Fiscal neutrality

Foreign ghost in our GST machine?

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Australian Taxation Office

Where Policy Meets Reality
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Introduction

A New Tax System

Twenty years ago, a bold step was taken to replace the old sales tax regime with a new GST law modelled with focused zeal on VAT-type legislation in force elsewhere. We picked and chose and innovated from laws in other lands. The A New Tax System Bills for the original blueprint were introduced into federal parliament on 2 December 1998 – a glorious day. It had been fully a quarter of a century since the Asprey Report recommended a broad-based consumption tax be introduced. The full history of this is traced by Kathryn James in her British Tax Review article – We of the “never ever”.

Foreign influence

The Tax Reform document accompanying the draft legislation said that the existing system was ‘out of date, unfair, internationally uncompetitive, ineffective and unnecessarily complex’. We liked the new drafting style, but were jarred by some of the terminology. We looked twice at the volume of exemptions which are generally seen as ‘anathema to the logic’ of VAT. But we were impressed at the vision of the project. In other places, introduction of consumption taxes had led to violence and riots, and sometimes the loss of government. We found we had indeed not escaped the arid drama of sales tax classification cases. And we wondered what influence foreign VAT principles may have here.

Underlying philosophy

Justice Graham Hill of the Federal Court was particularly interested in how the EU concept of fiscal neutrality might influence credit access in Australia. No-one disagrees that strong and robust neutrality is a pre-condition for delivery on the economic policy objectives of the tax. In one influential article, Hill

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1 This note revisits and updates (beyond recognition) a paper given at the Law Council Tax Committee Workshop on 18 October 2008, and later comments on the issue in Peacock (ed) GST in Australia: Looking Forward from the First Decade (at 40-42).
2 All views and any errors are mine. Special thanks to Michael Evans and Oliver Hood. Copyright is retained by the author.
4 Acquisition supplies, the RITC regime, and our financial supply regulations, for example.
6 Treasury Tax Reform: not a new tax, a new tax system (at 5).
9 INSERT EXAMPLES.
J described this as part of the ‘underlying philosophy’ of the VAT system. The question I have posed is whether EU neutrality has become some foreign ghost in our GST machine, as Graham hinted at.

Mundane reasons

My answer to this question is ‘no’. The reasons for this are ultimately mundane. To the extent that any principle akin to ‘fiscal neutrality’ in either of its EU senses is part of Australian law (either substantively or as some rule of construction), it is to be found first and exclusively within our own GST provisions by reference to orthodox principles of interpretation. The fact that the EU trader, in principle and in practice, is to be relieved entirely of input tax borne is an observation about the operation of foreign law in other jurisdictions. This is the case whether we are talking about neutrality as part of the EU treaty principle of equal treatment, or neutrality as a rule of construction derived from the language and experience of VAT directives. My question, however, only opens the door to another (better) question – that being, if EU neutrality is no part of our GST law, do we have a domestic neutrality of our own?

Our native neutrality

Of course we do, whether or not the GST law or extrinsic materials use that precise term. This is what Div 11 is all about. EU statutes and cases decided under them cannot impact, control or extend our own neutrality. EU neutrality is not some foreign ghost in our GST machine. Certainly, as Graham Hill hinted at, there remains a wider international and historical perspective to our GST law. That alone, however, provides no coherence basis for reception into our law of EU concepts. No linkage mechanism is present. No multilateral treaty was involved to which Australia is party. We passed no legislation like the European Communities Act 1972. No other interpretation rule exerts any proper influence – the language and context are too different. High-level policy or its preconception cannot leverage the terms of the GST law. And appeals to broader philosophy invariably fall on deaf legal ears.

No presumptive bias

These conclusions should come as no surprise. The idea that EU ‘fiscal neutrality’ produces some presumptive bias in favour of the Australian taxpayer where interpretation is contested is problematic just to say it. Rather like the ‘private domestic consumption’ yardstick of the economic policy analysts, EU neutrality is a distraction from the routine legal task of determining what parliament meant by the words it used in our GST law. Australia did not acquire an EU-style neutrality by something like a process of international osmosis. The routine task of resolving constructional choice issues is performed by the ‘unqualified statutory instruction’ in s 15AA of the Acts Interpretation Act 1901. My conclusion is also supported by comments in three decided cases: one directly, the other two by inference. Block DP was right in 2009 when he concluded that the ‘principle of fiscal neutrality is not part of Australian law’.

Policy and reality

The theme for this conference – Where Policy Meets Reality – suggests an atmosphere of some regret. Has the bright idealism of the GST architects and the economic policy people been forced back to the grim reality of mere legal rules? Perhaps for some, the wake started in 2008 when the High Court decided Reliance Carpet. Certainly, that case said important things which only go to underline that EU neutrality is no foreign ghost in our GST machine. The real reality, however, is that we do have a robust neutrality deriving from the GST law itself. It functions rather like its EU counterpart, and it is reckoned by some to work more efficiently – how ironic! It may not be the same as the EU one and it may not be pure, but neutrality in the EU is far from pure either. The EU counterpart is reduced by inconsistencies

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11 Electrical Goods Importer v FCT [2009] AATA 854 (at [52]).
and is unpredictable in its outworkings. It is subject to judicial abuse and manipulation; it is Delphic in its evolutions; it is said to create chaotic outcomes, and it is attacked constantly by member states.

No great policy disaster

When it comes to our neutrality, policy may well have hit the reality of law 20 years on. It always does – that’s how a ‘rule of law’ system is supposed to work. By contrast, the EU system of VAT has been described as being governed by the ‘rule of economics’12. In the opinion of two British commentators – ‘If we depart from the economic rules, however, there will be no coherent system at all and the best thing to do with the Directives is to burn them’13. Even if our domestic neutrality is a little out-of-sync with what happens in Europe, any ‘rule of economics’ people among us presumably would not say that we have to start burning down the GST house. In our ‘rule of law’ system, the neutrality outcome two decades on from the start of the tax is no great policy disaster on any objective basis. Far from it, as Rio Tinto Services shows, the system works to modern standards and with tolerable integrity14.

Ideal of neutrality

VAT and neutrality

Tax laws ‘work best when they interfere least with production and consumption decisions in a properly functioning market’15. The central idea is that those decisions ‘should be made based on their economic merits and not for tax reasons’16. As Schenk and Oldman state, VAT is intended to tax personal consumption comprehensively, neutrally, and efficiently17. VAT also ‘has been the biggest EU success story so far’, and neutrality ‘is the leading principle of VAT’18. Michael Ridsdale observes that the ECJ ‘has consistently synonymised the purpose of the VAT directives with the principle of fiscal neutrality’19.

Classic statement

Neutrality in the EU is used in two distinct senses, as explained by Dr Friederike Grube in her 2017 article20. First, it reflects the constitutional principle of ‘equal treatment’ insofar as equal transactions are to be treated the same way, and taxable persons carrying on the same activities are to be treated the same way for VAT purposes. Second, neutrality is an interpretive principle derived from successive VAT directives21. While this division oversimplifies the EU picture22, for present purposes it provides a working model. The classic statement of neutrality comes from the 1985 ECJ decision in Rompelman23.

... the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of the valued added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

Primary deduction right

15 James The Rise of the Value-Added Tax (at 26).
16 van Brederode Systems of General Sales Taxation: Theory, Policy and Practice (at 45).
17 Schenk & Oldman Value Added Tax – A Comparative Approach (at 33).
18 Vanistendael in Baker & Bobbett (eds) Tax Polymath (at 369).
22 cf Evans VAT Principles (at 6-11), Terra & Kajus A guide to the European VAT Directive, CHECK.
24 Rompelman v Minister van Financiën [1985] ECR 655 (at 664).
Neutrality expresses the notion that traders in a VAT system are entitled, as a matter of primary right and systemic imperative, to recoup all the tax they bear on inputs. They are to be, to the greatest extent, fiscally neutral insofar as business inputs are concerned. Fiscal neutrality is the mechanism which prevents cascading – that is, the ‘tax-on-a-tax’ effect so noxious to proper functioning of any VAT system. From a policy perspective, GST is to be eliminated as a cost component in the price of taxable outputs. Best-practice VAT design requires that taxable persons receive ‘a full and immediate deduction (tax credit) of the VAT on inputs (including capital goods) from the VAT on output’.

**Economic angles**

Fiscal neutrality, is an economic purity mechanism of critical importance. No true VAT system can function without a robust and substantial neutrality. From an economic point of view, however, complete neutrality ‘would require supply to be perfectly elastic and demand to be perfectly inelastic’ – conditions which rarely collide in the real world. In practice, the ultimate tax burden will fall on those who are least able to shift it onto someone else. Consumption taxes are said to promote economic growth better than other taxes. Ben Terra and Julie Kajus contend that VAT is ‘believed to be superior to an income tax in fostering capital formation (and economic growth)’. However, the ‘relative burden of the VAT falls most heavily on those with least, thus making the good VAT a regressive tax’.

**Division 11 rules**

Our basic rules on fiscal neutrality, even if not called that, are found in Div 11 of the GST law. You are ‘entitled to the input tax credit for any *creditable acquisition that you make’ – s 11-20. The main condition for there being a creditable acquisition is that ‘you acquire anything solely or partly for a creditable purpose’ – s 11-5(a). Something is acquired for a creditable purpose ‘to the extent that you acquire it in *carrying on your *enterprise’ – s 11-15(1). As observed by Ross Stitt, the first limb of s 11-15 has not proved to be particularly ‘controversial’. Neutrality, therefore, is legislated directly in clear terms and it is comprehensive. Michael Evans refers to s 11-15(1) as the ‘elegant provision’.

**Input taxation carve-out**

The dramatic counterpoint to this open statement of domestic is its legal denial ‘to the extent that … the acquisition relates to making supplies that would be *input taxed’ – s 11-15(2)(a). This paragraph was described by Lindgren J in *AXA Asia Pacific* as the ‘blocking provision’, and so it has come to be known ever since. The categories of input taxed supplies most corrosive of neutrality in our GST system, of course, are financial supplies and residential premises. These may produce an indirect cascading, even if the supplies to which affected acquisitions relate are exempt from tax. We also have a unique regime of ‘reduced credit acquisitions’ at the rate of 75% for financial supply providers. This enhances underlying neutrality by reducing competitive disadvantage suffered via outsourcing. The point is that our GST law engineers its own neutrality in precise terms selected with deliberation by parliament.

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25 *HP Mercantile Pty Ltd v FCT* (2005) 60 ATR 106 (at 116 [45]), cf GSTR 2008/1 (at [43]).
27 van Brerede Systems of General Sales Taxation: Theory, Policy and Practice (at 32).
28 *Cooper The Discrete Charm of the VAT* [2007] University of Sydney Law School Legal Studies Research Paper No 07/65 (at 30).
31 *James The Rise of the Value-Added Tax* (at 33), Krever Designing and Drafting VAT Laws In Africa in Krever (ed) *VAT in Africa* 9 (at 18).
33 Evans *Capital Raising costs – the wrong side of the mirror?* (2007) 10/3 *The Tax Specialist* 120 (at 121).
34 *AXA Asia Pacific Holdings Ltd v FCT* [2008] FCA 1834 (at [38]).
35 cf GSTR 2008/1 (at [28]).
Theatres of advantage

In a GST system where input tax credits operate much like virtual cash in the general economy, an ongoing battle is naturally fought by taxpayers against the ATO to extend credit access and neutrality wherever possible. Where the line is to be drawn between pure neutrality and s 11-15(2)(a) has a profound and enduring impact across the economy. Fiscal neutrality is of greatest importance to financial institutions, life insurers and others making financial supplies as a core business element. They are the ones with the greatest stake in a pure or purer neutrality taking hold in our GST jurisprudence.

Endless searching

The only rational economic position for those entities (any entities) is to push neutrality as far as the courts or the Commissioner will allow. Sometimes the attempt is to force it into areas of prior controversy – capital raising by share issue – at other times, into new and emerging theatres of perceived advantage – minisite housing comes to mind. Of prime concern, therefore, is the relevance of fiscal neutrality in the Rompelman sense to Australian law. Does it inform the reach of our provisions (as some ghost in our GST machine perhaps), or could it impose a presumptive bias in favour of credit recovery where interpretation of the GST law yields contrary indications of comparable merit?

HP Mercantile case

At the hearing

The appeal from the AAT decision in Recoveries Trust was heard by a Full Federal Court bench comprising Hill, Stone and Allsop JJ on 4 May 2005. A range of GST cases had already worked their way to various courts and tribunals - most notably on validity, transitional relief, damages, valuation, residential premises, going concerns, contract law issues, legal costs, gambling, stamp duty, and body corporates. However, this was to be the first appellate level stress-testing of crucial credit denial provisions in Div 11. It was also before a presiding judge widely acknowledged as the preeminent meister of the entire field – Graham Hill. To say there was an air of anticipation is an understatement.

The big day had finally arrived. Stephen Gageler SC, now a judge on the High Court, appeared for the taxpayer, with Roderick Cordara SC for the Commissioner. As many may recall, there was standing room only. The atmosphere was distinctly festive, if not surreal. The christmas meeting of a medieval guild could just as well have commenced in session. At one stage, it appeared Hill J was about to pour

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58 Kretztechnik AG v Finanzamt Linz [2005] 1 WLR 3755.
59 Recoveries Trust v FCT [2004] AATA XXX.
62 Interchange Corporation Ltd v ACN 010 087 573 Pty Ltd [2001] QSC XXX, Shaw v Director of Housing (No 2) [2001] TASSC XXX.
64 Marana Holdings Pty Ltd v FCT [2004] FCAFC XXX, Karmel & Co Pty Ltd v FCT [2003] AATA XXX.
68 TAB Limited v FCT [2005] NSWSC XXX.
drinks for counsel. Tax tragic, many of them willing refugees from the sales tax days, looked on with childlike innocence and fascination. I know, I was one of them. What the rest of Australia would have thought of all this is not recorded. When Gageler SC rose to begin, there was complete silence.

Landmark decision

On 8 July 2005, the Full Federal Court handed its landmark decision in HP Mercantile Pty Ltd in favour of the Commissioner. Justice Graham Hill gave the main judgment of the court (as was generally expected), the other two judges (Stone & Allsop JJ) agreeing, but adding comments of their own. Hill J made no mention of ‘neutrality’ by name in his reasons. However, he drew particular attention to the cascading problem and the ‘genius of a system of value added taxation’ – that being, the mechanism of credits. As Robert Olding has noted, it was not surprising in the lease that these comments were made. The judge repeated earlier comments about the main characteristics of our GST, noted some of its unique features, and pointed to deliberate choices made to depart from foreign models. He railed against any concentration on ‘linguistic analysis’ as a proper tool for resolving what s 11-15(2)(a) means, instead favouring application of the standard purposive approach required by the High Court.

Legislative scheme

Hill J said that this requires the court to prefer a construction which gives effect to legislative purpose, that to be identified ‘both by reference to the language of the statute itself and also any extrinsic material which the court is authorised to take into account’. The judge then observed (at [45]) –

The language of the GST Act, as seen in the context of value added taxation generally, makes it clear that the legislative scheme is that a taxpayer will be entitled to an input tax credit where it is necessary that a credit be given to ensure that output tax payable by the taxpayer is not imposed upon an amount which already includes tax payable at some early stage in the commercial cycle. Where possible, GST is not to be found embedded in the price or consideration on which output tax is calculated when taxable supplies are made.

Syntax, policy & context

Several points may be made. The first is that, even if not formally named this way, the statement from HP Mercantile expresses the core components of the neutrality principle. Second, it is the language of the GST law, seen against the wider context of VAT more generally, which makes it clear what the scheme of the legislation is in this regard. Third, the statement is framed by reference to the basic necessity for credit access. Fourth, and importantly, the principle is to apply where it is otherwise available. Hill J concluded (at [66]) that the interpretation of the Commissioner ‘is supported by the syntax, the policy and the surrounding legislative context’. Accordingly, he dismissed the appeal.

Purpose & coherence

As Tom Reid has pointed out, the reasons of Hill J in HP Mercantile involve very much a systemic or coherent approach to interpretation, something which more recent High Court cases emphasise. The other judges both agreed with the reasons given by the presiding judge. Stone J added comments of her own explaining why the relationship required by s 11-15(2)(a) raised a question of law.

51 HP Mercantile Pty Ltd v FCT [2005] FCAFC 126 (at [45]).
52 Olding Trends in the Interpretation of GST law [2007] ATAX 19th Annual GST and Indirect Tax Weekend Workshop paper (at [9]).
53 cf SZTAL v Minister for Immigration and Border Protection [2017] HCA 34 (at [34]).
56 Reid Interpreting the GST law: tax law based on coherent principles (2005) 5 AGSTJ 239 (at 244).
necessary given that parties to AAT proceedings may only appeal to the Federal Court on a question of law, rather than a question of fact\(^59\). Allsop J (at [88-90]), with disarming frankness, said that, were it not for the explanation given by Hill J of the scheme, purpose and context of the GST provisions, he would have inclined to a different outcome from a purely textual point of view. At the time, I wrote\(^60\) –

\[\text{VAT remarks of Hill J arguably are ‘scene-setting’ only and do not involve any deliberate delineation of legal boundaries. In any event, the VAT provisions are very different to ours, and cases decided under them have limited relevance and utility, therefore … What is certain, however, is that this case will influence GST interpretation long into the future.}\]

His final communiqué

Interpret or translate?

A month after \textit{HP Mercantile} was handed down, and just a few weeks before his death, Graham Hill delivered what was to be his final communiqué on things GST in a paper to the \textit{Taxation Law & Research Policy Institute} at Monash University\(^61\) – \textit{To interpret or translate? The judicial role for GST cases}. The judge began by pointing out that, as Acts of the Commonwealth parliament, our GST law is subject to the ordinary principles of statutory interpretation. It could hardly be otherwise. He described these as being mainly ‘rules of commonsense’, a theme which has been taken up more than once\(^62\).

Income tax & foreign cases

Hill J then observed that various parts of the GST legislation draw on income tax law principles and experience. Next, he said that, given that our law is based to some extent on foreign analogs, questions inevitably arise as to how much regard will or should be had to foreign cases in the interpretation of provisions modelled on other VAT regimes. This was only natural given there was little else to go on in the early years. In a paper two years earlier, Hill J had said that, in many cases, it will only be possible to understand the Australian legislation by reference to case law which pointed up problems in the legislation of New Zealand and elsewhere\(^63\). The principle he framed around this observation (at 18) was that courts ‘will always have regard to the case law of other jurisdictions in order to determine what the mischief was …’. The maturing of our GST jurisprudence, however, and directions set by the High Court have dimmed the light foreign cases might otherwise shine on what our GST law may mean\(^64\).

Underlying philosophy

Whenever it is suggested that legal issues are to be resolved by recourse to ‘philosophy’ in any sense, judicial method alarm bells start to ring. The problem suggested by Hill J (at 225) in this context ...

... will be that, while the Australian GST may not be modelled, in a particular respect, upon the law of any other GST or VAT country, the underlying philosophy to be found in the interpretation of VAT laws in other countries (particularly the European Union) may influence the interpretation of the Australian GST. This, in turn, leads to a consideration of the place which the European Union Directives on harmonisation of the VAT have had, both in that philosophy and in interpretative rules which have been adopted from them.

What exactly did Justice Hill mean by these remarks? There is no denying that VAT generally has a deep and abiding political and economic philosophy which underpins its practical expression. In an earlier paper, the judge had set out his more general views on the issue – \textit{How is tax to be understood by the

\[\text{\textsuperscript{59} s 44(1) of the Administrative Appeals Tribunal Act 1975.}\]  
\[\text{\textsuperscript{60} Brysland (2005) 5 AGSTJ 137 (at 145).}\]  
\[\text{\textsuperscript{61} Hill J (2005) 5 AGSTJ 225.}\]  
\[\text{\textsuperscript{62} Middleton Statutory Interpretation: Mostly Common Sense (2016) 40 40(2) Melbourne University Law Review } \text{XX}, \text{Pearce etc Uber?}\]  
\[\text{\textsuperscript{63} Hill J Some Thoughts on the Principles Applicable to the Interpretation of the GST (2003) 6 Journal of Australian Taxation 1 (at 14).}\]  
\[\text{\textsuperscript{64} cf AXA Asia Pacific Holdings Ltd v FCT [2008] FCA 1834 (at [96]).}\]  

There he said (at 23) that ‘judicial decision making should not proceed by reference to judicial conscience or political philosophy but principled decision’. This view is nothing but mainstream.

**Emergence and uptake**

Indirect consumption taxes have been around since ancient times – it is ‘historically the oldest form of taxation’66. Jonathan Barrett sets out the political economy VAT background of Thomas Hobbes and John Locke in a 2010 article – *Equity and GST Policy*67. The author traces emergence of the concept of a consumption tax from the Wilhelm von Siemens essay on the Veredelte Umsatzsteuer a century ago68, through the French TVA of 1948 (la taxe de valeur ajoutée) presided over by Maurice Lauré (extended in 1954), and the Michigan Business Activity Tax of 195369. Professor Terra provides more detail on these events70, and on early American writings71. In relation to the French TVA, Carl Shoup observed72 —

> The latest innovation is the value-added tax. Its emergence in France illustrates the process by which a sort of continuing ferment of improvisation now and then gives rise to an invention of the first order.

Value-added tax has also been called the ‘Mata Hari of the tax world’ by Alan Tait at the International Monetary Fund – ‘many are tempted, many succumb, some tremble on the brink, while others leave only to return, eventually the attraction appears irresistible’73. At any rate, rapid international and some intra-national74 uptake followed, with New Zealand being recognised as having the purest system in terms of neutrality75. When our GST was introduced, Graeme Cooper & Richard Vann in their *Sydney Law Review* article concluded that our purity ‘is midway between the EU and New Zealand versions’76. As Michael Evans reminds us – *Neutrality, like truth, is rarely pure and never simple* – an understatement.

**Role of EU directives**

Later in his paper (at 238), Hill J returned to the putative role of EU neutrality saying that the EU Directives might be used for interpretational purposes insofar as they ‘represent the way value added tax is supposed to work in the continent which invented VAT’. This suggests something like the ‘vibe’ comments that became popular in early discourse about the new tax77. Hill J added that the Directives themselves may also be a ‘useful source of principle’ in interpretation or a ‘useful source of law or premise for legal reasoning’. This goes further than mere ‘vibe’ or economic nuance. To illustrate, the judge quoted Rompelman for the idea that system is meant to relieve the trader ‘entirely’ of the VAT burden on all economic activities. The three ingredients here are purpose, extent and coverage.

**Problems with policy**

Hill J also commented on the basic difficulty of ascertaining policy for a new law ‘necessarily written in language of great generality’. Characterising policy at the correct level is a perennial problem in all

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69 cf Schenk & Oldman *Value Added Tax – A Comparative Approach* (at 395-400).
72 Shoup *Taxation in France* (1955) 8 National Tax Journal 328.
73 Tait *Value Added Tax: International Practice and Problems* (at 3).
74 *First Nations Goods and Services Tax Act 2003* in Canada, for example.
75 Preface to White & Krever (eds) GST in Retrospect and Prospect (at vi-viii), cf Value-Added Tax Act 1991 (South Africa).
77 *Vibe references* from *The Castle* ‘it’s the vibe and its mabo’ etc.
statutory settings\textsuperscript{78}, as is the danger of reader preconception\textsuperscript{79}. Neither is policy a reflection of or to be derived from subjective sources, he pointed out. It is an objective exercise undertaken by reference to objective indicators. Also, there is the near notorious fact that extrinsic materials are often of little use in identifying policy or purpose (let alone determining meaning)\textsuperscript{80}. Justice Hill’s paper is openly framed on the difference between translation (rendering legal language into plain English), and interpretation (which involves explanation affected by the ‘experience and philosophy of the interpreter’).

**Special leave refused**

On 16 June 2006, ten months after Hill J died, a High Court panel comprising Gummow ACJ and Kirby J refused special leave sought by the taxpayer\textsuperscript{81}. Following spirited argument, Gummow ACJ summed-up by saying that a ‘purely textual analysis’ may give some support for the taxpayer position. Despite this, he and Kirby J ‘reached a conclusion similar to that of Justice Allsop’. Gummow ACJ continued –

However, as Justice Hill showed in what was the leading judgment delivered in the Full Court, the statutory scheme and legislative context and purpose carry the day for the respondent Commissioner.

Refusal of special leave is not generally taken to affirm the correctness of the decision below ‘unless, of course, the court goes out of its way to say that it does agree with what was said in the court below’\textsuperscript{82}. Arguably HP Mercantile falls into this category. Whether or not it derives some stronger precedential status by reason of the manner in which special leave was refused, however, does not much matter. The case was later endorsed by the High Court in Travelex\textsuperscript{83}; it is frequently referred to with approval by the NSW court of appeal\textsuperscript{84}; and it is taken as read by the Full Federal Court in every GST case it hears\textsuperscript{85}.

**Interim reflections**

**Solid orthodoxy**

Graham Hill never got to see how his musings on the interplay between neutrality and interpretation might resolve in the 15 years since he posed his ‘interpret or translate’ question. It would take a further four years even for the first GST case even to reach the High Court\textsuperscript{86}. In matters of statutory interpretation, three things may be said about the way in which Hill J saw the world of legislation.

The first is that he was solidly orthodox in his dedication to modern principle\textsuperscript{87}. This is the consensus position rather than a merely personal reflection. The second is that, in a tangible way, his systemic coherence, constructional choice and anti-linguistic positions anticipated later articulation of these elements in the Federal Court and above. The third is that the strong legacy Hill J lives on, not just in tax circles, but more widely in the law\textsuperscript{88}. Professor Vann called him a ‘tax titan’\textsuperscript{89}. We now have the Justice Graham Hill Memorial Speech delivered each year in his Honour’s honour. In the 2007 speech, Kirby J said

\textsuperscript{78} Gleeson – Carr BARNES etc
\textsuperscript{79} Australian Education Union v Department of Education & Children’s Services [2012] HCA 3 (at [18]), Certain Lloyd’s Underwriters v Cross [2012] HCA 56 (at 26)), Williams v Wreck Bay Aboriginal Community Council [2015] HCA 4 (at [79]).
\textsuperscript{80} INSERT Allen and other cases NSWCA.
\textsuperscript{81} HP Mercantile Pty Ltd v FCT [2006] HCATrans 320, noted Brysland (2006) 6 AGSTJ 69 (at 69).
\textsuperscript{83} Travelex [2008] HCA XXX (at [25, 68]) – check.
\textsuperscript{84} Shiwani v Anjoul [2017] NSWCA 74 (at [88]) illustrates.
\textsuperscript{85} INSERT LIST.
\textsuperscript{86} Reliance.
\textsuperscript{87} cf Olding Trends in the Interpretation of GST law [2007] ATAX 19th Annual GST and Indirect Tax Weekend Workshop paper (at [19]).
\textsuperscript{88} Edmonds J The Contributions of Justice Hill to the Development of Tax Law in Australia (2006) 2 Journal of the Australasian Tax Teachers Association 1, Kirby J NAME (2007) 42/4 Taxation in Australia 202, for example. OTHERS.
\textsuperscript{89} Buffini Tax Titan was no heir but had all the graces, 26 August 2005 Australian Financial Review 29.
that HP Mercantile was one of the judge’s ‘greatest legacies’ 90. Gzell J described the judgment as a ‘powerful piece of jurisprudence’ 91. Edmonds J called it a ‘template for the future’ 92. In the special leave application for American Express in 2011, Slater QC referred to HP Mercantile then said 93 – ‘Justice Hill knew perhaps more about GST and VAT than anyone in Australia, with due deference to your Honours’.

At tax conferences around the country year-by-year, homage continues to be paid to our late friend.

Purpose & context

As HP Mercantile also illustrates, Hill J had a refined appreciation for ‘context’ as an important driver in contemporary interpretation, as well as its central role in the operation of what would later be called the ‘unqualified statutory instruction’ 94 – s 15AA of the Acts Interpretation Act 1901. It is the international VAT context to our GST adventure which underpins his comments regarding the possible influence of EU Directives on the Div 11 scheme of neutrality. When it comes to interpretation, we are to have regard to context in the ‘widest sense’ at the beginning of the process, and not merely if some difficulty later arises 95. Allsop CJ has observed that this passage from CIC Insurance had ‘been cited too many times to be doubted’ 96. The judge (at [7]) pointed out that the search for statutory meaning ‘is not a search for the meaning of secondary sources or for some purpose externally derived then to be transported into the statute’. This is important as we look at the possible influence of EU neutrality in Australia.

Extent of context

The exploration of context for interpretation purposes is necessary rather than optional 97. However, it can never be an end in itself. Context is always to be considered in close tandem with, and at the same time as, the text 98. Although context is ‘often messy’ and different in every situation 99, it is to be approached in a disciplined, systematic and logical way 100. Context usually includes the existing state of the law and the mischief the provisions were enacted to address 101. Extrinsic materials are naturally at the centre of context, but ‘statements of meaning’ within those materials (though not ignored) are usually accorded little weight 102. Context, of course, in its ‘widest sense’ may go further than these things, but it is not limitless or unconstrained. Nor is context uniform in its extent, value or impact.

The weight and cogency of contextual factors is judged by the ordinary rules of interpretation 103. The more remote a something is from the act and time of legislating, the higher will be its level of generality or abstraction. This means it will naturally have less (perhaps no) influence on any constructional choice to be made. Context, however, is expanded to include ‘the way the statutory text is applied in the courts after the text is enacted’ 104. Statutory context, therefore, is also a changing or evolving thing.

First commandment

90 Kirby J Justice Graham Hill Memorial Speech (2007) 42/4 Taxation in Australia 202 (at 204), ADD BLACK CJ.
91 Gzell The Legacy of Justice Graham Hill [2006] TIA Annual Convention South Australian Division paper (at 2).
92 Edmonds Tribute to the late Justice Graham Hill [2005] Law Council Tax Workshop paper (at 5).
94 SZTAL.
95 ‘at the same time’, SAS Trustee Corporation v Miles [2018] HCA 55 (at [64]).
This is only natural. It is also a consequence of the first commandment that interpretation must begin and end with the text. One ever-present problem is that there is no bright line drawn in the land of context to tell us when we have passed from potential legal relevance into alien non-justiciable territory – be it economics, science, philosophy or some other realm. Some idea of the potential scope of ‘context’ in any particular case may be found by reference to the extrinsic materials listed in s 15AB(2) of the Acts Interpretation Act 1901. That list is open-ended, but the utility of any particular document, whatever its source, is conditioned by the gateway requirement that the material in question is ‘capable of assisting in the ascertainment of the meaning of the provision’. In practice, this imposes an important restraint on what extrinsic material may properly be considered by a court. It also provides a rough guide to the kinds of contextual things that might possibly be of utility to the interpreter.

Theoretic possibilities

Finally, as I read again Graham Hill’s ‘interpret or translate’ paper, he is essentially posing questions and suggesting possibilities. He draws no conclusions; he makes no findings; and he embeds no doctrines. Instead, Hill J raises whether underlying VAT philosophy and EU Directives ‘may influence’ interpretation in Australia or ‘might be taken’ as a source of interpretational principle or a ‘useful source of law or premise for legal reasoning’. The judge also sounded a ‘cautionary note’ in this general respect, adding the important qualifier that there is ‘no legislative impediment’ to the possibilities he suggests.

This is an obvious point to make, but it teasingly leaves the gate open in situations where the GST law is silent. A final thing to note is the High Court caution that we are not to read too much into words of a judgment. What a judge writes in reasons for judgment are not to be read like a statute, of course. What a judge writes in a conference paper is naturally subjected to more circumspection (with respect). Graham Hill also once said that he reserved the right to change his mind on these things.

Ode to Neutrality

Neutrality central

Michael Evans has been the central activist in neutrality debates for more than two decades. He is an indefatigable influencer and outlier for a ‘strict and complete’ neutrality within our GST system. Nothing he writes, he says, is not about neutrality. In his view, EU neutrality is already an aspect of the GST law, as least as a rule of interpretation inferred from the context and purpose of the legislation when passed. That would make it a ‘foreign ghost fully resident in our GST machine’ (my words). Who will forget Michael’s magnificent Ode to Neutrality written on the ten year anniversary of the original ANTS Bills being introduced into federal parliament. That was about 12 months after the High Court gave judgment in its first foray into what parliament meant when enacting those Bills – Reliance Carpet.

A romantic idea

It may come as no surprise that I disagree with both the detail and the sentiment of the. My rejection of the idea that we have somehow absorbed EU neutrality as an ‘underlying philosophy’ of legislation the GST law involves a standard application of interpretation principles required by the High Court. Mr Rompelman is no foreign ghost in our GST machine. I have drunk from no ‘bitter cup of literal interpretation’ (words from the Ode), nor have I sacrificed high transnational principle on the ‘crucifix of...
mindless textualism’ (again from the Ode). The idea that merely legislating for a VAT-type model would bring with it an ‘underlying philosophy’ to which our GST law would bend was always a romantic idea.

Rebecca Millar views

Early in our GST adventure, Rebecca Millar asked whether Australia needed to or would develop its own version of neutrality – ‘only time will tell’, she said\(^\text{111}\). Fast-forward 13 years or so, and the answer given by Professor Millar is simply that we have our own neutrality derived from Div 11 provisions. If I understand Rebecca correctly, there is no reason really to ask if EU neutrality somehow applies in our system. This is a conclusion to be drawn from her 2017 paper – *The principle of neutrality in Australian GST*\(^\text{112}\). As Professor Millar points out, no special rules apply to interpretation of the GST law. And nothing in the extrinsic materials provides any likely foundation for reception of EU neutrality either.

In Australia, the broader principle established in *Rompelman* ... is quite conveniently spelled out for us in the text of the law [primarily s 11-15(1)] ... Thus, rather than merely being a principle of interpretation, under Australian GST the principle of neutrality is found in a specific legal rule.

Rebecca looks at a range of Australian cases through the lens of our native neutrality, including three which consider the s 11-15(2)(a) limitation to our neutrality rule\(^\text{113}\). She then tests how our neutrality rule would play out on the facts of some recent EU cases\(^\text{114}\). I agree that our native neutrality is something that emerges from the text of the GST law. What I find difficult is any ongoing suggestion that, over and above our GST law, some interpretive EU rule of construction applies in Australia, as a matter of ‘underlying philosophy’ or otherwise. Professor Millar of course does not argue for any ‘foreign ghost’.

Robert Olding views

In a 2012 article\(^\text{115}\), Robert Olding set out what he called – *An ATO perspective on the creditable purpose test*. The article is comprehensive and reaches the same general conclusions as this note. It is framed against the hypothetical ‘minco example’ under which look-through credit access on minesite accommodation insurance is tested in a coal export situation. Robert accepted (at 133) that a ‘high-level feature’ of VAT regimes is to relieve business of the burden and to prevent cascading\(^\text{116}\). Then he said –

... policy considerations are seldom single-dimensional: an application that may seem to be clearly consistent with perceived policy in one context may seem less so, or offend a different policy consideration, in another ... Accordingly, the approach adopted is not to start with a notion of how an ideal GST would operate and see if the Australian GST can be construed to give life to that perspective> Rather the approach is to endeavour to determine how the provision should be properly construed in light of the judicial guidance available from the GST cases handed down to date ...

Although it had been accepted in *HP Mercantile* ‘where possible’ that GST was not be found embedded in the output price, Robert (at 137-138) points out that nowhere in that case or in *AXA Asia Pacific* is the legal test stated in these terms. The relationship required is one of objective fact and no ‘look-through’ approach is endorsed\(^\text{117}\). Attention is then drawn to the dangers of using high-level policy to inform the meaning of provisions and to the related problem of policy preconception in interpretation\(^\text{118}\). In this


\(^{115}\) Olding An ATO perspective on the creditable purpose test (2012) 12 AGSTJ 131.

\(^{116}\) cf Explanatory Memorandum (at [3.24]).


\(^{118}\) National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd [2012] FCAFC 59 (at [94-99]) quoted.
regard (at 142), Robert concluded that ‘we must guard against assuming that whatever construction furthers the high level objects taxing value added or preventing cascading must be the law’.

He also drew attention to the fact that ‘what lies behind the enactment of a taxing provision as a matter of public policy or economic theory is not the same thing as the elements or criteria of tax liability which Parliament has laid down’119. A further point made by Robert is that parliament rarely pursues a singular general policy120. Statutory provisions more usually involve a compromise of competing policy objectives. That general policy cannot be read as the law must now be regarded as beyond argument. On the future impact of HP Mercantile, Robert suggests that cascade avoidance as a key feature of the tax ‘will continue to inform judicial decision-making’, but that the case ‘is unlikely to be accepted as authority for that principle becoming a proxy for the relationship required by s 11-15(2)(a)’121. If the word ‘inform’ merely means ‘provide background’, then I agree. The second point is already assured.

**Four Australian cases**

**TAB Limited** - 2005

**Disunity and neutrality**

Several GST cases have probed in one way or another, if EU-style neutrality somehow applies in this country. The first gambling supply case is one of them - TAB Limited122. Dealing with a taxpayer argument that ‘liable’ in s 126-10(1) was limited to race dividends actually paid, Gzell J said (at [83]) –

> It would be an odd result if total amounts wagered were to be determined on an accruals basis, while total monetary prizes were to be determined on a cash basis. That would create a disunity or, would offend what has been called the principle of neutrality in jurisdictions that have a developed value added tax jurisprudence: Elida Gibbs Ltd ... at [20]123.

**No authoritative finding**

The passage in Elida Gibbs to which Gzell J referred mentions neutrality ‘in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain’. While neutrality is referred to in the reasons given by the judge, it is by no means certain that Gzell J was making any authoritative finding about the status of EU neutrality in our law. Cordara and Parisi have questioned the correctness of TAB Limited and have questioned the basic characterisation of gambling activities for GST purposes124. In their view, the European position that the principal objective of gambling is entertainment (and not financial gain) is the better view125.

**TSC 2000 Pty Ltd** - 2007

**Economic equivalence argument**

In TSC 2000 Pty Ltd, the taxpayer (a gambling syndicate organiser) argued for a particular application of the GST law by reference to ‘fiscal neutrality’126. The argument being made was essentially one of

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120 Carr v Western Australia [2007] HCA 47 (at [5]) quoted.
121 Olding Trends in the Interpretation of GST law [2007] ATAX 19th Annual GST and Indirect Tax Weekend Workshop paper (at [74]).
123 Elida Gibbs Ltd v CEC [1997] QB 499 (at 560 [20]).
124 Cordara & Parisi Australian Goods and Services Tax Cases – Decisions and Commentary (at [13.5.2]).
125 RAL (Channel Islands) Ltd v CEC [2005] EUECJ C-452/03 (at [31]) quoted.
economic equivalence. In other words, that the GST effectively borne by all members of one syndicate should be the same, whether they placed their lotto bets directly or via the taxpayer acting as their agent. The taxpayer relied on a passage from an earlier VAT car trade-in case, Lex Services –

Its central core meaning [fiscal neutrality, that is] ... is that whether goods purchased by the final consumer have been through the hands of a dozen different traders at successive stages of their manufacture, distribution and marketing or are the product of a single manufacturer who is also a retailer the VAT system should (through its mechanisms of input tax and output tax) produce the same end result ...

Three principles

Responding to this narrative of how neutrality works, Hack DP drew attention to the comments by Hill J in HP Mercantile regarding necessary credit access. The deputy president observed (at [54]) that the idea of neutrality had ‘limited application’ to the case before him. He said (A) that it ‘is an aid to construction where it is necessary to determine which of competing constructions is to be preferred’, (B) that it cannot operate to modify the plain operation of the statute, and (C) that, if there is a supply from a practical and business point of view, ‘then recourse to the principle of fiscal neutrality is unnecessary and unwarranted’. Echoing earlier Federal Court comments, Hack DP observed that what lies behind the enactment of a taxing provision as a matter of public policy or economic theory is not the same thing as the elements or criteria of tax liability which parliament has laid down.

Div 126 denies neutrality

Later in his reasons (at [83-85]), the deputy president returned to fiscal neutrality and the argument by the taxpayer that the ATO position was ‘very odd … a good clue to its being wrong’. Any oddity here, however, said Hack DP, ‘arises as a consequence of the particular statutory provisions that apply to this case’. In his view, s 126-30 ‘operates to prevent the principle of fiscal neutrality operating’.

Aid to construction

The approach of Hack DP very much reflects suggestions of Hill J in two respects. One, EU neutrality may function as an aid to construction but, two, saying it is excluded here by the gambling provisions in question. Roderick Cordara and Pier Parisi commented on TSC 2000 Pty Ltd that Div 126 is ‘nothing other than a provision aimed at securing the outcome in gambling supplies of what the ECJ established ... being the fundamental point that “the taxable amount is the consideration actually received”’.

AXA Asia Pacific - 2008

Cordara’s argument

The taxpayer in another matter argued for credits before Lindgren J in a life insurance group situation by reference to neutrality – AXA Asia Pacific. This case raised (A) whether independent consideration

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127 Take up this economic equivalence point somewhere else – see PBD paper references.
128 Lex Services plc v CEC [2004] 1 All ER 434 (at 443 [26]).
131 ‘An acquisition of a thing is not a *creditable acquisition if the supply of the thing acquired was a *gambling supply’ – s 126-30(1).
132 Cordara & Parisi Australian Goods and Services Tax Cases – Decisions and Commentary (at [13.10.2]).
134 AXA Asia Pacific Holdings Ltd v FCT [2008] FCA 1834.
from a financial supplier is necessary to support an acquisition supply by the acquirer\(^{135}\), (B) whether trust grouping extends to unit trustees not GST registered in that capacity\(^{136}\), and (C) the correct basis on which to apportion credits\(^{137}\). Cordara SC, who appeared for the taxpayer, said that input taxation –

\[\text{... is an exception to the overarching concept underlying GST} \]  
\[\text{(that is, neutrality), which is that no ‘sticking’} \]  
\[\text{tax will stay in the chain of suppliers: instead they should all be able to recover the input tax that they have} \]  
\[\text{had to incur (built into the price of their acquisitions) to make supplies that are either taxable or GST-free,} \]  
\[\text{with the burden only being borne by the final private consumer.} \]

**Foreign decisions**

Counsel explained this by pointing out that it is of the essence in a VAT-based system that entities get all their input tax back so they remain neutral in a fiscal sense. Cordara SC was reflecting the orthodox European position that neutrality is ‘inherent in the common system of VAT’\(^{138}\). Lindgren J (at [62]) quoted the ‘legislative scheme’ comments in *HP Mercantile*, but he did not otherwise mention neutrality. The judge did say (at 96]), however, that he saw ‘no reason to import as authorities on the construction of the GST Act approaches that were taken in cases concerning different statutory texts and contexts’. He also said (at [122]) that a ‘look through’ approach was inconsistent with the GST law\(^{139}\).

**Electrical Goods Importer** 2009

**Cash-back payments**

This case, decided shortly after *Reliance Carpet* was handed down in the High Court, is the most targeted analysis of the status of EU-style neutrality in Australia yet\(^{140}\). Fiscal neutrality was argued to reduce consideration by reference to cash-back amounts paid directly by the importer to consumers purchasing from interposed retailers. Block DP (at [41]) first drew attention to the fact that neutrality was an implication drawn from the description of VAT as a ‘general tax on consumption’. Next, he observed (at [43]) that the passing reference in *TAB Limited* could not be taken as a pronouncement ‘that the principle is part of Australian law’. After noting remarks of Hill J in *HP Mercantile*, the deputy president returned to consider the ECJ case referred to in *TAB Limited* by Gzell J – *Elida Gibbs Ltd*.

**Public policy & economic theory**

That case involved a similar discount scheme under which the manufacturer redeemed consumer coupons direct. It was held that the ‘nominal value of redeemed coupons must be deducted from the original purchase price’. Block DP (at [47]) said there was no equivalent of the EU directive in the GST law. He referred to *TSC 2000 Pty Ltd* for the principle that what lies behind a taxing provision ‘as a matter of public policy or economic theory’ is not the same thing as the criteria of liability which parliament has laid down\(^{141}\). He quoted a commentator (me) on the point\(^{142}\), then referred to remarks in *Reliance Carpet* (at [3-5]) which contrast the respective systems operating in Europe and Australia.

**Consumption and supply**

\[\text{135 cf GSTR 2002/2 (at [35]), Finanzamt Groß-Gerau v MKG-Kraftfahrzeuge-Factory GmbH [2003] EUECJ C-305/01, Hagemeyer Ireland Ltd plc v Revenue Commissioners [2007] IEHC 49.} \]

\[\text{136 ss 48-10(1)(c) and 184-1, cf Toyama Pty Ltd v Landmark Building Developments Pty Ltd [2006] 62 ATR 73 (at 85 [66]), Di Lorenzo Ceramics Pty Ltd v FCT 2007 ATC 4662 (at 4676 [87]).} \]

\[\text{137 GSTR 2006/4 (at [32-35]), Ronpibon Tin NL v FCT (1949) 78 CLR 47 (at 55-56), HP Mercantile Pty Ltd v FCT [2005] FCAFC 126 (at [37]).} \]


\[\text{139 cf Cordara & Parisi Australian Goods and Services Tax Cases – Decisions and Commentary (at [7.10.3]).} \]

\[\text{140 Electrical Goods Importer v FCT [2009] AATA 854.} \]

\[\text{141 WR Carpenter Holdings Pty Ltd v FCT [2007] FCAFC 103 (at [29]).} \]

\[\text{142 Brysland (2007) 7 AGSTJ 129 (at 134), cf Brysland in Peacock (ed) GST in Australia: Looking Forward from the First Decade (at 40-42).} \]
In Reliance Carpet, the High Court was concerned to stress (A) that, as a matter of legal analysis, what generates the tax liability is ‘not consumption, but a particular form of transaction, namely supply …’143, (B) that, by contrast to the Australian system, VAT is a ‘general tax on the consumption of goods and services’144, and (C) that the composite expression ‘taxable supply’ is of critical importance for the imposition of liability. Block DP concluded (at [51-52]) that there were no ‘competing interpretation’ in this case, that neutrality ‘cannot modify the plain operation of the statute, and that the ‘principle of fiscal neutrality is not part of Australian law’. These findings are expressed in categorical terms.

What commentators said

Roderick Cordara and Pier Parisi point out that Block DP did not discuss Elida Gibbs in detail, nor did he ‘attempt to articulate precisely the principle of fiscal neutrality’145. The authors say there was broad reference to the principle ‘without acknowledging that while it has specific aspects … which can assist in understanding the basics of a VAT, such as the GST, it is essentially, a core principle of European law146. Cordara and Parisi quote from treaty provisions on equal treatment, observing that these goals ‘obviously do not form part of the objectives of the GST Act’. They suggest that, had Electrical Goods Importer been better argued for the taxpayer, there may have been scope to appeal more tactfully to underlying policy. Although the authors suggest that reliance on foreign cases for general principles may produce more success, it is not clear this is correct or has been borne out in practice.

Interpretation in Australia

Before considering EU cases on neutrality and how it works in practice, something should be said about the respective interpretation protocols applied in Australia and Europe. Spoiler Alert – they are vaguely similar in some ways (partly for nomenclatural reasons), but the core values are different, and radically so. To provide appropriate context, some of the historical perspective also needs to be touched on.

Legalism and literalism

For most of the twentieth century, Australia nurtured a generally literalist approach to statutory interpretation. Often referred to as ‘black letter’, strictness was front and centre147 but cynicism148 at times not far from the surface. The approach is thought to have been typified, if not generated and encouraged, by the way the Barwick Court decided a suite of tax cases. Kirby J later spoke about the ‘misfiring of texts that was the main legacy of the era of literalism’149. What was called the ‘new literalism150 led to what was described as a ‘notorious era of interpretation of legislation in Australia’151. Hill J had accepted this generally as being correct, but regarded the issue as being more complex 152. There developed a degree of embarrassment about this, and a sense that Australia was out-of-step and behind the times in this area of the law. The UK had moved to a more purposive approach, perhaps partly due to the influence of EU law on the British Isles following the European Communities Act of 1972.

Agitation for change

143 Sterling Guardian Pty Ltd v FCT [2006] FCA XXX (at [XXX]) quoted.
144 Article 2(1) of the First Directive referred to.
145 Cordara & Parisi Australian Goods and Services Tax Cases – Decisions and Commentary (at [2.10.2]).
146 NCC Construction Danmark A/S v Skatteministeriet [2009] Case C-174/08 (at [41]) quoted.
149 Palgo Holdings Pty Ltd v Gowans [2005] HCA 28 (at [112]).
150 Krever Murphy on Taxation in Scutt (ed) Lionel Murphy: A Radical Judge (at 130).
There was a desire for change and a more modern approach to interpretation which took more account of purpose and context. A central agitator for this change was Patrick Brazil at the Attorney-General’s Department in Canberra. One way this agenda was to be progressed was by a series of conferences, to which influential judges and others were invited from here and offshore. Lord Scarman from Britain was one of the international visitors. In a lecture at Monash University in 1980, the law lord said:\textsuperscript{153} –

\begin{quote}
Indeed, when I, an English judge, read some of the decisions of the High Court of Australia, I think they are more English than the English. In London no-one would dare to choose the literal rather than a purposive construction of a statute: and ‘legalism’ is currently a term of abuse.
\end{quote}

**Parallel revolution**

Sir Garfield Barwick retired as chief justice of the High Court at the age of 77 years on 11 February 1981, citing failing eyesight caused by diabetes. Before he departed, however, a bench of five other justices heard the prior year losses case, Cooper Brookes. Four months after Barwick left the stage, the decision was handed down:\textsuperscript{154} It delivered just the comprehensive refutation of literalism that many had hoped for, and one that continues to resonate to this day:\textsuperscript{155}. Cooper Brookes was followed, precisely a week later, by the enactment of federal legislation to entrench purposive interpretation as the statutory norm in Australia – s 15AA of the Acts Interpretation Act 1901. A parallel revolution had taken place, but not one wholly unanticipated by the flow of legal history. David Marr observed generally of Barwick CJ – “He was his own man, but without followers:\textsuperscript{156} So it turned out to be with statutory interpretation.

**Historical antecedents**

The idea that purposive methods are some ‘modern approach’ to interpretation is, of course, a legal misnomer. The historical antecedents of purposive interpretation are generally regarded as ‘equity of the statute’ principles:\textsuperscript{157} and the ‘mischief rule’:\textsuperscript{158} More recent digging suggests:\textsuperscript{159}, however, that the roots go all the way back to Aristotle\textsuperscript{160} and continental Roman law (perhaps cave paintings also). It seems there is nothing new in the solar heat of legal interpretation. The modern ascendancy of purposivism in the common law world, however, dates from 1958 with publication of the teaching materials of two Harvard Law School academics, Henry Hart and Oliver Sacks:\textsuperscript{161} For them, ‘every statute must be conclusively presumed to be a purposive act’. This quickly became a running orthodoxy:\textsuperscript{162}. In America, though, that movement was later to be eclipsed by the ‘new textualism’ of Antonin Scalia\textsuperscript{163}.

**Three decades of purpose**

A steady chorus of High Court decisions over nearly 30 years should convince us that formalistic black letter approaches to interpretation are now behind us:\textsuperscript{164} Black letter construction is a thing of the past. The AAT put it correctly when it said – ‘It is clear that the High Court has determined that the current approach to statutory interpretation must be the purposive approach and not a literal approach’:\textsuperscript{165}.

\begin{footnotes}
\footnotetext[154]{Cooper Brookes (Wollongong) Pty Ltd v FCT (1981) 147 CLR 297.}
\footnotetext[155]{HFM043 v Republic of Nauru [2018] HCA 37 (at [24]) for example.}
\footnotetext[156]{Marr (at 299).}
\footnotetext[157]{Eyston v Studi (1574) 75 ER 688 (at 695), Plucknett Statutes & their Interpretation in the First Half of the Fourteenth Century (1986).}
\footnotetext[158]{Heydon’s Case (1584) 76 ER 637 (at 638), Black Development of principles of statutory interpretation [2013] Francis Forbes Society.}
\footnotetext[159]{Corcoran Theories of Statutory Interpretation in Corcoran & Bottomly (eds) Interpreting Statutes (at 11-14).}
\footnotetext[160]{Aristotle Ethics Book 5, Chapter 10 (at 113-114).}
\footnotetext[161]{Hart & Sacks The Legal Process: Basic Problems in the Making and Application of Law.}
\footnotetext[162]{Brooks The responsibility of judges in interpreting tax legislation in Cooper (ed) Tax Avoidance and the Rule of Law (at 111) CHECK.}
\footnotetext[164]{cf Corcoran Theories of Statutory Interpretation in Corcoran & Bottomly (eds) Interpreting Statutes (at 29).}
\footnotetext[165]{Reid v Secretary of Education, Science and Training [2006] AATA 1051 (at [35]).}
\end{footnotes}
There was concern in 2010\textsuperscript{166} that comments made in Saeed v Minister hinted at some revisitation of more literalistic methods\textsuperscript{167}. This turned out not to be the case, as Spigelman CJ and others had predicted\textsuperscript{168}. Kirby J said that the High Court ‘should not return to the dark days of literalism’\textsuperscript{169}. Spigelman CJ was fond of referring to legal interpretation as a ‘fashion industry’\textsuperscript{170}. However, any even survey of High Court work in this area over the past decade should allay any lingering anxieties. The undeniable reality is that purposive principle has been the ascendant norm for a long time in Australia.

**Interpretation in Europe**

To understand EU neutrality, some appreciation of the legal system which produced it is necessary. This involves, not only identifying the source of the principle, but also having a degree of rapport with how it was derived, and how it is applied and interpreted in practice. Some may be shocked by what follows.

**Teleological approach**

In the early case of Merck\textsuperscript{171}, the CJEU summarised its general approach to interpretation as follows –

… in interpreting a provision of the … law it is necessary to consider not only its wording, but also the context in which it occurs and the objects of the rules of which it is part.

This rather benign statement conceals much more than it reveals about what happens in practice. If I am reading the literature correctly, the Merck approach is honoured by EU judges more in the breach than the observance. As Gunnar Beck has written, the work of the CJEU (in treaty interpretation at least) ‘must be placed at the extreme activist end of the judicial spectrum’. He went on – ‘Law, for the CJEU, is essentially the continuation of politics by other means’\textsuperscript{172}. One early commentator, writing in the *European Law Review*, asked whether the CJEU is ‘running wild’\textsuperscript{173}. These are dramatic assessments.

**Science-fictional feel**

The predominating style of European interpretation is ‘teleological’ in nature\textsuperscript{174}. Even the word itself has something of a science-fictional feel to it. In ordinary speech, it means something like ‘purposive’, but in a kind of eerie way. In the context of EU interpretation, it is applied in a manner that goes far beyond the kind of purposivism known to any Australian judge. There is liberal reliance on ‘meta-teleology’ – that is, a small number of recurring abstract umbrella concepts derived by the judges themselves.

**Almost complete freedom**


\textsuperscript{167} Saeed v Minister of Immigration and Citizenship (2010) 241 CLR 252 (at 264).

\textsuperscript{168} Spigelman CJ The intolerable wrestle: Developments in statutory interpretation (2010) 84 ALJ 252 (at 264).

\textsuperscript{169} Re Energex Ltd (No 4) [2011] ACompT 4 (at [18-21]), cf Bryland in Peacock (ed) GST In Australia: Looking Forward from the First Decade (at 42-43).


\textsuperscript{171} cf Brooks The responsibility of judges in interpreting tax legislation in Cooper (ed) Tax Avoidance and the Rule of Law (at 172).

\textsuperscript{172} Beck Judicial Activism in the Court of Justice of the EU (1977) 36 University of Queensland Law Journal 353 (at 353).

\textsuperscript{173} Cappelletti Is the European Court of Justice ‘running wild’? (1987) XXX European Law Review XXX (at 3).

Advocate General Maduro explains that EU statutes are interpreted ‘in the light of the broader context provided by the EU legal order and its constitutional telos’175. Treaties are ‘living’ documents and read as such176. Beck also mentions that ‘political fashion’ is a factor in interpretation at the treaty level177. Professor Leslie Zines at ANU described the CJEU in 1973 as being impatient with the treaty provisions and determined not to let them stand in the way of the fulfilment of what the judges consider to be desirable political or economic ends178. Beck explains the resulting situation as follows179 –

This ultra-flexible interpretative approach minimises methodological constraint and affords the CJEU almost complete freedom of interpretation. This methodological flexibility leaves the CJEU free to give the greatest weight to whatever arguments, usually teleological criteria, support its preferred conclusion.

Panoramic pragmatism

The teleological approach transcends literal, historical and contextual approaches ‘because it is not restricted by the wording, background or context of the provisions in issue’180. It is purposeful, but in the sense of being dynamic in its drive to give effect to the spirit and scheme of legislation (as the judges see it). Judges take a ‘panoramic view’ and see solutions from a perspective of raw pragmatism.

The European way

The result is not unlike ‘web of beliefs’, ‘all things considered’ and ‘funnel of abstraction’ ideas of legal pragmatists elsewhere181. Continental judges are expected to ‘fill in the gaps’ by reference to background values, often opaquely expressed. ‘It is the European way’, Lord Denning once wrote182. The more principles-based style of legislative drafting pursued in the EU presupposes and supports this. There is no formal doctrine of stare decisis in the EU, nor any theory of ratio decidendi183. The CJEU is not bound by its own decisions, but will treat them in a ‘precedential’ way when that is seen as desirable.

Animals skinned alive

More creativity and judicial policy-making is ceded to (and demanded from) the EU judge184. Bingham J described this as ‘supplying flesh to a spare and loosely constructed skeleton’185. European legislation ‘must be understood in connexion with the economic and social situation in which it is to take effect’186. Much weight is placed on the practical consequences of each construction187. Reverse-engineering is an open fact of judicial life – that is, selecting an agreeable answer then finding whatever reasons may support it188. Ends justify means189. This is in stark contrast to ‘bottom-up’ methods which dominate

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176 Cliff v Ministry of Health [1982] ECR I-3415 (at [20]).
177 Beck, The Legal Reasoning of the Court of Justice of the EU (at 390-404).
179 Beck, Judicial Activism in the Court of Justice of the EU (2017) 36 University of Queensland Law Journal 333 (at 353).
183 Beck, The Legal Reasoning of the Court of Justice of the EU (at 390).
184 Neill, The European Court of Justice: a case study in judicial activism.
187 Enderby v Frenchay Health Authority [1994] 1 All ER 495 (at 513).
189 cf Schulyok The ECJ’s Interpretation of VAT Exemptions (2010) 07/08 International VAT Monitor (at 268).
judicial decision-making in common law countries. Francis Bennion summed up by saying that the ‘continental version of purposive construction enables the legislative animal to be skinned alive’.

*CJEU judgments*

In many situations, it is difficult properly to identify or evaluate the path of reasoning leading to the answer provided by the CJEU in its judgments, including in neutrality cases. Various comments from Matyas Bencze summarise the problem. The CJEU, he says, ‘engages in meta-teleology by assertion, rather than by justification through argumentation’. The court ‘often adopts a magisterial or declaratory style of judgment’ where a ‘lack of substantive or dialogical or dialectical reasoning is apparent’. A ‘key feature’ of judgment writing by the CJEU, says Bencze, is a ‘tendency to under-articulate its methods of reasoning’. It is this approach which ‘helps conceal discretion and real choice, and it means justification is under-developed’. Heuristically murky is one way to describe things.

*Existentialist atmosphere*

CJEU judgments traditionally involve short conclusory statements that go unlinked by reasons or analysis, much less any step-by-step progression of logic or argument. They are deeply analogical without inhibition or disclosure. There are no dissenting opinions and no right of appeal. The court merely declares the law, often in an opaque and Delphic manner. In some ways, the CJEU acts more like a legislator or the executive than a court. This builds into a certain existentialist atmosphere around what the court does in deciding cases. The unreality in this regard which pervades the euro-VAT world is considered further in the context of the ‘fiscal theme park’. For now, it is enough to observe that the uncertainty, unreasoning and abruptness aspects of the CJEU judgment writing style suggest parallels between the reader/litigant and Joseph K, the protagonist in Franz Kafka’s novel, *The Trial*.

*Activism and coherence*

These views reflect a particularly Anglo-centric conception of judicial method, of course. It would be misleading not to acknowledge that other views are held. David Edward, for example, says that the CJEU’s role ‘cannot be confined to that of providing a technocratic literal interpretation of texts produced by others’, and that the judge must proceed ‘to make the legal system consistent, coherent, workable and effective’. The legal pluralism of the EU, for one thing, pushes things in this direction.

*Internal coherence*

Leonor Soriano, writing in the journal *Ratio Regis*, defends European judicial method on the basis of coherence theory. The CJEU, in her view, ‘rightly refers to authority reasons and substantive reasons; values and principles’. Indeed, she says (at 298) that ‘many of the accusations of judicial activism addressed to the court are founded on a poor understanding of the content of legal reasoning and, in particular, of the role of coherence in the legal system and legal reasoning’. It is the coherence between different kinds of reasons within a judgment which are important for Soriano, not the content of the reasons themselves. Internal coherence of judgments is valued more than external consistency.

*Intra-EU perspectives*

An insider appraisal of EU interpretation comes from Giulio Itzcovich in the *German Law Journal*. This is a review more from a civilian law standpoint, but it does tend to bring more perspective to the
analysis. Itzcovich categorises the criteria applied as linguistic, systemic and dynamic. So far as the first is concerned, ordinary meaning is seldom conclusive, never binding and often overridden. Plain meaning may also be an illusion when EU legislation is drafted in several languages. One reason for a teleological approach is elimination any misunderstandings that may arise between different EU languages. This was one rationale given for the CJEU decision - Skatteverket v Hedqvist - that bitcoin is ‘currency’ for VAT purposes. Where there are linguistic differences, the answer cannot be determined on a basis that is ‘exclusively textual’. Regard must always be had to the aims and scheme of VAT.

No originalist intentions

Systemic criteria in this regard emphasise coherence of the system as a whole. In this context, Itzcovich points out that genetic or historical arguments play a ‘marginal role’, and ideas of ‘original intentions’ have no influence. Dynamic criteria have regard to functional, teleological and consequentialist factors. These serve more the need for evolution of EU law and ‘hold a prominent rank’ in the system of interpretation. At the end of a long article, Itzcovich (at 559) observes that the EU is a ‘structurally uncertain political community’. This, he says, has contributes to the CJEU preference for teleological interpretation and the firm refusal by the court to acknowledge the ‘historical will’ of legislators.

VAT teleology

There are mixed opinions about whether the kind of teleological approach described is applied with full force in all VAT situations. Some suggest that this is indeed what happens in practice. Others, like Beck (at 341), say that it is rare in VAT and similar cases for the CJEU to reach a conclusion ‘based solely or primarily on teleological criteria at odds with a literal reading’. VAT exemptions, certainly, are expected to be construed in a strict manner, though not always. The rationale in this regard is that exemptions are exceptions to the fundamental principle that VAT is to be levied ‘on all services supplied for consideration by a taxable person’. Recent CJEU neutrality cases analysed by Dr Grube in 2017, however, do suggest application of precisely the kind of teleology described above.

Economics over law

In their 2009 article – EU VAT and the Rule of Economics – John Watson & Kate Garcia state that ‘the principles on which the VAT system are based take precedence over the legal provisions’, and that the Directives ‘are merely the mechanism through which the economic structure of VAT is delivered’. The ECJ, they say, ‘clearly recognises that the legal provisions of the VAT Directives are subservient to the conceptual structure of the tax’. Referring to the Elida Gibbs case, they say the ECJ ‘rode roughshod over the arguments that the detailed provisions of the Sixth Directive could not deliver them’.

Ruthless correction

Further (at 191), Watson & Garcia say – ‘Where the detailed provisions of the directives do not deliver the economics or do not follow the principles of the First Directive, they are ruthlessly corrected by the
ECJ'. In a later article – Babylonian Confusion – the same authors say that ‘it would be nothing new for the ECJ to override the exact wording of the Directive in order to achieve a rational result’. These comments, alarming as they are, continue a steady theme about interpretation of euro-law by the CJEU.

**European law in Britain**

**EU law prevails**

Britain legislated for a value-added tax in 1973 after repeal of the Purchase Tax and the ill-fated Selective Employment Tax. The latter, taking the acronym ‘SET’, also came to be known as the Silliest Ever Tax. Neil Warren, in an early Revenue Law Journal article, sets out the historical background. UK courts in their application of European law, including VAT law, came ‘under a duty to follow the practice of the European Court’. This is a direct outcome of enacting the European Communities Act 1972, a statute which is to be repealed when (if) Brexit happens. In a 1981 case, Lord Denning had said – Community law is now part of our law; and whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it...

**Judicial subservience**

Halsbury’s Laws of England explains that in practice ‘there is a need to have constant reference to the Sixth Directive and to the various decisions of the ECJ in relation to VAT and allied topics in order properly to interpret and apply the domestic legislation’. If EU law applies directly, national legislation in conflict with it must give way. UK courts ‘are obliged to take judicial notice not only of decisions of the ECJ or any court attached to it but also any expression of opinion by such a court on any question of the meaning or effect of any Community instrument’. The subjugation of UK law to the EU teleos is an important driver in the Brexit debate under the populist catchcry ‘take back control’.

**British legal yoga**

In the early case of Haydon-Baillie, the VAT Tribunal took the view that, where the wording of the UK statute ‘echoes the intent of the Sixth Directive’, there is no further room for reliance on the directive because the ‘statute supersedes it’. The tribunal quoted Nolan J in Yoga for Health as follows –

I accept that I must do my best to adopt a European as distinct from a traditionally English approach to the question of construction, but by that I think little more is meant than that I should adopt what is often called a purposive or sometimes a teleological method of construction...

**UK legal thinking**

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207 cf Craig & Búrca EU Law Text, Cases, and Materials (at 74).
212 Macarthys Ltd v Smith [1981] QB 180 (at 200), cf Pham v Secretary of State for the Home Department [2015] 1 WLR 1591 (at [80]).
215 cf Marleasing SA v La Comercial Internacional de Alimentación SA [1993] BCC 421 (at [8]).
217 Yoga for Health Foundation v CEC [1984] STC 630 (at 654).
It is not in dispute that the influence of the EU on legal thinking within the UK, and development of the law there, has been profound by any measure. The converse impact of common lawyers on EU legal thinking has been less even, and more limited. This was predictable in all the circumstances. The interaction and exposure to new ideas (including teleological interpretation) ‘has resulted in a mutual exchange of ideas which has been described as a kind of osmosis between legal systems or the downloading and uploading of legal principles’\(^{218}\). Legitimate expectations is one area where a positive influence has been seen. Some feel that, in the digital age, a break from Europe will damage the UK reputation and capacity in the exported legal services market\(^{219}\). Time will tell and the clock is ticking.

**Sovereignty concerns**

Some think that the current state of affairs has eroded parliamentary sovereignty in the UK. Not at all, says Professor Neil Duxbury in his book *Elements of Legislation*. Sovereignty is retained at least because ‘parliament still has the right to withdraw from its obligations under European law’\(^{220}\). Both the CJEU and UK domestic courts, however, see UK sovereignty as being compromised by EU membership\(^{221}\). It was once proposed that a ‘sovereignty clause’ be legislated ‘to put the matter beyond speculation’\(^{222}\).

**Retained EU law**

Under the *European Union (Withdrawal) Act 2018*, the *acquis* of EU legislation applying in the UK (including VAT Directives), called ‘retained EU law’, will form part of domestic UK law on ‘exit day’\(^{223}\). This enormous legislative corpus will then be subject to rationalisation and progressive change\(^{224}\). The policy is aimed at maximising certainty and stability in what has been a dangerously uncertain process. However, the transposed law will now operate in a different context and much of it will not make sense.

**Take back control**

As Lord Neuberger said in the Brexit case – ‘... those legal rules derived from EU law and transposed into UK law by domestic legislation ... will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law’\(^{225}\). Lord Lloyd-Jones, now a judge on the UK Supreme Court, read the original Bill as preserving the authority of EU interpretation principles in relation to the domestic acquis\(^{226}\). This appears now to be made secure by s 6 of the *European Union (Withdrawal) Act 2018*. In practical terms, this means that Brexit itself may not make much difference at all to the VAT regime now operating in the UK. EU neutrality, together with the EU cases and the way it is to be understood, is extended. So much for ‘take back control’. Speaking about the great Brexit impasse, President Macron of France recently urged Europeans themselves to ‘take back control’.

**Fiscal theme park**

The English judge Sedley LJ once explained that, beyond the everyday world’, lies the world of VAT, a ‘kind of fiscal theme park in which factual and legal realities are suspended or inverted’\(^{227}\). This


\(^{219}\) Lord Thomas *Law Reform Now in 21st Century Britain: Brexit and Beyond* (at [8-9]).

\(^{220}\) *Duxbury Elements of Legislation* (at 232), cf Bennion on Statutory Interpretation (at 1294), *R v Chancellor of the Duchy of Lancaster* [2016] 3 WLR 196 (at [58]), *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (at [99]).


\(^{223}\) s 3(1) of the *European Union (Withdrawal) Act 2018*.

\(^{224}\) It has been estimated that around 186 statutes and 7900 statutory instruments currently implement EU in England alone – that is, without factoring in Scotland, Wales and Northern Ireland.

\(^{225}\) *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (at [80]).


\(^{227}\) *Royal & Sun Alliance Insurance Group plc v CEC* [2001] STC 1476 (at [54]).
description, made nearly two decades ago, is still being repeated in the First Tier Tribunal. Sedley LJ described (at [58]) going through a ‘hermeneutic turnstile’ into ‘this complex parallel universe’ where ‘relatively uncomplicated solutions are a snare and a delusion’. Another judge referred to the ‘mystic twilight of VAT legislation’. Lord Hope in Svenska called-out the ‘make-believe world of VAT’ where the statutory scheme does not always follow the real world and the guiding principle is neutrality.

Genuine difficulties

As Roderick Cordara has explained, these comments are no accident. They express genuine difficulties ‘in coming to terms with a tax that is based on an unfamiliar system of economic policies and has its genesis in civil law thinking and analysis’. Richard Lyall QC once put it to the ECJ that ‘there is a French philosophical structure underpinning the tax which is redolent of Descartes, who was greatly enamoured of dualism and its creative contradictions’. Together these comments are suggestive of just the kind of alien legal landscape that teleological interpretation has been apt to create. Others suggest the failure of European law to work properly could put the whole EU venture in jeopardy.

Drama if not emotion

Much of the UK commentary on teleological interpretation sounds in dramatic if not emotive language. It can be seen, of course, how an approach of this kind is naturally affronting to someone schooled in common law traditions. The very idea that the practice of judges in the EU may involve ‘the continuation of politics by other means’, and that EU judges ‘just make it up’ as part of some chaotic teleology, is terrifying anathema for those raised on a steady diet of principle and restraint. We may recall the fiscal theme park again where ‘factual and legal realities are suspended or inverted’.

Message to judges

The consistent message to UK judges, however, has been (A) to get used to the new teleology, and (B) to apply it where they are required to. The British and their judges have now had over 45 years of working with and applying European law – that ‘incoming tide, flowing into the estuaries and up the rivers of the United Kingdom’. Far from engineering a full-stop to the influence of EU interpretation in the British Isles, however, the scheme of the European Union (Withdrawal) Act 2019 is to extend it.

Some European cases

Endless matrix

There is an endless matrix of cases about EU neutrality in the Rompelman sense. Any attempt at comprehensive analysis can only end in a book. For present purposes, it is enough to understand where the principle comes from, to get some appreciation about its evolution, the manner in which it is interpreted, the role it plays within the EU legal structure, and how it is applied in practice by the CJEU within the European Union. Some feeling for these elements is desirable when seeking to evaluate whether EU neutrality might have already become a ‘foreign ghost in our GST machine’. With this in mind, I have selected EU ten cases, some of which are also dealt with by Dr Grube in her 2017 paper. These cases may not always be the most important ones, but they draw out some of the major themes.

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228 Virgin Media Ltd v CRC [2018] UKFTT 556 (at [113]) for example.
231 Cordara GST – History, Experience and Future [2007] Federal Court Judges Workshop paper (at [5-7]).
232 INSERT footnote.
234 Bulmer Ltd v Bollinger SA [1974] Ch 401 (at 418).
235 Grube Neutrality and input tax deductibility (2017) 17 AGSTJ 8 (at XXX).
**Key principle**

Fiscal neutrality has been a dominating force in the EU since the making of the First Directive in 1967. It was also a critical feature of Maurice Lauré's primitive ‘la taxe de valeur ajoutée’ in 1954. The classic statement of neutrality, and the one which this note adopts as authoritative, comes from the ECJ judgment in a preparatory activities case decided in 1985, *Rompelman v Minister van Financiën*\(^{236}\). The Rompelmans bought two units in premises under construction in Amsterdam. They were marked as 'showrooms' on the plan and the intention was to later lease them out to traders. The court said –

... the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of the valued added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

**Main features**

The main features emerging from this statement are as follows. First, it is a positive purpose of the provision to produce the effect it describes. Second, it is the trader as the taxable person who is the focus of the measure. Third, it is that person who is to be relieved of a tax burden that would otherwise apply. Fourth, the burden in question is to be relieved entirely – not partly and not provisionally, but ‘entirely’. Fifth, the relief is to apply universally across all economic activities, provided only that the purpose or results of those activities are themselves subject to the tax. Later cases have added myriad nuances of emphasis to these elements, but the original *Rompelman* formulation captures the essence. These include, sixth, that the right of deduction is ‘integral’ and ‘in principle cannot be limited’.

**Only after deduction**

Derivation of the classic statement in *Rompelman* followed on from reference (at [16]) to an earlier case where it was said that a basic element of the VAT system is that VAT is chargeable only after ‘deduction of the VAT borne directly by the cost of the various components of the price of the goods and services’\(^{237}\). The decision of the Advocate General in *Rompelman*, Sir Gordon Slynn, made no mention of neutrality, the case being conducted simply on the ability to deduct on a future taxable transaction\(^{238}\). *Rompelman* was extended in a case about a feasibility study on seawater treatment with no taxable supplies ever made by the municipal corporation involved. The ECJ held that input tax could be deducted provided there was no fraud or other abusive behaviour involved – *INZO v Belgian State*\(^{239}\).

**Amount actually paid**

In this ‘money-off coupon’ case, *Elida Gibbs Ltd v CEC*, the ECJ again explained that the ‘basic principle of the VAT system is that it is intended to tax only the final consumer’, so that the VAT collected ‘cannot

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\(^{237}\) *Schul v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409.

\(^{238}\) *Rompelman v Minister van Financiën* [1984] Case C-268/83 656.

\(^{239}\) *Intercommunale voor Zeewaterontzetting v Belgische Staat* [1996] Case C-110/94.
exceed the consideration actually paid by the final consumer\(^{240}\). The outcome of the case has been controversial, has led to problems and is criticised by commentators\(^{241}\). On neutrality, the ECJ had said –

\[
\text{... that it was apparent from the First Council Directive ... of 11 April 1967 on the harmonisation of the legislation of the member states concerning turnover tax that one of the principles on which the VAT system was based was neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain.}
\]

**Dominance of neutrality**

These are the comments to which Gzell J cross-referred in TAB Limited. The ECJ went on to say that, \('[i]n order to guarantee complete neutrality of the machinery as far as taxable persons are concerned, the Sixth Directive provides, in Title XI, for a system of deductions designed to ensure that the taxable person is not improperly charged VAT\(^{242}\). The comments emphasise elements derived in Rompelman, but that is not the end of the story. John Watson & Kate Garcia sum up the decision by saying\(^{243}\) –

\[
\text{The lesson from Elida Gibbs is not that retailers can be left aside but that the ECJ will do everything it can to ensure neutrality at the cost of considerable violence to the mechanisms of the VAT Directive.}
\]

**Authority confirmed**

Whether or not this is true or it matters, as Cordara and Parisi point out, Elida Gibbs ‘has withstood subsequent and sustained attacks, and was confirmed repeatedly in later cases under the Sixth Directive\(^{244}\). In Zipvit Limited, for example, Elida Gibbs was relied on for the proposition that ‘it is only the final consumer at the end of a chain of supply who bears the burden of the tax, which is designed to operate with complete neutrality at each intermediate stage in the chain\(^{245}\). The most powerful recent affirmation of Elida Gibbs, however, comes from the 2017 CJEU decision in Boehringer Ingelheim\(^{246}\).

**Kretztechnik AG - 2005**

**Capital-raising costs**

In this case, the ECJ held that credit access was available on certain capital raising costs of an Austrian manufacturer of medical equipment – Kretztechnik AG v Finanzamt Linz\(^{247}\). Issuing new shares was held by the court not to be an ‘economic activity\(^{248}\), and hence there was no supply for consideration under applicable VAT provisions. However, share issue costs, because they were incurred for the benefit of the company’s general economic activity, were to be considered as part of company overheads. Capital raising costs were creditable by the ECJ to the extent that the company made taxable supplies\(^{249}\).

**May not be limited**

\(^{240}\) Elida Gibbs Ltd v CEC [1997] QB 499 (at 560-561 [18-24]).
\(^{241}\) Watson & Garcia EU VAT and the Rule of Economics [2009] International VAT Monitor 190 for example.
\(^{242}\) Gaston Schouw Douane Expeditore BV v Inspecteur der Invoerrechten en Accijnzen [1982] ECR 1409 (at 1426 [10]).
\(^{245}\) Zipvit Limited v CRC [2018] EWCA Civ 1515 (at [46]), cf Marcandi Limited v CRC [2018] Case C-544/16 (at [93]).
\(^{246}\) Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co KG [2017] Case C-317/16.
\(^{247}\) Kretztechnik AG v Finanzamt Linz [2005] 1 WLR 3755.
The ECJ in Kretztechnik said (at 3771) that the right of deduction ‘is an integral part of the VAT scheme and in principle may not be limited’\textsuperscript{250}. It must be exercised immediately in respect of all the taxes charged on transactions relating to inputs\textsuperscript{251}. The court emphasised the theme from Rompelman about relieving the trader in question ‘entirely’ of the VAT burden. It made a further point of saying that the ‘common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT’. A later case goes further and says that the VAT system ‘rests above all on the principle of fiscal neutrality’\textsuperscript{252}.

**New directions**

Kretztechnik itself reversed earlier member state positions on the issue of capital raising, including Mirror Group in the UK\textsuperscript{253}. In Australia, the ATO had always taken the view that credits on capital raising costs are blocked\textsuperscript{254}. Michael Evans argues strongly that the ATO is wrong in this regard and that a properly contextual approach to Div 11 confirms the correctness of Kretztechnik in Australia\textsuperscript{255}. This case and others in the same area are discussed by Professor Terra in Chapter 8 of the GST in Australia book\textsuperscript{256}. As the professor notes, it was the Rompelman principle which drove the ECJ decision. As the share issue costs were ‘component parts of the price of its products’, there was an entitlement to deduct.

**Empowerment Enterprises** - 2006

Not always decisive

That fiscal neutrality has its limits, even in the EU, is illustrated by a 2006 Court of Session decision – CRC v Empowerment Enterprises Ltd\textsuperscript{257}. The issue was whether tuition to students by the taxpayer was exempt as ‘tuition given privately by teachers and covering school or university education’\textsuperscript{258}. The court accepted that in VAT, being a turnover tax, the focus was on the nature of the transaction, rather than the identity of the supplier\textsuperscript{259}. However, neutrality ‘cannot provide the answer to every question of interpretation … [and] … it is not always the deciding factor’\textsuperscript{260}. Lord Macfadyen then said (at [27]) –

*The relevance of the principle of fiscal neutrality in construing an exemption comes therefore to be that if the language used admits of two constructions, one which treats the identity of the supplier as relevant and one which does not, the latter is to be preferred. The principle of fiscal neutrality cannot, however, constitute the basis for a construction which is contrary to the clear language of the provision in question.*

**Tie-breaker function**

These comments resonate with the findings by Hack DP in TSC 2000. Importantly, EU neutrality functions as tie-breaker where conflicting positions are properly available. In another case, it had been said that neutrality ‘can in no circumstances constitute the basis for an interpretation contra legem of the provisions in question’\textsuperscript{261}. In Empowerment Enterprises, however it was held that this was not a case of competing interpretations. Neutrality simply had no impact on the exemption item in question.

\textsuperscript{250} Ecotrade SpA v Agenzia delle Entrate Ufficio di Genova 3 [2008] EUECJ C-95/07 (at [39]).


\textsuperscript{252} CRC v Isle of Wight Council [2008] EUECJ C-288/07 (at [16]).

\textsuperscript{253} Mirror Group Newspaper Ltd v CEC [XXX] STC 156.

\textsuperscript{254} GSTR 2008/1 (at [184-187]).

\textsuperscript{255} Evans Capital Raising costs – the wrong side of the mirror? (2007) 10/3 The Tax Specialist 120.

\textsuperscript{256} Terra Creditable Input Tax and Shares in EU VAT – Attribution, Apportionment and Allocation in Peacock (ed) GST in Australia: Looking Forward from the First Decade (at [186-187]).

\textsuperscript{257} CRC v Empowerment Enterprises Ltd [2006] ScotCS CSIH 46.

\textsuperscript{258} Article 13A.1(j) of the Sixth Directive.


\textsuperscript{260} Hoffmann v CRC [2004] STC 740 (at [60]).

\textsuperscript{261} Gregg v CCE [1999] STC 934 (at [29]).
Distribution chains

The decision of Advocate General Kokott in the celebrated ‘teacake case’, *Marks & Spencer plc v CCE*[^262^], sets out further basic propositions deriving from the principle of neutrality. Similar goods within each country must bear the same tax burden whatever the length of the production or distribution chain. This is guaranteed by the right to deduct input tax, under which ‘all intermediate stages are relieved entirely of the VAT burden’. Similar and competing goods must be treated in the same way, and economic operators carrying out the same transactions may not be treated differently for those transactions.[^265^]. Neutrality eliminates distortion in competition as a result of differing VAT treatment[^264^].

Unjust enrichment

The taxpayer had asserted it had a right under general EU principles (including fiscal neutrality) to recover VAT overpaid on teacake sales [which were subject to concessional treatment[^265^]]. The commissioners said that recovery was always subject to denial under UK law for unjust enrichment[^266^]. The ECJ agreed that community law does not prevent limitations of this type[^267^], provided they are administered on an ‘equal treatment’ basis[^268^]. Discrimination could not be allowed, therefore, between ‘payment traders’[^269^] [subject to the unjust enrichment rule] and ‘repayment traders’[^270^] [not subject to that rule at the relevant time], unless it could be ‘objectively justified’[^271^]. This outcome applied even though the economic traders concerned may not be in direct competition with one another.

Economic analysis

However, it was for the national court to determine if in fact there was discrimination of the type described. If discrimination was absent, the national court would then have to find if unjust enrichment would occur if overpaid VAT was to be refunded to the taxpayer. This was to be determined ‘following an economic analysis’ of all the relevant circumstances[^272^]. The ECJ emphasised yet again that fiscal neutrality ‘is a fundamental principle of the common system of VAT’[^273^] which ‘precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes’[^274^]. The *Guardian* commented that the decision brings to an end ‘an epic dispute after 12 years and two trips to the ECJ’[^275^].

[^262^]: *Marks & Spencer plc v CCE* [2007] EUECJ C-309/06 (at [56-63]).
[^263^]: *Finanzamt Oschatz v Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbein* [2008] EUECJ C-442/05 (at [42]), *Ampliscientifica Srl v Ministerop dell’Economica e delle Finanze* [2008] EUECJ C-162/07 (at [25]).
[^265^]: Article 28(2) of the Sixth Directive.
[^268^]: cf *LA Leisure Ltd v CRC* [2008] UKVAT V20648.
[^269^]: VAT debtors.
[^270^]: VAT creditors.
[^271^]: cf *Schmeink & Cofreth AG & Co KG v Finanzamt Borken* [2000] ECR I-6973 (at [59]).
Compulsory sales

This case raised if and how the principle of neutrality should affect compulsory sale situations. Marian Macikowski was a court enforcement officer who, at the request of a creditor, seized immovable property belonging to a taxable person – Royal sp z o.o. The officer subsequently auctioned the property to Mr and Mrs Babinski who paid the price in full into court. The last of three questions before the CJEU involved the ability of national law to deny Macikowski the ability to offset input tax deductions otherwise available to the taxable person, where the enforcement officer (as paying agent) was made liable for VAT by Polish Law. Did the principle of neutrality operate re-vest the right to deduct in Macikowski?

Asymmetrical outcome

The CJEU answered this question ‘no’. The court said the right to deduct is an ‘integral part’ of the system which in principle may not be limited, and that the right is exercisable ‘immediately’ for all input tax. It was the owner (not the paying agent) as the taxable person who was liable to submit a return and who had the right to deduct input tax. Articles 193 and 199(1)(g) read together allowed ‘another person’ to be made liable for the tax under national laws where the person liable is the taxable person to whom ‘the supply of immovable property sold by a judgment debtor in a compulsory sale procedure’. A national law requiring the enforcement officer to pay the tax was also justified as an ‘interim payment’ for Article 206 purposes. The CJEU held that the neutrality principle did not preclude making Macikowski liable, despite the fact that he had no practical ability to deduct input tax. This case appears to create an asymmetrical outcome insofar as the debtor retains deduction rights but court enforcement officer bears the tax.

Theoretical neutrality

The point has been made that, generally, in VAT situations the CJEU ‘pays very close regard to, and bases its decision on, the wording of the provision in question’. The language of Articles 193 and 199 is no perfect circle, however, and we are left to guess about the steps in the reasoning between those provisions and the conclusion reached. Teleological factors may have driven the outcome, but we are left to conjecture about this also. Perhaps all that may be said is that a theoretical neutrality was maintained in the outcome, but that the steps involved are heuristically murky. This is a common feature of CJEU decision writing. Often they read like the tweeting of some Delphic oracle. Short conclusory statements are unlinked by reasons or analysis, much less any step-by-step progression of logic or argument.

Volkswagen AG

Formal requirements

The way in which neutrality may apply when national laws place time limits on input tax recovery was the focus of this case. Hella companies in Slovakia supplied VW in Germany with moulds for the manufacture of lights. Over a long period no VAT was charged until Hella detected the mistake. After it paid the back-tax, VW sought to deduct input tax on the supplies, but that right had expired under national laws in force. The CJEU (at [38-39]) made familiar remarks about neutrality, but noted that the right to deduct is ‘subject to compliance with both substantive and formal requirements or

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277 Macikowski v Dyrektor w Gdańsku [2015] Case C-400/13.
279 Beck The Legal Reasoning of the Court of Justice of the EU (at 296).
280 Volkswagen AG v Finančné riaditeľstvo Slovenskej republiky [2018] Case C-533/16.
281 Senatex NAME [2016] Case C-518/14 (at [27]), SMS Group NAME [2017] Case C-444/16 (at [40]) cited.
conditions. The court had already held that national laws may validly take away the right to deduct where time limits were exceeded and the taxable person ‘had not been sufficiently diligent’.

No fraud or evasion

There was no hint or risk of evasion, and it was objectively impossible for VW to exercise the right of deduction before Hella made the adjustment. There was no lack of diligence by VW either, nor was there any abuse or ‘fraudulent collusion’ with the Hella companies. Subsequently, said the court (at [51]), fiscal neutrality precluded a member state from depriving VW of their right to deduct. The court had little difficulty distinguishing its earlier decision on forfeiture of deduction rights. The underlying drivers for the decision are the big principles which govern the EU – equal treatment, proportionality and certainty. The case also illustrates the minimalistic role played by precedent in the CJEU.

Volkswagen is another neutrality case where it is difficult to properly evaluate the path of reasoning leading to the answer provided. The general comments of Matyas Bencze above apply to this case.

Vadan - 2018

System jeopardy

My final case on EU neutrality continues a theme discussed by Dr Grube in her paper, that being the right to deduct where formal documentary requirements are not satisfied by the taxable person. In this case, Advocate General Tanchev held (at [85]) that ‘neutrality cannot be legitimately invoked by a taxable person who purports to jeopardise the operation of the common system of VAT through failure to keep the records required under the VAT Directive for a sustained period of time’. Earlier cases had dealt with the impact of various invoicing defects on the ability to deduct. This one involved a Romanian property developer with a bad compliance history who kept no invoices or other records for years, and who sought to rely merely on whatever a court appointed expert may glean from things.

A step too far

It was common ground that neutrality derived from Article 168 in the Rompelman form was not to be abridged by simple failure to comply with formal invoicing requirements. It was re-stated that the right of deduction is a fundamental principle of the VAT system and exercisable immediately to remove the burden of tax on all inputs. Although invoices are a ‘ticket of admission’ for deduction purposes, toleration of minor errors was required to ensure that neutrality was not undermined. Luc Vadan went a step too far, however. His infringement was ‘so great that it makes it impossible or overly difficult to ascertain whether the substantive conditions for entitlement to a deduction had been met’.

Recent formality trends

The transactions being over 10 years old meant Vadan’s non-compliance was itself a barrier to the production of conclusive evidence supporting any right to deduct. This case applies established principle to new (and radical) facts, and stands as an illustration that EU neutrality is not unlimited.

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282 Paper Consult NAME [2017] Case C-101/16 (at [38]) cited.
283 Astone NAME [2016] Case C-332/15 (at [34-35]).
284 Beck The Legal Reasoning of the Court of Justice of the EU (at 274-277). CHECK EARLIER
285 cf de Boer Commentary on Case C-533/16 [2018] IBF bulletin.
286 INSERT (at 13-17), Polski Trawertyn [2012] Case C-249/10.
290 Jeunehomme and EGI CHECK [1998] Case C-123/87 (at 4534).
291 cf Astone NAME [2016] Case C-332/15 (at [46]), Dobre NAME [2018] Case C-159/17 (at [35]).
this respect, it seems something of a CJEU rarity. The more recent trend in ‘formality’ cases is for the court to side with the taxpayer and against the national taxing authority\(^{292}\). Rompelman statements routinely prevail over member state legislation\(^{293}\), the bitcoin case being another example of this\(^{294}\).

**Comments on neutrality**

**Derived from Directives**

It is important to determine the precise source of EU neutrality in its second sense. Dr Grube says that it is ‘directly connected with the right of taxable persons to deduct input VAT’, with that right now finding expression in Article 168 of the VAT Directive\(^{295}\). The judge further explains this, saying that the right to deduct input tax ‘is essential to relieve taxable persons from the burden of the VAT payable or paid in the course of all their economic activities’. This phraseology is very much like how the ECJ in Rompelman expressed the concept, and how it is habitually described in the literature. It is not spelt out in so many words by Article 168, but the inference and derivation are clear enough. Does EU neutrality have a statutory source then? I certainly thought so when I first looked at the issue back in 2008\(^{296}\).

**Statutory source**

In TSC 2000 Pty Ltd, Hack DP (at [51]) referred to neutrality in slightly different terms to Dr Grube, quoting Lord Walker in Lex Services plc\(^{297}\). The quotation, however, leaves out certain words. The full text of what the law lord said begins as follows – ‘Its central core meaning (spelled out in art 2 of the First directive) …’ The part in brackets also suggests an understanding that EU neutrality has a statutory source. In Kraft Foods Polska, the CJEU observed that ‘VAT neutrality … is a fundamental principle of the common system of VAT established by the relevant European Union legislation’\(^{298}\).

Christian Amand, writing in the *World Journal of VAT/GST Law*, took this as a clear indication that Rompelman neutrality is a principle sourced, not in the treaties as primary law and not as a mere general principle of secondary law, but rather as a concept sourced in EU legislation itself\(^{299}\). So much seems uncontroversial, and indeed it is the conclusion Dr Grube herself expresses without qualification\(^{300}\).

**Fundamental right**

It is difficult to get an even perspective on EU neutrality from so far away. What EU commentators say, therefore, is crucial for any balanced assessment. Writing in INTERTAX, Marton Varju points to three key matters\(^{301}\). First of all, the right to deduct input tax is a fundamental\(^{302}\), imperative, immediate, comprehensive\(^{303}\), objective\(^{304}\) and binding\(^{305}\) entitlement of all economic operators in comparable situations\(^{306}\), to be given without significant limitations\(^{307}\), without regard to ‘purpose or results’ of


\(^{295}\) Grube Neutrality and input tax deductibility (2017) 17 AGSTJ 8 (at 9).

\(^{296}\) Brysland ETC.

\(^{297}\) Lex Services plc v CEC [2004] I All ER 434 (at [26]).

\(^{298}\) Kraft Foods Polska NAME [2012] ECR I-0000 (at [28]) TRACE CASE.


\(^{300}\) Grube Neutrality and input tax deductibility (2017) 17 AGSTJ 8 (at 24).


\(^{302}\) Rusedespred 00D v Direktor na Direktsia [2015] Case C-138/12 [at [29]] cited.

\(^{303}\) Kittel v Belgian State [2006] Case C-439/04 [at [48]] cited.


\(^{305}\) Hallifax plc v CCE [2006] Case C-355/02 [at [57]], Vámos v Nemzeti Adó [2018] Case C-556/16 cited.

taxable transactions, independent of VAT payment\textsuperscript{308} and even where some formalities are ignored\textsuperscript{309}. These aspects of neutrality largely reflect and amplify the classic formulation in Rompelman.

**Highly factual jurisprudence**

Second, Varju says that deduction rights are interfered with only on objective evidence of bad behaviour, like abuse of law or carousel fraud\textsuperscript{310}. This controversial though cautious CJEU response has been subject to criticism which Varju sees as ‘overly harsh’. Third, although the CJEU caselaw has been ‘overall balanced’, it has produced an ‘often highly factual jurisprudence’. Varju shows that the CJEU treads a fine line between giving full force to deduction rights and addressing the collection concerns of member states. A review of the caselaw, suggests that formality is routinely sacrificed to neutrality.

**Status and inconsistencies**

Christian Amand goes deeper\textsuperscript{311}. He emphasises that neutrality is ‘only a principle of interpretation’\textsuperscript{312}. His concern is how it inter-relates with equal treatment, and what precise status neutrality has as a ‘principle of the VAT system’ – ‘the principle’ or ‘a fundamental principle’? Various inconsistencies are identified in the way the CJEU has dealt with these issues. Amand refers to cases echoing the Rompelman ‘right to deduct’ statement and tries to reconcile this with ‘only a principle of interpretation’ comments. He traces neutrality back to the Treaty of Rome in 1957, concluding that it reflects the principle of equal treatment. This only complicates any clear understanding of the precise role that neutrality plays. His conclusion is to suggest that the CJEU approach ‘creates major confusion in the daily expectations of businesses operating in Europe and seriously damages the European economy’.

**Logistical problems**

It is one thing to think grandly about ‘underlying philosophy’ and how the foreign ghost of EU neutrality might guide the resolution of GST disputes in Australia. It is quite another to think through how the logistics of this might play out. The classic statement in Rompelman was derived in 1985 from language and principles set out in the First Directive. By the time we legislated, the EU framework had changed and a formidable corpus of neutrality jurisprudence was already building. Even if it was ‘highly factual’, that jurisprudence added to and gave explication to the underlying philosophy. When we legislated, did we take on the Rompelman principle as a kind of \textit{tabula rasa} shorn of all interim learning and nuance\textsuperscript{313}, or did our foreign ghost, Mr Rompelman, arrive in 1999 with all his clothes and possessions intact?

**Mr Rompelman’s clothes**

If the former, we should apply the principle as read through our eyes exclusively, and ignore everything which has happened in the EU neutrality space since 1985. If the latter, do we take Mr Rompelman as we found him in the arrivals hall at Mascot in 1999 with all his clothes and possessions? Or do we treat him as an ‘always speaking’ Mr Rompelman in the sense that all the EU neutrality jurisprudence laid down from 1999 informs the principle as we are to apply it year-on-year? There is no precedent for this and no ready analogy for untangling the practical issues. If we go with static Mr Rompelman, we not only have to ignore cases like Kretztechnik, but we are ‘lost in space’ in our lonely journey from the EU mother ship. If it is dynamic Mr Rompelman we have welcomed, each time his uncles at the CJEU decide


\textsuperscript{308} Kittel v Belgian State [2006] Case C-439/04 (at [49]) cited.


\textsuperscript{310} cf Amand & Boucquez A New Defence for Victims of EU Missing-Trader Fraud [2011] International VAT Monitor 234, Terra \textit{The European Court of Justice and the Principle of Prohibiting Abusive Practices in VAT in White & Krever (eds) GST in Retrospect and Prospect (at 495).}

\textsuperscript{311} cf Vallance v The Queen (1961) 108 CLR 56 (at 76).
a neutrality case, there is a potential impact on how our GST law might operate. None of these speculations is attractive. The only likely outcome is that Mr Rompelman stayed at home in Amsterdam.

Key observations

Several key observations can be made at this point. First, and importantly, EU neutrality is sourced directly in the statutory provisions of a foreign system called the EU. Second, neutrality is a derivative concept - it may guide interpretation, but will not invalidate laws cutting across it. Third, neutrality must co-exist and jostle with other big EU principles (like legal certainty and proportionality) – the former being described as a pillar of European law. Fourth, EU neutrality does not go so far as to require transactions having simply the same economic effect to be treated in the same fiscal way.

Fifth, neutrality is conditioned by EU anti-avoidance doctrines like abus de droit. Sixth, neutrality extends to aspects of the ‘over-worked metaphor of the level playing field for economic activities’. Seventh, exemptions inevitably interfere with the ‘principles of neutrality and of equality treatment’. Eighth, the intersection between neutrality and VAT legislation in practice is often determined by factors other than the text of relevant provisions. Ninth, neutrality is an impure, highly factual and constantly evolving principle whose practical application is less than straightforward to predict. Tenth, CJEU neutrality cases are so often written in a conclusory style, leaving much of the reasoning unexplained.

Ghost arguments

Mr Rompelman

The forensic drivers for EU neutrality being part of our GST law (whether as simple doctrine, or unpacked with all the options) are seen to stem from a standard application of purposive principles. In this regard, the ‘context in the widest sense’ phraseology of CIC Insurance is taken as some open invitation to read the words of Div 11 as if they contained concepts derived far away from foreign legislation in a foreign manner. The mandate for preferring an outcome consistent with EU neutrality is argued to be the ‘unqualified statutory instruction’ in s 15AA of the Acts Interpretation Act 1901.

Graham and Michael

Further support for this approach is mined from the judgment of Hill J in HP Mercantile (later endorsed by a High Court special leave panel), and comments from the same judge in a paper he delivered at Monash University a few weeks before he died – To interpret or translate? The judicial role for GST cases. The CJEU decision in Kretztechnik is seen as emblematic of how things should work in Australia. The arguments for this are best put by Michael Evans in his 2007 paper – wrong side of the mirror.
EU legislative basis

The fundamental question, however, is whether it is enough that, simply because our system is a VAT system deliberately created with a weather eye to other VAT systems, EU neutrality has embedded itself fully armed into our system. Although neutrality is often described as being ‘inherent’ in the EU system, the case for any implied absorption into our law is immediately rather unlikely once it is seen that the principle derives from a supranational statute requiring fiscal harmony elsewhere. Case after case in the EU links neutrality to express provisions within the VAT directive. Neutrality in the Rompelman sense has a legislative basis within the European Union, a conclusion confirmed by Dr Grube and others326.

Asking the hard question

How can a foreign statutory derivative, unlegislated for in our system, provide a proxy for the words chosen by our parliament? The fact is that our GST law does not contain any Rompelman-type formulation, nor does it talk directly about ‘no cascading’ or ‘embedded inputs’. Our s 11-15(2)(a) language may well be defective for not reflecting better the concept of EU neutrality, but that is a policy-political issue. It was also not until 2005 that the CJEU sought to apply Rompelman concepts to capital raisings. The accepted position until then was that input tax on share issue costs were not deductible. The fact that the CJEU in Kretztechnik changed its mind says nothing about the ATO position predating it. The legislations are different and are read under protocols which are also very different.

Absence of connection

In the absence of some formal reception or acceptance device – perhaps a multilateral treaty or a statute like the European Communities Act 1972 – how can a principle derived from a foreign statute become part of Australian law, when our law if framed in very different terms? Surely it is the different terms we legislated for in Div 11 which define our native neutrality, not what a foreign statute says, much less notions of ‘underlying philosophy’. EU neutrality with all of its nuances is derived from the VAT directive in a manner which is rather alien to the principles of interpretation which apply in Australia.

Even if we cut-and-pasted the relevant VAT provisions into our GST law, there is no security (and many reasons to doubt) that our neutrality would end up looking like some identical twin of the EU one. The suggestion that Kretztechnik be followed in Australia involves, not only acceptance of a foreign proxy for the words of s 11-15(2)(a), but also adoption of an interpretational methodology and subculture very much at odds with our own. CIC Insurance is no open-ended invitation simply to apply whatever may be in the distant historical background as if it was hard-wired into our GST law.

Context and its limits

Graham Hill was right to point to our ‘modern approach’ to interpretation as requiring consultation of context in the ‘widest sense’ up-front in the process. Context, however, is not unlimited, and the further you get from the textual centre the more remote is the possibility that what you might find can have any legitimate influence on the meaning of the provisions being examined. There comes a time, and rather quickly in many cases, when the boundaries of relevance and utility pass into the rear-view mirror. Foreign statutes, principles derived from them, and ‘underlying philosophy’ are squarely on the other side of the line in this regard. Reliance Carpet itself stands as the cardinal illustration of this.

Policy and philosophy

As the discussion of European interpretation shows, courts in the EU give far more prominence to economic policy as an interpretation tool than is allowed in Australia. This is one of the major themes

which emerges from a respected text in the area – *The Legal Reasoning of the Court of Justice of the EU* – by Gunnar Beck. In this country, the courts have set barricades against economic policy having all but any influence in this regard. We operate in a purposive system, perhaps an increasingly purposive one. It is not teleological in the EU sense, however. We are no longer free to adopt literalistic approaches, yet statutory interpretation in Australia remains a ‘text-based activity’ under which we are to start and finish with what the provisions say. The European tradition in so many ways is the reverse of this.

**Constructional choice**

It is true that ‘constructional choice’ theory has opened the interpretive lens in Australia over the last decade, and that greater attention is now given to things like systemic coherence. The manner in which these notions play out in practice, however, remains governed by principle and a strong tradition of restraint. A recent example is the dissenting judgment of Gageler J in *SZTAL v Minister*[^327]. While the CJEU is expected make legal decisions based on non-legal factors, in our system, matters of economic policy and philosophy only intrude but intangibly into the interpretation process, are rarely. However much we want GST to operate in some particular way or think it should operate, in our system, it is the words of the legislation which have the final say. This is not a case of reverting to some hard literalism of the past. It is simply the way that purposive principles of interpretation operate in Australia.

**Reliance Carpet**

The case which makes this point most loud and clear in the GST context is *Reliance Carpet*, decided by the High Court in 2008[^328]. The court held that a deposit forfeited in a land sale context was consideration for a taxable supply – that supply being the obligations assumed by the vendor on exchange. Concerned to distance our GST law from the influence of Article 2 of the First Directive, the High Court referred to an ‘important point respecting the nature of GST’ made in an earlier case[^329] –

> In economic terms it may be correct to call the GST a consumption tax, because the effective burden falls on the ultimate consumer. But as a matter of legal analysis what is taxed, that is to say what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply …[^330]

A turning of the analysis to one where the focus is sale price into which acquisition cost is an input cannot be maintained[^331]. The High Court then made observations about the two systems (at [3]) –

> By way of contrast to the Australian system, counsel for the Commissioner referred to Art 2(1) of the first Council directive … on the harmonisation of legislation of member states of the European Community concerning turnover taxes; this indicates that VAT is a general tax on the consumption of goods and services.

**Rio Tinto Services**

**Remote area housing**

In *Rio Tinto Services*, Davies J held that credit access on acquisitions into remote area housing in the Pilbara was blocked by s 11-15(2)(a) despite the fact that the mining group used the housing for the broader purpose of making taxable and GST-free supplies of iron-ore[^332]. Apart from saying important things about Div 11 provisions and wider policy considerations, this case is interesting for the

[^327]: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34.
[^328]: *FCT v Reliance Carpet Co Pty Ltd* (2008) 68 ATR 158.
[^329]: *Sterling Guardian Pty Ltd v FCT* (2006) 149 FCR 255 (at 258 [15]), cf *GST 2006/9* (at [10]).
[^330]: cf *HP Mercantile Pty Ltd v FCT* (2005) 60 ATR 106 (at 109-110 [10-15]).
[^332]: *Rio Tinto Services Ltd v FCT* [2015] FCA 94.
observation by Dr Grube that the Bundesfinanzhof in Germany ‘probably would have decided the case the same way’\textsuperscript{333}. The case is also of interest to me because this is the Hamersley Iron accommodation I lived in during 1978, first in Silver City at Tom Price, then in the single men’s quarters in Paraburdoo. I was a backhoe operator and truck-driver on a quarrying crew, then later a swimming pool attendant.

No enquiry into purpose

Rio had argued that, for s 11-15(2)(a) to be engaged, the making of s 40-35 residential rent supplies had to be the ‘moving cause’ or purpose of the refurbishment and other acquisitions. Providing the accommodation was ‘merely an intermediate step’, as the ‘moving cause’, according to Rio, was the carrying on of the enterprise of mining and selling iron-ore\textsuperscript{334}. This argument resonates with the story of when President Kennedy visited NASA headquarters at Cape Canaveral in 1962. Approaching a janitor at one point in the tour, the president asked – ‘And what do you do here?’ The janitor answered – ‘I’m helping to put a man on the moon!’ Moving along, Davies J said both s 11-15 tests involved matters of objective fact and that there was no requirement to look into the ultimate purpose of acquisitions.

Embedded costs

The judge rejected Rio’s contention that the statements of general policy found in HP Mercantile could be relied on as an aid to construing s 11-15(2)(a). Rio had argued in this regard that there would be ‘double taxation on taxable supplies and unrecoverable GST would be embedded in the GST-free supplies because Hamersley’s leasing activities operate at a loss’. The judge said (at [30]) that interpretation ‘does not seek to identify or assume the underlying policy of a provision and then to construe that policy’\textsuperscript{335}. Observations by Hill J in HP Mercantile on general policy could be accepted, said Davies J, ‘but those observations do not provide the answer to the proper construction of s 11-15’. She concluded (at [33]) that all acquisitions had a ‘direct and immediate connection’ to residential rent.

Appeal dismissed

In a short judgment delivered quickly, a Full Federal Court comprising Middleton, Logan & Pagone JJ dismissed the taxpayer appeal unanimously and jointly\textsuperscript{336}. The judges pointed out (at [6]) that the s 11-15(2)(a) enquiry was not whether something had been acquired in carrying on an enterprise but, and irrespective of that, to what extent the acquisition related to making supplies that would be input taxed. The relationship which needs to be focused on is ‘between the antecedent acquisitions for which credit is claimed and the subsequent supply for which the credit is, in effect, lost’.

Factual enquiry

This, said the Full Federal Court, is a factual enquiry. It does not depend on the ‘broader commercial objective of the supplier’. The court said (at [8]) that the enquiry called for by s 11-15(2)(a) –

\begin{quote}
... is not into the relationship between the acquisition and the enterprise more broadly ... The terms of s 11-15(2)(a) do not depend upon the reason or purpose of the enterprise making the supply or making the anterior acquisition. The provision does not turn upon a characterisation of the purpose, or the occasion of the purpose, of the supplier but upon a characterisation of the extent to which the acquisition relates to the subsequent supply.
\end{quote}

Before dismissing the appeal, the Full Federal Court noted (at [8]) that the extent of the relationship between the acquisitions and the residential rent in this case ‘is not to be reduced by

\begin{flushright}
\textsuperscript{333} Grube Neutrality and input tax deductibility (2017) 17 AGSTJ 8 (at 25).
\textsuperscript{334} CIR v BNZ Investment Advisory Services Ltd [1994] BCL 466 referred to.
\textsuperscript{335} Certain Lloyd’s Underwriters v Cross [2012] HCA 56 (at [24]) quoted.
\textsuperscript{336} Rio Tinto Services Ltd v FCT [2015] FCAFC 117.
\end{flushright}
the fact that the acquisitions may also have related to another purpose where the other purpose is only related to the acquisition wholly by and through the otherwise input taxed supply’.

**Looking through**

Much of the public comment following *Rio Tinto Services* has been directed at the ability to look through input taxed supplies to taxable ones as a means to establishing credit access. That door has been closed in Australia where the factual enquiry exposes sufficient nexus with an input taxed supply. Professor Millar\(^{337}\) compares *Rio Tinto Services* with *UAB Sveda*, a CJEU case decided about the same time\(^{338}\). Both cases look at the right to deduct on the basis of some ultimate commercial purpose. In *UAB Sveda*, the intermediate supply was ‘for no consideration’ – a key difference – and deduction of input tax was allowed\(^{339}\). In the EU, a primary use/secondary use analysis is applied, something which has no resonance in our GST law. Rebecca concludes (at 47) by saying that, in both jurisdictions, ‘once you establish an objective, relevant connection between an acquisition and an exempt/input taxed supply, the right to deduct/credit the input tax is blocked’.

**Unexpected outcomes**

In relation to the first instance decision, Gina Lazanas & Robyn Thomas note that it is an objective relationship between an acquisition and supplies which is required, ‘not the moving cause or principal purpose behind the acquisition’\(^{340}\). The authors go on to say (at 46) that ‘how the GST is intended to apply at a high level and mechanisms to avoid the cascading of tax, will not prevent s 11-15 from being construed on its terms’. Although the case ‘preserves the status quo’, it is said (at 47) that the decision may give rise to ‘unexpected outcomes’ where s 11-15(2)(a) is ‘more uncertain and complex in its operation’. Examples given by the authors include acquisitions in the context of mergers and acquisitions, and acquisitions which directly serve a dual purpose. Rational commercial outcomes may also be affected where incidental financial supplies are involved.

**Value of comparison**

Dr Grube and Professor Millar appear to agree that *Rio Tinto Services* would be decided in the same way in Europe as it was in Australia. There is no reason to doubt that this is correct, but we ask what significance does this happy outcome have? My answer is a simple one – none. That different legislation in different jurisdictions interpreted differently may produce the same outcome on the same facts may give comfort on wider economic policy or neutrality grounds may be interesting. It may provide us with an inner glow that our GST outcome is up there with results in the big league.

**Policy and reality**

However, the comparison tells us nothing about the legal efficacy of the decisions themselves, whether *Rio Tinto Services* is correct on its own, and much less whether either decision confirms the correctness of the other. If we test the outcomes together against some ‘strict and complete’ neutrality in an economic sense, both are undoubtedly sub-optimal. That neutrality would not deliver credit access in Europe on *Rio Tinto Services* facts is legally irrelevant. Returning to the theme of this conference, the reality in the Div 11 space may indeed be reflective of policy, even if ‘underlying philosophy’ of the kind hinted at by Graham Hill has no role to play in the analysis.

**Policy preconception**

\(^{337}\) Millar Limitations on the right to credit input tax (2016) 5/1 World Journal of VAT/GST Law 42.


\(^{340}\) Lazanas & Thomas *Rio Tinto Services Limited: No input tax credit relief* (2015) 15 AGSTJ 40.
One important point made by Davies J was that interpretation ‘does not seek to identify or assume the underlying policy of a provision and then to construe that policy’\( ^{341} \). This is a practice which the High Court has been concerned to call out more and more in recent years. This is precisely what the taxpayer in sought to do in Rio Tinto Services. Policy preconception is a major problem for interpreters.

It is also a barrier to our reception of EU neutrality ideas in particular. Most recently, in Williams v Wreck Bay Aboriginal Community Council, for example, four judges warned against ‘a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose’\( ^{342} \). Similar remarks were made around the same time in Commissioner of Police v Ferguson\( ^{343} \) –

The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions … The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose [citations omitted].

HIGH-LEVEL POLICY & COMPROMISE

Consumption angles

Consumption and us

What the High Court is saying (and saying very clearly) is that although, in economic terms, GST may be a ‘consumption tax’\( ^{344} \), that is not the legal yardstick by which its fiscal reach is to be measured. That GST is a tax on consumption is no doubt a truism\( ^{345} \), though the kind of ‘consumption’ involved may provide the opportunity for analysis and debate\( ^{346} \). The court in Reliance Carpet was at pains to emphasise this when it said (at [5]) that the ‘composite expression “a taxable supply” is of critical importance to the creation of liability to GST’. The reason ‘consumption’ is important in the EU is that the VAT Directives incorporate that concept into the statutory infrastructure for taxing purposes. As Matt Bambrick observes, ‘while consumption is an economic driver for our GST, it is not a legal principle of our GST’\( ^{347} \).

Consumption and them

Hill J pointed this out in an article in 2003\( ^{348} \). It is the VAT Directive consumption context which makes cases like Mohr v Finanzamt Bad Segeberg\( ^{349} \) of ongoing significance in EU jurisdictions\( ^{350} \). In that case (at [27]), it was stated that the scope of VAT is ‘limited by its character as a tax on consumption’. Roderick Cordara and Pier Parisi observe in their book that the underlying consumption notion in Europe has done little to limit the supply concept\( ^{351} \). In this regard, they point to comment that there is ‘no jurisprudence on the meaning of consumption’\( ^{352} \), and that the consumption tax principle ‘needs clarification on a Community-wide basis, as the present situation is unsatisfactory’\( ^{353} \). One reason for the lack of jurisprudence may be that expenditure on consumption is used as a proxy for consumption.

\( ^{341} \) Certain Lloyd’s Underwriters v Cross [2012] HCA 56 (at [24]) quoted.

\( ^{342} \) Williams v Wreck Bay Aboriginal Community Council [2019] HCA 4 (at [79]).

\( ^{343} \) Commissioner of Police v Ferguson [2019] WASCA 14 (at XXX).


\( ^{346} \) Cnossen VAT Treatment of Immovable Property in Thurongi (ed) Tax Law Design and Drafting 231 (at 232-234).

\( ^{347} \) Discussion with Matt Bambrick of the ATO on 20 March 2019.

\( ^{348} \) Hill J (2003) 6(1) JAT 1 (at 26).


\( ^{351} \) Cordara & Parisi Australian Goods and Services Tax Cases – Decisions and Commentary (at [1.15.2]).

\( ^{352} \) Royal & Sun Alliance Insurance Group plc v CCE [2001] EWCA Civ 1476 (at [48]).

\( ^{353} \) Butler VAT as a Tax on Consumption (2000) 5 British Tax Review 545 (at 552).
Terra and Kajus say that this ‘generally avoids the difficulties of defining consumption’\footnote{354 Terra & Kajus A Guide to the European VAT Directives (at [7.2.2]), James The Rise of the Value-Added Tax (at 41).}. In our system, we do not generally have to worry about ‘consumption’ because what we tax is value ascribed.

\textbf{Why it matters}

Such a conclusion is out-of-scope in Australia, by reason of the absence of any comparable statutory language, and the firm rejection of economic policy more generally as some proxy for the text of the law\footnote{355 OTHER CASES. trace too, carpenter etc}. Graeme Cooper dealt with this in a 2003 paper\footnote{356 Cooper [2003] TIA GST Intensive Conference paper, cf Ture in McClure (ed) The Value Added Tax: Key to Deficit Reduction (at 79-80), Williams in Thuronyi (ed) Tax Law Design and Drafting (at 169), Cooper & Vann (1999) 21 Sydney Law Review 337 (at 357-359).} – \textit{Why GST is not a consumption tax ... and why it matters}. In his view, the idea that GST is a consumption tax in economic terms ‘should play no role’ in GST interpretation. Three points can be made. The first is that Graeme Cooper is right. The second is that the opposing position is no longer tenable. The third is that, just as consumption plays no role in determining liability, and because of this, it necessarily plays no role in Div 11 credit access questions. Twenty years having passed since the ANTS Bills were introduced, policy has indeed hit legal reality.

\textit{Hill J on consumption}

In his \textit{Journal of Australian Taxation} article, Hill J also surveyed the possible impact of ‘consumption’ theory on GST interpretation\footnote{357 cf Hill J [2002] TIA Australian GST Symposium paper (at 26-27).}. He observed that there was no doubt parliament had intended that GST ‘would operate as a tax on consumption’, given comments in the \textit{explanatory memorandum}. Hill J pointed to the wide definition of ‘supply’, however, and to the fact that any obligation on a farmer to cease production (as was the case in Mohr) would involve a ‘supply’ for GST purposes. He said (at 27) –

\ldots it is obvious that it will be unsafe to assume the same result will follow in Australia. And it will always be unsafe to assume the same result in Australia as is reached in overseas decisions where the legislation is different. Any attempt to interpret the Australian legislation by adopting a policy driven consumption tax analogy must yield to the terms of the legislation if contradictory to the approach. Conversely, however, if the relevant statutory provision is Australia is substantially similar to the overseas provision, overseas cases will clearly be treated with respect.

\textit{How it turned out}

These comments have turned out to be partly correct and partly askew. Hill J’s point about it being ‘unsafe’ to assume our GST will produce the same results where the overseas legislation is different is an understatement. Of course, our results will yield to our legislation. But, if \textit{Reliance Carpet} shows us anything, it is that the idea of arguing by reference to offshore consumption theories is misconceived.

\textit{Foreign caselaw}

After an early trend towards engagement with foreign caselaw on GST questions, partly driven by Hill J himself\footnote{358 ACP Publishing Pty Ltd v FCT [2005] FCAFC 57 (at [2-3]) quoting Dansk Denkavit Aps v Skatteministeriet [1994] 2 CMLR 377 (at 394-395).}, the track record as well as messages from other judges suggests that foreign cases are not of much utility when interpreting our GST law\footnote{359 cf Edmonds Recourse to foreign authority in deciding Australian tax cases (2007) 36 Australian Tax Review 5, Lindgren The Courts’ role in statutory interpretation: the relevance of overseas case law to Australia’s GST [2009] National GST Intensive Conference paper.}. Three reasons may be advanced for this. The first is that our statutory provisions are different. Second, the interpretation protocols which apply in the EU (including the UK in VAT matters) diverge radically from those in Australia. Third, there is now an extensive jurisprudence on the tax (including five High Court cases), and that jurisprudence is mature.
In Avon Products, the High Court in a sales tax context observed that foreign cases dealing with different statutory regimes need to be treated with ‘considerable caution’. The Full Federal Court in Saga Holidays said this warning ‘is particularly apt in the present circumstances since the details of the GST Act are significantly different from those of the equivalent legislation in the UK and other countries’. Robert Olding predicted in 2011 that, as our courts continue to develop their own GST jurisprudence, ‘reference to overseas cases and legislation will decline’. This has proven accurate.

Specific consumption

A swathe of provisions across the GST law adopt some idea of consumption for one purpose or another. In addition to customs law and food senses, the GST law uses ‘consumption’ and cognates as part of the legal gateway in a variety of situations. These include health exemptions, exported goods, exported services, joint ventures, margin scheme, creditable purpose, deceased estates, and some definitions. The most enigmatic of these is s 38-190(1), where the words ‘consumption outside Australia’ appear in the heading though not in the provision itself. Mansfield J, dissenting in Travelex, had regard to ‘consumption’, but none of the majority judges in the High Court factored it into their analyses. Amendments in 2016 introduced the notion of an ‘Australian consumer’ into s 9-25(5) for when certain supplies are connected with the ‘indirect tax zone’. The definition of ‘Australian consumer’ in 9-25(7) involves a statutory rather than an economic concept.

Protean concept

Not much can be read into the fact that ‘consumption’ in some sense or another plays a role in the GST law. Consumption is a protean concept, as well as being an old illness and a modern affliction. The most that can be said is that, if and when parliament wanted consumption to form part of the legal description for when GST applies, it said so directly. This is a natural corollary of the comments on ‘consumption’ in Reliance Carpet. The other point is that when parliament adopts ‘consumption’ as part of the legal description, what is referred to depends on the statutory context. The ‘Australian consumer’ for s 9-25(5) purposes need look nothing like the prototypical EU consumer, for example.

Fiscal nullity analogy

Consumption (however defined) does not condition operation of the GST law, except where it is legislated for directly, and even then it will be a certain sense of ‘consumption’ forged by context. There may also be an analogy to be drawn with fiscal nullity, a doctrine which shares some themes with...
abus de droit principles. We did not inherit the UK doctrine of fiscal nullity because (A) the British legislation was very different, (B) that legislation was founded on economic equivalence ideas, and (C) anti-avoidance provisions had already been legislated into our income tax laws. So it is with consumption. The fact that parliament has legislated for it in specific contexts excludes it generally as a concept or principle that may otherwise generally influence interpretation of the GST law.

**Tax Office perspective**

The ATO has said little on ‘fiscal neutrality’ directly. In GSTR 2005/3 (exploitation of second-hand goods provisions), it is stated that Div 66 is to prevent cascading and ‘to promote neutrality for acquisitions from registered and unregistered entities’. In GSTR 2006/9 (supplies), reference is made in the context of s 9-10(3) to the ECJ decision in *Lange v Finanzamt Fürstenfeldbruck*, where it was said that neutrality precludes any generalised differentiation between lawful and unlawful transactions for taxing purposes. The EU position is then contrasted with the Australian one, where something done illegally may still be a ‘supply’ (and taxable) even where all competition between lawful and unlawful sectors is precluded. GSTR 2008/1 (creditable purpose) deals with neutrality-related themes in some detail.

**Nature of consumption**

The ATO also accepts that an obligation undertaken by a farmer to reduce production would involve a ‘supply’ for s 9-10(2)(g) purposes under our law. Two additional points are then made. The first is that ‘differences in the structure of the legislation mean that the overseas cases should be considered with some caution’ – this is now a given. Edmonds J made similar points in a 2007 Australian Tax Review article. It was the absence of comparable statutory provisions which led the High Court in *Reliance Carpet* to reject the relevance of a VAT case – Société Thermale. Others pointed out that to argue by reference to CJEU decisions in the future was ‘now fraught with danger’. The second point made by the ATO regarding consumption is that – ‘Consumption must always be present but the nature of the consumption depends on the nature of what is consumed’. This statement is essentially truistic.

**Practical business tax**

A contextual thing

GST has been described in various cases as a ‘practical business tax’. As a result, there has been debate about what impact this might have on interpretation of the GST law. At its highest, there was
once a suggestion that some special rule of construction therefore applies. Peter Green, speaking to
his 2008 ATAX Noosa paper, rejected this thesis, calling it ‘the refuge of the desperate man’. It is now
judicially settled that the description of GST as a ‘practical business tax’ is merely part of the wider
context, to which regard should be had in the beginning when applying the modern approach.

Forensic impact

The forensic impact of this factor in any particular case, however, even after 20 years of the tax, remains
conjectural and mixed. Could it, for present purposes, strengthen the case for EU neutrality being
absorbed into our law? As Logan J has observed, a value added tax, through the elimination of
cascading, is in this economic sense, a ‘practical business tax’. The judge went on to suggest that
reference to GST as a practical business tax may be more likely to mask than illuminate the task of
interpretation. In my view, this has been borne out to a degree in practice, where focus on the PBT-
status of the tax has only worked as a distraction from the words of the legislation.

PBT begs the question

This is something Reliance Carpet appears to emphasise by omission. PBT cannot sanction the disregard
of legal analysis, something already pointed out in the income tax sphere. PBT just begs the question.
Despite some high-powered analytical investment in the concept by commentators, there is not much
to show for GST being a ‘practical business tax’. Certainly, there is no case I am aware of in which the
concept has been decisive in the final result. In one AAT decision, for example, the result reached on
common law grounds was simply seen as consistent with GST being a practical business tax. After
considering two Full Federal Court decisions – Brady King and South Steyne – Robert Olding said –

If practical business tax considerations are considered to be relevant in a particular case, it is important to
understand which particular aspect of that context is considered relevant in the circumstances and why. If
practical business tax aspects are not relevant, it is important to understand why that contextual
consideration should be dismissed or given little weight in the particular case.

Always-speaking taxi

In Uber BV, Griffiths J took a practical, common-sense and always-speaking approach to the meaning of
‘taxi’ in the GST law. Although the judge referred to the ‘practical business tax’ context generally, his
approach merely applied the anti-linguistic orthodoxy within the ‘modern approach’. This is not so far
from what Graham Hill himself proposed in his Journal of Australian Taxation article when he suggested
a rule which ‘requires GST legislation to be interpreted in a practical or business-oriented way ... that is
not overly technical’. As the years go by, the shiny lustre and promise of PBT has dulled somewhat.

389 cf Green [2008] ATAX Noosa paper (at 14-20), Stone J [2006] TIA National GST Conference paper, Logan J Where are we at with
Committee Workshop paper (at XXX).
390 cf Conti in Saga.
392 Saga FFC.
393 Olding [2008] Law Council Tax Committee Workshop paper (at XXX).
394 Logan J Where are we at with GST – black letter or the practical business tax [2008] TIA National GST Intensive Conference paper (at 1-2
[3]).
395 City Link Melbourne Ltd v FCT 2004 ATC 4945 (at XXX [97]) CHECK.
396 Trustee for the Whitby Trust v FCT [2017] AATA 343 (at [69]).
397 Olding Interpretation of the GST Act – Towards a Principled Basis? in Peacock (ed) GST in Australia: Looking Forward from the First
Decade (at 86).
398 Uber BV v FCT [2017] FCA 110 (at [127-130]).
399 INSERT CASES and inc HCA – see ALJ article. Lansell House Pty Ltd v FCT [2010] FCA 329 (at [57]), Comptroller-General v Pharm-A-Care
Laboratories Pty Ltd [2018] FCAFC 237 (at [14]) for example.
A plastic concept

This may be an indirect result of directions taken by the High Court in the five GST cases so far to have come before it. Practical business tax is also an inherently impressionistic and plastic concept, and one which is often worn as a cloak for self-interest. Like the ‘businesslike interpretation’ principle which applies in contract law\(^\text{400}\), PBT is an idea very much in the eye of the beholder. PBT may be a core article of GST faith, but everyone has their own version of what it means. Both sides may seek to rely on ‘practical business tax’ in litigation contexts, but they leverage it for starkly different outcomes\(^\text{401}\).

Wanted dead or alive

In her recent neutrality paper, Rebecca Millar includes an ‘aside’ on practical business tax, starting from an earlier flippant comment that ‘it should be considered dead’\(^\text{402}\). After considering how the concept has played out before the courts, Rebecca walked this back a little to now say that it ‘remains alive’. In the context of her paper, however, she said that PBT is a side issue to our search for the principle of neutrality. I agree with both sentiments, but would characterise the first as a ‘sleeping dog in the corner’ kind of aliveness. Rebecca, however, makes another point which is potentially interesting.

Linguistic analysis

This is that a possible reason for PBT remaining relevant ‘is because it is a GST-specific reflection’ of the ‘modern approach’ to interpretation. This may flow from the consensus idea that PBT is simply part of the background context. That does not mean that PBT may ever be decisive in a forensic situation. Its remoteness from the words of the text tells against that. Other aspects of the ‘modern approach’, however, may push things in the same general direction – like the dissuasion of intense linguistic analysis – as the Uber BV experience shows\(^\text{403}\). In a *Melbourne University Law Review* article, Justice Middleton put it well when he said that ‘we should not be blinded by too many rules or over-analysis, or mechanical or scientific analysis’\(^\text{404}\). To conclude, PBT may still be alive, but it never does much.

Tie-breaker ideas

Two protagonists

The idea of having unlegislated tie-breaker rules for tax statutes is behind us. Two great protagonists, Kirby and Hill JJ, fought a private battle of sorts over many years about whether there still exists a rule that tax legislation is read strictly with ambiguity being resolved against the revenue\(^\text{405}\). Their competing views are summarised by Kirby J in his 2007 article – *Justice Graham Hill Memorial Speech*\(^\text{406}\). Kirby J regarded the rule as obsolete by reference to purposive principles\(^\text{407}\) and ‘a much less hostile judicial attitude’ these days. A tax statute is ‘just another statute’, he observed in another case\(^\text{408}\). Hill J, for various reasons, took the view that to abandon the rule ‘is an encouragement to sloppy drafting’\(^\text{409}\).

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\(^{400}\) *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7 (at [35]), *Simic v NSW Land & Housing Corporation* [2016] HCA 47 (at [78]), *Daswan Australia Pty Ltd v Linacre Developments Pty Ltd* [2018] VSCA 350 (at [50]).

\(^{401}\) TRY to give examples here.

\(^{402}\) Millar *The principle of neutrality in Australian GST* (2017) 17 AGSTJ 26 (at 29-31).


\(^{405}\) Scott (1907) 5 CLR 132 (at 154-155), *Anderson (1937)* 57 CLR 233 (at 243), *Pearce & Geddes* (at [9.35-9.36]).


\(^{408}\) *FCT v Chant* (1991) 103 ALR 387 (at 391).

Damascus and Alcan

In his *Along the Road* to Damascus paper, Michael D’Ascenzo agreed with Kirby J on the issue, adding ‘that it is unlikely that Parliament intended “free riders” in relation to taxable activities “to the detriment of the general body of taxpayers”’.  Years later, the High Court appeared to put the matter to rest in *Alcan* when it said that ‘tax statutes do not form a class of their own’.  This has not deterred a lingering nostalgia for the old approach, however.  One view is that the purposive approach itself ‘requires that they be construed literally’.  When parliament legislated for s 15AA in 1981, however, one effect was to shut down older common law rules to the extent of any inconsistency.  My view is that no special status rule now applies to tax laws, and no systemic presumption favours revenue or taxpayer.  Kirby J was right when he said tax laws are to be construed ‘like any other federal statute’.

Unqualified statutory instruction

The tie-breaker rule which applies to all federal statutes, including the GST law, is s 15AA of the Acts Interpretation Act 1901.  Where a constructional choice is available on the words of a provision, this ‘unqualified statutory instruction’ requires that choice to be made by reference to the interpretation ‘which would best achieve the purpose or object’ of the provision derived by legitimate means.  It is true that parliament could legislate for a Div 11 tie-breaker rule, but it is yet to do so.  No-one has sought to promote such a course, and it is an issue for which policy support may be difficult to achieve.

TSC 2000 revisited

It was Hack DP in *TSC 2000* who said fiscal neutrality ‘is an aid to construction where it is necessary to determine which of competing constructions is to be preferred’.  A position of this kind creates a presumptive bias in favour of credit access.  This is immediately inconsistent with the GST law being construed just ‘like any other federal statute’.  It is also excluded by the terms of s 15AA which leave no room for its operation.  While fiscal neutrality is a principle of interpretation in Europe – as confirmed by commentators and cases - that outcome is complicated by derivation and status issues.  It simply was not open to the deputy president in *TSC 2000* to adopt EU neutrality as a new tie-breaker rule for GST.  There is no presumption in Australia in favour of credit access where arguments are otherwise balanced.

Scene in New Zealand

Our close attention

Evidence shows that we modelled our GST system close attention to the position across the Tasman.  Of course, we picked and chose more widely for inspiration as well, and we innovated where appropriate.  The New Zealand regime, it has been observed, is probably the purest one yet legislated for.  The idea of ‘purity’ in this context is primarily an inverse of aggregate exemptions conceded by the legislature.  A rough comparison of our respective statutes is enough to provide a working proxy on this score.  What has been said about neutrality in New Zealand, therefore, is potentially of interest in evaluating whether EU-style neutrality has become a ‘foreign ghost in our GST machine’.  If, for example, a neutrality of that kind has taken hold independently in New Zealand, that might provide some basis (perhaps along the lines suggested by Graham Hill) for a similar thing happening here.

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411 *Alcan* [2009] HCA 41 (at [57]), cf Episodes 14, 24 & 36.
412 Pagone [2017] NZLSTC paper (at 13).
413 *Plaintiff S10* [2012] HCA 31 (at [57]), cf *Alcan* [2009] HCA 41 (at [41]), Pearce & Geddes (at [2.23]), Episode 39. CHECK
414 *FCT v Ryan* [2000] HCA 4 (at [84]) dissenting.
416 Ask EVANS about this.
Canterbury Jockey Club

In Canterbury Jockey Club, it was held by a single judge that stake money amounts paid by the club to trainers on race days were consideration for taxable services on which input deductions were available. One ‘reason’ given by Cull J (at [86-87]) for this was that ‘without the input deductions being claimed by the Club, the GST payment on stake money is not neutral’. The judge went on to say that GST ‘was intended to be broad-based and neutral’. After quoting from Glenharrow Holdings on ‘offsetting deductions’, he stated that GST ‘was introduced to be a neutral tax’. He acknowledged, however, that compliance and administration costs ‘preclude perfect neutrality ever being achieved’.

Glenharrow Holdings

When the Supreme Court gave judgment in Glenharrow Holdings in 2008, a tax avoidance saga of epic dimensions came to an end. The case was fought over arrangements producing a $45m credit as a ‘one-off economic benefit’ under second-hand goods provisions on purchase of a mining licence. In speaking about agreements ‘to defeat the intention and application of the Act’, Blanchard J (at [41-43]) made general comments on GST being a type of value-added tax levied on transactions with consumers. Registered persons are not ‘subject to the GST’s economic incidence’, something which is consistent with the neutrality and efficiency of the revenue collection rationales that underlie the Act.

Reasons and reasons

Although Cull J gave neutrality as a ‘third reason’ for services being provided to the club by registered trainers, the comments in Glenharrow Holdings he relied on were but backgrounding on that the GST is meant to do – that is, meant to do in economic terms. The judge independently had found on the evidence and the law that the three elements necessary for taxable services being provided to the club were made out – supply, consideration, nexus. At that point and on that basis, credit access was confirmed on the law. Cull J’s observation about the outcome being consistent with an economic policy or model added nothing and could not constitute a ‘reason’ for the conclusion reached.

In the land of Vatopia

Ideal standard provisions

At the end of their book – Value Added Tax: A Comparative Approach – law professors Alan Schenk and Oliver Oldman reproduce the Commonwealth of Vatopia Value Added Tax Act. This fictitious statute from a fictitious place is also available on the International Monetary Fund website. Following from the comparative review of VAT systems by the authors, the Vatopia legislation takes the form of ideal standard provisions as a starting point for design of a value-added tax suitable for modern conditions. On the website, but not in the book, are comprehensive explanatory notes on how the Vatopian Model is to work. As the name may suggest, the land of VAT utopia is a mythical tax place where factual and legal realities are not suspended or inverted, and no ‘fiscal theme park’ rears into view. Kathryn James adopts the Vatopia Model as a legal approximation to the ‘good VAT’ she argues for in her book.
Input Tax Deduction

Under the heading Input Tax Deduction, Vatopia s 27(1) lists components of the total input tax allowed, the most important being the ‘input tax payable in respect of taxable supplies made to the person during the tax period … for use in a taxable activity carried on by the person’. Under s 5(2), ‘taxable activity’ does not include (relevantly) ‘an activity to the extent that the activity involves the making of exempt supplies’. An ‘exempt supply’ is a supply ‘specified in paragraph 2 of Schedule II’. Paragraph 2 list a number of things, the first one of which is ‘a supply of financial services to the extent provided in regulations issued by the Minister’. Other supplies mentioned include prescription drugs, medical services, education services, accommodation, government supplies and not-for-profit situations.

Rough comparison

Vatopia s 27(1) seeks to engineer a neutrality position comparable to our s 11-15(1), though not as elegantly. Neutrality is then degraded by the exclusion from what is a ‘taxable activity’. This is the interesting part. How does the formula adopted in the ideal standard Vatopian provision compare against our s 11-15(2)(a)? In Vatopia, you are denied credits ‘to the extent that the activity involves the making of exempt supplies’. In Australia, denial operates ‘to the extent that … the acquisition relates to making taxable supplies that would be *input taxed’. Leaving aside nomenclature, the differences are minimal. Both jurisdictions accept apportionment, but adopt slightly different words to describe the nexus requirement. Vatopia requires that the activity ‘involves the making’ of tainted supplies where we say the acquisition must ‘relate to making’ supplies of that kind. No doubt, arguments could be teased out to produce a theoretical distinction, but the point is that the tests are all but the same.

Vatopian Model delivers

One reason Kathryn James evidently embraces the Vatopian Model is that it is seen to deliver on the key neutrality requirements necessary for a ‘good VAT’ to operate well in practice. Even if financial supplies should be fully taxed, as Michael Evans advocates for, the current VAT normal remains to exempt them from the tax and to block input tax credits. In her book (at 27), Kathryn says that the good VAT ‘is considered neutral because it does not interfere, or interferes less than other taxes, with market decisions relating to consumption, production or saving’. Norm 2 in this regard (at 28) is that the good VAT ‘is not a tax intended to fall on business because the tax is forward shifted to consumers’.

What’s the problem?

Three points can be made. First of all, the inference to be drawn from the ‘good VAT’ comments is that s 5(2)(b) of the Commonwealth of Vatopia Value Added Tax Act ensures appropriate neutrality. Second, s 11-15(2)(b), being all but indistinguishable from the Vatopian provision, should be delivering the same degree of neutrality as is required for the ‘good VAT’. Third, that level in practice, judged against the facts in Rio Tinto Services, is also about the same as applies in the EU – how ironic! When we put these three things together, one question emerges – What’s the problem? Leaving aside future reform globally, the remaining issue is around how input taxed supplies are defined, and what regulations the Vatopian minister might make. These are political matters for parliament and the executive arm.

Some conclusions

426 ‘INVOLVES’
428 US Advisory Commission on Intergovernmental Relations The Value-Added Tax and Alternative Sources of Federal Revenue (at 8).
429 Cnossen A VAT Primer for Lawyers, Economists and Accountants (2009) 54 Tax Notes (at 319-320).
Where I come out

Experience of the statute

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