’ for purposes of Div. 855 of *Income Tax Assessment Act 1997* (Cth.) – where trustee resolved to distribute to the beneficiary 99.27% and 100% of capital gains made from sale of those shares in those respective years – where trustee assessed in respect of those gains pursuant to s. 115‑220 and to s. 98 of the *Income Tax Assessment Act 1936* (Cth.) – where beneficiary also assessed in respect of those gains pursuant to s. 115-215(3) – whether capital gains capable of being disregarded by beneficiary pursuant to s. 855-10 – interaction of Div. 855 with Subdiv. 115-C – consideration of *Peter Greensill*  **ADMINISTRATIVE LAW –** application for judicial review under s. 39B of the *Judiciary Act 1903* (Cth.) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth.) **–** where judicial review sought in respect of decision by the Commissioner not to remit shortfall interest charge under s. 280-160 of Sch. 1 of the *Taxation Administration Act 1953* (Cth.) in respect of the beneficiary for the 2014 year of income **–** whether Commissioner had asked wrong statutory question and had thereby erred at law **–** whether Commissioner applied test as expressed in s. 8AAG for remission of general interest charge as opposed to test under s. 280-160 for remission of shortfall interest charge |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth.)  *Evidence Act 1995* (Cth.) ss. 118, 119  *Income Tax Assessment Act 1936* (Cth.) ss. 95AAA, 95AAC, 95, 98, 98A, 99, 99A  *Income Tax Assessment Act 1997* (Cth.) ss. 102-5, 102-20, 115-200, 115-210, 115-215, 115-220, 115-222, 115-225, 115-227, 115-228, 136-10, Subdiv. 768-H, Div. 770, ss. 855-1, 855-5, 855-10, 855-15, 855-25, 855-40  *Judiciary Act 1903* (Cth.) s. 39B  *Petroleum Resource Rent Tax Assessment Act* *1987* (Cth.) s. 20  *Taxation Administration Act 1953* (Cth.) s. 8AAG, Sch. 1, s. 280-160  Explanatory Memorandum, *New International Tax Arrangements (Managed Funds and Other Measures) Bill 2004* (Cth.)  Explanatory Memorandum, *Tax Laws Amendment (2006 Measures No 4) Bill 2006* (Cth.)  *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1983] ATS 16, signed in Sydney on 6 August 1982 Art 22 |
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| Cases cited: | *Australian Securities Commission v. Marlborough Gold Mines Ltd* (1993) 177 C.L.R. 485  *BHP Billiton Iron Ore Pty Ltd v. National Competition Council* (2007) 162 F.C.R. 234  *BHP Petroleum (Timor Sea) Pty Ltd & Ors v. Minister for Resources* (1994) 49 F.C.R. 155  *Burton v. Commissioner of Taxation* (2019) 271 F.C.R. 548  *Carr v. Western Australia* (2007) 232 C.L.R. 138  *Chamberlain v. The Queen* (1983) 72 F.L.R. 1  *Colonial First State Investments Ltd v. Federal Commissioner of Taxation* (2011) 192 F.C.R. 298  *Comcare v. Martin* (2016) 258 C.L.R. 467  *ConnectEast Management Ltd v. Commissioner of Taxation* (2009) 175 F.C.R. 110  *Esso Australia Resources Ltd v. Federal Commissioner of Taxation* (1998) 83 F.C.R. 511  *Federal Commissioner of Taxation v. Greenhatch* (2012) 203 F.C.R. 134  *Gartside v. Inland Revenue Commissioners* [1967] U.K.H.L. 6; [1968] A.C. 553  *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 C.L.R. 259  *Peter Greensill Family Co Pty Ltd (trustee) v. Commissioner of Taxation* [2020] FCA 559  *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 194 C.L.R. 355  *Sole Luna Pty Ltd as Trustee for the PA Wade No 2 Settlement Trust v. Commissioner of Taxation* [2019] FCA 1195  *SZEEU v. Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 F.C.R. 214  *Transurban City Link Ltd v. Allan* (1999) 95 F.C.R. 553  *Union-Fidelity Trustee Company of Australia Ltd v. Federal Commissioner of Taxation* (1969) 119 C.L.R. 177  *Woodside Energy Ltd v. Commissioner of Taxation* (2009) 174 F.C.R. 91 |
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| Date of hearing: | 21 July 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Taxation |
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| Category: | Catchwords |
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| Number of paragraphs: | 101 |
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| Counsel for the Applicants: | Ms. R. Seiden, S.C. with Ms. E. Bishop |
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| Solicitor for the Applicants: | Watson Mangioni |
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| Counsel for the Respondent: | Mr. M. O’Meara, S.C. with Mr. D. Lewis |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | | NSD 1495 of 2019 |
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| BETWEEN: | N & M MARTIN HOLDINGS PTY LTD  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

AND

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|  | | NSD 1498 of 2019  NSD 1499 of 2019 |
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| BETWEEN: | NICHOLAS MARTIN  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |
| JUDGE: | STEWARD J | |
| DATE OF ORDER: | 18 AUGUST 2020 | |

THE COURT ORDERS THAT:

1. The parties are to confer and, if agreement can be reached, provide the Court with orders for final relief within 14 days hereof, or failing that, each party shall file written submissions on the issue of the form of final relief limited to four pages in length.

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

REASONS FOR JUDGMENT

STEWARD J.:

1. In the years of income ended 30 June 2013 and 2014, N & M Martin Holdings Pty Ltd (“Holdings”) as trustee for the Martin Family Trust (the “Trust”) sold shares in Altium Limited. Holdings is a resident discretionary family trust. Holdings resolved to distribute 99.27% and 100% of the capital gains made from the sale of those shares in those years of income (respectively) to Mr. Martin. Mr. Martin is a discretionary object of the Trust. At the time of those distributions, he was living in China and was a non-resident for income tax purposes. The Altium shares were not “taxable Australian property” (“T.A.P.”) for the purposes of Div. 855 of the *Income Tax Assessment Act 1997* (Cth.) (the “*1997 Act*”).
2. The respondent (the “Commissioner”) issued assessments to Mr. Martin on the basis that he had made capital gains in both years pursuant to s. 115-215(3) of the *1997 Act*. The Commissioner has also assessed Holdings, as trustee, for the same gains pursuant to s. 98 of the *Income Tax Assessment Act 1936* (Cth.) (the “*1936 Act*”) and s. 115-220 of the *1997 Act*. Neither Holdings nor Mr. Martin have paid the tax thereby owing. The Commissioner’s contention is that if Holdings pays the tax assessed to it, Mr. Martin will be entitled to a deduction against his own tax liability that is equal to the amount of tax paid by Holdings in respect of Mr. Martin’s interest in the net income of the Trust, and to a refund if that amount of tax paid by Holdings exceeds his tax liability as assessed: ss. 95AAC(1) and (2), 98A(2) of the *1936 Act*.
3. Both Mr. Martin and Holdings contend that the assessments are excessive because the capital gains assessed to Mr. Martin should have been disregarded pursuant to s. 855-10 of the *1997 Act*. That is because Mr. Martin was a non-resident at the relevant times and the Altium shares were not T.A.P. It is not disputed that if Mr. Martin had held the Altium shares himself, as opposed to being a discretionary object of a trust that held the shares, any capital gains made by him from the disposal of those shares in the 2013 and 2014 years of income would have been disregarded, and Mr. Martin would not have been liable to pay any Australian income tax on those gains.
4. Mr. Martin and Holdings, however, have a problem. Their legal argument has already been considered and rejected by Thawley J. in *Peter Greensill Family Co Pty Ltd (trustee) v. Commissioner of Taxation* [2020] FCA 559. Even though Mr. Martin and Holdings before me relied upon new and additional contentions in support of a different conclusion concerning the application of s. 855-10 and Subdiv. 115-C of the *1997 Act*, it was accepted that I should follow Thawley J. unless I were to be satisfied that *Peter Greensill* is wrong: *BHP Billiton Iron Ore Pty Ltd v. National Competition Council* (2007) 162 F.C.R. 234. For the reasons which follow, and notwithstanding the rigorous efforts of Senior and Junior Counsel representing Mr. Martin and Holdings, I am not satisfied that *Peter Greensill* is wrong. In my view, it is my duty to follow it.
5. Notwithstanding this conclusion, the parties are agreed that if the capital gains assessed by the Commissioner are not to be disregarded he has, nonetheless, miscalculated the CGT discount to be applied to those gains in both the 2013 and 2014 years of income. In that respect the Commissioner, very properly, conceded that the assessments issued to Mr. Martin and to Holdings are “to some extent excessive.” Accordingly, both parties also agreed that each assessment should be set aside and that the matters should be remitted to the Commissioner to re-calculate the correct amount of the CGT discount.
6. In separate proceedings brought pursuant to s. 39B of the *Judiciary Act 1903* (Cth.) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth.), Mr. Martin seeks judicial review of a decision made by the Commissioner to decline to remit the shortfall interest charge (“S.I.C.”) arising from the issue of the 2014 year assessment to Mr. Martin. That decision was made pursuant to s. 280-160 of Sch. 1 to the *Taxation Administration Act 1953* (Cth.) (the “*T.A.A.*”). For the reasons which follow, I am satisfied that the Commissioner’s decision should be set aside. He asked the wrong question.

### Legislative Provisions

1. These proceedings concern a number of provisions of the *1997 Act* and *1936 Act*. They are somewhat complex.
2. One commences with Div. 855 of the *1997 Act*. In simple terms, the Division permits a non‑resident to disregard a capital gain made by her or him from a CGT event if the relevant CGT asset the subject of the event is not T.A.P. Section 855-10 is the operative provision which Mr. Martin contends permits him to disregard the capital gains assessed to him in these proceedings. It is relevantly as follows:

**855‑10 Disregarding a capital gain or loss from CGT events**

(1) Disregard a \*capital gain or \*capital loss from a \*CGT event if:

(a) you are a foreign resident, or the trustee of a \*foreign trust for CGT purposes, just before the CGT event happens; and

(b) the CGT event happens in relation to a \*CGT asset that is not \*taxable Australian property.

Note: A capital gain or capital loss from a CGT asset you have used at any time in carrying on a business through a permanent establishment in Australia may be reduced under section 855‑35.

1. It is unnecessary to set out the provisions concerning what is, and what is not, T.A.P. However, s. 855-40 of the *1997 Act* was critical to the Commissioner’s case. The section creates a “special rule” for a non-resident beneficiary of a “fixed trust” who has been assessed, amongst other things, for capital gains arising from an application of s. 115-215 of the *1997 Act*. It relevantly is as follows:

**855‑40 Capital gains and losses of foreign residents through fixed trusts**

(1) The purpose of this section is to provide comparable taxation treatment as between direct ownership, and indirect ownership through a \*fixed trust, by foreign residents of \*CGT assets that are not \*taxable Australian property.

(2) A \*capital gain you make in respect of your interest in a \*fixed trust is disregarded if:

(a) you are a foreign resident when you make the gain; and

(b) the gain is attributable to a \*CGT event happening to a \*CGT asset of a trust (the ***CGT event trust***) that is:

(i) the \*fixed trust; or

(ii) another fixed trust in which that trust has an interest (directly, or indirectly through a \*chain of trusts, each trust in which is a fixed trust); and

(c) either

(i) the asset is not \*taxable Australian property for the CGT event trust at the time of the CGT event; or

(ii) the asset is an interest in a fixed trust and the conditions in subsections (5), (6), (7) and (8) are satisfied.

Note: Section 115‑215 treats a portion of a trust’s capital gain as a capital gain made by a beneficiary, and applies the CGT discount to that portion as if the gain were made directly by the beneficiary.

(3) You are not liable to pay tax as a trustee of a \*fixed trust in respect of an amount to the extent that the amount gives rise to a \*capital gain that is disregarded for a beneficiary under subsection (2).

(4) To avoid doubt, subsection (3) does not affect the operation of subsection 98A(1) or (3) of the *Income Tax Assessment Act 1936* (about taxing beneficiaries who are foreign residents at the end of an income year).

1. It was accepted by the parties that the Trust was not a “fixed trust” as referred to in s. 855-40.
2. Two other provisions of Div. 855 should be set out. Section 855-1 is headed “What this Division is about” and relevantly provides as follows:

A foreign resident can disregard a capital gain or loss unless the relevant CGT asset is a direct or indirect interest in Australian real property, or relates to a business carried on by the foreign resident through a permanent establishment in Australia.

Special rules apply for individuals who were Australian residents but have become foreign residents (see also Subdivision 104-I) and for foreign resident beneficiaries of fixed trusts.

1. Finally, section 855-5 is headed “Objects of this Subdivision” and provides as follows:

(1) The objects of this Subdivision are to improve:

(a) Australia’s status as an attractive place for business and investment; and

(b) the integrity of Australia’s capital gains tax base.

(2) This is achieved by:

(a) aligning Australia’s tax laws with international practice; and

(b) ensuring interests in an entity remain subject to Australia’s capital gains tax laws if the entity’s underlying value is principally derived from Australian real property.

1. I next turn to the provisions of Subdiv. 115-C. The object of that Subdivision may be simply stated. In very general terms, where the income of a trust estate includes a net capital gain, the trustee may distribute income derived from that gain to a beneficiary. Where the beneficiary is presently entitled to a share of that income, she or he may need to include that share in her or his assessable income pursuant to Div. 6 of Pt. III of the *1936 Act*. When that occurs, that amount does not comprise or include, however, any capital gain made by the trustee for the purposes of Pt. 3-1 of the *1997 Act*; rather, the amount is another species of statutory income “having no single character”: *Federal Commissioner of Taxation v. Greenhatch* (2012) 203 F.C.R. 134 at 143 [31]. As such, absent Subdiv. 115-C, the beneficiary could not reduce the amount so included in her or his assessable income with any capital losses she or he might have. Subdiv. 115-C however, in broad terms, converts the amount assessable to the beneficiary, which is derived from the capital gains made by the trustee, into another capital gain. This permits the beneficiary to reduce the amount of that gain by any capital losses she or he might have.
2. The means adopted by Parliament to achieve this object is highly complex; perhaps unnecessarily so. A “simplified outline” of Parliament’s solution to this issue may be found at the commencement of Div. 6 of Pt. III of the *1936 Act* in s. 95AAA, which relevantly is as follows:

The following is a simplified outline of the relationship between this Division, Division 6E and Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997*.

This Division sets out the basic income tax treatment of the net income of the trust estate. Generally:

(a) it has the result of assessing beneficiaries on a share of the net income of the trust estate based on their present entitlement to a share of the income of the trust estate; and

(b) it has the result of assessing the trustee directly on any residual net income; and

(c) as a collection mechanism, it has the result of assessing the trustee in respect of some beneficiaries, such as non-residents or those under a legal disability.

If the trust estate has capital gains … this basic treatment is modified as described below.

Division 6E modifies the operation of this Division for the purpose of excluding amounts relevant to capital gains … from the calculations of assessable amounts under sections 97, 98, 99, 99A and 100.

Division 6E does not modify the operation of this Division (or any other provision of this Act) for any other purpose. For example:

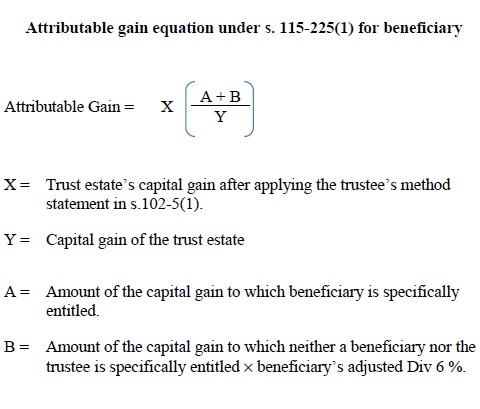
(a) it does not modify the operation of this Division for the purposes of applying section 100A; and

(b) it does not modify amounts taxed in the hands of the trustee under [Subdivision 115-C] of the *Income Tax Assessment Act 1997*.

Subdivision 115-C … of the *Income Tax Assessment Act 1997* provide[s] the corresponding taxation treatment for those capital gains ... Specifically:

(a) Subdivision 115-C of that Act has the effect that an amount corresponding to each of those capital gains is taxed in the hands of the beneficiaries of the trust (as a capital gain) and, if necessary, assessed to the trustee.

1. Before me, the Commissioner sought to illustrate how to apply Subdiv. 115-C to a beneficiary with the following formula:



1. Whilst this formula was helpful to me, assisted as I was by the explanation given about it by Mr. O’Meara, Senior Counsel for the Commissioner, it may be doubted whether the average Australian, who may not be able to secure Mr. O’Meara’s help, could easily or ever apply it.
2. I turn to set out the applicable provisions of Subdiv. 115-C. One commences with s. 115-200 which appears under the heading “What this Division is about.” It provides:

This Subdivision sets out rules for dealing with the net income of a trust that has a net capital gain. The rules treat parts of the net income attributable to the trust’s net capital gain as capital gains made by the beneficiary entitled to those parts. This lets the beneficiary reduce those parts by any capital losses and unapplied net capital losses it has.

If the trust’s capital gain was reduced by either the general 50% discount in step 3 of the method statement in subsection 102-5(1) or by the small business 50% reduction in Subdivision 152-C (but not both), then the gain is doubled. The beneficiary can then apply its capital losses to the gain before applying the appropriate discount percentage (if any) or the small business 50% reduction.

If the trust’s capital gain was reduced by both the general 50% discount and the small business 50% reduction, then the gain is multiplied by 4. The beneficiary can then apply its capital losses to the gain before applying the appropriate discount percentage (if any) and the small business 50% reduction.

Division 6E of Part III of the *Income Tax Assessment Act 1936* will exclude amounts from the beneficiary’s assessable income if necessary to prevent it from being taxed twice on the same parts of the trust’s net income.

1. Section 115-210 explains when Subdiv. 115-C applies. It relevantly provides:

**When this Subdivision applies**

(1) This Subdivision applies if a trust estate has a \*net capital gain for an income year that is taken into account in working out the trust estate’s net income (as defined in section 95 of the *Income Tax Assessment Act 1936*) for the income year.

1. Section 115-215 is a fundamental provision. It creates the “extra” capital gain in the hands of the relevant beneficiary where a trust estate has a net capital gain. It provides:

**Assessing presently entitled beneficiaries**

*Purpose*

(1) The purpose of this section is to ensure that appropriate amounts of the trust estate’s net income attributable to the trust estate’s \*capital gains are treated as a beneficiary’s capital gains when assessing the beneficiary, so:

(a) the beneficiary can apply \*capital losses against gains; and

(b) the beneficiary can apply the appropriate \*discount percentage (if any) to gains.

*Extra capital gains*

(3) If you are a beneficiary of the trust estate, for each \*capital gain of the trust estate, Division 102 applies to you as if you had:

(a) if the capital gain was not reduced under either step 3 of the method statement in subsection 102-5(1) (discount capital gains) or Subdivision 152-C (small business 50% reduction) — a capital gain equal to the amount mentioned in subsection 115-225(1); and

(b) if the capital gain was reduced under either step 3 of the method statement or Subdivision 152-C but not both (even if it was further reduced by the other small business concessions) — a capital gain equal to twice the amount mentioned in subsection 115-225(1); and

(c) if the capital gain was reduced under both step 3 of the method statement and Subdivision 152-C (even if it was further reduced by the other small business concessions) — a capital gain equal to 4 times the amount mentioned in subsection 115-225(1).

Note: This subsection does not affect the amount (if any) included in your assessable income under Division 6 of Part III of the *Income Tax Assessment Act 1936* because of the capital gain of the trust estate. However, Division 6E of that Part may have the effect of reducing the amount included in your assessable income under Division 6 of that Part by an amount related to the capital gain you have under this subsection.

(4) For each \*capital gain of yours mentioned in paragraph (3)(b) or (c):

(a) if the relevant trust gain was reduced under step 3 of the method statement in subsection 102-5(1) — Division 102 also applies to you as if your capital gain were a \*discount capital gain, if you are the kind of entity that can have a discount capital gain; and

(b) if the relevant trust gain was reduced under Subdivision 152-C — the capital gain remaining after you apply step 3 of the method statement is reduced by 50%.

Note: This ensures that your share of the trust estate’s net capital gain is taxed as if it were a capital gain you made (assuming you made the same choices about cost bases including indexation as the trustee).

(4A) To avoid doubt, subsection (3) treats you as having a \*capital gain for the purposes of Division 102, despite section 102-20.

*Section 118-20 does not reduce extra capital gains*

(5) To avoid doubt, section 118-20 does not reduce a \*capital gain that subsection (3) treats you as having for the purpose of applying Division 102.

1. At this stage, I should set out ss. 102-5 and 102-20, as both are referred to in s. 115-215. Section 102-5(1) provides:

**Assessable income includes net capital gain**

(1) Your assessable income includes your net capital gain (if any) for the income year. You work out your ***net capital gain*** in this way:

*Working out your net capital gain*

*Step 1.* Reduce the \*capital gains you made during the income year by the \*capital losses (if any) you made during the income year.

Note 1: You choose the order in which you reduce your capital gains. You have a net capital loss for the income year if your capital losses exceed your capital gains: see section 102-10.

Note 2: Some provisions of this Act (such as Divisions 104 and 118) permit or require you to disregard certain capital gains or losses when working out your net capital gain. Subdivision 152-B permits you, in some circumstances, to disregard a capital gain on an asset you held for at least 15 years.

*Step 2.* Apply any previously unapplied \*net capital losses from earlier income years to reduce the amounts (if any) remaining after the reduction of \*capital gains under step 1 (including any capital gains not reduced under that step because the \*capital losses were less than the total of your capital gains).

Note 1: Section 102-15 explains how to apply net capital losses.

Note 2: You choose the order in which you reduce the amounts.

*Step 3.* Reduce by the \*discount percentage each amount of a \*discount capital gain remaining after step 2 (if any).

Note: Only some entities can have discount capital gains, and only if they have capital gains from CGT assets acquired at least a year before making the gains. See Division 115.

*Step 4.* If any of your \*capital gains (whether or not they are \*discount capital gains) qualify for any of the small business concessions in Subdivisions 152-C, 152-D and 152-E, apply those concessions to each capital gain as provided for in those Subdivisions.

Note 1: The basic conditions for getting these concessions are in Subdivision 152-A.

Note 2: Subdivision 152-C does not apply to CGT events J2, J5 and J6. In addition, Subdivision 152-E does not apply to CGT events J5 and J6.

*Step 5.* Add up the amounts of \*capital gains (if any) remaining after step 4. The sum is your ***net capital gain*** for the income year.

1. Section 102-20 provides:

**Ways you can make a capital gain or a capital loss**

You can make a \*capital gain or \*capital loss if and only if a \*CGT event happens. The gain or loss is made at the time of the event.

Note 1: The full list of CGT events is in section 104-5.

Note 2: The gain or loss may be affected by an exemption, or may be able to be rolled-over. For exemptions generally, see Division 118. For roll-overs, see Divisions 122, 123, 124 and 126.

Note 3: You may make a capital gain or capital loss as a result of a CGT event happening to another entity: see subsections 115-215(3), 170-275(1) and 170-280(3).

Note 4: You cannot make a capital loss from a CGT event that happens to your original interests during a trust restructuring period if you choose a roll-over under Subdivision 124-N.

Note 5: The capital loss may be affected if the CGT asset was owned by a member of a demerger group just before a demerger: see section 125-170.

Note 6: Under subsection 230-310(4) gains and losses are taken to arise from a CGT event in particular circumstances.

Note 7: This section does not apply in relation to the capital gain mentioned in paragraph 294-120(5)(b) of the *Income Tax (Transitional Provisions) Act* *1997.*

1. Returning to Subdiv. 115-C, ss. 115-220 and 115-222 provide for an increase in the amount of a trustee’s assessable income pursuant to either ss. 98, 99 or 99A of the *1936 Act* (where these provisions otherwise apply) to the extent that an applicable beneficiary has been taken to have made an extra capital gain pursuant to s. 115-215. The amount of the increase is not, however, treated as a capital gain in the hands of the trustee. Section 115-220 provides:

**Assessing trustees under section 98 of the *Income Tax Assessment Act 1936***

(1) This section applies if:

(a) you are the trustee of the trust estate; and

(b) on the assumption that there is a share of the income of the trust to which a beneficiary of the trust is presently entitled, you would be liable to be assessed (and pay tax) under section 98 of the *Income Tax Assessment Act 1936* in relation to the trust estate in respect of the beneficiary.

(2) For each \*capital gain of the trust estate, increase the amount (the ***assessable amount***) in respect of which you are actually liable to be assessed (and pay tax) under section 98 of the *Income Tax Assessment Act 1936* in relation to the trust estate in respect of the beneficiary by:

(a) unless paragraph (b) applies — the amount mentioned in subsection 115-225(1) in relation to the beneficiary; or

(b) if the liability is under paragraph 98(3)(b) or subsection 98(4), and the capital gain was reduced under step 3 of the method statement in subsection 102-5(1) (discount capital gains) — twice the amount mentioned in subsection 115-225(1) in relation to the beneficiary.

(3) To avoid doubt, increase the assessable amount under subsection (2) even if the assessable amount is nil.

1. Sections 115-225 and 115-227 determine the “amount” of the capital gain each beneficiary is taken to have obtained. They are the English language version of the formula provided by Mr. O’Meara. Section 115-225(1) provides:

**Attributable gain**

(1) The amount is the product of:

(a) the amount of the \*capital gain remaining after applying steps 1 to 4 of the method statement in subsection 102-5(1); and

(b) your \*share of the capital gain (see section 115-227), divided by the amount of the capital gain.

1. Section 115-227 provides:

**Share of a capital gain**

An entity that is a beneficiary or the trustee of a trust estate has a share of a \*capital gain that is the sum of:

(a) the amount of the capital gain to which the entity is \*specifically entitled; and

(b) if there is an amount of the capital gain to which no beneficiary of the trust estate is specifically entitled, and to which the trustee is not specifically entitled — that amount multiplied by the entity’s \*adjusted Division 6 percentage of the income of the trust estate for the relevant income year.

1. Section 115-228, which is unnecessary for me to set out, determines the amount of the capital gain to which the relevant entity is specifically entitled for the purposes of s. 115-227.
2. In Mr. O’Meara’s formula, “X” represents the amount determined under s. 115-225(1)(a); “A + B” represents the amount determined under s. 115-227; and “Y” is a reference to the gross capital gains of the trust estate.
3. Finally, and dealing with the issue of remission of S.I.C., s. 280-160 of Sch. 1 of the *T.A.A.* provides:

**Remitting shortfall interest charge**

(1) The Commissioner may remit all or a part of an amount of \*shortfall interest charge you are liable to pay if the Commissioner considers it fair and reasonable to do so.

(2) Without limiting subsection (1), in deciding whether to remit, the Commissioner must have regard to:

(a) the principle that remission should not occur just because the benefit you received from the temporary use of the shortfall amount is less than the \*shortfall interest charge; and

(b) the principle that remission should occur where the circumstances justify the Commonwealth bearing part or all of the cost of delayed payments.

1. As the Commissioner pointed out in his written submissions, prior to 2005, the only interest charge in relation to income tax was the general interest charge (“G.I.C.”). The Commissioner had, and retains, a power to remit G.I.C. That power is contained in s. 8AAG of the *T.A.A*. In some respects that power is similar to that found in s. 280-160. However, there are differences. One, as will be seen, is important. Section 8AAG provides:

**Remission of the charge**

(1) The Commissioner may remit all or a part of the charge payable by a person.

(2) However, if a person is liable to pay the charge because an amount remains unpaid after the time by which it is due to be paid, the Commissioner may only remit all or a part of the charge in the circumstances set out in subsection (3), (4) or (5).

(3) The Commissioner may remit all or a part of the charge referred to in subsection (2) if the Commissioner is satisfied that:

(a) the circumstances that contributed to the delay in payment were not due to, or caused directly or indirectly by, an act or omission of the person; and

(b) the person has taken reasonable action to mitigate, or mitigate the effects of, those circumstances.

(4) The Commissioner may remit all or a part of the charge referred to in subsection (2) if the Commissioner is satisfied that:

(a) the circumstances that contributed to the delay in payment were due to, or caused directly or indirectly by, an act or omission of the person; and

(b) the person has taken reasonable action to mitigate, or mitigate the effects of, those circumstances; and

(c) having regard to the nature of those circumstances, it would be fair and reasonable to remit all or a part of the charge.

(5) The Commissioner may remit all or a part of the charge referred to in subsection (2) if the Commissioner is satisfied that:

(a) there are special circumstances because of which it would be fair and reasonable to remit all or a part of the charge; or

(b) it is otherwise appropriate to do so.

### Statement of Agreed Facts

1. The parties agreed upon the applicable facts, and recorded that agreement in the following statement:

**The Martin Family Trust**

1. The Applicant in proceedings No NSD 1495 of 2019, N & M Martin Holdings Pty Ltd (**NMMH**), is the trustee of the Martin Family Trust (**MFT**).

2. The MFT was established by a Deed of Settlement dated 2 September 1991 between David Mark Warren (as settlor) and NMMH as trustee (the **Trust Deed**).

3. The Trust Deed was amended by a Deed of Variation dated 31 March 1997 (the **Deed of Variation**).

4. Material terms of the Trust Deed were as follows:

4.1. clause 1.1(d) defined “year” as in effect the financial year ended 30 June;

4.2. clause 2 (prior to its variation by the Deed of Variation) provided to the effect that, until the vesting day, the trustees stood possessed of the income of the trust fund before the end of each year to divide and pay some or all of it among such of the beneficiaries as the trustees determined in their absolute discretion and that the trustees stood possessed of so much of the income of a year that had not been divided and paid at or prior to the end of that year for the beneficiaries in equal shares;

4.3. clause 3 provided to the effect that, in lieu of paying income in cash, the trustees could transfer property of like value from the trust fund to the person entitled to that income;

4.4. clause 6.22 provided to the effect that the trustees had the power to appropriate any portion of the trust fund towards the share of a person entitled under the MFT;

4.5. clauses 10 and 15 conferred on Mr Martin the power to remove and appoint the trustee or trustees of the MFT;

4.6. clause 11 provided to the effect that the trustees were able to amend the terms of the Trust Deed as they saw fit; and

4.7. clause 14 provided that the beneficiaries of the MFT were Nicholas Michael Martin (the Applicant in proceedings 1498 of 2019 and 1499 of 2019) (**Mr Martin**), Manizheh Martin, their issue both present and future, the parents, brothers, sisters and other blood relatives of Mr Martin and any body corporate in which either of Mr Martin and/or Manizheh Martin severally or together are majority shareholders.

5. Clause 1(b) of the Deed of Variation provides:

the following is added to Clause 2:-

“For the purposes of this clause and this Deed the word “income” shall include capital gains realised or unrealised) in the value of the assets of the Trust Fund and whether taxable or non-taxable. The Trustees may determine in their discretion to distribute different classes or types of income (e.g. capital gains) to different beneficiaries and to some beneficiaries to the exclusion of others”.

**NMMH**

6. At all material times NMMH was a company incorporated in Australia.

**Mr Martin**

7. Mr Nicholas Martin:

7.1. was at all material times a beneficiary of the MFT;

7.2. on 16 May 2011, departed Australia permanently to live in China.

**NMMH’s holding of shares in Altium Ltd**

8. As at 16 October 2012, the Trustee held 11,762,690 shares in a company listed on the Australian Stock Exchange, Altium Ltd (**Altium**).

**2013 Income Year**

9. During the income year ended 30 June 2013, NMMH in its capacity as Trustee of the MFT disposed of 3,820,000 shares in Altium, for which it received consideration of $4,128,162 (**2013 Disposals**).

10. NMMH in its capacity as trustee of the MFT made a capital gain of $4,109,312 as a result of the 2013 Disposals.

11. On 28 June 2013, NMMH in its capacity as trustee of the MFT resolved, among other things, that:

11.1. to the extent permitted by the Trust Deed, the income of the MFT for the income year ended 30 June 2013 comprised all those amounts being income for the purposes of the accounting records of the MFT less the expenses and outgoings of the MFT for that income year attributed to those amounts in the accounting records;

11.2. the “net income” of the MFT to be distributed as follows:

11.2.1. the first $18,000 to Jason Martin;

11.2.2. the second $18,000 to Nava Martin;

11.2.3. the “balance of Income” to Nicholas Martin; and

11.3. the income to be paid and applied for the benefit of those beneficiaries be entered into the books of the MFT as having been so distributed and be held on trust by NMMH absolutely on behalf of each beneficiary in accordance with the terms of the Trust Deed.

12. The records of the MFT for the income year ended 30 June 2013 state that its net income for trust law purposes was $4,934,397.

13. On 10 April 2014, NMMH lodged the tax return for the MFT for the income year ended 30 June 2013, which reported:

13.1. a net capital gain of $4,109,312 and an unfranked divided of $826,415;

13.2. net income under s 95(1) of the *Income Tax Assessment Act 1936* (**ITAA36**) of $4,923,776;

13.3. a nil assessable amount under s 98(3) of the ITAA36; and

13.4. that capital gains of $4,079,331 were distributed to Mr Martin and $808,523 of the other income had been distributed to Mr Martin.

14. In his tax return for the income year ended 30 June 2013, Mr Martin reported that he did not have a capital gains tax event for the income year and he did not report making any capital gains.

**2014 Income Year**

15. During the income year ended 30 June 2014, NMMH in its capacity as trustee of the MFT disposed of 7,942,690 shares in Altium, for which it received consideration of $17,757,642 (**2014 Disposals**).

16. NMMH in its capacity as trustee of the MFT made a capital gain of $17,757,642 as a result of the 2014 Disposals.

17. On 28 June 2014, NMMH in its capacity as trustee of the MFT resolved, among other things, that:

17.1. to the extent permitted by the Trust Deed, the income of the MFT for the income year ended 30 June 2014 comprised all those amounts being income for the purposes of the accounting records of the MFT less the expenses and outgoings of the MFT for that income year attributed to those amounts in the accounting records;

17.2. the “net income” of the MFT be distributed as follows:

17.2.1. 100% of all “income” to Mr Martin; and

17.3. the income to be paid and applied for the benefit of those beneficiaries be entered into the books of the MFT as having been so distributed and be held on trust by NMMH absolutely on behalf of each beneficiary in accordance with the terms of the Trust Deed.

18. The records of the MFT for the income year ended 30 June 2014 state that its net income for trust law purposes was $18,193,612.

19. On 3 March 2015, NMMH lodged the tax return for the MFT for the income year ended 30 June 2014 (**2014 Trust Return**) which reported:

19.1. a net capital gain of $8,878,821 which was made in respect of a capital gain of $17,757,642 from the 2014 Disposals, interest income of $35,122 and an unfranked dividend of $426,077;

19.2. net income under s 95(1) of the ITAA36 of $9,315,389;

19.3. a nil assessable amount under s 98(3) of the ITAA36; and

19.4. that capital gains of $8,878,821 were distributed to Mr Nicholas Martin and $436,568 of the other income had been distributed to Mr Martin and that his “share of income of the trust estate” was $9,315,389.

20. In his tax return for the income year ended 30 June 2014, Mr Nicholas Martin reported that he did not have a capital gains tax event for the income year and he did not report making any capital gains.

**Assessments and Objections**

21. On 22 April 2014, the Respondent issued to Mr Nicholas Martin a notice of assessment for the Income Year ended 30 June 2013 which showed that his taxable income was $7,129 with tax imposed of $2,316.92 (**Initial 2013 Martin Assessment**).

22. On 14 April 2015, a notice of assessment was issued to Mr Martin for the income year ended 30 June 2014 which showed that his taxable income was $8,177 with tax imposed of $2,638.02 (**Initial 2014 Martin Assessment**).

23. On 6 April 2017, the Respondent purported to issue two notices of assessment addressed to “A/C NICHOLAS MICHAEL MARTIN”, one being for the income year ended 30 June 2013 which stipulated a taxable income for that year of $4,079,331 and the other being for the income year ended 30 June 2014 which stipulated a taxable income for that year of $8,878,821 (**Purported Trustee Assessments**).

24. On 10 April 2017, the Respondent issued Mr Martin with:

24.1. a notice of amended assessment in respect of the income year ended 30 June 2013 which stipulated that his taxable income for that year was to be $4,086,460 (**2013 Martin Amended Assessment**); and

24.2. a notice of amended assessment in respect of the income year ended 30 June 2014 which stipulated that its taxable income for that year was to be $8,886,938 (**2014 Martin Amended Assessment**).

25. On 19 April 2017, the Respondent issued to both Mr Martin and NMMH a letter notifying both of the audit of the affairs of the MFT and in particular, how the capital gains of the MFT referable to Mr Martin’s interests in the trust should be assessed for the income year ended 30 June 2013 and income year ended 30 June 2014. Each letter was accompanied by a document of Reasons for Decision in respect of the notices of assessment and amended assessment that had been issued on 6 April and 10 April 2017.

26. On 1 June 2017, Mr Martin lodged notices of objection in respect of the 2013 Martin Amended Assessment (**2013 Martin Objection**) and the 2014 Martin Amended Assessment (**2014 Martin Objection**) under *Taxation Administration Act 1953* (**TAA53**) Pt IVC Div 3.

27. On 1 June 2017, the NMMH lodged a notice of objection in respect of the Purported Trustee Assessments under TAA53 Pt IVC Div 3 (**Trustee First Objection**).

28. On 21 June 2017, NMMH and Mr Martin requested the Respondent take into account the statutory declaration of Bill Shew dated 21 July 2017 to demonstrate that reasonable care was taken.

29. On 27 June 2017, the Respondent issued a notice of assessment for the income year ended 30 June 2013 (**2013 Trustee Assessment**) and a notice of assessment for the income year ended 30 June 2014 (**2014 Trustee Assessment**).

30. On 7 July 2017, the Respondent informed Mr Martin and NMMH that they and their agent, Mr Shew, had acted with reasonable care and that no administrative penalties applied. However, shortfall interest was applied for the income year ended 30 June 2014 for Mr Martin.

31. On 27 July 2017, NMMH in its capacity as trustee of the MFT objected to the 2013 Trustee Assessment (**Trustee 2013 Objection**) and the 2014 Trustee Assessment (**Trustee 2014 Objection**).

32. On 9 August 2017, Mr Martin requested the Respondent remit to the base rate the shortfall interest charge in respect of the 2014 Martin Amended Assessment (**Remission Request**).

33. On 22 February 2019, the Respondent commenced an audit in respect of the 2014 Trustee Assessment and the 2014 Martin Amended Assessment in respect of the rate at which any capital gains are reduced (discount percentage).

34. On 28 March 2019, the Respondent issued to NMMH in its capacity as trustee of the MFT a notice of amended assessment for the income year ended 30 June 2014 **(2014 Trustee Amended Assessment**) increasing its taxable income to $17,757,642.

35. On 1 April 2019, the Respondent issued to Mr Martin a notice of amended assessment for the income year ended 30 June 2014 (**Second 2014 Martin Amended Assessment**) increasing his taxable income to $17,765,759.

36. On 4 April 2019, NMMH in its capacity as trustee of the MFT and Mr Martin by their representative wrote to the Respondent and sought to vary the Trustee 2013 Objection and the 2013 Martin Objection (**Amended 2013 Trustee Objection** and **Amended 2013 Martin Objection**).

37. On 23 May 2019:

37.1. Mr Martin objected to the Second 2014 Martin Amended Assessment; and

37.2. NMMH in its capacity as trustee of the MFT objected to the 2014 Trustee Amended Assessment.

38. On 22 July 2019, the Respondent issued purported objection decisions to NMMH in its capacity as trustee of the MFT and Mr Martin under the name of “Debbie Hastings, Deputy Commissioner of Taxation.”

39. On 15 August 2019, the Respondent issued new objections decisions:

39.1. to NMMH in its capacity as trustee of the MFT, disallowing its objections for the income year ended 30 June 2013 and the income year ended 30 June 2014; and

39.2. to Mr Martin, disallowing its objections for the income year ended 30 June 2013 and the income year ended 30 June 2014.

40. On 15 August 2019, the Respondent also refused to remit the shortfall interest charge for the income year ended 30 June 2014.

(Footnotes omitted.)

1. The Court adopts the foregoing facts and is grateful to the parties for their co-operation on this issue.

### Statement of Issues Not in Dispute

1. The parties were also able to reduce the number of issues in dispute by agreement. Again, I commend the parties for their exercise of good sense. The issues not in dispute were recorded in the following statement:

**Mr Martin**

1. In the years ended 30 June 2013 (**2013 Income Year**) and 30 June 2014 (**2014 Income Year**), Mr Martin was not a resident of Australia within the meaning of ITAA36 s 6 and was a “foreign resident” within the meaning of *Income Tax Assessment Act 1997* **(ITAA97**) s 995-1 and for the purposes of ITAA36 Div 6.

**NMMH**

2. At all material times NMMH was an “Australian resident” within the meaning of ITAA36 s 6(1)(b).

3. At all material times MFT was a “resident trust for CGT purposes” within the meaning of ITAA97 s 995-1.

**NMMH’s holding of shares in Altium Ltd**

4. At all material times, the Altium shares were not “taxable Australian property” within the meaning of that term in s 855-15 of the ITAA97 and the Altium shares did not constitute an “indirect Australian real property interest” within the meaning of item 2 or s 855-25.

5. The Altium shares held by NMMH in its capacity as trustee of the MFT constituted a “CGT asset” for purposes of the ITAA97 s 108-5 definition.

**2013 Income Year**

6. As a result of the 2013 Disposals, CGT event A1 happened within the meaning of ITAA97 s 104-10(1).

7. This was a discount capital gain within the meaning of ITAA97 s 115-5.

**2014 Income Year**

8. As a result of the 2014 Disposals, CGT event A1 happened within the meaning of ITAA97 s 104-10(1).

9. This was a discount capital gain within the meaning in ITAA97 s 115-5.

### The Decision in Peter Greensill

1. In *Peter Greensill*, a resident trustee had made a capital gain from the sale of shares which were not T.A.P., and had distributed 100% of that gain to a non-resident beneficiary. The trust was not a fixed trust but a family discretionary trust. The Commissioner assessed the trustee pursuant to s. 98 of the *1936 Act* and s. 115-220 of the *1997 Act*. Unlike the position in these proceedings, no assessment had been issued to the non-resident beneficiary. The taxpayer contended that s. 115‑220 did not apply to it because the beneficiary had made no extra capital gain for the purposes of s. 115‑215; any such gain had to be disregarded pursuant to s. 855‑10.
2. Relevantly, and in general terms, Thawley J. decided that s. 855-10 did not permit the non‑resident beneficiary to disregard the extra capital gain created by s. 115-215 because that gain was not a capital gain from a CGT event that had happened to the beneficiary as required. Rather, it was an extra gain created by s. 115-215. That conclusion was driven by Thawley J.’s construction of the word “from” in s. 855-10.
3. Thawley J. carefully reviewed the authorities concerning the meaning of the word “from”. At [51]-[54] his Honour thus said:

51. The meaning of a connecting word such as “from” depends on the context in which the word is used: *Associated Beauty Aids Pty Ltd v Commissioner of Taxation* (1965) 113 CLR 662 at 668 (Barwick CJ); *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285. When used as a term to indicate a connection between two matters, “from” has been interpreted as meaning that there must be a causal connection between the matters: *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at 297, citing *Pizzino v Finance Brokers (WA) Pty Ltd* (1982) 56 ALJR 843 at 845 (Gibbs CJ, Murphy and Wilson JJ), at 846-847 (Brennan and Deane JJ); *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165-167 (Gleeson CJ); *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5]* (1998) 90 FCR 1 at 6 (Beaumont J); see also: *Comcare v Amorebieta* (1996) 66 FCR 83 at 95; *Amlin Corporate Member Ltd v Austcorp Project No 20 Pty Ltd* (2014) 311 ALR 222 at 231. The Oxford English Dictionary defines “from” as referring to an element of causation or derivation, defining “from” as denoting “derivation, source, descent” or “ground, reason, cause, or motive”.

52. Causation plays a role, at the very least as a *sine qua non* in that there cannot be a capital gain without a CGT event, but causation is not the exclusive criterion by which the statutory question in s 855-10(1), whether a capital gain is “from” a CGT event, is answered. The answer to the question involves an assessment of the degree of connection between the two subject matters for it to be said that one (the capital gain) is “from” the other (a CGT event).

53. The use of the word “from” indicates, in this statutory context, a greater degree of connection between the relevant matters than phrases such as “in relation to” or “in respect of” which have been held to “do no more ... than signify the need for there to be some relationship or connection between two subject matters”: *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472 at 487.

54. In *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at 563, Hill J observed in relation to the phrase “relates” to:

It was common ground that the words “relates to” are wide words signifying some connection between two subject matters. The connection or association signified by the words may be direct or indirect, substantial or real. It must be relevant and usually a remote connection would not suffice. The sufficiency of the connection or association will be a matter for judgment which will depend, among other things, upon the subject matter of the enquiry, the legislative history, and the facts of the case. Put simply, the degree of relationship implied by the necessity to find a relationship will depend upon the context in which the words are found.

See also: *Travelex Ltd v Commissioner of Taxation* (2009) 178 FCR 434 at [25] (Mansfield J), [44] (Stone J), [57] (Edmonds J); *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at [25] (French CJ and Hayne J).

1. Before me, the applicants did not suggest that any of the foregoing reasoning contained any error. In my view, and respectfully, the reasoning is irreproachable.
2. Thawley J. went on to consider the statutory context. That context included contrasting the word “from” in s. 855-10 with the phrase “attributable to a CGT event” in s. 855-40. Section 855-40 refers to a capital gain “attributable to a CGT event” rather than to a gain “from” a CGT event precisely because the section was addressing, perhaps amongst other things, the extra gain taxable to a beneficiary under s. 115-215. That gain is not the product of a CGT event which happens to a beneficiary; thus, in both this case and *Peter Greensill*, neither beneficiary sold or assigned their equitable right to due consideration and due administration of the trust. Rather, the extra capital gain created by s. 115-215(3) is the product of or “attributable to” another CGT event which has happened to a trustee. These considerations supported, in Thawley J.’s view, a construction of the word “from” which connoted a “direct connection” between the capital gain and the CGT event. Thus, his Honour said at [63]:

Capital gains made by a beneficiary of a fixed trust might be disregarded under s 855‑40. The language employed by that provision provides support for the understanding of s 855-10(1) earlier referred to. It applies to a capital gain “you make in respect of your interest in a fixed trust” where, amongst other matters, the gain “is attributable to a CGT event happening to a CGT asset of a trust”. This language is quite different to the language of s 855-10 which requires the capital gain to be “from” a CGT event. The note to s 855-40(2) indicates that the provision operates with respect to the capital gain taken to have been made by a beneficiary under s 115-215 of the ITAA 1997. Section 855-10, which does not contain such a note, operates differently. Section 855‑10 does not provide for the disregarding of capital gains attributed to the beneficiary of a non-fixed trust under Subdiv 115-C.

1. Statutory context also included the notes to s. 102-20, set out above. Note 3 refers to an entity making a capital gain even though the applicable CGT event happens to another entity. Section 115-215(3) is identified as an example of this. Note 6 refers to a capital gain or loss which in certain circumstances is “taken to arise from a CGT event”. Thawley J. then referenced s. 115‑215(4A), and noted that it did not state that the extra capital gain made by a beneficiary was taken “to arise from a CGT event” in contrast to the language of Note 6.
2. Statutory context thus supported the following conclusion reached by Thawley J. at [60]:

Understood in context, s 855-10(1) indicates that the capital gain to be disregarded is that which is made by an entity immediately as a consequence of the happening of a CGT event; a capital gain which is attributed to a beneficiary, because of a CGT event happening to a CGT asset owned by a trust, was not intended to fall within the phrase “a capital gain ... from a CGT event”. The capital gain deemed to have been made by a beneficiary under s 115-215 of the ITAA 1997 is not a “capital gain ... from a CGT event” within s 855-10(1).

1. Thawley J. was of the view that his conclusion was supported by the legislative history. That history suggested that Parliament had expressly addressed the position of a non-resident beneficiary who might be thought to “indirectly” own assets of a resident trust which are not T.A.P. and which have been sold, thus giving rise to a capital gain. In 2004, Parliament enacted former Subdiv. 768-H, the predecessor to s. 855-40, to extend the concession created by s. 855‑10 to enable, perhaps amongst other things, such a beneficiary also to disregard the capital gain it is taken to have made by reason of s. 115-215. However, Parliament expressly limited that concession to a beneficiary of a “fixed trust.” At [67] Thawley J. referenced the relevant extrinsic material and said:

The explanatory memorandum to the *New International Tax Arrangements (Managed Funds and Other Measures) Bill 2004* (Cth) (**2004 EM**), which inserted s 768-605, stated (emphasis in original [in para. 1.7]):

1.7 Another change is to disregard a capital gain made by a foreign resident in respect of the taxpayer’s interest in a fixed trust if the *gain relates to an asset without the necessary connection with Australia*. For example, this will apply where the capital gain arises from the disposal by an Australian fixed trust of a portfolio interest in an Australian public company. Again, this is appropriate because a foreign resident would not be assessed on such a gain if the asset were held directly.

...

1.12 These amendments are not confined to foreign residents with interests in widely held unit trusts. The amendments will apply to interests in closely held trusts and trusts that are not unit trusts. This is to ensure the benefits of the measures apply as widely as possible, irrespective of the trust arrangements through which the foreign resident invests. **However, the trust in which the foreign resident has invested and all relevant trusts in the chain must meet the definition of ‘fixed trust’ in the *Income Tax Assessment Act 1997* (ITAA 1997). This is to ensure that there is no discretion available to the trustee to provide benefits to parties who are not beneficiaries of the trust. This is important to the integrity of the amendments.**

(Emphasis added to para. 1.12.)

The passage I have highlighted in the foregoing extrinsic materials strongly supports the existence of a decision made by Parliament to *exclude* the extension of the concession created by s. 855-10 to a beneficiary of a trust which, as here, is not a fixed trust.

1. Thawley J. went on to observe that the extrinsic material relevant to the amending Act which introduced Div. 855 did not suggest that Parliament intended to reverse its decision (at [68]):

The *Tax Laws Amendment (2006 Measures No 4) Act 2006* (Cth), repealed Div 136 and Subdiv 768-H and enacted Division 855. The explanatory memorandum to the *Tax Laws Amendment (2006 Measures No 4) Bill 2006* (Cth) (**2006 EM**) explained the new concept of “taxable Australian property”. The 2006 EM said nothing about Div 855 changing the taxation of capital gains deemed to be made by foreign resident beneficiaries under s 115-215. It did state at [4.113]:

Amendments made by this Bill move a specific treatment for capital gains and capital losses made by foreign residents from interests in, or through interests in, fixed trusts from Subdivision 768-H into Division 855. The general operation of the CGT and foreign resident rules will ensure that a capital gain or a capital loss on an interest in a fixed trust made by a foreign resident is disregarded if that interest is not taxable Australian property. The provisions specifically dealing with the distribution of capital gains to foreign beneficiaries will continue to operate.

1. Finally, Thawley J. noted that, as here, if the non-resident beneficiary in *Peter Greensill* had owned the shares directly, he would have made a capital gain that would have been disregarded pursuant to s. 855-10. His Honour further noted that the taxpayer’s argument proceeded on an assumption that “there existed a policy objective of not taxing foreign beneficiaries of resident trusts in respect of CGT events in relation to CGT assets which were not taxable Australian property” (at [70]). Thawley J. addressed that assumption in the following way (at [70]):

This approach falls foul of the caution expressed in *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [26] that a danger to be avoided in construing a statute is making an *a priori* assumption about a statute’s purpose and construing the statute to coincide with the assumption. The correct process is the inverse: the purpose is to be derived from what the legislation says, not from an assumption about the desired or desirable operation of the provisions. The policy objective asserted by the applicant is not to be found in the legislative history identified above and nor is it supported by the terms of former s 160L of the ITAA 1936 or the capital gains tax regime when it was introduced.

1. I observe that on no view, save in the broadest economic sense, could either the beneficiary in *Peter Greensill*, or Mr. Martin here, be considered an “indirect” owner of the assets of their respective trust estates. Being discretionary objects, neither enjoyed any legal or equitable interest in the property of either trust: *Gartside v. Inland Revenue Commissioners* [1967] U.K.H.L. 6; [1968] A.C. 553 at 617–618.

### Meaning of “Plainly Wrong”

1. In *BHP Billiton Iron Ore*, Greenwood J. (with whom Sundberg J. agreed) very usefully observed as follows (at 253-254 [83]‑[86]):

83. The circumstances in which a judge in the exercise of the Court’s original jurisdiction might find a decision of a single judge of the Court to be “plainly wrong” should be approached with real and deliberative caution and would generally involve that class of case where for one reason or another there is transparent error such as the consideration of an incorrect statutory instrument in the resolution of the controversy; consideration of a provision of a statute in a form not enacted at the relevant date of the events or a failure to consider a provision of an Act relevant to the disposition of the cause, thus causing the analysis to fall into error; a failure to apply having regard to the issues raised by the controversy, a binding decision of a Full Court of this Court or the High Court; a failure to apply a decision of a Full Court of this Court, an intermediate Court of Appeal of another jurisdiction or an authority of the High Court expressing a clear persuasive emphasis of opinion in favour of a particular conclusion (particularly concerning legislation of the Commonwealth Parliament); or some other circumstance that has caused a dispositive adjudication of the controversy to *miscarry*.

84. That minds might differ on a question is not a foundation for a conclusion that a decision supported by exposed reasons for judgment after full argument, is plainly wrong.

85. The difficulty however lies in preserving that degree of important flexibility necessary to enable a judge to do justice between the parties to a controversy inherent in a dispositive adjudication of that controversy when a judge is persuaded that an earlier authority is wrong (apart from illustrations of the kind above) balanced with the importance of consistency and certainty in the administration of the law. The question is always a matter of careful judgment.

86. The circumstances which might properly lead to a departure from an earlier authority will necessarily vary according to the content of the case and the issues and therefore no prescriptive rules ought to be formulated. However, the point of equilibrium in that balance might be reached by recognising the required emphasis necessary in concluding that an earlier authority is “plainly wrong” or “clearly wrong”. In cases where a party advised and represented by experienced senior counsel properly discharging the duty owed to the Court urges upon the Court the merits of the reasoning of the authority in the resolution of the immediate case, it would be difficult to conclude that the authority is “plainly wrong” notwithstanding that a judge might reach an entirely different view of the proper construction of the provision against the background of the facts found and thus conclude that the early authority is wrongly decided. There is a distinction between concluding a decision is wrongly decided and a conclusion that an earlier authority is “plainly wrong” and thus ought not to be applied and followed.

1. I have very gratefully applied the foregoing observations in deciding whether to follow and apply *Peter Greensill*.
2. I am otherwise mindful of the difficulties which have sometimes arisen from the use of the word “plainly” as a measure of the high degree of confidence which a trial judge must have before declining to follow another first instance decision of this Court: Rebecca Lewis, ‘“Plainly Wrong”: The application of the Federal Court’s threshold of error’ (2020) 48 *Australian Bar Review* 372. As Allsop J. (as his Honour then was) observed in *SZEEU v. Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 F.C.R. 214 at 257 [190]-[191], after considering the decisions of the Full Court of this Court in *Chamberlain v. The Queen* (1983) 72 F.L.R. 1 and *Transurban City Link Ltd v. Allan* (1999) 95 F.C.R. 553:

The proper approach enunciated in *Chamberlain* and *Transurban* is that, normally, a previous Full Court decision will be followed unless the later Full Court is convinced or persuaded of the error in the previous decision which would be perpetuated in doing otherwise. If it is a question upon which minds simply differ, both views being open, it would mean that the later court would not be convinced of the earlier court’s error. Beyond these considerations, it is undesirable to formulate exhaustive criteria as to when a later Full Court should or should not depart from an earlier Full Court decision. It will depend upon the nature of the controversy, the strength of the arguments and the particular circumstances, including the degree to which the later court is persuaded of the error of the earlier court.

It is clear from *Chamberlain* and *Transurban* that the question is not whether the error is obvious or patent, that is whether the error appears obvious or plain to see on the face of the judgment. Rather, the use of words such as “plainly” or “clearly” as qualifying the word “wrong” (see *Transurban* at [29]) is merely another way of expressing what both *Chamberlain* and *Transurban* convey: the need for being convinced or persuaded of the earlier Full Court’s error.

1. Whilst the foregoing observations were made in relation to the exercise of this Court’s appellate jurisdiction, in my view analogous concepts apply equally to the exercise of this Court’s original jurisdiction: see also *Hicks v. Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 per French J. (as his Honour then was).

### Applicants’ Submissions

1. The applicants do not submit that Thawley J. was “plainly wrong” because he applied the wrong provisions; or because he applied the wrong version of the provisions; or because he overlooked a provision; or because he failed to apply binding precedent; or because of some other glaring error that needs correction. Rather, they attacked his Honour’s construction of the word “from” in s. 855-10, largely based on arguments or contentions that they submitted had not been drawn to Thawley J.’s attention.
2. This was summarised in the applicants’ written submissions as follows:

(i) Justice Thawley was not directed to various provisions which support the Applicants’ construction of s 855-10 and subdiv 115-C and which were relevant to the disposition of the case (**Statutory Context issue**).

(ii) Nor was Thawley J directed to a Full Federal Court opinion on the effect of s 115-215 for beneficiaries (**Authorities issue**).

(iii) Further still, the context in which the Residency Hypothesis was inserted into the ITAA36 was not considered; nor was the impact of overriding the Residency Hypothesis, in respect of other classes of taxpayers (such as resident beneficiaries of foreign trusts); and had these issues been addressed would have tended against the construction adopted (**Residency Hypothesis issue**).

(iv) There was no consideration of how losses in respect of non-TAP assets could be disregarded (**Loss issue**)

1. The second contention set out above may be dealt with immediately. In *Burton v. Commissioner of Taxation* (2019) 271 F.C.R. 548, I made the following observation at 571‑572 [102]:

It should be noted that at the time the assets were disposed of here, there were and remain complex provisions contained in Pt 3-1 of the 1997 Act that deemed the beneficiary of a trust, in certain circumstances, to be the taxpayer that made the capital gain instead of the trust estate: s 115‑215. The operation of similar predecessor provisions was explained by the Full Federal Court in *Federal Commissioner of Taxation v Greenhatch* (2012) 203 FCR 134. The parties agreed that those provisions applied to the taxpayer, and that we should proceed on the basis that it was the taxpayer, and not the trust estate, that incurred the various instances of CGT event A1. In other words, the 1997 Act treated Mr Burton as if he, in his personal capacity, sold the Nepa Investment (and the other assets sold). Accordingly, what was ultimately included in his assessable income was not his share of the net income of the trust attributable to that gain pursuant to s 97 of the 1936 Act, but rather, a net capital gain pursuant to s 102-5 of the 1997 Act. The taxpayer did not rely upon this statutory fiction in any way as a reason for contending that he was entitled to the FITO he claimed.

1. The taxpayer, Mr. Burton, was a beneficiary of a resident trust estate that had sold certain securities. He was also the trustee of that trust estate. My statement that Subdiv. 115-C operated to treat the taxpayer in that case as if he had sold the shares in his personal capacity, rather than in his capacity as trustee, was relied upon by the applicants before me as support for the proposition that the extra capital gains assessed here to Mr. Martin were “from” a CGT event as required by s. 855-10. That proposition overstates the importance and nature of what I wrote in *Burton*. *Burton* was a case concerning the foreign income tax offset provisions in Div. 770 of the *1997 Act*, as well as Art. 22(2) of the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1983] ATS 16, signed in Sydney on 6 August 1982(the “Convention”)*.* The Court was not in any way concerned with the operation of Subdiv. 115-C or Div. 855. My observations at 571‑572 [102] simply reflected an assurance conveyed to the Court by the parties that no issue concerning the operation of Subdiv. 115-C was before the Court, and that to test the issues arising in relation to Div. 770 and under the Convention, the Court could safely ignore the presence of a trust estate.
2. The applicants also submitted that Stone J. in *Colonial First State Investments Ltd v. Federal Commissioner of Taxation* (2011) 192 F.C.R. 298 expressed the effect of s. 115-215 in similar terms (at 315 [61]):

The Subdivision applies if the trust estate has a net capital gain that is taken into account in calculating the trust’s net income for the income year: s 115-210. Consistent with the explanation in the outline above, s 115-215 is intended to ensure that appropriate amounts of the trust estate’s net income attributable to the trust estate’s capital gains are treated as a beneficiary’s capital gains when assessing the beneficiary. It applies to the beneficiary of a trust estate whose assessable income includes, inter alia, an amount under s 97(1) of the 1936 Act.

With respect, this paragraph appears to do no more than restate the purpose of s. 115-215 as stated in subs. (1).

1. In relation to the first contention as set out above at [48], it was also said that Thawley J. had not been taken to certain relevant provisions. In their written submissions, the applicants put the following:

As noted above, his Honour was not taken to the following:

(i) Section 100-20 and s 102-20 are unambiguous: you can make a capital gain or loss *only* if a CGT event happens;

(ii) Section 115-215(4A) is also unambiguous: to avoid doubt the amount in 115‑215(3) is a \*capital gain (as defined), therefore characterising the gain in s 115- 215(3) as being from a CGT event;

(iii) The \*capital gain worked out under CGT event A1 is the capital proceeds “from the disposal” less the asset’s cost base ( s 104-5 item A1 of the table)

(iv) Section 855-10(1) is read consistently with 115-215(4A), Note 3 to s 115-215 and s 100-20 and s 102-20 and the lack of any qualifying words in s 855-10(1) indicates that it makes no difference whether the \*capital gain occurred directly or indirectly to the taxpayer.

1. Before me, the applicants accepted that, contrary to para. (ii) above, his Honour was taken to s. 115-215(4A).
2. As to the proposition at para. (i), it was forcibly submitted that whilst a taxpayer may make a capital gain from a CGT event that might happen to another entity, nonetheless every capital gain must, in some way, be the product of such an event. Here, the capital gains assessed to Mr. Martin arose because Holdings had sold shares in Altium Limited, and each sale constituted the happening of CGT event A1. It followed that Mr. Martin’s capital gains were “from” those events in the sense required by s. 855-10. That conclusion did not involve any forced or artificial interpretation of the word “from”; rather, it applied the ordinary and natural meaning of that word. In that respect, the applicants referred to the following observation of Beaumont J. in *BHP Petroleum (Timor Sea) Pty Ltd & Ors v. Minister for Resources* (1994) 49 F.C.R. 155 at 170-171:

In my opinion ... ‘from’ is intended to have its dictionary meaning, that is to say, to indicate the starting point, source or origin, of an application or request.

1. In that case, the Full Court of this Court was concerned with construing the word “from” as it appears in s. 20(4) of the *Petroleum Resource Rent Tax Assessment Act* *1987* (Cth.). Section 20 relevantly addresses a taxpayer’s ability to apply to the Resources Minister to combine more than one petroleum project for the purposes of that Act.
2. The applicants also relied upon Note 3 to s. 102-20 and upon s. 115-215(4A) for the proposition that, for the purposes of Pt. 3-1 of the *1997 Act* (the CGT rules), it makes no difference whether a CGT event happens to you or to another entity; all that matters is that a CGT event had taken place.
3. The applicants also submitted that if Thawley J.’s construction of the phrase “from a CGT event” in *Peter Greensill* were found to be correct, then the operation of several other provisions in the *1997 Act* would be “thrown into doubt”. They gave the following examples in their written submissions:

(i) s 115-15 – if *Greensill* is correct, then no foreign beneficiary of a resident trust was ever entitled to the CGT discount which appears contrary to Parliament specifically introducing s 115-110, s115-115 and s 115-120 to curtail that discount after 8 May 2012;

(ii) s 121-20 – if *Greensill* is correct then the implication arises that there is no statutory requirement for a beneficiary to keep records of attributable gains under s 115-215 for the reason that they cannot be said to be from a \*CGT event. Contrary to the Respondent’s submission recorded in *Greensill* that it would be onerous to require foreign trustees to be expected to keep records, the Applicants contend it would be astounding if they were not so required. Foreign trustees need to keep records for the purpose of s 97, s 99B and to determine what is TAP; in the context of any dispute with the Respondent that might arise for a taxpayer (often many years later given time periods for amendment of assessments), in order to maintain the optimum ability to contest assessments, a taxpayer must keep CGT records indefinitely (despite the more limited time periods in Div 121) and it is not onerous in this day of electronic storage for a taxpayer to keep records; further, in discharging the taxpayer’s burden of proof under s 14ZZK or s 14ZZO of the *Taxation Administration Act 1953* (Cth), it is no answer to assert that he, she or it complied with CGT record keeping obligations;

(iii) s 768-915(1) – it follows from *Greensill* that the same application would apply here and temporary resident beneficiaries would not disregard a capital gain or loss attributed to them;

(iv) s 100-33(1) – if *Greensill* is correct then a resident beneficiary could not apply a rollover in respect of a capital gain arising under s 115-215;

(v) s 152-100 Guide – this would not appear to make any sense if the beneficiaries of a trust which claims the small business concession could not likewise benefit;

1. The applicants’ third contention concerned what it described as the “residency hypothesis”. This was a reference to the definition of “net income” in relation to a trust estate in s. 95 of the *1936 Act* which assumes that the trustee is a resident of Australia for the purpose of calculating the trust estate’s total assessable income. I explained the origin of this assumption or “hypothesis” in *Sole Luna Pty Ltd as Trustee for the PA Wade No 2 Settlement Trust v. Commissioner of Taxation* [2019] FCA 1195. It had been introduced into the definition of “net income” in 1979 to overcome the effect of the High Court’s decision in *Union-Fidelity Trustee Company of Australia Ltd v. Federal Commissioner of Taxation* (1969) 119 C.L.R. 177. At [91]-[92] in *Sole Luna*, I said:

91. Section 95 was amended in 1979 to overcome an aspect of the decision in *Union-Fidelity Trustee Company of Australia Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 177. In that case, the High Court decided that the net income of a trust estate for the purposes of Div 6 of Part III of the 1936 Act could not include income from a foreign source. The definition of “net income of a trust estate” in s 95 was at the time relevantly in the following form:

... ‘the net income of a trust estate’ means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income, less all allowable deductions, except the concessional deductions and except also, in respect of any beneficiary who has no beneficial interest in the corpus of the trust estate, or in respect of any life tenant, the deduction of such of the losses of previous years as are required to be met out of corpus.

The words “and were a resident” did not appear in this version of the definition of “net income of a trust estate”. Kitto J observed at 187 that the hypothetical taxpayer contemplated by the definition of “net income of a trust estate” did not include anything which would make that taxpayer a resident of Australia. His Honour said:

In the light of the definition of “taxpayer” the expression “calculated under this Act as if the trustee were a taxpayer in respect of that income” may be expanded to read “calculated under this Act as if the trustee were a person deriving that income”. But the “as if” shows beyond question that the basis of the calculation is to be a hypothesis different from the actual fact. Since the fact is that the trustee derived the income, the hypothesis that it was derived by “a person” must be that it was derived not by the trustee but by a hypothetical person as to whom none of the facts is postulated which would make him a “resident” within the definition of that word in s. 6 (1). Unless a person is a “resident” of Australia he is by definition a “non-resident”. Accordingly, by limiting the meaning of “the net income of a trust estate”, for the purposes of (inter alia) s. 99, to the total assessable income of the trust estate calculated under the Act as if the trustee were a taxpayer in respect of that income, less all allowable deductions except concessional allowances, s. 95 excludes from gross income all income which s. 25 (1) brings into assessable income in the case only of a taxpayer who is a resident (i.e., income from sources outside Australia), and, as consistency requires, excludes from the allowable deductions to be subtracted from the gross income which remains included in the assessable income those deductions which are allowable only in the case of such a taxpayer.

Barwick CJ reached the same conclusion. His Honour said at 181:

Income for the relevant purposes of the Act falls into one of two categories – that which is derived from an Australian source and that which is not derived from an Australian source. The scheme of the Act is to bring to tax both kinds of income where the taxpayer deriving it is a resident of Australia but to bring to tax only income of the former kind where the taxpayer is not a resident of Australia. It is therefore clear to my mind that if nothing is known as to the residence of a taxpayer the only income which can certainly be said to be assessable income is the income derived by the taxpayer from an Australian source. Unless it is known that he is a resident, it cannot be said that any other income is to be included in his assessable income.

See also Menzies J at 190.

92. By the *Income Tax Assessment Amendment Act 1979* (Cth) (the “1979 Act”), a new version of the definition, now simply called “net income”, was substituted for the old. The new definition inserted the words “and were a resident” to the content of the hypothetical taxpayer. The Explanatory Memorandum which accompanied the 1979 Act (*Income Tax Assessment Amendment Bill (No.5) 1978* (Cth)) made it clear that Parliament was of the view that the taxable income of a resident trust estate should include income from all sources. The Explanatory Memorandum stated as follows at 16:

In broad terms, the amendments to be made by these clauses are designed to ensure that resident beneficiaries are subject to Australian tax under the trust estate provision both on income from Australian sources and, subject to relief from double taxation where it is also taxed in the country of source, on income from foreign sources, while non-resident beneficiaries are taxed only on income from Australian sources. To achieve these results, the net income of a trust estate is to be calculated as if the trustee were a resident taxpayer. The assumption that the trustee is a resident will have the effect of bringing into the calculation of net income, assessable income from foreign sources and deductions related to that foreign source income.

The new definition in s 95 was described as follows at 21:

The term “net income” is to be defined as meaning, in relation to a trust estate, the total assessable income of the trust estate calculated as if the trustee were a resident taxpayer less all allowable deductions other than those deductions that are excluded from consideration by the present definition of “the net income of a trust estate” ...

1. The relevance of this residency hypothesis to the construction of s. 855-10 was not entirely clear to me. It would appear to be anchored in the proposition that, if I were to follow *Peter Greensill*, certain anomalous outcomes would arise. Principally, it was submitted that a resident beneficiary of a non-resident trust that had made non-T.A.P. capital gains would “escape liability” in respect of those gains until the trustee had distributed the gain to that beneficiary.
2. The applicants’ fourth contention as set out above at [48], called the “losses issue”, was that the “corollary to overriding the Residency Hypothesis is that a foreign beneficiary of a resident trust will not disregard any non-TAP capital losses.”
3. In respect of the third and fourth contentions, it was said that Thawley J. had not been told about the anomalous consequences as contended for by the applicants.
4. Much time was also spent in the applicants’ written and oral submissions about how s. 855-10 was to intersect with Subdiv. 115-C. The parties disagreed about this issue. In summary form, the applicants contended that it was the relevant beneficiary who applied steps 1 to 4 of s. 102‑5 for the purposes of s. 115-225, and that if s. 855-10 were applicable, it would apply at step 1. Thus, in their written submissions at para. 33(ii), the applicants state as follows:

The s 115-225(1) amount for each capital gain of the trust estate (the “attributable gain”) is equal to the amount of each capital gain after applying steps 1 to 4 of the s 102-5(1) method statement multiplied by Mr Martin’s share of each capital gain (pursuant to s 115-227) divided by the amount of each capital gain.

Pausing there, reading s 115-225(1) as part of s 115-215(3), s 115-215(3) in effect, reads as follows: if you are a beneficiary of a trust estate, for each \*capital gain of the trust estate, Division 102 applies to you as if you had a \*capital gain equal to the amount (or twice or 4 times the amount) of the capital gain remaining after *applying* steps 1 to 4 of the method statement multiplied by your share of the net income.

Accordingly, the question that arises here is – who is *applying* the method statement for the purposes of s 115-225? The Applicants contend that taking into account 115-215(3) and (4A), it must be Mr Martin. In other words, Mr Martin applies the method statement in respect of the trust estate’s capital gains, starting from the position that he and not the Trustee had each one of the \*capital gains of the trust estate. The “you” in step 1 of the method statement is the beneficiary; albeit in respect of the trust estate’s \*capital gains because he is treated by s 115-215(3) as if he had the gain. His foreign residency is now relevant. He then applies Steps 1 to 4 of the method statement, as directed by s 115-225(1)(a); disregarding at Step 1, non-TAP \*capital gains and non-TAP \*capital losses, as directed by s 855-10.

It is highlighted that the Applicants’ construction in this regard is at odds with *Greensill* at [30], [40],[42] and [47(1)].

(Footnotes omitted.)

1. The Commissioner disagreed with the foregoing. In his view, the entity applying steps 1 to 4 of s. 102-5 for the purposes of s. 115-225 was the applicable trustee. He contended that if a non-resident beneficiary were to make capital gains arising from an application of s. 115‑215(3) that were to be disregarded (which, he said, was possible in the case of a fixed trust where s. 855-40 is engaged), that beneficiary would apply Div. 855 after the operation of each of ss. 115-215, 115-225 and 115-227 had determined the amount of the beneficiary’s extra capital gain. It was my impression that this methodology was what the applicants described as their “alternative approach.”
2. For my part, this issue did not seem to make a great deal of difference to the applicants’ case. Nor did the operation of Subdiv. 115-C seem to be directly relevant to the correct construction of s. 855-10 and its use of the word “from”. As I understood it, the applicants’ case turned upon whether it could be said that the extra capital gain, which by operation of s. 115-215(3), Mr. Martin had obtained, could be said to have been “from a CGT event” as required by s. 855‑10. With great respect, the answer to that question did not to me seem to turn upon how a taxpayer should apply ss. 115-225 and 115-227. It may otherwise be accepted that the interaction of Subdiv. 115-C and Div. 855 may be of possible relevance to the assessments issued to Holdings. This is explained below.
3. The applicants also disagreed with the proposition that s. 855-40 was a specific, and exhaustive rule, addressing the position of non-resident beneficiaries of resident trusts that make capital gains from the disposal of T.A.P. assets. They submitted that having regard to the legislative history, which they contend had not been explained to Thawley J., s. 855-40 was “an historical curiosity with little field of operation.” The applicants contended that prior to the introduction of the predecessor to s. 855-40 (former Subdiv. 768-H), the funds management industry needed relief because, at that time the *1997 Act* taxed as a capital gain the sale by a non-resident beneficiary of her or his interest in a resident fixed trust even though such a trust mostly owned non-T.A.P. assets. New Subdiv. 768-H provided this relief. But it also provided express relief where a capital gain arising from the sale of a non-T.A.P. asset by a resident fixed trust had flowed through to a non-resident beneficiary and that beneficiary had thereby obtained an extra capital gain by reason of Subdiv. 115-C. In both cases the relief was limited to “fixed trusts”. The applicants asserted that this second form of relief was not needed because the predecessor to Div. 855 (former Div. 136 of Pt. 3-1 of the *1997 Act*) already permitted a capital gain of this kind to be disregarded, just like present s. 855-10. It was suggested that the second type of relief may have been introduced to overcome the Commissioner’s then practice to tax these types of capital gains, based upon what the applicants said was a similar misapprehension of the former law to the misapprehension now relied upon by the Commissioner in relation to Div. 855. In any event, the applicants accepted that, on their construction of s. 855-10, s. 855‑40 was left with little work to do.
4. In this context, like the taxpayer in *Peter Greensill*, the applicants contended that the Commissioner’s construction of s. 855-10 led to entirely capricious outcomes. It was accepted that had Mr. Martin directly owned and then sold the Altium shares, his capital gains would have been disregarded under Div. 855. As the applicants submitted at para. 20 of their written reply:

Section 855-40 manifests no intelligible policy which would explain the anomaly that must follow from the construction advanced by the Respondent. On his construction, a gain made on the happening of a CGT event to an asset which is not TAP would be disregarded if made by a non-resident directly, or if made by a non-resident trustee and distributed to a non-resident or resident beneficiary, but would not be disregarded if made by a resident trustee and distributed to a non-resident beneficiary. Such an outcome is capricious and is not to be reached by adopting a construction which departs from the plain words of the section and can only be supported by a presumption which is liable to be displaced by the legislative text.

1. Before me, Ms. Seiden, Senior Counsel for the applicants, elaborated upon the foregoing arguments. When asked to identify the error in the reasons in *Peter Greensill* which would justify the characterisation of that decision as “plainly wrong”, she contended that it was not open to read s. 855-10 as requiring the relevant capital gain to have been from a CGT event which had happened to the taxpayer seeking to rely upon the provision to disregard that capital gain. She argued that Thawley J. had impermissibly added words to the language of s. 855-10 in the following way:

(1) Disregard a \*capital gain or \*capital loss from a \*CGT event ***that happens to you*** if:

1. However, the words “that happens to you” simply do not appear in the provision and should not, it was said, be implied into it so as to confine the field of application of s. 855-10 in this way. Equivalent words appear expressly in other parts of Pt. 3-1 of the Act, indicating, it was said, that Parliament had made a conscious choice not to include them in s. 855-10. In the written submissions of the applicants the following examples of this were given:

**104-35 Creating contractual or other rights: CGT event D1**

(1) CGT event D1 happens if you create a contractual right or other legal or equitable right in another entity.

………

*Exceptions*

(5) CGT event D1 does not happen if:

………

(b) the right requires you to do something that is another \****CGT event that happens to you***; or …….

**104-155 Receipt for event relating to a CGT asset: CGT event H2**

(1) CGT event H2 happens if:

(a) an act, transaction or event occurs in relation to a \*CGT asset that you own; and

(b) the act, transaction or event does not result in an adjustment being made to the asset’s \*cost base or \*reduced cost base.

………

*Exceptions*

(5) CGT event H2 does not happen if:

………

(b) the act, transaction or event requires you to do something that is another **\**CGT event that happens to you***; or

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There is a roll-over if a CGT event happens to you because of something occurring in relation to one or water entitlements for the event to happen to you.

(Emphasis added by the applicants.)

1. I was otherwise urged to find that there was nothing ambiguous about the language found in s. 855-10(1). A capital gain cannot be made without the happening of a CGT event. This had occurred here with the sale of the Altium shares and the corresponding happening of A1 CGT events. Mr. Martin’s capital gains came “from” those events. The fact, it was said, that the applicable CGT events might have happened to another entity was of no moment. Note 3 to s. 102-20 confirms that a taxpayer can make a capital gain from a CGT event that has happened to another entity. This central point of the applicants’ case was also, it was submitted, confirmed by the definition of a capital gain in s. 995-1 to the *1997 Act* which is in the following form:

**capital gain**: for each \*CGT event a capital gain is worked out in the way described in that event.

1. Finally, the applicants also relied upon the fact that one possible explanation for the presence of the phrase “from a CGT event” in s. 855-10(1) may be discernible from the language used in former Div. 136 of Pt. 3-1 (the predecessor CGT provisions). Former s. 136-10 of the *1997 Act* was in this form:

You make a \*capital gain or \*capital loss from a \*CGT event set out in this table only if the thing referred to in the relevant row of the table has the \*necessary connection with Australia.

1. A table of CGT events then followed this provision. On one view, the phrase “from a CGT event” may simply derive from its original use in former s. 136-10 to incorporate this table.

### Commissioner’s Submissions

1. I do not wish to dwell on the Commissioner’s submissions concerning the correct operation of Subdiv. 115-C or upon Mr. O’Meara’s formulae. For the moment, it is more profitable to summarise the Commissioner’s reasons for supporting Thawley J.’s construction of s. 855‑10(1) in *Peter Greensill*.
2. Mr. O’Meara submitted that the case presented by the applicants was capable of being reduced to the following syllogism:
   1. section 115-215 generates a capital gain for a beneficiary;
   2. all capital gains are from CGT events;
   3. it follows that Mr. Martin’s capital gains were “from” CGT events within the meaning of s. 855-10.
3. Mr. O’Meara contended that the syllogism suffered from an undistributed middle. The middle term assumed the very issue of statutory construction in favour of the applicants. It followed that the syllogism neither advanced nor denied the applicants’ case.
4. Mr. O’Meara submitted that the statutory context well supported the construction of s. 855-10 as adopted in *Peter Greensill*. He relied upon the statutory context identified by Thawley J. and upon the following further contentions:
   1. in the definition of T.A.P. in s. 855-15, item 3 of the table in s. 855-15 refers to a CGT asset “you have used at any time in carrying on a business” through a permanent establishment;
   2. the reference in s. 855-25, which prescribes when an interest held in an entity is an “indirect Australian real property interest”, to the holding of a membership interest in an entity;
   3. the reference to “direct ownership” and “indirect ownership” in s. 855-40(1). For convenience, I reproduce that subsection as follows:

The purpose of this section is to provide comparable taxation treatment as between direct ownership, and indirect ownership through a \*fixed trust, by foreign residents of \*CGT assets that are not \*taxable Australian property.

* 1. the applicants submitted that it was plain that s. 855-10 deals with “direct” ownership of a CGT asset by a taxpayer and that s. 855-40 deals with “indirect” ownership in the limited way conferred by that provision. However, the only beneficiaries entitled to “comparable taxation treatment” with a direct owner are those who own assets indirectly “through a fixed trust.”

1. The Commissioner also submitted that the word “from” is being used in s. 855-10 as the applicable connector between a capital gain and a given CGT event. Words used in this way can be difficult to construe and may justify more than one meaning depending on the context in which they appear. I was referred to the following passage in *Comcare v. Martin* (2016) 258 C.L.R. 467 at 479 [42] (per French C.J., Bell, Gageler, Keane and Nettle JJ.):

Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any “common sense” approach to causation which can provide a useful, still less universal, legal norm. Nevertheless, the majority in the Full Court construed the phrase “as a result of” in s 5A(1) as importing a “common sense” notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context and purpose.

(Footnotes omitted.)

1. The Commissioner submitted that Thawley J. correctly interrogated the “statutory text, context and purpose” when construing the connector word “from.” His Honour did not add words to the language of s. 855-10; rather he gave meaning, by the use of language, to that connector word. Additional language is often required to explain words used as connectors, such as in the case of the phrases “in relation to” or “in respect of”.
2. The Commissioner also relied upon s. 115-215(4A). He submitted that the provision exists precisely because the ordinary rule is that a capital gain cannot be made unless a CGT event happens to a taxpayer. That ordinary rule was said to be expressed in s. 102-20, which provides that a capital gain or loss can only be made “if and only if a CGT event happens.” Section 115‑215(4A) was introduced, it was said, precisely because s. 115-215(3) creates an assessable extra capital gain for a taxpayer absent the occurrence of a CGT event which has happened to the taxpayer.

### Disposition

1. *Peter Greensill* is, with very great respect, a very well-reasoned judgment that traverses all of the relevant statutory and extrinsic materials that bear upon the correct construction of s. 855‑10. It reaches a logical conclusion after detailed analysis of the language of that provision, statutory context, and legislative history. As I understand it, it is the subject of an appeal to the Full Court of this Court. In such circumstances, as a matter of precedent, comity and good sense, in my view I should follow it as a trial judge. If I may say so, that is all the more important in the field of taxation law, being a national law that affects all Australians: c.f. *Australian Securities Commission v. Marlborough Gold Mines Ltd* (1993) 177 C.L.R. 485 at 492. It would undermine the certainty of that law if judges of this Court, sitting at first instance, were to develop and apply conflicting interpretations of the *1997 Act* and *1936 Act*.
2. The contentions of the applicants before me were also the subject of rational and thoughtful argument. If one were to confine the required analysis just to the language of s. 855-10, their submissions have much to commend them, and might be favoured by an appellate court. There is nothing about the applicants’ contentions that does any damage to the ordinary and natural meaning of the word “from.” Their construction of that word is neither peculiar nor strained. Moreover, the case the applicants advance would, one might think, be likely to enhance “Australia’s status as an attractive place for business and investment”, which is one of the “objects” of Div. 855: s. 855-5(1)(a).
3. Nonetheless, I am not convinced that *Peter Greensill* is wrong. On the contrary, and with great respect to the applicants, I am inclined to the view that it was correctly decided. That is largely because s. 855-10 cannot be construed in isolation. It must be construed in its statutory context. That context includes all of the matters highlighted by Thawley J. in *Peter Greensill*, and the matters referred to by Mr. O’Meara. Whatever might have been the reach of former Subdiv. 768-H, s. 855-40 is now a specific rule that addresses capital gains of the kind that arise for beneficiaries under Subdiv. 115-C. By its terms, it does not apply to a non-resident beneficiary when a CGT event happens to that person, such as the sale by that non-resident beneficiary of units in a resident unit trust. Rather, it only operates where a CGT event has happened to an asset of the trust and not to an asset of the beneficiary: s. 855-40(2)(b). Where a capital gain is nonetheless made by that beneficiary which is “attributable” to that CGT event, the possibility of relief arises. That language, in particular the use of the word “attributable”, is entirely consistent with the operation of Subdiv. 115-C, which creates an extra capital gain for a beneficiary when a trust estate has made a net capital gain, and calculates the amount of that gain, amongst other things, by reference to the amount of the capital gain to which the beneficiary is “specifically entitled” as determined under s. 115-228.
4. In my view, like Thawley J., I am presently persuaded that s. 855-40 is a specific rule directed at an application of Subdiv. 115-C to a foreign beneficiary. However, it is a rule limited to fixed trusts. As Thawley J. recognised, Parliament made a specific choice to limit the rule in this way. Because the applicants’ construction of s. 855-10 entirely avoids that limitation, Thawley J’s conclusion and reasoning should be preferred. Unless there are clear indications to the contrary, a court should not adopt a construction of s. 855-40 that leaves it, as conceded by the applicants, with little work to do: *Project Blue Sky Inc v. Australian Broadcasting Authority* (1998) 194 C.L.R. 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ. Here, there are no such clear contrary indications. In that respect, this is probably not a case where s. 855-40 can be characterised as a provision that had only been inserted into Div. 855 “from an abundance of caution” and no more: c.f. *Commissioner of Taxation v. Greenhatch* (2012) 203 F.C.R. 134 at 144 [40] per Edmonds, Greenwood and Robertson JJ. Whilst the provision may have been inspired by the concerns of the funds management industry, those concerns should not control the meaning of the provision or deny its language the effect Parliament intended: c.f. *Woodside Energy Ltd v. Commissioner of Taxation* (2009) 174 F.C.R. 91. It follows that because s. 855-10 must be read with s. 855-40, I am not convinced that the construction of the word “from” adopted in *Peter Greensill* should be rejected.
5. The applicants’ reliance on numerous supposed anomalous outcomes probably does not defeat that conclusion. Care should be taken in relying upon possible anomalies in order to justify one’s preferred construction of a statutory provision. As Black C.J. and Sundberg J. observed in *Esso Australia Resources Ltd v. Federal Commissioner of Taxation* (1998) 83 F.C.R. 511 at 518-519, when considering ss. 118 and 119 of the *Evidence Act 1995* (Cth.):

Especially when different views can be held about whether the consequence is anomalous on the one hand or acceptable or understandable on the other, the Court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the Parliament.

See also *ConnectEast Management Ltd v. Federal Commissioner of Taxation* (2009) 175 F.C.R. 110 at 119 [41].

1. In my view, and with very great respect, the immediate statutory context, in particular the role of s. 855-40 and the language that it uses, presently appears to me to be of more importance in the construction of s. 855-10 than the various possible anomalies relied upon by the applicants. In particular, the possible anomalies identified at para. 84 of the applicants’ written submissions are said to arise in provisions falling outside of Div. 855 (and of Subdiv. 115-C). In that regard, I query whether the context-specific construction of the connector word “from” in s. 855-10 that I have accepted would have any real bearing on the construction of those other provisions. Those provisions would fall to be construed in their own immediate statutory contexts.
2. The same observations should also be made about the reliance by the applicants upon other provisions falling outside of Div. 855 which expressly use the phrase a “CGT event that happens to you.” In any event, and with great respect, I also observe that the applicants’ submissions concerning the impermissible reading of the words “that happens to you” into s. 855-10 appear to beg the question. They proceed on the assumption that the connector word “from” in s. 855-10 is to be construed in the broader way contended for the applicants.
3. I am also not convinced that Thawley J. was wrong in concluding that one should not construe a provision based upon some pre-existing *a priori* assumption about the content of the law. In the case of a taxing Act, such assumptions are probably of no validity. As Gleeson C.J. observed in *Carr v. Western Australia* (2007) 232 C.L.R. 138 at 143 [6]:

[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

1. I otherwise respectfully agree with the submissions otherwise advanced by Mr. O’Meara on behalf of the Commissioner that were made in support of Thawley J.’s decision. It follows that the applicants’ tax appeals should be allowed, but only in relation to the calculation of the correct CGT discount which the parties agreed should be remitted to the Commissioner to reconsider.

### The Assessments Issued to Holdings

1. The parties disagreed about the excessiveness of the assessments issued to Holdings as trustee of the Trust. In particular, the Commissioner was of the view that if I were to decide that Mr. Martin was entitled to disregard his capital gains pursuant to s. 855-10, it would not follow that there was no additional amount to be included in the assessable income of Holdings pursuant to s. 98 of the *1936 Act* and s. 115-220 of the *1997 Act*. That is because the Commissioner submitted that the moment for Mr. Martin to disregard his capital gains was *after* those gains had been created by s. 115-215 and quantified by s. 115.225. It followed that, in such a case, the requirement in s. 115-220(2)(a) for there to be an amount arising under s. 115-225 would be satisfied.
2. The applicants disagreed with this approach because, amongst other things, they contended that Mr. Martin would disregard any capital gains at an earlier stage in applying s. 115-215(3). In such a case, there would be no amount arising under s. 115-225 because all of the applicable gains would have first been disregarded.
3. I have decided that Mr. Martin was not entitled to disregard the capital gains he had made pursuant to s. 855-10. It follows that I need not decide the difficult issues described above. I think it would be better to decide those issues in a case where they need to be resolved.
4. As I understood it, the parties were otherwise in agreement about how the applications concerning Holdings were to be disposed of on the basis, which I have found to be correct, that Mr. Martin was not entitled to disregard the capital gains he had made.

### The Remission Decision

1. By an amended originating application, Mr. Martin sought orders for the setting aside of the Commissioner’s S.I.C. remission decision for the 2014 year of income on the following grounds:

The decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made as the decision maker exercised the discretionary power not in accordance with rule or policy or without regard to the merits; and

There was a breach of the rules of natural justice in connection with the making of the decision in failing to take into account relevant considerations, including for the following reasons:

1. the taxpayer took reasonable care to comply with his taxation obligations;
2. the taxpayer had a reasonably arguable position;
3. the respondent concedes (2)(a) and (2)(b);
4. the 2014 assessment issued on 22 April 2015 and the audit did not commence until 31 January 2017.

There was a breach of the rules of natural justice in that the respondent has not treated the applicant with taxpayers in a like situation, in particular by refusing to apply PS LA 2006/8 even though one of the criterion (being the two year time period) was not strictly met.

1. Before me, it did not appear that Mr. Martin put any real focus on these grounds. Rather, Ms. Bishop, who presented the case for Mr. Martin, focused on a different case, or at least that is what it appeared to be to me. This case was, what might be characterised as a short point, and was concisely developed. The Commissioner made no objection to it.
2. In simple terms, Ms. Bishop argued that the decision maker had asked the wrong statutory question and had thereby erred at law. She commenced by contrasting an aspect of the test under s. 8AAG of the *T.A.A.* for remission of G.I.C. with the applicable test for the remission of S.I.C. pursuant to s. 280-160 of Sch. 1 of the *T.A.A.* Under s. 8AAG(5), the Commissioner may remit G.I.C. where he is satisfied that “there are special circumstances because of which it would be fair and reasonable to remit all or a part of the charge.” In contrast, s. 280-160 does not refer to “special circumstances”, and permits remission “if the Commissioner considers it fair and reasonable to do so.” Ms. Bishop submitted that a careful reading of the Commissioner’s record of decision shows that the decision maker applied the test as it is expressed under s. 8AAG rather than as it is expressed in s. 280-160.
3. Ms. Bishop referred the Court to the following parts of the Commissioner’s written decision (dated 15 August 2019):

We have decided that in your situation there are no **special circumstances** that make it fair and reasonable to reduce the SIC.

…

Full or partial remission of SIC may be warranted where:

…

* There are **special circumstances** where it would be fair and reasonable to do so.

…

While we acknowledge your statements in your application for remission, we have determined that they are not a basis for any remission of SIC.

Due to the absence of any **special circumstance** that warrants remission, your request for remission of SIC is therefore refused.

(Footnote omitted and emphasis added.)

1. She submitted that the foregoing shows that the decision maker was under the misapprehension that the test for remission under s. 280-160(1) required the identification of *special* circumstances that make it fair and reasonable to remit S.I.C. Because of that mistake, the decision maker had asked the wrong statutory question and had thereby erred.
2. The Commissioner disagreed. He first submitted that the record of the decision should not be construed minutely and finely with an eye keenly attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 C.L.R. 259 at 272. So much may be accepted. He then submitted that when one applied that approach, and looking at the reasons in totality, the phrase “due to the absence of any special circumstance” should be read simply as a conclusion that the circumstances relied upon by Mr. Martin were not sufficient to constitute remission on fair and reasonable grounds. Those circumstances were that Mr. Martin had taken reasonable care; had a reasonably arguable position; and that the Commissioner had only just commenced his audit within the two year time period prescribed in *PS LA 2006/8 — Remission of shortfall interest charge and general interest charge for shortfall periods*. In other words, the decision maker had considered whether it was fair and reasonable to remit the S.I.C based on the circumstances identified by Mr. Martin.
3. I commence by making the observation that the tests expressed in s. 8AAG(5) and s. 280‑160(1) are different, although in their practical application they may well overlap. Section 280-160(1) confers a very general power of remission whereby the Commissioner may consider any matter that he considers might make it fair and reasonable to remit S.I.C. The power conferred by s. 8AAG(5) is more confined. That is because it first requires the Commissioner to be satisfied that there are circumstances which are “special” because of which, and nothing else, it is fair and reasonable to remit G.I.C. The first aspect of this power is not a requirement of s. 280-160(1).
4. With great respect to Mr. O’Meara, I do not agree that the decision maker correctly applied the power of remittal. Having regard to the contrast in the language between s. 8AAG(5) and s. 280-160(1), I think the Commissioner has here confused the two powers. One can see that from the repeated reference to the applicable test as being whether there existed “special circumstances that make it fair and reasonable to reduce” the S.I.C., and from the Commissioner’s express conclusion that it was the absence of “any special circumstance” that justified the refusal to remit S.I.C. For these reasons, in my view the decision maker asked the wrong question.
5. It follows that the S.I.C. remission decision should be set aside, and the matter should be remitted to the Commissioner to re-determine whether to remit S.I.C. in accordance with the correct test. Whether that will lead to any remission will be a matter for the Commissioner to determine.

### Form of Final Relief

1. I will give the parties 14 days within which to file agreed orders disposing of all proceedings, especially in relation to the issue of costs. Failing that, each party is to file submissions addressing the form of final relief, again within 14 days.

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| I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Steward. |

Associate:

Dated: 18 August 2020