

## Chapter 11

# The Gatekeeper Court: For the Revenue or For the Taxpayer?

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### Introduction

Since its establishment four decades ago, the Federal Court of Australia ('the Court') has become the leading tax court in the nation. Twenty-five years ago, while denying special leave to appeal from the Full Court of the Federal Court to the Commissioner of Taxation in *Westfield Ltd v FCT*,<sup>1</sup> Mason CJ stated that the Full Court should be 'the ultimate Court of appeal in taxation matters subject only to the exceptional cases in which this Court grants special leave to appeal'.<sup>2</sup> More recently, Gummow J observed to an eminent tax counsel (acting for the Commissioner) while granting leave to the taxpayer:

I do not believe any Court is the final Court of appeal in anything, Mr Slater, and that idea that was once around I can assure you is no longer around. ... No one is immune from our gaze and attention ... Let alone revenue matters which are of enormous importance to the country as a whole and therefore to this Court.<sup>3</sup>

Justice Nettle has also observed that the High Court is open for business on tax appeals.<sup>4</sup> Nonetheless, very few tax cases reach the High Court.

In view of the importance of the Federal Court, and to adopt a phrase which those who have studied income tax will recall, this chapter conducts 'a wide survey and an exact scrutiny'<sup>5</sup> of its record in taxation matters over the last 40 years. We first present a short history of tax jurisdiction in the Court and provide a 'wide survey' of statistics of tax cases since 1977, including statistics about winners and losers in tax cases. We then turn to discuss some important themes in tax cases before the Court, including the boundaries of ordinary income and allowable deductions; the task of statutory

1 (1991) 28 FCR 333 ('*Westfield*').

2 *FCT v Westfield Ltd* (1991) 22 ATR 400, 402.

3 *Bruton Holdings Pty Ltd (in liq) v FCT* [2009] HCATrans 138 (19 June 2009); Chloe Burnett, 'Income according to ordinary concepts – the jurisprudence of Justice Graham Hill' (2013) 28 *Australian Tax Forum* 189, 192.

4 Justice Geoffrey Nettle, 'Applications for Special Leave in Tax Matters' (Speech delivered at the Tax Bar Association Annual Dinner, 29 October 2015) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/nettlej/nettlej29Oct15.pdf>>.

5 *Western Gold Mines NL v Commissioner of Taxation (WA)* (1938) 59 CLR 729, 740 (Dixon and Evatt JJ), discussing the 'wide survey and exact scrutiny' of the facts needed to establish 'income' for tax purposes.

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