CARRYING ON A BUSINESS UNDER THE INCOME TAX ACT— SOME PROBLEMS OF DEFINITION

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Introduction

The definition of business has been included in New Zealand taxing statutes in approximately its present form for over fifty years. Section 2 of the current Act[1] defines it, as did the Act of 1923,[2] as follows:

> 'Business includes any profession,[3] trade,[4] manufacture,[5] or undertaking[6] carried on for pecuniary profit.

Unlike most of the Act, this particular definition is short, and on first reading, reasonably straightforward. There are, however, several theoretical[7] and practical[8] problems which arise for consideration. It will be impossible to discuss every possible issue in the course of this

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1 Land and Income Tax Act 1954.

2 Land and Income Tax Act 1923, s. 2.

3 See *Blackwell* v. *M.N.R.* [1949] C.T.C. 312; *Marsh* v. *I.R.C.* [1943] 1 All E.R. 199; *Carr* v. *Evans* [1944] 2 All E.R. 163; *I.R.C.* v. *Maxse* [1919] 1 K.B. 647; *Currie* v. *I.R.C.* [1921] 2 K.B. 332; *Bradfield* v. *F.C.T.* (1924) 34 C.L.R. 1; *In re Debtor* [1921] 1 Ch. 97; *I.R.C.* v. *Brander & Cruickshank* [1971] 1 W.L.R. 212. Note that the New Zealand definition of business is arguably narrower than that in the Income and Corporation Taxes Act 1970 (U.K.) and *Commonwealth Income Tax Assessment Act* 1936-1974 as these Acts also include the word 'vocation' and 'calling' or 'employment' respectively. The New Zealand Courts appear to have unconsciously broadened the meaning of profession however. Consider *Graham* v. *C.I.R.* [1961] N.Z.L.R. 994, 998 per McCarthy J.

4 For the distinction between 'business' and 'trade' see generally Halsbury, *Laws of England* (3 ed), Vol. 38 paras, 382-384. Particularly note *Harris* v. *Amery* (1865) 13 L.T. 504; *C.T. (N.S.W.)* v. *Kirk* [1900] A.C. 558; *St. Aubynes Estate* v. *Stick* 17 T.C. 414, 419 per Finlay J.; *Muat* v. *Stewart* 2 T.C. 601, 607 per Lord McLaren.

5 Infra.

6 *Eunson* v. *C.I.R.* [1963] N.Z.L.R. 278, 280 per Henry J.; *Reference Under Electricity Commission (Balmain Electric Light Company Purchase) Act* (1955) 57 S.R. (N.S.W.) 100, 128 per Sugerman J.; *Drumheller* v. *M.N.R.* [1959] C.T.C. 275, 280 per Thurlow J.; *M.N.R. v. Orlando* [1960] C.T.C. 58; *M.N.R.* v. *Valclair* [1964] C.T.C. 22.

7 The major one is whether the words 'carried on' prevent an isolated transaction by a taxpayer constituting a business within s. 2. Suffice it to say that in the writer's opinion it may be by virtue of the word 'undertaking' although, as casual profits may be caught under s. 88 (1) (c), this argument has no practical significance. See generally Webb, Single Venture Partnerships [1971] N.Z.L.J. 347; *Land Projects Ltd.* v. *C.I.R.* [1964] N.Z.L.R. 723; *Blockey* v. *F.C.T.* (1923) 31 C.L.R. 503; *C.I.R* v. *Stott* [1928] A.O. 252 (S. African S.C.). Compare *Tara Exploration and Development Co. Ltd.* v. *M.N.R.* [1970] C.T.C. 557 and *James A. Taylor* v. *M.N.R.* [1956] C.T.C. 189. See also the cases cited in n. 6 supra.

8 For example, the question as to when a business commences. See Hansen, "The Time for Commencement of a Business" [1974] A.T.R. 183.

article. Accordingly, three particular points of some considerable practical significance will be dealt with in detail.

The first flows directly from the wording of the definition. Over the last decade some confusion has arisen over the meaning of the phrase 'for pecuniary profit'. An attempt will be made to clarify this area which has become particularly important in light of the recent Supreme Court decision in *Prosser* v. *C.I.R.*[9] The second necessitates an enquiry as to what activities fall within a particular type of undertaking. For example, what constitutes a manufacturing business; is the designing of machine tools part of the process of manufacturing such implements or is it preliminary to and thus outside the manufacturing process? The final issue raises the question of whether a taxpayer's operations constitute a single business or two or more separate undertakings. The relevance of these enquiries will become apparent at a later stage.

'For Pecuniary Profit'

The inclusion of the phrase 'for pecuniary profit' in a general definition of business in a taxing statute appears to be unique in New Zealand.[10] The presence of these few words has not, until the last decade, and more particularly, the last three or four years, played any great importance in the incidence of taxation. Over this latter period, however, the Courts in New Zealand have developed an approach which appears to have limited to some extent the scope of a business as defined in the Act. These developments have centred around the question of whether or not the definition in section 2 is exhaustive or merely inclusive. That is, whether or not the taxpayer's activities must be carried on for pecuniary profit before they can constitute a business. At this stage it seems well established[11] that the definition is, despite the use of 'includes',[12] exhaustive in nature and the writer has no wish to challenge the present state of the law.[13] What is

9 73 A.T.C. 6006.

10 Compare for example Commonwealth Income Tax Assessment Act 1936-74, s. 6. Note, however, that the same or similar phrase is used occasionally with respect to particular activities; see Income Tax Act R.S.C. 1952, c. 48 *as am.* 1970-71-72, S.C. c. 63, s. 248 (1) (definition of personal or living expenses); Income and Corporation Taxes Act 1970, s. 170 (U.K.) (deductibility of losses).

11 *C.I.R.* v. *Watson* [1960] N.Z.L.R. 259, 262 per Henry J.; *Graham* v. *C.I.R.* [1961] N.Z.L.R. 994; 998 per McCarthy J.; *Harley and Another* v. *C.I.R.* [1971] N.Z.L.R. 482, 486-487, per North P.; *Prosser* v. *C.I.R.* 73 A.T.C. 6003, 6009 per Quilliam J.

12 See *Haynes* v. *McKillop* (1905) 24 N.Z.L.R. 833; *Dilworth* v. *C.S.D.* [1899] A.C. 99.

13 The writer in fact agrees wtih Mr Justice McCarthy in *Graham's* case supra, in his conclusion that the words 'for pecuniary profit' add nothing to the common law meaning of business. Even at common law a 'commercial animus' was required and this amounts to no more than an objective intention to carry on 'for pecuniary profit'. See *Religious Tract and Book Society of Scotland* v. *Forbes* (1896) 3. T.C. 415; *Brighton College* v. *Marriott* [1926] A.C. 192, 204 per Lord Blanesburgh; *British Legion, Peterhead Branch, Remembrance and Welcome Home Fund* v. *I.R.C.* 35 T.C. 509, 514 per Lord President; *Sterling Paper Mills Inc.* v. *M.N.R.* [1960] C.T.C. 215, 227 per Fournier J.; *Thomas* v. *F.C.T.* 72 A.T.C. 4094, 4099 per Walsh J. See particularly *White* v. *F.C.T.* (1968) 120 C.L.R. 191, 216 per Barwick C. J.: ". . . a business in the relevant sense of necessity involves the earning of or the intention to earn profits." It is true that at common law there was no need for a profit *motive* as opposed to objective *intention* but this is also the case under the New Zealand definition, infra.

important, however, is to determine the approach of the New Zealand courts in determining whether or not this criterion has been satisfied.

It is vital to establish at the outset that in analysing a taxpayer's situation the Courts have expressed no interest in the *motive* behind his activities. As was made clear by McCarthy J. in the leading case of *Graham* v. *C.I.R.*,[14] the words 'for pecuniary profit' do not:[15]

> point to motive. Motive as distinct from intention is generally not the concern of the law. 'For' points to intention. I agree with the authors of *Gunn's Commonweath Income Tax Law and Practice* (6 ed.) that the essential test as to whether a business exists is the intention of the taxpayer as evidenced by his conduct, and that the various tests discussed by the decided cases are merely tests to ascertain the existence of that intention. I think that it conforms with this approach to construe the word 'for' as importing intention.

When applied to the facts of *Graham* the distinction between motive and intention becomes quite clear. The taxpayer was an evangelist who was a member of the Open Brethren Assemblies. As such, he was 'employed' in the Wanganui area. He received no salary or allowance for his duties but over the years received and came to expect a sufficient income from gifts and offerings donated by individuals and the Assemblies. McCarthy J. held that the taxpayer's activities constituted the carrying on of a business and was thus assessable under section 88 (1) (a). In reaching his conclusion His Honour pointed out that while it could not be said that the taxpayer was *motivated* by the thought of the money which would flow to him, it would be unrealistic to suppose that after several years of receiving a steady income he did not intend that gifts would be made to him.[16] Like the outstanding artist, his work was not undertaken *for the purposes* of making a profit, "but even a Picasso *intends* to sell sufficient of his work to keep body and soul together."[17]

Subsequent Courts have continued to approach cases from the basis of objective intention and, in the writer's view, quite correctly so. What is disturbing is the manner in which that intention has been measured. The problem reached its peak (hopefully) in the recent decision of Mr Justice Quilliam in *Prosser* v. *C.I.R.*[18] Here, the taxpayer was a chartered accountant who had been interested in farming for a considerable time. Later in life, he bought a property of about forty acres and having taken advice as to the kind of farming he should carry on, planned to stock the land with beef cattle, to be fattened or sold three or four months later. The anticipated profit was about $1,500 net per annum. Unfortunately for Prosser, due to the decrease in profitability of sheep farming at that stage, the price of cattle had increased and his plan was no longer a viable proposition. He adopted an alternative scheme of producing weaner calves which proved to be an even less viable proposition and accordingly he made a loss, varying between $525 and $1,700. The farm took up approximately two to three days of the taxpayer's time every week. After allowing the taxpayer to deduct his losses for several years the Commissioner in 1971 refused to accept the deduction of any losses

14 [1961] N.Z.L.R. 994.
15 Ibid., 998-99.
16 Ibid., 999.
17 Id.
18 73 A.T.C. 6003.

on the farming operations on the grounds that the latter no longer amounted to a business. In the Supreme Court Quilliam J. upheld the Commissioner's finding and the taxpayer's appeal against the disallowance of the deductions was dismissed.

It is not intended to criticise Mr Justice Quilliam's decision on the facts. The proposition of law that the learned judge put forward as the basis for his conclusion cannot, on the other hand, be so readily accepted. His Honour cited the following passage from the judgment of North P. in an earlier decision of the Court of Appeal in *Harley* v. *C.I.R.*[19] as authority for his approach:

> The learned judge in the Court below—if I understood his judgment correctly—treated the matter as raising simply a qustion of fact and he appears to have formed the opinion that once he was satisfied that the appellants were not carrying on their farming operations 'for fun or as a hobby' the proper view was that they were carrying on a business within the meaning of the Act. With respect, I think that it is at least arguable that the words in the definition clause make it necessary for the taxpayer to establish that he was carrying on his operation for pecuniary profit and accordingly, if the enterprise had no prospect of earning a profit, it *may* be wrong to described the enterprise as a business.

Mr Justice Quilliam then continued:

> Both Turner J. at 492 and Richmond J. at 496, made it clear that they shared the President's doubts. The proposition therefore that in order to constitute an undertaking a business it should be shown that there was *both the intention to make a pecuniary profit and also the prospect of earning one* had been expressed, although so far as the Court of Appeal was concerned, the observations of North P. must be regarded as obiter.[20]

Indeed, his Honour went even further in clarifying his position later in his judgment and concluded that there must be a *reasonable prospect*[21] of making a profit before a business could be found to exist. It is respectfully submitted that Mr Justice Quilliam's approach is incorrect. It has little or no basis in law and provides for practical problems which could result in some ridiculous decisions.

It is difficult to see exactly what authority His Honour based the the rule on. There is certainly no reference to "reasonable prospect" or even "prospect" in the definition clause.[22] Moreover, it is clear that in so far as Mr Justice Quilliam is relying on the comments of McCarthy J. and North P. in the preceding decisions of *G.* v. *C.I.R.* and *Harley* v. *C.I.R.* respectively, he is mistaken in his interpretation

19 [1971] N.Z.L.R. 482.

20 73 A.T.C. 6006, 6009. Emphasis added.

21 Ibid., 6011. His Honour cited as authority for his approach the unreported decision of Speight J. in *Gohlightly* v. *C.I.R.* (Supreme Court, Auckland, August 18, 1972). Speight J. found that a business existed on the facts but did state that the taxpayer must show both an intention to and a prospect of earning profits. It will be suggested that even these comments are incorrect, but as far as providing authority for the prerequisite of a *reasonable* prospect of profit, His Honour's judgment is not in point. The word 'reasonable' is used, but only in the sense of describing the taxpayer's prospects on the particular facts; i.e., 'reasonable' as opposed to 'doubtful'. With respect, it appears that Quilliam J. has misinterpreted Speight J.'s judgment. See also 5 N.Z.T.B.R. Case 11.

22 Compare Income War Tax Act S.C. 1927, c. 97. Section 2 (rl) refers to a "*bona fide* business carried on with a reasonable chance of profit". Such an additional criterion should not, it is submitted, be read into a taxing statute in the absence of express wording to that effect.

of the cases. The former makes no reference to the prospects of earning income in any one year; the facts of the case did not require such a discussion. Nor did the President of the Court of Appeal go as far in his comments as Mr Justice Quilliam suggests. What in fact North P. said in *Harley* was that it *may* be wrong to describe an undertaking as a business where it has no prospect of making a profit; it *may,* in particular circumstances, be evidence going to the question of whether or not the intention of the taxpayer was to make a profit. What is quite certain is that the learned President did not intend the "prospect of a profit" to be a separate criterion; nor was he setting down a rule of law.

Even if the writer is wrong in his interpretation of North P.'s comments, it is quite clear that he made no reference to reasonable prospects, but was referring to the position where there was no prospect at all of a profit, i.e. where the venture was totally unrealistic.[23]

Ultimately, one suspects that in *Prosser* Quilliam J. has confused the business activities of a concern with the result of those activities. As Lord Guest stated recently:[24]

> The Revenue is not concerned with the particular method of trading; they are only concerned with the result of the business.

It is suggested that these words apply in New Zealand to no less extent than in England. The Commissioner under the statutory definition may only have regard as to whether or not the taxpayer intends to make a profit. In any case, the chances of a profit materialising may be an important factor in his final decision. But it is only one of many considerations which must be taken into account and it is by no means determinating on every occasion. What is certain is that the Commissioner, if satisfied that the taxpayer on an objective analysis intends to make a profit from his undertaking, cannot penalise the latter because the market is economically depressed or because he is not particularly skilled in his work, i.e. on account of the results of his labours. Such factors are for the most part irrelevant once the definition section is satisfied.

As commented above, the approach adopted by Quilliam J. could involve the courts in numerous practical problems. At least His Honour did not limit himself to a reasonable prospect of a profit in the particular income year in question.[25] One might well ask, however, what period the "reasonable prospect" should be related to? Within two years or three or perhaps a decade? On the facts of the case the learned judge stated that if there was a resurgence in the price of wool, then the taxpayer's farm might become once again an undertaking reasonably capable of realising a profit and accordingly a business. One wonders how Quilliam J. came to the conclusion that in 1970 and 1971 there was no reasonable possibility of an increase in lamb and wool prices sufficient to draw people back to sheep farming.[26] Indeed, his Honour is only to be admired for reaching so

23 The other members of the Court of Appeal did not even go as far as this. They were content to rely on s. 111 as the basis for their decision. See also *Tweedle* v. *C.T.* (1942) 2 A.I.T.R. 360.

24 *Harrison (Watford) Ltd.* v. *Griffiths* 40 T.C. 281.

25 73 A.T.C. 6006, 6010.

26 Ibid., 6012.

definite a conclusion on a subject on which the economists of the country were divided.

There are further complications which arise from the *Prosser* decision. It is unclear whether Quilliam J. was referring merely to "taxable" profit, or profit in a commercial sense. There may be substantial differences between the two. Particularly in the case of farming operations a taxable profit may initially be realised but subsequently disappear when advantage is taken by the taxpayer of incentive deductions and depreciation allowances.[27] At the same time the existence of a taxable profit may be dependent on something as uncertain as the taxpayer's financial arrangements. Take for example the taxpayer who owns a farm financed for the most part by loan moneys. Any taxable profit is eliminated by the deduction of the interest payments.[28] Yet a profit for tax purposes could appear virtually overnight were the taxpayer to put into the farm a substantial amount of his own monies, thereupon reducing the interest bill. It is suggested that it is a little unrealistic to say, as does Quilliam J.[29] that an undertaking can constitute a business one year and then disappear the next. As William J. commented in *Tweedie* v. *F.C.T.*:[30]

> . . . it is difficult to see how [the taxpayer's] activities could at that moment of time be transmogrified from an indulgence in a somewhat unusual form of recreation into the carrying on of a business.

The final problem which Quilliam J. does not appear to envisage is just how general the application of his criterion of a business is to be. One could, for example, put up a strong argument that having regard to its past record, there is no reasonable prospect that the Hotel Intercontinental will ever make a profit. Nor would one suspect that the chances of a substantial increase in wool prices was a less reasonable prospect than the Republic Oil Company finding oil in New Zealand. Could it seriously be said that these undertakings are not businesses for the purpose of the Land and Income Tax Act?

In conclusion, it is submitted that Mr Justice Quilliam's reasoning is unsoundly based and would not be followed by the Court of Appeal in the future. The correct approach is that adopted by North P. in *Harley* v. *C.I.R.* The taxpayer must prove an intention to carry on the undertaking at a profit and in the particular circumstances the fact that there is no prospect of a profit *may* point to the conclusion that there is no business for tax purposes. It must be remembered that intention, when judged objectively, involves a consideration of all the evidence. Thus, important considerations might be how much capital and activity has the taxpayer put into his activity; or what is the cause of the current failure of the operations—is it bad management or perhaps a shortage of labour? All these factors must

27 For example, Land and Income Tax Act 1954, ss. 119-120, 130-136, 136B-136K.

28 Land and Income Tax Act 1954, s. 112 (1) (g).

29 73 A.T.C. 6003, 6013.

30 (1942) 2 A.I.T.R. 360, 364. See also 14 C.T.B.R. (N.S.) Case 75, 432, 437 per Mr R. E. O'Neil.

be taken into account, and it is submitted that there is no easy solution such as that suggested in Prosser's case.[31]

It may be pertinent, in considering this topic, to refer to the comments of Circuit Judge Manton in *Commissioner of Inland Revenue* v. *Field*[32] In this case the American Court faced the same problems which have occupied New Zealand courts over the past year or two and it is suggested the following passage is worthy of consideration:[33]

> It is not essential that the taxpayer be engaged in solely one business. He may have interests in several enterprises among which he divides his time. His intention is important. . . . In the instant case there is substantial evidence that the enterprises were conducted as a business for profit and with an expectation of ultimate profits. We cannot say that the expectation of profits is unreasonable or forecast continuous losses in the light of experience in cattle or horse breeding and racing. If the right to deduct losses under the statute required that profit appear to the Court to be possible, that requirement would be quite general and could be applicable to any enterprise, whether it was farming, manufacturing, or promotion of any character. We may not, in this way, foredoom any business venture. Cattle breeding and horse racing projects are old. Some have been profitable, others have not. It is a matter of intention and good faith, and all the circumstances in the particular case must be our guide. In this case we think the respondent embarked on this enterprise with the expectation of making profits; at least he did so with an earnest and honest intention.

This is not to say that every man who buys expensive land close to the city as an investment, but decides to finance his purchase by mortgages and to deduct the interest payments in the meantime, can call his operations a business simply by running a few sheep or cattle on the property. He cannot on this basis, at least over a period of years "intentionally" make a substantial loss on his activities and hope to deduct this loss from his other income.[34] On the other hand, it must not be forgotten that the loss may well be greater at the commencement of an undertaking or venture than in later years. This follows from the tide of development and should not in the absence of specific statutory provision affect the nature of the undertaking for tax purposes.

In England these principles have been incorporated into statutory provisions. Section 170 of the Income and Corporation Taxes Act

31 The hobby/business cases are striking examples of the factors which must be taken into account. See the cases cited above, and also 5 N.Z.T.B.R. Case 10; 1 N.Z.T.B.R. Case 18; 17 C.T.B.R. (N.S.) Case 15; 18 C.T.B.R., (N.S.) Case 21; 14 C.T.B.R. (N.S.) Case 75; 10 C.T.B.R. Case 132; *Needham* v. *M.N.R.* [1974] C.T.C. 2078; *Huband* v. *M.N.R.* [1974] C.T.C. 2001.

32 67 F. (2d) 874.

33 Ibid., 877-878. For an excellent illustration of the factors to be taken into account in looking at farming businesses see *Harris* v. *M.N.R.* [1974] C.T.C. 801.

34 This raises the incidental question of whether an activity which looks like a business but is run with the intention of making a loss can ever be a business. This problem, which has arisen in other jurisdictions in the context of dividend stripping is of some importance but cannot be discussed fully here. See *Harrison (Watford) Ltd.* v. *Griffiths* 4 T.C. 281; *Thompson* v. *Guernville Securities* [1971] 3 All E.R. 1071; *Bishop* v. *Finsbery Securities* [1966] 3 All E.R. 105; *F.A. & A.B. Ltd.* v. *Lupton* [1971] 3 All E.R. 948; *Investment and Merchant Finance Corp. Ltd.* v. *F.C.T.* (1971) 45 A.L.J.R. 432; *Williams* v. *F.C.T.* 72 A.T.C. 4157. See also Commonwealth Income Tax Assessment Act 1936-74, s. 46 (1A) and Myers, "Dividend Stripping Operations in the Light of Recent Amendments" (1973) 2 A.T.R. 71.

1971 prevents a loss being deducted unless the trade in which it is incurred is being carried on "on a commercial basis and with a view to the realisation of profits". It is important to note that the Chancellor of the Exchequer said in relation to this section that no limit is fixed for the distance at which a profit may be described and expressly commented that a difficult long term task of improvement may be easily reconciled with the eventual realisation of profits.[34a] This, it is suggested, is basically a restatement of the common law criteria of a business and is equally applicable to the New Zealand situation.

Accordingly, it is submitted that the position in New Zealand is as follows. It is a prerequisite to the establishment of a business for the purposes of section 88 (1) (a) that the taxpayer is conducting his activities with the intention of making a profit. There is, however, no *requirement* that there be any prospect, let alone a reasonable prospect, of any profit being realised. While as one commentator has said, "the dilettante cannot deduct",[35] the bona fide businessman who is involved in a long term scheme or whose activities consistently run at a loss because of factors beyond his control, should not, it is suggested, be penalised on this account. In short, what the courts should be concerned with is the *modus operandi* of the taxpayer's activity. If the undertaking appears objectively to have its basis in commercial principle, and particularly if it seems to be run in a manner comparable to businesses of a similar nature, then in the writer's opinion that taxpayer is carrying on a business within the meaning of the Act.

The Scope of a Particular Business—A Matter of Interpretation

The problem of deciding exactly what activities fall within the business in question has been brought about in the main by statutory developments. Thus, in the Land and Income Tax Act 1954, incentives and special rates of taxation are provided for taxpayers carrying on, inter alia, the business of life insurance,[36] manufacturing,[37] forestry,[38] and mining for petroleum.[39] It is only natural that in these circumstances the taxpayer will seek to bring his activities within the area granted favourable tax treatment. Accordingly, such questions of definition are frequently arising for consideration by the Courts.

The question before the courts on such occasions is essentially one of fact. Are the taxpayer's activities encompassed by the statutory provisions? The interpretation problems involved in such an enquiry have, however, caused some difficulty. What does a 'business of life insurance' involve? Or the issue may become one of 'what constitutes a mining operation'? Two possible approaches open to the courts in such an enquiry may be demonstrated by reference to various Commonwealth decisions.

The two approaches which could be adopted by the courts in interpreting such legislative provisions are as follows: First, to enquire of the meaning of the words in their popular sense. Secondly, to give

34a Hansard, *H. C. Debates* Vol. 624, col. 318.
35 Cain, "Hobbies and Assessments" (1972) 5 N.Z.U.L.R. 62.
36 Land and Income Tax Act 1954, s. 150.
37 Ibid., s. 117A.
38 Ibid., ss. 91, 129D, 153C, 153D.
39 Ibid., ss. 153E and 153G dealing with the assessment of mining companies generally.

to the words the meaning applied to them by those in the trade in question. Both possibilities are illustrated by a very recent decision of the Commonwealth Taxation Board of Review.[40] In this case, the main business carried on by the taxpayer was that of typesetting for the printing industry. On isolated occasions it did perform small printing jobs, but only when this could be done by the taxpayer company at prices competitive with regular printers. The question arose as to whether the taxpayer company was carrying on the business of printing so as to qualify for a tax incentive granted by the Commonwealth Income Tax Act.[41]

The Board reached the conclusion that the taxpayer was not carrying on the said business. The decision was not, however, an easy one. As the Members admitted,[42] the taxpayer was unquestionably engaged in the printing trade or industry. It was a member of the Printing Employers Federation and its employees were covered by the printing employees' award. Nevertheless, this did not conclusively answer the question as to the existence of a printing business. In deciding finally against the taxpayer the Board applied both the approaches noted above.[43]

> A principle of statutory interpretation is that, in a general statute, words will prima facie be presumed in their popular sense. As was said by Lord Tenderdon in *Attorney-General* v. *Winstanby* (1831) 2 D. & Cl. 302, 310 'the words of an Act of Parliament which are not applied to any particular science or art' are to be construed 'as they are understood in common language'. It would not, in my opinion, accord with the ordinary popular meaning of the words "printing business' to say that what the taxpayer does in the course of setting type or producing an art reproductive print is carrying on a business of printing. Admittedly what the taxpayer does is an essential preliminary step to the carrying on of printing operations by other persons, but to a member of the general public, who want a job of printing done, the taxpayer would not meet the description of a person carrying on business as a printer.

The alternative approach of trade usage was then applied:[44]

> However, it may be arguable that this is a case where the proper test is to look not to the popular meaning but to what is the prevailing usage in the particular trade of which, in a broad sense, the taxpayer is a member. This principle of construction is illustrated in *Central Press Photos Ltd.* v. *Department of Employment and Productivity* [1970] 3 All E.R. 777. . . . As Salmon L. J. said in that case at p. 782, "The question is not what do the words 'commercial photography' mean to a Professor of English; it is the meaning which would be attributed to them by people in the trade." Yet it does not seem to me that this approach leads to any more satisfactory result for the taxpayer. It is, according to the evidence, known in the trade as a 'trade-type' house. Its customers from within the trade (and these provide the overwhelming preponderance of its business) do not approach it to get printing jobs done but to obtain typesettings or art reproductive proofs. I do not see how according to the usage of the trade, the taxpayer can be regarded as carrying on a business of printing.

It is suggested that these passages offer an excellent illustration of the general approaches open to the Courts in this area. The manner in which the Members relate the various interpretations of

40 Case D29, 72 A.T.C. 170.
41 Commonwealth Income Tax Assessment Act 1936-1969, s. 62AA (4).
42 72 A.T.C. 170, 172-173.
43 Id.
44 Ibid., 174.

' printing business ' to the facts of the case represents the reasoning leading up to their conclusion as logical and decisive.

For the most part, however, the courts have not drawn the distinction outlined in the Commonwealth Board of Review decision. They do not appear to have consciously applied either a ' popular ' or ' trade ' approach with any degree of preference. If any trend is apparent, it is perhaps towards that of applying the ordinary meaning of the words in question, relating the facts to the common usage. This has particularly been the case with the line of Australian authorities dealing with the expression ' mining operations '.[45] The High Court has consistently stated that the phrase is a popular rather than a technical expression and that the words should be understood in their ordinary and natural meaning.[46]

Perhaps most important are the comments in these cases that such expressions have a flexible as opposed to rigid meaning.[47] The scope of the words ' mine ' and ' mining ' is "by no means fixed and is readily controlled by context and subject matter".[48] Thus in *F.C.T.* v. *I.C.I. Australia Ltd.*[49] the words were held to be intended to have a meaning wide enough to include the obtaining of salt by pumping brine from underground deposits. The only requirement of the words was said to be the recovery from below the earth's surface of mineral bearing substances.

On the other hand, it was recently decided[50] that the working in an open pit of limestone amounted to quarrying and not mining. The opinion of the Court was that there would be incongruity in speaking in Australia of "limestone workings as a mining property". There seems to the writer to be little difference, if any, between the recovery of limestone from an open pit and the recovery of coal by the open-cast mining process. In fact, the conclusion by the Court that the recovery of limestone in these circumstances was not mining, was reached in the face of evidence from those in the trade that the activities in question were, in the common parlance of the mining industry, mining operations. Clearly, here the Court favoured the ' popular ' as opposed to the ' trade ' approach to interpretation.

Whatever approach is adopted by the courts, it is submitted that the vital significance of the above decisions is that they show that, no matter what the expression of definition in question, the categorisation of any one activity will be in the final analysis a question of fact. Examples from a series of cases arising under the selective employment tax (U.K.) provisions demonstrate this further. By section 1 (1) of the Selective Employment Payments Act 1966, the Minister of

45 Commonwealth Income Tax Assessment Act 1936-1973, s. 122. For the relevant New Zealand sections see n. 39 supra. Note, however, that the latter are restricted to nominated minerals.

46 *F.C.T.* v. *Broken Hill South Ltd.* (1941) 65 C.L.R. 150, 155; *N.S.W. Associated Blue Metal Quarries Ltd.* v. *F.C.T.* (1956) 94 C.L.R. 509, 523-524; *F.C.T.* v. *I.C.I. Australia Ltd.* 72 A.T.C. 4213.

47 *F.C.T.* v. *I.C.I. Australia Ltd.* ibid., 4226.

48 *N.S.W. Associated Blue-Metal Quarries Ltd.* v. *F.C.T.* supra, n. 46, 522. Also *Lord Provost and Magistrates of Glasgow* v. *Fairlie* (1888) 13 App. Cas. 657, 675 per Lord Watson: ". . . the words ' mines ' and ' minerals ' are not definite terms: they are susceptible of limitation or expansion according to the intention with which they are used."

49 Supra, n. 46.

50 *North Australian Cement Ltd.* v. *F.C.T.* (1969) 119 C.L.R. 353.