SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jo* [2012] QCA 356
PARTIES:	**R** **v** **JO, Tatsuo** (appellant)
FILE NO/S:	CA No 349 of 2011 DC No 936 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2012
JUDGES:	Muir and Fraser JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	TAXES AND DUTIES – INCOME TAX AND RELATED LEGISLATION – LIABILITY TO TAXATION GENERALLY – SOURCE OF INCOME – GENERALLY – where appellant convicted after jury trial of nine offences of dishonesty concerning alleged tax evasion scheme – where appellant argued payments to overseas company not dividends within ss 6(1) and 44 *Income Tax Assessment Act* 1936 ("*ITAA*"), deemed dividends, or "income" within ordinary meaning in s 25 *ITAA* 1936 – where appellant submitted jury could not exclude hypothesis that payments were fringe benefits, which were excluded from appellant's assessable income – where appellant contended he did not obtain a financial advantage as a result of the alleged deception – whether payments were dividends, deemed dividends or ordinary income – whether jury could exclude hypothesis that payments were fringe benefits – whether appellant obtained financial advantage from alleged deception CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – AID, ABET, COUNSEL OR PROCURE – PARTICULAR CASES – where offence committed by company controlled by appellant – where appellant argued no evidence he aided company to make payments to another

company within the meaning of s11.2(1) of the *Code* – where appellant contended that because he was guiding mind of company, his acts in making payments were acts of the company and hence the company's liability for the offence was direct not vicarious – where appellant argued that his acts did not constitute aiding because it involved commission of an act which facilities and is different from act that constitutes principal offence – whether the appellant aided company

Criminal Code 1995 (Cth), s 11.2(1), s 134.2
Fringe Benefits Tax Assessment Act 1986 (Cth), s 66, s 136, s 148
Income Tax Assessment Act 1936 (Cth), s 6, s 19, s 23L, s 25, s 44, s 51
Income Tax Assessment Act 1997 (Cth), s 6-5, s 6-10, s 8-1

Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, cited
Expo International Pty Ltd (in Liq) v Torma (1985) 3 NSWLR 225, considered
Federal Commissioner of Taxation v Anstis (2010) 241 CLR 443; [2010] HCA 40, cited
Federal Commissioner of Taxation v Belford (1952) 88 CLR 589; [1952] HCA 73, considered
Federal Commissioner of Taxation v Myer Emporium Ltd (1987) 163 CLR 199; [1987] HCA 18, applied
Fisher v Bennett (1987) 85 FLR 469, considered
Hadjiloucas v Crean [1988] 1 WLR 1006; [1987] 3 All ER 1008, considered
Hamilton v Whitehead (1988) 166 CLR 121; [1988] HCA 65, considered
Howell v Commissioner of Taxation (1994) 28 ATR 105; [1994] FCA 1012, considered
J & G Knowles & Associates Pty Ltd v FCT (2000) 96 FCR 402; [2000] FCA 196, considered
O'Connors Management Pty Ltd v Curry; *Smith v Curry* (unreported, Walsh J, WASC, 17 February 1997), considered
Permanent Trustee Co (NSW) v Federal Commissioner of Taxation [1940] ALR 291; (1940) 2 AITR 109, considered
Potts' Executors v Inland Revenue Commissioners [1951] AC 443, considered
R v Goodall (1975) 11 SASR 94, considered
R v Portus; Ex parte Federated Clerks Union of Australia (1949) 79 CLR 428; [1949] HCA 53, considered
R v Vasic (2005) 11 VR 380; [2005] VSCA 38, considered
Raftland Pty Ltd v Federal Commissioner of Taxation (2008) 238 CLR 516; [2008] HCA 21, considered
Re Ross; ex parte A-G for the Northern Territory (1980) 54 ALJR 145; [1980] HCA 2, considered
Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 18 FCR 449; [1988] FCA 179, considered

	Snook v London & West Riding Investments Ltd [1967] 2 QB 786, considered *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513; [1987] HCA 48, considered *St Michaels Golf Club v Bell* [2002] NSWSC 61, considered
COUNSEL:	F L Harrison QC, with D J Walsh and M J Henry, for the appellant P Callaghan SC, with M P Cahill, for the respondent
SOLICITORS:	Rostron Carlyle for the appellant Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MUIR JA**: I agree that the appeal should be dismissed for the reasons given by Fraser JA.

[2] **FRASER JA:** The appellant has appealed against his convictions after a trial before a jury in the District Court of nine offences of dishonesty concerning an alleged tax evasion scheme.

[3] The appellant's senior counsel frankly acknowledged that the evidence in the Crown case proved that the appellant had put in place arrangements which amounted to shams designed to reduce tax liabilities. The appellant also did not contend that the evidence was insufficient to allow the jury to find beyond reasonable doubt that the Crown had proved the dishonesty and deceptions alleged against him. In relation to eight of the convictions (the exception was count 4), the appellant's argument was that the trial judge erred in holding that the appellant had a case to answer. The suggested deficiency in the Crown case on those eight convictions concerned the proper characterisation of various payments for the purposes of the income tax and fringe benefits tax laws once the sham arrangements were disregarded. In relation to one of those eight convictions (count 9) the appellant advanced an alternative contention that the appellant's acts could not amount to aiding the commission of the offence by the company which he controlled, as was alleged against the appellant. That contention also formed the sole ground of appeal against the remaining conviction (count 4).

Relevant evidence

[4] Before discussing the appellant's arguments it is useful to summarise the evidence in the Crown case which bears upon those arguments. Much of this evidence was given by Australian Tax Office auditors Messrs Hall and O'Shea with reference to interviews they had conducted with the appellant and numerous documents, tendered in the Crown case, which had been obtained upon searches of the home and office of the appellant, the office of the appellant's accountant, Mr Stoddart, and banks and liquidators. Evidence that the appellant was responsible for the entries in the relevant books of account which were reflected in the tax returns was given by Ms Oertel, who worked as a bookkeeper.

[5] The appellant, who resided in Australia at the relevant times, was a director of the Australian registered companies Sacos Equipment Pty Ltd ("Sacos") and Investa Consultancy Services Pty Ltd ("Investa"). The other director of Sacos was Mr Isaac. Its shareholders were the appellant, Isaac, Taiko Sukamoto, and Sacos

Corporation. The appellant held about one-third of the shares. Isaac gave evidence that the business conducted by Sacos was the appellant's business, Isaac being responsible for an allied business, and that the appellant engaged his own accountant, Mr Stoddart, as the accountant for Sacos and all of the appellant's business. The directors and shareholders of Investa were the appellant and his wife, Ms Misako Jo. Under the appellant's direction, Sacos operated a business of buying and selling mining equipment. Neither Sacos nor Investa had any employees.

[6] Between 17 February 1997 and 20 November 2002, at the appellant's direction, Investa paid Auspac $660,000 and Sacos paid Auspac Finance Corporation Ltd ("Auspac") $1,060,000. Auspac was a Hong Kong registered company controlled by Stoddart. The payments to Auspac were recorded in the Sacos and Investa books of account (which were reflected in their financial statements and income tax returns) as business expenses (such as commissions, consultancy fees and collection costs). The appellant wrote cheques for some of the Auspac payments and directed Oertel to make some of the payments. The appellant recorded three Investa payments to Auspac as "Consultants Fees. Sales Commission", and "Sales Commission" in the Investa chequebook. On 19 September 2002 Sacos paid Auspac $200,000. At the appellant's direction, Oertel recorded the payment as "superannuation".

[7] Between 6 March 1997 and 25 November 2002 Auspac and other companies controlled by Stoddart paid at the appellant's direction $315,000 by way of loan from the appellant to Isaac (Isaac gave evidence of this loan), $34,000 to Misako Jo and $1,137,000 to the appellant. In the appellant's 1998 Income Tax Return he disclosed gross income (salary and wages) of $21,925, compared with 1998 financial year deposits into one of the appellant's personal bank accounts totalling $472,596.81 and withdrawals from that account totalling $510,879.45. In respect of the 1999 financial year, the appellant disclosed gross income (directors fees) of $20,000, whereas deposits made into one of the appellant's personal bank accounts amounted to $305,000. The comparable figures for the financial year ended 30 June 2002 were $20,000 and $135,000 respectively, and for 30 June 2003 the comparable figures were $30,000 and $105,000 respectively.

[8] The payments by Auspac and other Stoddart controlled corporations totalled $1,486,000, which amounted to 90 per cent reimbursement of the amount paid by Sacos and Investa to Auspac. Documents seized from Stoddart's office and home included reconciliations of the payments made by Sacos and Investa to Auspac with the payments by Auspac and other Stoddart controlled companies to the appellant and others at his direction.[1] The documents tendered in the Crown case also included a letter from the appellant to Stoddart dated 30 April 1997 seeking payments to his nominated bank account. Written on the letter was a reconciliation of payments, less ten per cent commission, made by Sacos and Investa to Auspac with payments made by Auspac and other Stoddart controlled companies to the appellant and his wife. Those payments to the appellant and his wife were reflected in bank deposit slips. Other documents recording similar reconciliations, with supporting bank deposit slips, were tendered in the Crown case. A "summary of transactions" prepared by Hall referred to the receipt of the payments from each of which was deducted a fee equal to ten per cent of the payment received.[2] After this

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[1] For example, exhibit 23 at Supplementary Record Book 98.
[2] Exhibit 24 at Supplementary Record Book 99.

information was presented to the appellant and Mr Wood (who the appellant had authorised to act as his representative in dealings with the Australian Tax Office), Wood told Hall that the appellant wished to do the right thing and he had been misled by his accountant, upon whom he had relied.

[9] The dates and amounts of the payments to the appellant and his wife were summarised in an exhibit.[3] The document records some large payments ($225,000 from Auspac on 28 June 1999, $80,000 from Credit Link Finance Pty Ltd on 30 June 1999, $135,000 from Auspac on 27 May 2002, $50,000 from Credit Link Finance Pty Ltd on 30 September 2002, $40,000 from Credit Link Finance Pty Ltd on 3 October 2002, and $135,000 from Auspac on 25 November 2002), but otherwise the total of $1,171,000 is made up of amounts which vary from $1,000 up to $35,000. In all, 52 payments were made between 6 March 1997 and 25 November 2002. Most of the payments were made in 1997 and 1998. There were five payments in 1999, between 28 June and 30 September, and four payments in 2002, between 27 May and 25 November. A comparison between the schedule summarising payments to the appellant and his wife and the schedules summarising payments from Sacos and Investa to Auspac[4] reveals that for the most part the payments to Auspac funded relatively smaller and much more frequent payments from Auspac and Stoddart controlled companies to the appellant and his wife. Thus, for example, the first two payments to Auspac were made by Investa on 17 February 1997 ($20,000) and 6 March 1997 ($20,000) and, before any further payment was made to Auspac, Stoddart controlled companies and Auspac made nine payments in the total amount of $31,000 between 6 March and 22 April 1997.

[10] The appellant spent $273,253 of the money he received from Stoddart controlled companies on the demolition and rebuilding of his home, mortgage payments, and living expenses.

[11] In relation to count 4, Sacos made payments totalling $800,000 to Auspac by cheques drawn between May and November 2002. The cheques were recorded in Sacos' books of account variously as commission, employer expenses, and superannuation expenses. The appellant instructed Oertel to draw the cheques, he signed the cheques, he controlled the manner in which the payments were recorded in Sacos' books of account, and he arranged for the cheques to be paid to Auspac.

[12] In an interview on 22 October 2004, the appellant told Hall and O'Shea that Auspac was a broker which facilitated a number of deals for him. Auspac was not in fact a broker. Nor was it a superannuation fund. There was no record in the Sacos and Investa books of account of Auspac providing brokerage services or any goods or services. The appellant said that Investa and Sacos had no employees. He also said that he had not heard of Credit Link Finance (one of the Stoddart controlled companies that made many of the payments to the appellant) and he denied that Stoddart or any entity associated with Stoddart owed him money. The appellant professed to be surprised when Hall told him that he had information that the appellant had transferred money out of Australia and money had been transferred back to him in Australia. The appellant said that Sacos had paid $35,000 into superannuation for the appellant and his wife "last year" and cash of "of perhaps

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[3] Exhibit 46 "Flow of Funds Spreadsheet" (Supplementary Record Book 166).

[4] Exhibit 28 "Summary – Payments from Sacos to Auspac" (Supplementary Record Book 102) and Exhibit 29 "Summary – Payments from Investa to Auspac" (Supplementary Record Book 103).

$20,000", he had also received director's fees from companies of which he was a director (the appellant mentioned $10,000 per month that had been paid to Investa for the last 12 to 18 months), the appellant had received a salary from Investa, and Investa had also paid some expenses, including a car and mobile phone.

[13] On 17 November 2004, Wood, in the presence of the appellant, told Hall and O'Shea that the appellant had thought that the payments to Auspac were deductible expenses but he was confused; they were not deductible expenses but were loans. There were no loans to Auspac recorded in the Sacos and Investa books of account, except for two payments, totalling $400,000, which Investa made to Auspac in the 1999 financial year and which were reversed to expenses on 30 June 1999.

[14] Wood told Hall on 31 March 2005 that all of the amounts in question were loans and that the appellant would provide documents to demonstrate that. Wood subsequently produced to the Australian Tax Office a purported loan contract between the appellant and Tavam Finance Corporation ("Tavam") dated 1 July 1997 which provided for a ten year unsecured loan of $1,500,000 at 6 per cent. The appellant claimed that he received $1,068,000 in drawdowns on that loan. In two separate statements of assets and liabilities, one for immigration purposes and the other, a finance application, the appellant did not disclose any loan to Tavam. Tavam was owned and controlled by Stoddart. It was registered in the British Virgin Islands and de-registered on 1 May 2001. There was no record of any payment by Tavam into the appellant's personal bank account. Tavam did not have any bank account in Australia. It had not in fact deposited monies into any Australian bank.

[15] The appellant did not give or call evidence.

Evidence characterising the payments under the tax legislation

[16] An officer with the Australian Taxation Office, Mr Knipler, gave evidence (much of it in cross-examination) expressing opinions about the proper characterisation under the taxation legislation of the payments made by Sacos and Investa. For example, he was asked in cross-examination whether the reason that the Commissioner of Taxation had characterised the payments to Auspac as dividends rather than as wages was that this approach resulted in the total tax "…gatherable from all entities being greater…".[5] Knipler responded that "…the tax laws did apply quite differently…" because the companies were not entitled to a deduction if the payments were characterised as a dividend and there would also be no imputation credit, whereas if the payments were characterised as payments in respect of the appellant's employment the companies would be entitled to a deduction. Knipler said that this difference was not a consideration that the Commissioner would take into account; rather, the Commissioner merely answered the question of how the tax law applied in the particular situation. Another example is Knipler's evidence in cross-examination that the payments were caught by the specific provision in s 44 of the *Income Tax Assessment Act* 1936 ("the 1936 Act") and that the appellant's contention that the payments were in the nature of wages was unsustainable because there was no evidence that any of the money was paid to the appellant in his capacity as an employee of either company.[6] Hall gave some evidence of the same character.

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[5] Transcript 8-29 at Record Book 8.1.

[6] Transcript 8-26, lines 10-25; Record Book 848.

[17] In this appeal the respondent relied upon those and other similar passages in Hall and Knipler's evidence. The opinion evidence was inadmissible on the issue of characterisation and I disregard it. I note that there was no objection to that evidence, its admission was not the subject of any ground of appeal, and the appellant disclaimed any contention that the jury were not properly directed about the legal tests to be applied in a way which allowed the jury to decide whether the offences had been proved.

Counts 1, 2 and 3

[18] As the trial judge observed in the course of rejecting the no case submission made on behalf of the appellant, the Crown alleged that the appellant "…participated in a scheme whereby his two companies evaded the payment of tax by falsely taking as deductions payments made to another company which payments were often in a circuitous way paid to the personal accounts of the accused and/or his wife or at least paid at the direction of the accused. By this method the accused evaded the payment of income tax that he would otherwise have been obliged to pay with the consequence that he received a significant flow of untaxed funds to his own accounts." Senior counsel for the appellant accepted that the trial judge accurately described the Crown's case in summing up to the jury as being that "…[the company] in each case dishonestly deprived the Commonwealth of money to which it would have been entitled but for the dishonesty."

[19] Counts 1, 2 and 3 concern the deductions which Sacos and Investa were allowed against their assessable income for the payments to Auspac described in Sacos' and Investa's income tax returns as expenses of various kinds. These counts charged that the appellant was knowingly concerned in offences by Investa (counts 1 and 2, concerning the 1996 and 1997 financial years) and Sacos (count 3, concerning the 1997 financial year) of defrauding the Commonwealth. In each case the principal offence was described as "lodging with the Commissioner of Taxation, a company Income Tax Return…" for specified financial years "…which contained false information". The prosecution alleged that the lodgement of the income tax return with knowingly false information about claimed deductible expenses caused the Commonwealth actual loss of revenue.

[20] At the relevant times, s 29D of the *Crimes Act* 1914 provided that "[a] person who defrauds the Commonwealth … is guilty of an indictable offence". The appellant did not contend that the Crown failed to prove beyond reasonable doubt that he was knowingly concerned in the fraud offences alleged against Investa and Sacos. The appellant's no case submission at trial, which the trial judge rejected and which was substantially repeated on appeal, was that the evidence was insufficient to prove beyond reasonable doubt that those companies had defrauded the Commonwealth. The appellant accepted that the evidence justified ignoring the characterisation that the appellant had given to the companies' payments in his companies' tax returns. His argument was that the prosecution did not prove fraud or that the Commonwealth lost anything of value because the evidence did not allow the exclusion of the hypothesis that the payments were deductible by Sacos and Investa as outgoings "incurred in gaining or producing [the relevant company's] assessable income" under s 51 of the 1936 Act or the materially identical provision in s 8-1 of *Income Tax Assessment Act* 1997 ("the 1997 Act"). That was so, the appellant argued, because the evidence did not exclude the inference that the payments were

employee remuneration paid to third parties on behalf of or as directed by the appellant.[7]

[21] In reply to the respondent's argument that the appellant's remuneration was evidenced by the companies' books of account and financial statements and that there was no evidence that the relevant payments were made as remuneration for work done by the appellant for his companies, the appellant submitted that this ignored the fact that the parties' characterisation of the transactions was a sham; the payments were not shown as wages because wages would have been taxable in the appellant's hands, but the result of applying the sham doctrine is that the payments have to be characterised according to law. The appellant acknowledged that there were amounts for remuneration shown in the companies' tax returns but submitted that these were inadequate payments to the appellant for his role as a director or worker in the business. The appellant argued that if one started with the position that "what is most likely to have happened if the sham scheme had not been adopted would have been simply that the monies would have paid direct to [the appellant], and he would have had to pay tax on them…", then those payments would have been characterised as remuneration for the appellant's work either as a director or in the ordinary business affairs of the company.

[22] The test by which the trial judge considered the no case submission was whether "…there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty…".[8] That was the correct test. For the following reasons the trial judge was also correct in rejecting the appellant's argument that the evidence in the Crown case was incapable of excluding the hypothesis that the companies' payments were remuneration for the appellant.

[23] It is appropriate first to identify the elements of the tax evasion scheme disclosed by the evidence, since this informs the analysis upon all counts in the indictment. The prosecution made a powerful case that the Tavam loan contract did not reflect the actual intentions of the parties to it but was manufactured to provide a false explanation to third parties, notably including the Commissioner of Taxation, of the appellant's receipt of large amounts of money from Stoddart's other companies. In *Sharrment Pty Ltd v Official Trustee in Bankruptcy*[9] Lockhart J quoted Diplock LJ's description of one kind of sham in *Snook v London & West Riding Investments Ltd*[10] as "acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create …". Lockhart J observed that it was not clear from Diplock LJ's formulation whether it was the subjective intention of the parties that was determinative, but considered that logically that seemed to be the correct result.[11] In *Raftland Pty Ltd v Federal Commissioner of*

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7 Section 19(1) of the 1936 Act deemed income or money to have been derived by a person although it was not actually paid over to him but was dealt with on his behalf or as he directed. That section did not apply to the 1997-98 or later year of income. Sections 6-5(4) and 6-10(3) of the 1997 Act treated an entity as having received an amount if the amount had been applied or dealt with on the entity's behalf in the 1997-98 or later year of income.

8 *Doney v The Queen* (1990) 171 CLR 207 at 214-215.

9 (1988) 18 FCR 449 at 453 – 456.

10 [1967] 2 QB 786 at 802.

11 (1988) 18 FCR 449 at 456.

Taxation[12] Gleeson CJ, Gummow and Crennan JJ observed that with reference to the remarks of Diplock J, in *Hadjiloucas v Crean*,[13] Mustill LJ referred to one example of a "sham" where an agreement might be taken otherwise than at its face value, where the term "sham" "denoted an objective of deliberate deception of third parties."

[24] The evidence certainly justified the jury in concluding that the Tavam loan contract should be disregarded on that basis; it did not reflect but was instead designed to conceal the parties' real arrangements.

[25] The evidence also justified the following conclusions. Auspac did not supply any consideration to Sacos or Investa for their payments to Auspac. The payments instead reflected an arrangement between the appellant and Stoddart under which the appellant paid Stoddart 10 per cent of the monies which the appellant caused Sacos and Investa to pay to Auspac, and under which Stoddart caused Auspac and other companies he controlled to pay the 90 per cent balance of those monies as the appellant directed. Auspac was interposed as the initial recipient of the payments only to conceal the identity of the appellant as the person entitled to the payments and to create the deceptive appearance that the payments were made to Auspac for services it had rendered to Sacos or Investa. The jury could therefore disregard the descriptions in Sacos' and Investa's records of the payments to Auspac as company expenses of various kinds. In that respect it was not necessary to apply any legal doctrine concerning sham arrangements. The jury could disregard those descriptions simply because they were wrong.

[26] The appellant's submission that "what is most likely to have happened if the sham scheme had not been adopted would have been simply that the monies would have paid direct to [the appellant], and he would have had to pay tax on them…" reflects an approach which might have been but was not adopted. It is necessary to consider the reason why the companies made the payments that it did make,[14] rather than to consider what the companies might have done if the appellant had not participated in the tax evasion scheme. The jury could exclude remuneration for any work done by the appellant as a reason for the payments to Auspac by finding that the arrangements for the appellant's remuneration were reflected in Sacos' and Investa's accounts and matching financial statements. There was no evidence that those records did not reflect the intention of the appellant and his companies as to the amount of the appellant's remuneration for his services to Sacos and Investa. Nor was there any evidence that the payments by Sacos and Investa to Auspac were intended to be made by way of additional remuneration for the appellant's services to Sacos and Investa.

[27] There was also no evidence that the remuneration recorded in the appellant's and the companies' records was inadequate, but in any event the relevant question was instead whether the very large amounts of money relating to each count which the companies paid to Auspac were for services provided by the appellant to Sacos and Investa. That was a question of fact which was for the jury to decide upon the whole of the evidence. I conclude that it was open to the jury to find beyond reasonable doubt that the services provided to Sacos and Investa by the appellant

[12] (2008) 238 CLR 516 at 531 – 532.

[13] [1988] 1WLR 1006 at 1019; [1987] 3 All ER 1008 at 1019.

[14] See, for example, *Newstead Wharves Pty Ltd v Federal Commissioner of Taxation* (1976) 6 ATR 703 per Newton J at 723 line 20.

were not a reason for those payments and that the parties' intention was instead to distribute the companies' profits to the appellant.

[28] The appellant advanced the alternative argument that, if, contrary to his primary argument, the payments were correctly characterised as payments of dividends out of profits, then the payments were in any event deductible by the companies. The appellant submitted that the Crown did not point to any provision of any legislation which provided that a payment which was incurred in gaining or producing assessable income etc which came within the definition of "dividend" in s 6(1) and within s 44 of the 1936 Act might not be deducted from the companies' assessable income. In the section of these reasons concerning counts 6, 7, 8 and 10 I conclude that the payments to Sacos formed part of the appellant's assessable income as dividends falling with s 6(1) and s 44. For present purposes it is sufficient to observe that, on the footing that the descriptions of the payments in the companies' records as various company expenses were false and the payments were also not employee remuneration, there was no basis in the evidence for an inference that the payments to Auspac were incurred by Sacos or Investa in gaining or producing either company's assessable income.

Count 4

[29] Count 4 charged that:

> "Between the twenty-first day of May 2002 and the twenty-second day of November 2002 at the Gold Coast and elsewhere in the State of Queensland TATSUO JO did aid the commission of an offence by Sacos Equipment Pty Ltd in that Sacos Equipment Pty Ltd paid $800,000.00 to Auspac Finance Corporation Limited with the intention of dishonestly causing a loss to another person, namely the Commonwealth."

[30] The trial judge was not asked to hold that there was no case to answer on count 4. The appellant did not argue that the evidence was insufficient to allow the jury to find beyond reasonable doubt that the Crown had proved each element of the alleged offence by Sacos. The appellant's single argument in relation to count 4 was that there was no evidence that the appellant aided Sacos to make the payments to Auspac within the meaning of the provision in s 11. 2(1) of the *Criminal Code* (Cth) ("the *Code*") that a "…person who aids, abets, counsels or procures the commission of the offence by another person…" is criminally responsible for the offence.

[31] The $800,000 payment by Sacos was made by a number of smaller payments. The Crown case upon aiding was based upon evidence that the appellant instructed Oertel to draw cheques to make the payments, the appellant signed cheques authorising the payments, and the appellant arranged for the payments to be deposited into Auspac's account. The appellant's argument commenced with the uncontroversial proposition that, because the appellant was the guiding mind and controller of Sacos, the appellant's acts in making the payments were the acts of Sacos, so that Sacos' liability for its offence was direct rather than vicarious: *Hamilton v Whitehead*.[15] From that premise the appellant argued that the appellant's acts could not constitute aiding because, as a matter of law, aiding necessarily involves the commission of an act which facilitates and is different from the act that constitutes the principal offence.

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15 (1988) 166 CLR 121 at 126-127.

[32] That legal proposition cannot stand with Bray CJ's analysis in *R v Goodall*.[16] In that case the accused and another man were directors of a company. The accused was charged with an offence that, being entrusted with certain cheques in order that he should apply part of the proceeds of the cheques for specified company purposes and refund to the subscribers certain amounts, fraudulently converted part of the proceeds of the cheques to the use or benefit of the company. Certain points raised on the part of the accused at the commencement of a criminal trial were referred to the Full Court of the Supreme Court of South Australia. One of the points was whether the Crown could rely upon the several acts of the accused and his co-director and upon the acts of both those persons to show that the accused was aiding and abetting the company to commit the offences. Bray CJ, with whose reasons Jacobs J agreed, observed that if the legal existence of the company as a juristic person separate from the legal personality of its members was strictly insisted upon, and if that involved "some sort of metaphysical bifurcation or duplication of one act by one man so that it is in law both the act of a company and the separate act of himself as an individual" then "so be it". Bray CJ concluded[17] that "my view is that the logical consequence of *Salomon's Case*[18] …is that the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done." Similarly, Sangster J concluded that, "[t]he company has its own separate artificial legal entity and the accused his own separate natural legal entity, but they are nonetheless separate legal entities, either of which is legally capable of aiding and abetting the other."[19] In *Hamilton v Whitehead* [20] the High Court (Mason CJ, Wilson and Toohey JJ) expressed agreement with Bray CJ's view.

[33] The appellant argued that Bray CJ's analysis was not necessary for the decision in *R v Goodall* but although Bray CJ referred to the question as "abstract",[21] his analysis, and Sangster J's similar reasons on this point, formed the substantial ground for the Full Court's affirmative answer to the relevant question. The appellant also sought to distinguish *R v Goodall* on the ground that it concerned the several actions of two directors whereas the present case concerns only the actions of one director. That is not a ground upon which the present case may be distinguished. Bray CJ focussed upon the liability as an aider or abetter of an offence by a company of "the individual controller of the company" and concluded that "the controller of a company can aid and abet the company in the commission of a crime and that his own acts can constitute both the commission of the crime by the company and the aiding and abetting of it by himself as an individual."

[34] The appellant argued that *Hamilton v Whitehead* was distinguishable because the charge against the accused in that case was not one of aiding or abetting the company of which he was a director but rather of being knowingly concerned in the commission of the offences alleged against the company. However, the High Court's approval of Bray CJ's analysis in *R v Goodall* formed an essential aspect of the High Court's rationale for rejecting an argument, based upon a passage in

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16 (1975) 11 SASR 94 at 100-101.

17 (1975) 11 SASR 94 at 101.

18 *Salomon v Salomon & Co Ltd* [1897] AC 22.

19 (1975) 11 SASR 94 at 111.

20 (1998) 166 CLR 121 at 128.

21 (1975) 11 SASR 94 at 99.

Dixon J's judgment in *Mallan v Lee*,[22] that the accused managing director could not, when acting in that capacity, be guilty both as a principal offender and as an accessory.

[35] There is no reason to think that "aids" in s 11.2(1) of the *Code* bears a different meaning in this respect from that which was found to be applicable in *R v Goodall* and *Hamilton v Whitehead*. Whether or not Bray CJ's analysis was strictly necessary for the decision in *R v Goodall*, and whether or not it and *Hamilton v Whitehead* are factually distinguishable on any ground, the persuasive force of Bray CJ's reasons and the High Court's considered approval of them are reasons enough to reject the appellant's argument.

[36] The appellant referred to *O'Connors Management Pty Ltd v Curry*; *Smith v Curry*[23] in which a company and its manager, Smith, were convicted of an offence against health legislation of using a public building to accommodate a number of persons in excess of numbers specified in the relevant certificate. Walsh J referred to provisions of liquor licensing legislation which made the conduct of the relevant business the responsibility of the appellant's licensee and a person appointed as manager or permitted by the licensee to manage the business. After referring to *Hamilton v Whitehead*, *R v Goodall*, and other cases, Walsh J held that under the relevant statutory regimes "the actions of Smith should be viewed solely as the acts of the Company and do not give rise to the aiding and abetting of the offence by Smith personally." That decision may be explained by Walsh J's construction of the applicable legislative provisions. It could not in any event justify the Court in not applying the High Court's approval in *Hamilton v Whitehead* of Bray CJ's analysis in *R v Goodall*.

Count 9

[37] Count 9 charged that on about 4 November 2003 the appellant aided the commission of an offence by Investa, in that Investa, by a deception, dishonestly obtained a financial advantage from another person, namely the Commonwealth, by lodging with the Commissioner of Taxation a company Income Taxation Return for the financial year ending 30 June 1999 which contained false information. The offence alleged against Investa was created by s 134.2 of the *Code*, which provides that a person is guilty of an offence if "(a) the person, by a deception, dishonestly obtains a financial advantage from another person; and (b) the other person is a Commonwealth entity". The offence alleged against the appellant that he "did aid the commission" of the offence by Investa relied upon as 11.2(1) of the *Code*. In relation to count 9 the appellant adopted the argument about aiding which he had advanced in relation to count 4. For the reasons given in relation to count 4, that argument should be rejected. In relation to the principal offence alleged against Investa, the appellant adopted the arguments he advanced in relation to counts 1, 2 and 3. Those arguments should be rejected for the reasons given in relation to those counts.

Counts 6, 7, 8 & 10

[38] Counts 6, 7, 8 and 10 charged offences that (on or about 22 October 2003 for counts 6 and 7, on or about 25 October 2003 for count 8, and on or about 10 January 2004 for count 10), the appellant by a deception dishonestly obtained a financial advantage from the Commonwealth by causing the lodgement with the

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22 (1949) 80 CLR 198 at 215-216.

23 Supreme Court of Western Australia, unreported, 17 February 1997 (Walsh J, BC 9700410).

Commissioner of Taxation of a personal Income Tax Return for specified financial years (30 June 2003 for count 6, 30 June 2002 for count 7, 30 June 1999 for count 8, and 30 June 1998 for count 10) which contained false information. At the times of those alleged offences, s 134.2 of the *Code* provided that a person is guilty of an offence if "(a) the person, by a deception, dishonestly obtains a financial advantage from another person; and (b) the other person is a Commonwealth entity."

[39] The Crown case was that the appellant dishonestly evaded the payment of income tax by understating his assessable income by omitting the money paid by Sacos and Investa to Auspac at the appellant's direction. There was no challenge to the evidence in the Crown case that the amounts of tax not paid as a result of the alleged understatements of income amounted to $767,547.18 in respect of these four counts.[24] What was in issue in the no case submission was whether, as the prosecution alleged, the payments to Auspac formed part of the appellant's assessable income on any one of three bases, namely, under the 1936 Act as dividends falling with ss 6(1) and 44, or (for years in which Div 7A applied) as deemed dividends, or as "income" within the ordinary meaning of that term in s 25.

[40] In addition to arguing that none of those three bases was applicable, the appellant advanced two general arguments. First, the appellant argued that the jury could not exclude the hypothesis that the payments amounted to fringe benefits under the *Fringe Benefits Tax Assessment Act* 1986, which were excluded from the appellant's assessable income by s 23L(1) of the 1936 Act ("income derived by a taxpayer by way of the provision of a fringe benefit is not assessable income … of the taxpayer.") Secondly, the appellant argued that the appellant did not in any event obtain a financial advantage as a result of the alleged deception.

Fringe benefits

[41] Section 66(1) of the *Fringe Benefits Tax Assessment Act* 1986 provided that, subject to the Act, "…tax imposed in respect of the fringe benefits taxable amount of an employer of a year of tax is payable by the employer." (The appellant pointed out that the companies were not charged with an offence against this legislation.) In s 136(1), "fringe benefit" was defined to include "…a benefit provided ... to the employee or to an associate of the employee ... by ... the employer ... in respect of the employment of the employee ...."; "benefit" was defined to include "any right, privilege, service or facility"; "employee" was defined to include "an employee within the meaning of Division 2 of Pt VI of the *Income Tax Assessment Act* 1936 (Cth)" (s 221A of the 1936 Act defined "employee" as "a person who receives, or is entitled to receive, salary or wages…", which include payments made by a company by way of remuneration to a director.); "employment" was defined to include "the holding of any office or appointment, the performance of any functions or duties, [and] the engaging in of any work."; and the phrase "*in respect of*, in relation to the employment of an employee include[d] by reason of, by virtue of, or for or in relation directly or indirectly to, that employment". Section 148(1) provided that "[a] reference in this Act to the provision of a benefit to a person in respect of the employment of an employee is a reference to the provision of such a benefit… (a) whether or not the benefit is also provided in respect of, by reason of, by virtue of, or for or in relation directly or indirectly to any other matter or thing; …' and '(h) whether or not the benefit is provided as a reward for services rendered, or to be rendered, by the employee."

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24 Exhibit 36, and the evidence of Hall at Record Book 568-570.

[42] As the appellant accepted, the benefits liable to a fringe benefits tax were confined (so far as is presently relevant) to those provided to employees in respect of their employment. In *J & G Knowles & Associates Pty Ltd v FCT*,[25] the Full Court of the Federal Court (Heerey, Merkel, and Finkelstein JJ) considered the meaning of the expression in s 136(1) "in respect of the employment". The Full Court concluded that the phrase requires "a nexus, some discernible and rational link, between the benefit and employment" but that is not sufficient. The court referred to *Smith v Federal Commissioner of Taxation*[26] (which concerned the expression "allowances, gratuities, benefits, bonuses and premiums allowed, given or granted to him in respect of, or in relation directly or indirectly to, any employment of or services rendered by him..." in s 26(e) of the 1936 Act) and the questions framed by the Justices in that case: whether the benefit is a "…product or incident of the employment? (Wilson J at 519)"; is "…some aspect of the employment a substantial reason for the benefit? (Brennan J at 526)"; is "in a very real sense the payment ... a consequence of the existing relationship of employer and employee'? (Toohey J at 533)"; and is "the employment one of the 'proximate causes' of the payment? (Gaudron J at 537)". The Full Court held that "what must be established is whether there is a *sufficient* or *material*, rather than *a*, causal connection or relationship between the benefit and the employment..." and that if the benefit was not a "product or incident of the employment" it was "…likely to be extraneous to the employment and would not bear FBT, notwithstanding that the employment might have been a causal factor in the provision of the benefit." The court noted that "[t]he fact that a benefit is provided to a director because it was authorised by that director will not, of itself, be sufficient to characterise the benefit as one which is 'in respect of' the employment."

[43] On that authority, the mere facts that the appellant was a director who provided some services to the companies and that the payments were made at the direction of the appellant could not be regarded as establishing a sufficient relationship between the payments and the appellant's employment. For the reasons already given in relation to counts 1, 2, and 3, the jury could find that the payments were not a product or incident of the appellant's employment but were intended to be distributions of the companies' profits to the appellant in his capacity as a shareholder of those companies. It was open to the jury to find beyond reasonable doubt that the payments were not made "in respect of the employment" of the appellant by Sacos or Investa.

Financial advantage

[44] The appellant argued that the evidence demonstrated only that he attempted to obtain a financial advantage, not that he did so. The argument was based upon the evidence that, long after the lodgement of the relevant tax returns, amended assessments were issued which were designed to ensure that the appellant was made liable for the unpaid tax. The appellant referred also to the imposition of the compounding general interest charge under provisions in the *Taxation Administration Act* 1953 and to a suggested absence of permanence in any advantage obtained by the appellant. The appellant invited the Court to prefer the decision by Miles CJ in *Fisher v Bennett*,[27] that no financial advantage is obtained

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25 (2000) 96 FCR; [2000] FCA 196.

26 (1987) 164 CLR 513.

27 (1987) 85 FLR 469.

by the breathing space gained by passing a bad cheque, to the contrary view in Victorian and other decisions.[28]

[45] I accept the respondent's argument that the offence in each case was complete upon the appellant lodging the relevant income tax returns when he obtained the advantage of his understatements of assessable income under the self assessment regime. The subsequent reassessments of the appellant's tax liability and the imposition of interest and tax penalties were irrelevant to the commission of the offence, although those matters might bear upon the appropriate sentence. I add that, if it were necessary to decide the point, I would hold that the Court should follow the decision of the Victorian Court of Appeal in *R v Vasic*,[29] in which Nettle JA (with whose reasons on this topic Cummins AJA agreed) held that a debtor who writes a cheque in pretended payment of an existing debt knowing that the cheque will be dishonoured obtains a financial advantage by deception. Contrary to a submission made for the appellant, that view was not based upon the proposition that money has a time value so that a creditor loses if the debtor successfully delays payment because, upon payment, the creditor ordinarily has no claim for interest. The presence or absence of a claim for interest formed no part in Nettle JA's analysis of what constituted a "financial advantage" for the purpose of the cognate provision in s 82 of the *Crimes Act* 1958.[30]

[46] It is now necessary to consider the three alternative bases upon which the respondent contended that the jury could find beyond reasonable doubt that the payments formed part of the appellant's assessable income.

Dividends

[47] Section 44(1) of the 1936 Act provided that "the assessable income of a shareholder in a company…shall…(a)…include dividends paid to him by the company out of profits derived by it from any source…". Section 6(1) provided that 'paid' in relation to dividends…includes credited or distributed". The term "dividend" was defined as including "(a) any distribution made by a company to any of its shareholders, whether in money or other property…" (The qualifications expressed in those sections were not submitted to be material.)

[48] The reasons already given in relation to counts 1, 2, and 3, indicate my conclusion that these requirements were fulfilled. The appellant was a shareholder in Sacos and he and his wife were the sole shareholders in Investa. The appellant did not submit that the money could not be regarded as having been paid out of those companies' profits; after allowing for all expenses (including the appellant's remuneration recorded in the companies' financial records), the profits were evidently sufficient to sustain the payments which the appellant caused Sacos and Investa to make to Auspac over the years.

[49] In relation to the remaining element expressed in s 44(1), the appellant argued that the payments were made to Auspac rather than to the appellant. The appellant argued that s 19(1) of the 1936 Act and ss 6-5(4) and 6-10(3) of the 1997 Act,

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28 *Matthew v Fountain* [1982] VR 1045; *Fisher v Bennett* (1987) 85 FLR 469; O*tte v Magistrates' Court of Victoria* (1996) 89 A Crim R 223; *R v Rosar* (1999) 8 Tas R 344, [1999] TASSC 7; *R v Vasic* (2005) 11 VR 380 at [10], [11], p 384, (2005) 155 A Crim R 26, [2005] VSCA 38.

29 (2005) 11 VR 380.

30 See (2005) 11VR 380 at [7] – [17].

which deemed income or money to have been derived by the taxpayer when it was dealt with as he directed, were not applicable because, as was held by Hill J, with whose reasons Davies and Whitlam JJ agreed, in *Howell v Commissioner of Taxation*[31] the deeming in s 19 was of no consequence unless the money, when derived, had the character of income. In relation to that decision, because it does not seem to me to be necessary for the respondent to invoke those deeming provisions, I merely note that Hill J also referred to the description of the purpose of s 19 stated by Rich J in *Permanent Trustee Co of New South Wales Ltd v Commissioner of Taxation*[32] as being "… to prevent a taxpayer escaping through though his resources have actually been increased by the accrual of the income … or its utilisation for some purpose"; that might be thought to be a generally accurate description of what the evidence showed in this case (although it seems more apt in relation to the question whether the payments amounted to "income" rather than dividends).

[50] The following conclusions were open on the evidence. Sacos and Investa intended to part with any interest in the money they paid to Auspac at the time of each payment. Each payment to Auspac increased the appellant's personal resources, because the appellant could thereafter draw down the same amount from Auspac or another Stoddart company, subject only to Stoddart retaining 10 per cent as the commission payable by the appellant. The appellant's conduct in causing his companies to make the payments to Auspac was equivalent to directions by the appellant to his companies to discharge their obligation to pay the money to him by paying Auspac. On the basis of those conclusions, and regardless whether or not the deeming provisions were applicable, the money paid by the companies to Auspac could be regarded as having been "paid to" the appellant for the purposes of s 44(1) on the footing that it was paid to a third party at the direction of the appellant to discharge the companies' dividend debts to the appellant.[33]

[51] The appellant argued that this analysis overlooked the fact that the payments were only made to the appellant, whereas it would be expected that a dividend would be paid also to the other shareholders. The submission has little force in circumstances in which, although the appellant held only half of the shares in Investa and only about one-third of the shares in Sacos, the evidence justified the jury in finding that the appellant controlled both companies, his co-director in Sacos gave evidence that he regarded Sacos' business as being the appellant's business, the appellant's wife was the only other shareholder in Investa, and the appellant caused Sacos and Investa to make the payments to Auspac for the purpose of transferring the money to himself and his wife free of tax.

[52] Another argument advanced for the appellant was that the payments should not be regarded as dividends because they were not paid to the appellant in his capacity as a shareholder. The decisions cited by the appellant did not support the proposition that the expression "payment to a shareholder" in s 44(1) must be construed as meaning payment to a shareholder in the capacity of shareholder. *St Michaels Golf Club v Bells*[34] concerned the proper construction of an article in the constitution of

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31 (1994) 28 ATR 105; [1994] FCA 1012.

32 (1940) 2 AITR 109 at 110-111

33 See *ABB Australia Pty Limited v Commissioner of Taxation* (2007) 162 FCR 189; [2007] FCA 1063 per Lindgren J at [164] – [170].

34 [2002] NSWSC 61 at [64], affirmed without reference to this point at [2003] NSWCA 159; (2003) 46 ACSR 113.

a golf club which precluded committee members from receiving remuneration for services. Gzell J construed the article as a prohibition against the receipt of remuneration for services performed by an individual as a member of the committee in that capacity. *Expo International Pty Ltd (in Liq) v Torma*[35] concerned the meaning of the provision in s 122 of the *Bankruptcy Act* 1966 (Cth) which avoids as against the trustee in bankruptcy certain payments made by a person who is unable to pay his debts as they become due from his own monies in favour of a creditor which has the effect of giving that creditor a preference over other creditors. The New South Wales Court of Appeal construed the reference to a payment in favour of a creditor as referring to a payment to a creditor in that capacity. The provisions construed in those decisions are far removed from s 44(1). However, it is not necessary to decide whether s 44(1) is qualified by a similar implication or whether its scope is relevantly limited in this respect only by the requirement that the payments be out of profits. Bearing in mind that the jury could conclude that the payments to Auspac were not intended by the appellant and his companies as remuneration, the jury could find that the payments were made to the appellant as a shareholder.

[53] The appellant argued that the expression "paid to [a shareholder] by the company" did not comprehend indirect payments, because that was inconsistent with Div 7A of the 1936 Act and the analysis in, for example, *Potts' Executors v Inland Revenue Commissioners*.[36] It would not be appropriate to rely upon the anti-avoidance provisions in Div 7A to adopt an unduly narrow construction of s 44(1). As to *Potts' Executors*, the issue and facts are so different from those here as to render that decision of no real assistance in construing s 44(1).

[54] The no case submission was correctly rejected on the basis that the payments by Sacos and Investa to Auspac could be regarded as dividends which were included in the appellant's assessable income.

[55] It is therefore strictly not necessary to consider the alternative bases upon which the respondent relied for concluding that the payments formed part of the appellant's assessable income. Nevertheless, I will express my conclusions upon the issues agitated in the parties' arguments.

Deemed dividends under Div 7A

[56] The respondent argued that, if s 44 of the 1936 Act did not apply, the same result would flow from Div 7A in the same Act for the financial years to which that division applied.[37] Div 7A is described in the division heading as "distributions to entities connected with a private company". In Subdiv B, s 109C(1) provided:

> "109C(1) **Payments treated as dividends**
> *When private company is taken to pay a dividend*
> A private company is taken to pay a dividend to an entity at the end of the private company's year of income if the private company pays an amount to the entity during the year and either:

[35] (1985) 3 NSWLR 225; 83 FLR 357.

[36] [1951] AC 443 at 453, 454, 457, and 465-6.

[37] The division was inserted by Act No. 47 of 1998 and, with one irrelevant exception, it commenced on 23 June 1998. It therefore had no scope for application in relation to counts 1 and 2, which charged offences on or about 2 June 1997 and 12 May 1998. The other counts charged offences after the commencement of Div 7A.

> (a) the payment is made when the entity is a shareholder in the private company or an associate[38] of such a shareholder; or
> (b) a reasonable person would conclude (having regard to all the circumstances) that the payment is made because the entity has been such a shareholder or associate at some time.
>
> Note 1: Some payments do not give rise to dividends. See Subdivision D.
> Note 2: A private company is treated as making a payment to a shareholder or shareholders associate if an interposed entity makes a payment to the shareholder or associate. See Subdivision E."

[57] Section 109C(3) defined "payment to an entity" as comprehending "(a) a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity …". Section 109J precluded s 109C from operating to the extent that a payment "(a) discharges an obligation of the private company to pay money to the entity; and (b) is not more than would have been required to discharge the obligation had the private company and entity been dealing with each other at arms length." (That provision would apply if, contrary to my conclusion, the payments must be regarded as having been made to discharge a debt for remuneration.) Section 109Z (in Subdiv F of Div 7A, entitled "General Rules Applying to all Amounts Treated as Dividends") provided that "If a private company is taken under this division to have paid a dividend to an entity, the dividend is taken for the purposes of this Act to be paid: (a) to the entity as a shareholder in the private company; and (b) out of the private company's profits."

[58] The appellant relied upon s 109ZB(3) which provided that "…this division does not apply to a payment made to a shareholder, or an associate of a shareholder, in their capacity as an employee (as defined in the *Fringe Benefits Tax Assessment Act* 1986) or an associate of such an employee." For reasons given earlier, my conclusion is that the evidence in the Crown case allowed the exclusion of any inference that the payments were made to the appellant in his capacity as an employee.

[59] I earlier concluded that the payments by Sacos and Investa to Auspac could be regarded as having been payments "to" the appellant. If that conclusion is wrong, the question would arise whether the payments by Sacos and Investa to Auspac could be regarded as payments "on behalf of [the appellant] or for the benefit of [the appellant], with the meaning of s 109C(3), with the result that s 109C(1) deemed Auspac and Investa to have paid dividends to the appellant at the end of each relevant year of income.

[60] As to the meaning of "on behalf of", the appellant relied upon *Re Ross; ex parte A-G for the Northern Territory*.[39] The question there was whether the Commission held its leasehold interest in Utopia Station "on behalf of" persons who were members of the Aboriginal race of Australia within the meaning of a provision of

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[38] "Associate" is broadly defined in s 318 of the 1997 Act.
[39] (1980) 54 ALJR 145 at 149.

the *Aboriginal Land Rights (Northern Territory) Act* 1976. Stephen, Mason, Murphy and Aiken JJ referred to Latham CJ's observation in *R v Portus; Ex parte Federated Clerks' Union of Australia*[40], that "on behalf of" was "not an expression which has a strict legal meaning", and said that "it bears no single and constant significance" but "may be used in conjunction with a wide range of relationships, all however in some way concerned with the standing of one person as auxiliary to or representative of another person or thing …" The joint reasons continued:

> "…It may be used when speaking of an agency relationship, but also of some quite ephemeral relationships, such as that which exists between a party to litigation and the witness he calls, a witness 'on behalf of' the defence. Again, it may, as the Northern Territory here contends, be used where the relationship is that of trustee and cestui que trust. It was of such a use that Lord Cairns L.C. spoke when he said, in *Gillespie v. City of Glasgow Bank,* (1879), 4 App. Cam 632, at p. 640 that the phrase could describe a. relationship of trustee and cestui que trust 'if the circumstances of the case are consistent with that interpretation'. Context will always determine to which of the many possible relationships the phrase 'on behalf of' is in a particular case being applied; 'the context and subject matter' (per Dixon J. in the *Federated Clerks' Case* at p. 438) will be determinative."

[61] The appellant also argued that the payments should not be regarded as having been made "for the benefit of" the appellant because that phrase did not comprehend indirect benefits. The appellant referred to s 101 of the 1936 Act, which referred to the income of a trust being paid or applied "to or for the benefit of specified beneficiaries". That was submitted to have been construed as requiring that "the actual payment benefits the beneficiary".[41]

[62] *Re Ross* confirmed that the meaning of the expression "on behalf of" depends upon the context in which it is used. The same must be so also in relation to the expression "for the benefit of". Section 109C(3)(a) does not limit its scope to payments made for the "direct" benefit of the entity. Having regard to the findings about the elements of the tax evasion scheme which were open to the jury, the better view is that the conclusion was open that the payments made by the appellant's companies to Auspac were made both "on behalf of" and "for the benefit of" the appellant within the meaning of s 109C(3)(a).

[63] The appellant argued that the provisions of Subdiv E of Div 7A concerning payments through interposed entities suggest that s 109C was not designed to cover this situation. It is sufficient in this respect to refer to the simplified outline of Subdiv E set out in s 109S:

> "This Subdivision allows a private company to be taken under Subdivision B to pay a dividend to an entity (the *target entity)* if an entity interposed between the private company and the target entity makes a payment or loan to the target entity under an arrangement involving the private company.

[40] (1949) 79 CLR 428, at p 435.

[41] The appellant referred to *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547 per Gummow J.

> This result is achieved by treating the private company as making a payment or lean of an amount determined by the Commissioner to the target entity …
>
> The arrangement must involve the private company and one or more interposed entities in making payments or loans … the purpose of the target entity receiving a payment or loan from an interposed entity …"

[64] That the application of the anti-avoidance provisions in Subdiv E may overlap in some respects with the application of the anti-avoidance provisions in Subdiv B does not seem to be a persuasive reason for adopting an unduly narrow construction of either subdivision.

[65] I would reject the arguments advanced for the appellant for his contention that the jury could not find beyond reasonable doubt that the payments were not part of the appellant's assessable income as deemed dividends under Div 7A.

Income forming part of the appellant's assessable income

[66] The respondent submitted that the jury could also hold that the payments to the appellant constituted assessable income under s 25(1) of the 1936 Act as "income derived directly or indirectly from all sources whether in or out of Australia" which was not otherwise excluded from assessable income. The appellant's principal response to this argument was that the payments to the appellant lacked that periodicity and regularity which was necessary to make them income. The appellant referred to the statement by Mason ACJ, Wilson, Brennan, Deane and Dawson JJ in *Federal Commissioner of Taxation v Myer Emporium Ltd*[42] that:

> "The periodicity, regularity and recurrence of a receipt has been considered to be a hallmark of its character as income in accordance with the ordinary concepts and usages of mankind."

[67] I would reject the submission that there was such a lack of periodicity, regularity or recurrence of receipts as to suggest that they did not constitute income in the appellant's hands "in accordance with the ordinary concepts and usages of mankind". The evidence summarised earlier revealed very frequent payments every month between March 1997 and June 1998 in amounts ranging between $1,000 and $35,000. It is true that the subsequent payments in June, August and September of 1999, and in May, September, October and November of 2002, were much larger and less frequent, but their character was influenced by the large number and frequency of the earlier payments from the same sources. Further indications that the payments constituted income are found in the facts that because the appellant controlled all of the payments there was certainty of receipt, and he used the payments for personal expenses chosen by him without being required to account to the payer for the use of the payments.[43]

[68] I conclude that the proper characterisation of the payments is "income" and that those payments formed part of the appellant's assessable income.

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42 (1987) 163 CLR 199 at 215.

43 See *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443 at [17]-[22] (French CJ, Gummow, Kiefel and Bell JJ).

Taxing the same income twice

[69] A result of these reasons is that I would hold that it was open to the jury to find that the payments by Sacos and Investa to Auspac were not deductible in Sacos' and Investa's hands and were assessable in the appellant's hands. The appellant argued that, as a general principle, the tax legislation should not be interpreted as taxing the same income twice. An inclination to avoid that result may be seen, for example, in Dixon CJ's reasons in *Federal Commissioner of Taxation v Belford*,[44] to which the appellant referred, although Dixon CJ noted that there was no express provision against double taxation and it was not easy to imply one in that case.[45]

[70] The tax legislation contained provisions which allowed the appellant ample scope to avoid any double taxation, most obviously the provisions for imputation credits in relation to dividends. Furthermore, to the extent that the company might legitimately pay employee remuneration and provide fringe benefits it could claim allowable deductions for the remuneration and provide fringe benefits which would be excluded from the employee's assessable income (in the latter case the company would be liable for fringe benefits tax). The potential for double taxation arose in this case, not because of any surprising construction of the relevant statutory provisions, but because of the artificial arrangements which the appellant put in place to evade tax.

Proposed order

[71] The appeal should be dismissed.

[72] **FRYBERG J:** The only issue in this appeal was whether the trial judge should have withdrawn any of the charges from the jury. Fraser JA has demonstrated in his reasons for judgment why the trial judge was correct in refusing to do so. I agree with those reasons.

[73] This court was not invited to consider the correctness of the summing up, and I have not done so.

[74] The appeal should be dismissed.

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44 (1952) 88 CLR 589.
45 (1952) 88 CLR 589 at 599.