FEDERAL COURT OF AUSTRALIA

Healius Ltd v Commissioner of Taxation [2019] FCA 2011

File numbers:	NSD 1750 of 2018 NSD 1752 of 2018 NSD 1753 of 2018 NSD 1754 of 2018 NSD 1755 of 2018
Judge:	**PERRAM J**
Date of judgment:	29 November 2019
Catchwords:	**TAXATION** – deductibility of lump sum payments made to doctors in respect of contracts to conduct their practice at medical centres operated by Applicant for a certain period – where doctors would then pay a proportion of billings from patients to Applicant in exchange for use of premises and administrative services – whether lump sum outgoings of capital or of a capital nature under *Income Tax Assessment Act 1997* (Cth) s 8-1(1)(a) – character of advantage sought – means by which advantage to be used, relied upon or enjoyed – means adopted to obtain advantage **CONTRACTS** – interpretation of contracts – clause purporting to involve sale of doctors' practices and goodwill to Applicant – where Applicant itself unable to conduct a doctor's practice and where doctors would continue to practice at Applicant's medical centres – where goodwill inseparable from practice – where finding of clause being void for uncertainty would frustrate entire agreement and related agreement – consideration of relevant principles
Legislation:	*Income Tax Assessment Act 1997* (Cth) Pt 3-90, s 8-1 *Taxation Administration Act 1953* (Cth) s 14ZZ
Cases cited:	*Allied Mills Industries Pty Ltd v Commissioner of Taxation* (1989) 20 FCR 288 *Associated Portland Cement Manufacturers v Kerr* [1946] 1 All ER 68 *AusNet Transmission Group Pty Ltd v Commissioner of Taxation* [2015] HCA 25; 255 CLR 439 *Box v Commissioner of Taxation* [1952] HCA 61; 86 CLR 387 *BP Australia Ltd v Commissioner of Taxation* (1965) 112

CLR 386

Broken Hill Theatres Pty Ltd v Commissioner of Taxation (1952) 85 CLR 423

CityLink Melbourne Ltd v Commissioner of Taxation [2004] FCAFC 272; 141 FCR 69

Colonial Mutual Life Assurance Company Ltd v Commissioner of Taxation (1953) 89 CLR 428

Commissioner of State Revenue (WA) v Placer Dome Inc [2018] HCA 59; 93 ALJR 65

Commissioner of Taxation v CityLink Melbourne Ltd [2006] HCA 35; 228 CLR 1

Commissioner of Taxation v Murry [1998] HCA 42; 193 CLR 605

Commissioner of Taxation v Sharpcan Pty Ltd [2019] HCA 36; 93 ALJR 1147

Commissioner of Taxation v South Australian Battery Makers Pty Ltd [1978] HCA 32; 140 CLR 645

Commissioner of Taxation v Star City Pty Ltd [2009] FCAFC 19; 175 FCR 39

Council of the Upper Hunter Country District v Australian Chilling & Freezing Co Limited [1968] HCA 8; 118 CLR 429

Geraghty v Minter [1979] HCA 42; 142 CLR 177

GP International Pipecoaters Pty Ltd v Commissioner of Taxation [1990] HCA 25; 170 CLR 124

Hallstroms Pty Ltd v Commissioner of Taxation [1946] HCA 34; 72 CLR 634

Handbury Holdings Pty Ltd v Commissioner of Taxation [2009] FCAFC 141; 179 FCR 569

Heavy Minerals Pty Ltd v Commissioner of Taxation [1966] HCA 60; 115 CLR 512

Idameneo (No 123) Pty Ltd v Angel-Honnibal [2002] NSWSC 1214

Idameneo (No 123) Pty Ltd v Gross [2012] NSWCA 423; 83 NSWLR 643

Kelsall Parsons & Co v Commissioner of Inland Revenue (1938) SC 238

Magna Alloys and Research Pty Ltd v Commissioner of Taxation [1980] FCA 150; 49 FLR 183

National Australia Bank Ltd v Commissioner of Taxation (1997) 80 FCR 352

Primary Health Care Ltd v Commissioner of Taxation [2010] FCA 419; 186 FCR 301

Sidameneo (No 456) Pty Ltd v Alexander [2011] NSWCA 418

	Sun Newspapers Limited v Commissioner of Taxation (1938) 61 CLR 337 *Symbion Medical Centre Operations Pty Ltd v Alexander* [2010] NSWSC 1047 *Tyco Australia Pty Ltd v Commissioner of Taxation* [2007] FCA 1055; 67 ATR 63 *Western Gold Mines NL v Commissioner of Taxation (WA)* [1938] HCA 5; 59 CLR 729 *Zahedpur v Idameneo (No 123) Pty Ltd* [2016] QCA 134
Date of hearing:	28 and 29 October 2019
Registry:	New South Wales
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	91
Counsel for the Applicant:	Mr M Richmond SC with Ms C Burnett
Solicitor for the Applicant:	King & Wood Mallesons
Counsel for the Respondent:	Mr G J Davies QC with Mr C J Peadon
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 1750 of 2018
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BETWEEN:	**HEALIUS LTD** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent
JUDGE:	**PERRAM J**
DATE OF ORDER:	**29 NOVEMBER 2019**

THE COURT ORDERS THAT:

1. The application to appeal from the Respondent's objection decision dated 24 August 2018 be allowed.
2. The matter be remitted to the Respondent for reassessment according to law.
3. The Respondent pay the Applicant's costs as taxed or agreed.

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

REASONS FOR JUDGMENT

PERRAM J:

Introduction

1 During the income years ending 30 June 2003 to 30 June 2007 ('the relevant years') Idameneo (No 123) Pty Ltd ('Idameneo') paid doctors lump sums in return, loosely speaking for now, for their promise exclusively to conduct their practices from one of its medical centres for a period, usually of five years. At the expiry of these agreements some doctors were paid further lump sums to extend the term of the arrangements. The outgoings in question are summarised in the following table:

	Year ended 30 June 2003 (NSD1750/18)	**Year ended 30 June 2004** (NSD1752/18)	**Year ended 30 June 2005** (NSD1753/18)	**Year ended 30 June 2006** (NSD1754/18)	**Year ended 30 June 2007** (NSD1752/18)
Acquisition Costs	$31,012,599	$15,514,000	$20,488,023	$36,706,780	$40,104,463
Extension Payments	-	$90,000	-	$840,000	$398,635
Associated Costs	$2,340,853	$2,002,928	$1,735,677	$2,914,078	$3,848,094
Total	$33,353,452	$17,606,928	$22,223,700	$40,460,858	$44,351,192

2 The question now is whether the lump sum outgoings were of 'capital or of a capital nature' within the meaning of s 8-1(2)(a) of the *Income Tax Assessment Act 1997* (Cth) ('the Act') or whether they were on revenue account being payments to secure customers. It is not in dispute that the lump sum outgoings were incurred in the course of earning assessable income within the meaning of s 8-1 so that the question of whether they were of capital or of a capital nature will determine whether the Applicant, of which Idameneo is a wholly owned subsidiary, is entitled to deduct them against its assessable income in the relevant years. The Respondent ('the Commissioner') assessed the Applicant's income in the relevant years on the basis that

the lump sum outgoings were of capital or of a capital nature and therefore not deductible with the consequence that the Commissioner disallowed the Applicant's corresponding objections in each relevant year. It is from those disallowances that the Applicant now appeals under s 14ZZ of the *Taxation Administration Act 1953* (Cth). There is no separate issue about the extension payments or the associated costs (which consisted of stamp duty and the like). The parties agreed at the end of the hearing that the tax treatment of those outgoings would abide the result in relation to the lump sum outgoings.

The Evidence

3 The Applicant called evidence from three witnesses.

Mr Andrew Kenneth Duff

4 Mr Duff swore an affidavit dated 7 February 2019. Some minor portions of the affidavit were not read. Mr Duff is a chartered accountant and during the relevant years was employed by the Applicant as its chief financial officer. He gave evidence about the nature of Idameneo's businesses, its medical centres and its contractual and business arrangements with the doctors who worked in those medical centres. Mr Duff was extensively cross-examined. He gave his evidence in a thoughtful and measured fashion. I accept his evidence (and it was not submitted by the Commissioner that I should do otherwise).

Mr Jerome Chi-Lok Tse

5 Mr Tse affirmed an affidavit dated 11 February 2019. Mr Tse is a partner of King & Wood Mallesons and is the solicitor for the Applicant in these proceedings. He gave evidence about entries in various telephone books in the relevant years. This evidence was directed to showing the proportion of doctors in areas where Idameneo operated medical centres who worked from its medical centres. Mr Tse was not cross-examined. As events transpired, neither party's submissions made reference to his evidence and I mention it only for completeness.

Ms Bimlesh Lata Chand

6 Ms Chand affirmed an affidavit dated 5 September 2019. Ms Chand is a member of CPA Australia and is employed by the Applicant as a tax manager. She conducted an analysis of the relationship between the amounts which Idameneo had paid to doctors to acquire their practices and the distance between the location of their old practice and the medical centre to which they had then moved. She too was not cross-examined. As with Mr Tse, the parties did not develop any submissions about the significance of Ms Chand's evidence.

7 The Respondent did not call any witnesses.

Relevant Facts

8 The Applicant is an Australian resident listed public company. Idameneo was at all material times since 1994 a wholly owned subsidiary of the Applicant. Idameneo is the trustee of the Artlu Unit Trust of which the Applicant is the sole unit holder. With effect from 1 July 2002 the Applicant became the head company of a tax consolidated group of which Idameneo and the Artlu Unit Trust were subsidiary members. The effect of Pt 3-90 of the Act is that these subsidiary members of the consolidated group are to be treated for tax purposes as if they were part of the head company: *Handbury Holdings Pty Ltd v Commissioner of Taxation* [2009] FCAFC 141; 179 FCR 569 at 570 [2]. This appeal is concerned with the affairs of Idameneo but Pt 3-90 means that for tax purposes the issues which arise are taken to be concerned with the Applicant. In the interests of clarity, I will refer to Idamaneo save where the context necessitates otherwise.

9 Idameneo began its business in 1985 when its founder, the late Dr Edmund Bateman, opened a general practice at the Warringah Mall Centre at Brookvale, a suburb in the northern beaches district of Sydney. In the early years of the business, it had acquired pre-existing medical centres which were already staffed by doctors. By the time of the commencement of the relevant years (in early 2002), however, it had changed that business model somewhat in that it began to open new medical centres and not just to operate pre-existing ones. The business of Idameneo had three segments. These were the provision of premises and services to doctors, a pathology business and a development business which bought and developed medical centres which it then sold and leased back. Only the first of these businesses is presently relevant.

10 The change to the services business in 2002 necessitated the engagement of doctors to work at the new centres. During the relevant period it opened 18 such new medical centres. During that period Idameneo entered into arrangements with 505 medical practitioners to whom it paid lump sums for them to bring their practices across to its medical centres. 425 of these were general practitioners with the balance being dentists and specialists of various kinds including one gastroenterologist. Most of these contracts were of five years' duration but amongst them there were some with terms as short as six months and a few as long as ten years. Although the length of a contract may be a matter which impacts upon the question of whether an outlay to secure a contract is on capital account neither party submitted that any of the contracts should be treated differently by reason of their length. In substance, the hearing was conducted on the

basis that the Court should approach the matter on the assumption that the duration of the contracts was on average around five years. The contracts with different durations were to be seen, as was put for the Applicant, as being at the margins. The Commissioner did not dissent from this approach.

11 Mr Duff gave evidence at a more detailed level about the operation of the medical centres. They had long opening hours, mostly from 7am to 10pm, although in some cases they operated 24 hours a day. Although there were exceptions to this, by and large the doctors at the medical centres only bulk billed, that is to say, they only charged the scheduled fee recoverable under Medicare for the service provided. In practice, this meant that patients were not obliged to pay anything. Further, the medical centres involved an integrated model which provided not only general practitioners, but also other health care professionals such as dentists and physiotherapists, together with pathology collection, pharmacy, day surgeries and diagnostic imaging. Another important feature was that it was not necessary for patients to make an appointment.

12 In many cases Idameneo contracted directly with the individual medical practitioner but in about 20% of cases the medical practitioner had previously operated their practice through a corporate vehicle and in those cases the Idameneo contracted with that entity and the medical practitioner (the latter effectively guaranteeing the performance of the former). Other than in one minor aspect upon which the Commissioner relied, and to which I will return briefly later in these reasons, it was not suggested by either party that the issues which arose in the case of these corporate contracts differed in any way from those arising in the case of the contracts with individual doctors. Consequently, it is not necessary to examine them separately.

13 Although the individual contracts were not identical in every respect, it was not suggested that any of the differences which did exist between them were material. The hearing was conducted largely by reference to the contracts between Idameneo and one doctor who, in the interest of privacy since he is not a party to this litigation, I will refer to as Dr PH. He entered into two agreements with Idameneo which were embodied in deeds, copies of which were annexed to Mr Duff's affidavit. The first, dated 27 February 2002, was entitled 'Provision of Services to Medical Practitioner' and the second, dated 27 June 2002, was entitled 'Sale of Practice'. I will refer to these respectively as the Practitioner Contract and the Sale Deed.

The contractual provisions

14 By cl 2.1 of the Sale Deed, Dr PH agreed to sell and Idameneo agreed to buy ‘the practice of the Doctor comprising the goodwill of the practice and the items in Schedule 1’. The items in Schedule 1 consisted of all items in the surgery and waiting rooms of Dr PH’s former practice (which had been in Hornsby, NSW) and was said to include diagnostic equipment and all surgical implements, instruments, lamps and magnifying glasses. Some of this equipment might be referred to as forming part of a ‘doctor’s bag’ (an expression which surfaced intermittently during the course of the hearing but with no very precise content). However, some of the equipment conceivably encompassed in Schedule 1, such as weighing scales or perhaps a fridge, would not comfortably fit in such a bag, even a large one.

15 The sale price for this purchase was $350,000: cl 2.3. Of this amount, $10,000 was to be paid by Idameneo to Dr PH on the execution of the Sale Deed (i.e. 27 June 2002): cl 2.5(a). The remaining $340,000 was to be paid when Dr PH began operating his practice at the medical centre at Warringah Mall: cl 2.6.

16 Mr Duff gave evidence as to how fees of this kind were calculated. The basic principle was that the fees were determined by the late Dr Bateman, the Applicant’s former chief executive officer. But Mr Duff, as the chief financial officer, was familiar with what Dr Bateman’s methods had been and he gave evidence about them. There was no precise formula but there were various relevant factors. One was the number of hours the doctor promised to work at the medical centre. A doctor who agreed to work for 50 hours per week for five years might receive $400,000 by way of lump sum while 40 hours for the same period might only net the doctor $300,000. Hours could be reduced during the life of the agreement, of course, but there then needed to be a refund of a corresponding portion of the lump sum. This refund obligation is likely in many cases to have made seeking a reduction in hours (and the duration of the agreement) less attractive to the doctors. A second factor for Dr Bateman was the size of the doctor’s annual billings in their own practice prior to joining the medical centre together with Dr Bateman’s rather unsentimental assessment of how effective and efficient the doctor was. Although Mr Duff did not say explicitly say why billings mattered I think it may be inferred that a doctor who could demonstrate on an historical basis a proven enthusiasm for the generation of fees was a doctor who would benefit Idameneo given that the fees it earned from the doctor—as will be seen—were a function of the doctor’s own earnings.

17 The number of patients a doctor had in their previous practice was also relevant in those cases where when the doctor was moving to the medical centre from a nearby location for it was plausible to think that the doctor might bring the patients across to the medical centre, though Mr Duff did not monitor the extent to which that actually occurred. But where the doctor was relocating from further afield this was less important because patients would not tend to travel great distances. A third factor was Idameneo's current appetite for additional doctors at a given medical centre which could fluctuate. Where the number of doctors at a medical centre had for whatever reason dwindled, for example, this increased the appetite of Idameneo for recruitment and it might pay increased lump sums while such a state of affairs persisted.

18 This was with good reason. Mr Duff's evidence showed that the addition of each new doctor to a mature medical centre could, on an annual basis, add an extra $200,000 to $300,000 to Idameneo's bottom line. Nor did this benefit flow necessarily from the patients which a doctor might bring to the medical centre from their former practice. Idameneo was content to engage doctors who did not bring patients from their former practices and still pay them a significant up-front lump sum (though there were also cases where Idameneo paid no lump sum). This was because the doctors would usually build up a significant patient base within three to six months. That doctors might arrive without a patient base could occur because the doctor in question did not have one or because the doctor, as I have already noted, had moved from a sufficiently distant place such that the patients would not follow. This matter is to be emphasised because it shows that the lump sum payments, whilst not necessarily unrelated to the extent of a pre-existing practice, were also by no means driven by that matter alone and, in some circumstances, not at all. What was important from Idameneo's perspective was to have as many doctors in each medical centre or, as Mr Richmond SC for the Applicant delicately put it, it was about 'bodies on seats' which may itself be seen as a matter consistent with the putative addition to Idameneo's bottom line for each additional doctor in its medical centres of $200,000 to $300,000 per annum. It is also consistent with Mr Duff's corresponding evidence that one of the Idameneo's main business concerns was the sourcing of enough doctors to meet patient demand at its medical centres. Further, this ongoing demand was present not only in the case of new medical centres which had only been open for a matter of months but also in the case of medical centres which had been open for some years.

19 Idameneo's ongoing appetite for doctors was driven, however, not only by the direct revenue it would bring to Idameneo. Where there was a shortage of doctors at a medical centre this

increased waiting times which led to patient dissatisfaction, loss of patients and therefore a loss of revenue.

20 By cl 2.7 the parties agreed that the sale of Dr PH's practice was the supply of a going concern and Dr PH agreed to conduct the practice efficiently and in a business-like manner 'in order to maintain the goodwill of the practice'. It will be observed that there is a certain internal tension between Dr PH's obligation in cl 2.1 to sell the goodwill to Idameneo and his obligation under cl 2.7 to maintain that goodwill.

21 By cl 4.1(d) the parties agreed that the sale would not be completed until Dr PH had executed the Practitioner Contract and commenced work at the medical centre. Clause 4.2(a) required Dr PH to work at the medical centre for at least five years from the date of the date of the Practitioner Agreement (i.e. 27 February 2002). (I interpolate here that the Sale Deed assumed that it would be executed before the Practitioner Contract whereas in Dr PH's case the opposite occurred—however, nothing was suggested by either party to turn on this). There were two exceptions to this *viz* where explicit permission to do so was given by Idameneo to Dr PH or where he was required to render urgent medical attention. By cl 4.2(b) Dr PH was required to work in his practice for no fewer than 50 hours per week for 48 weeks of the financial year and he was entitled to be absent from the medical centre for four weeks per financial year (with a corresponding entitlement in the first year determined on a pro rata basis). Clause 4.2(c) fleshed out these obligations. Dr PH was to work on average 10 hours per weekend, 4.5 hours one weekday evening and one half of the Christmas and New Year special roster which was five days on, five days off. These reasonably onerous obligations corresponded with Idameneo's desire that most of its medical centres would operate seven days per week and be open late (and that some of them should operate around the clock).

22 Although Idameneo had purchased all of Dr PH's equipment in Schedule 1 to the Sale Deed and although this necessarily included the contents of his doctor's bag (on the assumption that Dr PH had such a bag—on this the evidence was, I regret, unclear), cl 4.3 perhaps somewhat churlishly required Dr PH to supply his own 'items of equipment normally found in a doctor's bag, such as ophthalmoscope, auroscope and stethoscope'. What Idameneo did with what had been the contents of Dr PH's doctor's bag remains unclear but perhaps need not be resolved.

23 Clause 4.5 required, in substance, Dr PH to apply for Medicare benefits for the services he provided at the medical centre and the parties agreed by cl 4.6 that they would treat all money received in consequence as having been received by Idameneo regardless of whether the

Practitioner Contract was at that time on foot or terminated. This obligation was expanded upon in the Practitioner Agreement which I discuss below. The evidence of Mr Duff was that Idameneo's medical centres only bulk billed. Although I accept that evidence it does not appear to be an incident of any express contractual obligation resting upon Dr PH. The effect would appear to come about because, as I explain later, the doctors gave the right to do their billing to Idameneo and, in the exercise of that power, Idameneo appears to have decided to charge only the scheduled fee. But there was no surprise in any of this. Idameneo intended its medical centres to be bulk billing outfits and that was how the doctors understood the situation, too. The information brochure provided to doctors who were contemplating moving their practices to one of Idameneo's medical centres, which was tendered as Exhibit 1, contained a statement that 'the patient benefits include that Medicare services are bulk billed'.

24 Clauses 5.1-5.2 are important. They provided as follows:

> **5. RESTRAINT**
>
> 5.1 The parties agree, that given that the Purchaser is acquiring the goodwill of the practice, that the Doctor is to render medical services from the New Premises, as a reasonable protection for the business of the Purchaser, the Doctor must not during the restraint period render medical services at any place within a radius of 7 kilometres of the Old Premises or the New Premises.
>
> 5.2 The restraint period under the preceding Clause is the period from completion until the later to occur of:
>
> (a) the 5th anniversary of completion; or
>
> (b) the 3rd anniversary of the date on which the Practitioner Contract terminates for whatever reason.

25 Key concepts here are the assumption in the clause that the restraint of trade was being granted because Idameneo had acquired Dr PH's goodwill, the duration of the restraint (the later of five years or three years after termination of the Practitioner Contract, i.e. up to eight years) and the restraint's geographical extent (the union of two intersecting circles each of a 7km radius, one centred on Dr PH's old practice at Hornsby and one on the medical centre at Warringah Mall). Dr PH remained free to practice outside this area at any time or, after five years had passed, anywhere at all. It may not have been practical for Dr PH to exercise the former liberty given that during the five year period he remained bound to work at the medical centre for 50 hours per week including at least one day on the weekend. But such a Herculean work ethic was not forbidden to Dr PH and, in legal principle at least, he could have worked the seventh day anywhere in Cronulla without falling foul of the restraints in cll 5.1-5.2.

26 Where Dr PH breached the restraint clause the parties agreed in cl 5.4 that he would pay liquidated damages set at 50% of whatever he had earned by reason of his disobedience. As will be seen shortly, this corresponds with the fee Dr PH agreed to pay Idameneo for the suite of services with which it provided him which was set at 50% of his earnings from the patients. There is no need to inquire further whether, to the extent that Dr PH charged more than the scheduled fee whilst engaged in such trysts, cl 5.4 constituted a penalty since Idameneo only bulk billed.

27 Clause 8 dealt with termination. Idameneo could terminate the Sale Deed where the doctor committed various species of misconduct including the existential misconduct of ceasing to be a doctor at all. One of these (in cl 8.2(b)) countenanced a situation where Idameneo reasonably believed the doctor had committed an act which would adversely affect the reputation or business of Idameneo conducted at the medical centre. This suggests, but does not necessarily prove, that Idameneo itself had goodwill in the business it was operating and that this goodwill was not necessarily the same as the goodwill inhering in each of the doctor's practices being conducted from the same premises. Where the contract was terminated by Idameneo for the doctor's misconduct he became obliged by cl 8.3 to pay it $6,416.66 for each remaining month of the unexpired portion of the contract. When one does the arithmetic on this, the figure $6,416.66 means that Dr PH would in that circumstance be obliged to refund to Idameneo a pro rata portion of the purchase price he had received corresponding to the unexpired portion of the contract with 10% added to it.

28 Finally, insofar as the Sale Deed is concerned, cl 10 provided that the parties were not partners or in an employment relationship, that Dr PH was an independent contractor and that he was responsible for insurance, workers' compensation, taxation deductions and payments, and the provision of holidays to himself.

29 The Practitioners Agreement began with some recitals which made clear that Idameneo provided premises and extensive services to Dr PH and that Dr PH would be rendering medical services from those premises. By cl 3.1 Idameneo was obliged to provide Dr PH with such administrative services, clerical staff, facilities, plant and equipment as were in its opinion necessary for him to render medical services from the medical centre. This was then set out in much more detail in cl 3.2. One of these in cl 3.2(h) was an obligation to keep and write up accounts for Dr PH, the collection of his fees and the issuing of receipts on his behalf. Dr PH authorised Idameneo to render these accounts on his behalf in cl 4.1 and he agreed to sign all

necessary documentation to allow Idameneo to recover the Medicare benefit. In return for these services, Dr PH agreed by cl 6.1 to pay Idameneo as remuneration for the use of its premises and the provision of its services a fee of 50% of all moneys banked with Idameneo in respect of the provision of his services. Twice a month the balance of the remaining 50% was to be remitted to him: cl 6.2. The Practitioner Agreement also contained provisions dealing with termination and the relationship between the parties which were in substance identical to those in the Sale Deed: cll 9 and 10.

30 By cl 5.1 Dr PH agreed to attend the medical centre and to render medical services from it but by cl 5.2 it agreed that it could not direct him as to how those medical services were to be performed in respect of which he remained free to exercise his professional judgment. By cl 5.5 Dr PH agreed to keep proper medical records but these were explicitly said to be the property of Idameneo.

The business structure of Idameneo

The commercial reality

31 There is no real dispute that Idameneo did not provide health services to the public, that the doctors did provide such services in the course of their own businesses or that Idameneo's business was providing services to the doctors. However, there is an issue between the parties as to whether the provision by the doctors of their services to the public was to be seen, despite their status as independent contractors, as part of the business structure of Idameneo.

32 For his part, the Commissioner submitted that during the relevant period the business of Idameneo was to develop and operate medical centres. The word 'operate' may be apt to suggest that Idameneo itself had as part of its business structure the provision of medical services to the public. Indeed, the Commissioner submitted that this was so and that it was a 'core component of [Idameneo's] business structure'. It was submitted to be part of the structure of Idameneo's business for three reasons. *First*, cl 4.2 of the Sale Deed obliged the doctor to render medical services from the medical centre. It was not the case that a doctor fortuitously alighted upon one of Idameneo's medical centres and began spontaneously providing medical services to the public; rather, each doctor was bound to do so by the terms of the Sale Deed and the practice of the doctor from the medical centre was not serendipitous but calculated. This implied that Idameneo's medical centres were business structures housing doctors whose raison d'être was the making of Medicare fees. Consequently, so the argument ran, the provision of the ensuing medical services to the public by the doctors housed within it

was a part of the structure of Idameneo' business. And, so viewed, the payment of a fee to each doctor so as to submit herself or himself to the discipline of the tether was not to be seen as merely some species of marketing expense. It was instead a fee for the creation of what was in effect, a hive of doctors. *Secondly*, the Sale Deed stipulated that the doctor would work at the end of the tether for five years. *Thirdly*, the Sale Deed also required that the doctor only provide medical services from Idameneo's medical centres.

33 I do not accept that these matters had the consequence that the provision of the doctors' services formed part of Idameneo's business structure. I do accept that it was essential from Idameneo's perspective that there were doctors operating their practices from its medical centres and that that commercial imperative gave it good reasons to seek to tie the doctors, so far as possible, exclusively to it. But it is not correct, I think, that the provision by the doctors of medical services at the medical centres was a component of Idameneo's business structure. That structure consisted of the premises from which the centres were operated, the equipment provided to the doctors at those premises, the various staff who provided administrative assistance and the arrangements by which those services were provided to the doctors. The fallacy in the Commissioner's submission lies in the impermissible elision of that which is commercially essential to a business structure with the business structure itself. For example, I do not doubt that customers of Woolworths are commercially essential to its business but it would be far-fetched to say that those customers were part of its business structure. That observation is not undermined, as the Commissioner submitted it was, merely because Idameneo charged each doctor a service fee equivalent to 50% of the doctors' fees (a different percentage applied in the case of dentists and pathologists but this is of no moment for present purposes). Nor do I accept the Commissioner's submission that the fact that Idameneo also provided other integrated services at the medical centres (such as pathology) was material to this issue. In particular, I do not accept the Commissioner's submission that Idameneo had effective control of referrals by the doctors so that they would, for example, be bound to use Idameneo's pathology services. There was no evidence to this effect.

34 The nature of Idameneo's business was more accurately described, in my opinion, in the prospectus it issued to the market in 1998. That business was the provision of 'a comprehensive range of services and facilities to general practitioners, specialists and other health care providers who conduct their own practices and businesses at its medical centres, licensed day surgeries and specialist clinics'. Similarly, the Applicant's 2005 annual report described the business of Idameneo as being a 'service company for medical, para-medical and related

services and a daycare surgery operator'. The annual reports in other years were expressed in similar terms. A brochure provided to doctors who were thinking of moving to one of Idameneo's medical centres described its business in similar terms 'Primary is a service company to practitioners'.

35 The invoicing procedures adopted by Idameneo were also suggestive of the existence of two separate businesses. Exhibit 2 was a set of invoices for one of the doctors and it showed very distinctly the fee payable to Idameneo for its services and the fees received by the doctor for the conduct of the doctor's practice. These invoices also showed that the doctor reimbursed Idameneo for the GST it was obliged to collect on the provision of its services to the doctor. This of course generated input credits in the hands of the doctor. The doctors' services were in the main GST-free, with the consequence that they were likely to obtain refunds of the GST paid for on the supply of Idameneo's services. This is suggestive of the existence of two separate businesses. So too is the decision of the New South Wales Court of Appeal in *Idameneo (No 123) Pty Ltd v Gross* [2012] NSWCA 423; 83 NSWLR 643 where it was accepted that Idameneo was not liable for the negligence of a doctor although it was liable for its failure to maintain a proper system of patient records. If the Commissioner's submissions were correct then one might perhaps expect tort liability to extend to Idameneo for the professional negligence of the doctors working at its medical centres but such does not appear to be the case.

The legal reality

36 The commercial reality of Idameneo's arrangements suggests that the real business being conducted by Idameneo did not include the provision of health care services to the public. This appearance is confirmed by the provisions of the Sale Deed. Whilst is true that cl 2.1 provided that in return for the purchase price Idameneo was to acquire 'the practice of the Doctor comprising the goodwill of the practice and the items in Schedule 1' analysis of the precise terms of the Sale Deed and the course of authority which has interpreted the operation of cl 2.1 (or its equivalents) confirm that Idameneo did not acquire the doctor's practice or his goodwill.

37 As a matter of analysis, although cl 2.1 spoke in terms of a sale of Dr PH's practice it is clear that Dr PH did not sell his practice which he continued, following execution of the Sale Deed, to conduct albeit now from Idameneo's premises and with the benefit of its services. Indeed, he was obliged by cl 4.2 of the Sale Deed and cl 5.1 of the Practitioner Agreement to provide his medical services at that place and no other and by cl 10 of the Sale Deed to do so as an

independent contractor. Further, because Idameneo could not itself provide health services to the public (not being a doctor and not employing any doctors), it was conceptually impossible for Dr PH's practice to have been assigned to it. Consequently, whatever cl 2.1 says about the sale of Dr PH's practice to Idameneo, this is not on any view what the balance of Sale Deed does. This gives rise to a construction issue about cl 2.1 to which I return below.

38 Further, because the Sale Deed did not in fact involve the disposition of Dr PH's practice to Idameneo neither was cl 2.1 competent to assign his goodwill in that practice detached from it. No doubt, Dr PH's business as a general practitioner at his Hornsby surgery had attached to it goodwill. That goodwill was the right or privilege to make use of all that constituted the attractive force which brought in Dr PH's custom: *Commissioner of Taxation v Murry* [1998] HCA 42; 193 CLR 605 ('*Murry*') at 615 [23] per Gaudron, McHugh, Gummow and Hayne JJ; *Commissioner of State Revenue (WA) v Placer Dome Inc* [2018] HCA 59; 93 ALJR 65 ('*Placer Dome*') at 79 [71] per Kiefel CJ, Bell, Nettle and Gordon JJ. Although this was certainly an asset belonging to Dr PH it was not an asset of which he could dispose without at the same time disposing of his practice, for 'goodwill is not something which can be conveyed or held in gross; it is something which attaches to a business. It cannot be dealt with separately from the business with which it is associated': *Geraghty v Minter* [1979] HCA 42; 142 CLR 177 at 181 per Barwick CJ, 193 per Stephen J; *Murry* at 615 per Gaudron, McHugh, Gummow and Hayne JJ; *Placer Dome* at 80 [76] per Kiefel CJ, Bell, Nettle and Gordon JJ.

39 As a matter of legal reality, therefore, the benefit that Idameneo derived from the Sale Deed and Practitioner Agreement was twofold. *First*, it obtained the benefit of Dr PH's promise to work 50 hours per week in, and only in, its medical centre and to be so indentured for five years; and, *secondly*, it obtained the benefit of the restraint of trade covenants in cll 5.1-5.2. This is consistent with the commercial reality I have described above and also with the evidence given by Mr Duff that he considered the main purpose of restraint clauses such as cll 5.1 and 5.2 to be to ensure that the doctors performed their services at Idameneo's medical centre for the period of the contract.

40 There are other reasons to reject the idea that cl 2.1 involved a sale of Dr PH's practice which are largely practical in nature. For example, if the transaction was truly a sale then it would be difficult to imagine why there would be any obligation on the doctor to refund part of the purchase price in the event of the early termination of the five year arrangement. Yet cl 8.3 bound the doctor to refund a pro rata portion of the lump sum payment in the event that the

contract was terminated early. Neither do I accept that this part of the Commissioner's case is advanced by the fact that where a doctor had operated through a corporate vehicle this entity was a party to the Sale Deed (as I understood this submission it went, I think, to show that the parties were interested in the entity which owned the practice). Nor is it correct to say, as the Commissioner endeavoured to show, that the warranty by the doctors in cl 6.1 as to the gross receipts of their former practices showed that what was involved was a sale of business. No doubt, many contracts for the sale of a business include such a provision but its presence does not inevitably signal the presence of the sale of a business.

41 That the purchase price was paid for the benefit of these two covenants and not for the purchase of the practice or Dr PH's goodwill is confirmed by a series of restraint of trade cases in which Idameneo has sought to enforce the restraint clause against doctors who have tried to practice contrary to it. These cases confirm that in the present situation the goodwill cannot literally be sold and that the reference to the sale of the goodwill in the contracts has to be understood as the purchase for valuable consideration of the obligation to practice at Idameneo's medical centres for a fixed term and subject to the restraint: see e.g. *Idameneo (No 123) Pty Ltd v Angel-Honnibal* [2002] NSWSC 1214 ('*Angel-Honnibal*') at [37]-[39] per Palmer J. Further, the restraint clause was to be seen 'primarily for the purpose of creating and protecting the drawing power of the centres themselves as places in which doctors wish to [practice], to the commercial benefit of [Idameneo]': at [39]. On this view of affairs, the covenant securing the exclusivity of the doctor's services is to be seen as merely the other side of the coin of securing those services. Another way of putting that perhaps is that the principal benefit obtained under the agreement is the promise of the doctor to practice only from the medical centre for five years and that there is a secondary ancillary benefit in the form of the restraint of trade clause which helps make more effective the principal benefit.

42 The Commissioner took issue with this reading of *Angel-Honnibal* submitting that at [76] and [80] Palmer J had referred to the fact that the goodwill had been sold by the doctor to the Plaintiff. This is true but is contrary to the detailed analysis his Honour had earlier undertaken at [37]-[39]. It is clear, I think, that the discussion at [76] and [80] is about the unrelated topic of whether the restraint was proportionate. I do not think, in that context, that his Honour's reference to the sale of the goodwill is to be construed as anything other than a shorthand for his earlier analysis at [37]-[39].

43 In *Zahedpur v Idameneo (No 123) Pty Ltd* [2016] QCA 134 at [76] P McMurdo JA (with whom Philippides and Bond JJA agreed at [1] and [81]) said that the payment of the lump sum was for 'the appellant's services over a five year term' and did not explicitly refer to the restraint clause (which had however been mentioned by his Honour at [17]). I do not read the reasons of P McMurdo JA as involving a reasoned rejection of the notion that the lump sum was paid for both the covenant to work for the five years and the restraint covenant. The discussion at [76] is concerned instead with a rejection of the submission that the lump sum was paid for the goodwill which was the actual issue under consideration.

The proper construction of cl 2.1 of the Sale Deed

44 Because this is a tax appeal concerned with ascertaining whether the lump sum payments were on the capital or revenue accounts, neither the Applicant nor the Commissioner sought explicitly to say what the proper construction of cl 2.1 was, although both parties advanced submissions in line with the authorities about what the true nature of the payment was having regard to the whole of the provisions of the Sale Deed and the Practitioner Agreement. This leaves as something of a puzzle how cl 2.1 is to be construed. On any view, it explicitly says that Idameneo was purchasing Dr PH's practice consisting of his goodwill and the chattels in Schedule 1. How should this be read when it is clear from the balance of the Sale Deed that Idameneo was not purchasing either the practice or the goodwill? It is not an outcome to be encouraged to conclude that cl 2.1 is meaningless because this would, most likely, imply that it was void for contractual uncertainty and, given the centrality of cl 2.1 to the Sale Deed, this would most likely have the knock-on effect of rendering the entire Sale Deed (and with it the Practitioner Agreement) void for uncertainty as well. To avoid this problem, it is established that a Court should strive to avoid this outcome including, when the occasion arises, by giving the provision an interpretation which, in other circumstances, might be thought to be strained: *Council of the Upper Hunter Country District v Australian Chilling & Freezing Co Limited* [1968] HCA 8; 118 CLR 429 at 436-437 per Barwick CJ.

45 The literal words of cl 2.1 are: 'The Doctor agrees to sell, and the Purchaser agrees to buy, the practice of the Doctor comprising the goodwill of the practice and items in Schedule 1'. Consistent with the analysis of the Sale Deed and Practitioner Agreement I have described, it should be construed to mean as if it read:

> The Doctor agrees to sell, and the Purchaser agrees to buy, the benefit of the Doctor's covenants to practice from the Purchaser's medical centre in accordance with this Deed including his covenant in cl 2.7 to maintain his goodwill in that practice and the items

in Schedule 1.

46 I therefore conclude that the operation of the Sale Deed on its proper construction was that the $350,000 lump sum payment in cl 2.1 was paid, not for Dr PH's practice (which was not sold) or his goodwill in that practice (which could not be sold), but for Dr PH's promise to conduct his practice from the medical centre for five years and not to provide medical services to anyone within a radius of 7km of the medical centre or his own former practice at Hornsby within that period. Although 'goodwill' was perhaps a misnomer, it was not, however, entirely wide of the mark. Idameneo had an interest in Dr PH making as much revenue as possible because it was to receive half of whatever he earned and whilst his goodwill necessarily remained with him, the effect of cll 2.1 and 4.2(a) was to require Dr PH to deploy that goodwill which delivered benefits to Idameneo too.

The accounting treatment of the lump sum payments

47 It may be admitted that the conclusion that Idameneo did not acquire Dr PH's goodwill is not consistent with the accounting treatment the Sale Deeds received in the Applicant's accounts but that accounting treatment was driven by the relevant accounting standards. The evidence about this came from Mr Duff. He said at [83] of his affidavit that the accounting treatment of the lump sum payments was governed for part of the relevant period by Australian Accounting Standards Board ('AASB') standard AASB 1013 and, after 1 July 2005, by AASB 3. AASB 1013 required purchased goodwill to be recognised as a non-current asset and amortised over 20 years but under AASB 3, the amortisation of goodwill was abolished and instead it was now to be assessed annually for impairment. Regardless, it was for this reason that the lump sum payments were included as outlays for the acquisition of goodwill, a long term asset. Consistently, Idameneo recorded the lump sum payments under the heading 'Cash flows from investing activities'. Mr Duff gave evidence in re-examination that cash flows from operating activities were recorded in the profit and loss and all other case flows were then included under the heading 'Cash flows from investing activities'. The Commissioner submitted that this accounting treatment was relevant to what Idameneo thought the nature of the transactions was which was pertinent when the time came to assess the nature of the lump sum payments from a practical and commercial perspective. I do not accept this submission. The evidence of Mr Duff establishes that the accounting treatment was a result of the accounting standards and not of any particular perception about the nature of the transactions.

Relevant principles

48 The principles to be applied in determining whether an outgoing is of capital or of a capital nature depends upon a weighing of factors including 'the form, purpose and effect of the expenditure, the benefit derived from it and its relationship to the structure, as distinct from the conduct, of a business': *AusNet Transmission Group Pty Ltd v Commissioner of Taxation* [2015] HCA 25; 255 CLR 439 ('*AusNet*') at 450 [15]. A wide survey and exact scrutiny of the taxpayer's activities must be undertaken: *Western Gold Mines NL v Commissioner of Taxation (WA)* [1938] HCA 5; 59 CLR 729 at 740. The determination is an evaluative task and, as in many areas which feature evaluative judgments, the individual factors may weigh in opposite directions: *AusNet* at 450 [14]-[15].

49 In *Sun Newspapers Limited v Commissioner of Taxation* (1938) 61 CLR 337 ('*Sun Newspapers*'), Dixon J observed observed this about the distinction between outgoings on the capital and revenue accounts (at 363):

> There are, I think, three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.

50 Subsequently, in *GP International Pipecoaters Pty Ltd v Commissioner of Taxation* [1990] HCA 25; 170 CLR 124 at 137 the High Court observed that the first of these, the character of the advantage sought, was 'the chief, if not critical, factor in determining the character of what is paid'. The character of the advantage sought must be assessed by reference to 'the advantage sought by the taxpayer by making the payments': *AusNet* at 455 [23], citing *Commissioner of Taxation v South Australian Battery Makers Pty Ltd* [1978] HCA 32; 140 CLR 645 ('*South Australian Battery Makers*') at 655. In making that assessment the transaction is to be approached, as the Commissioner submitted, from a commercial or business point of view: *Hallstroms Pty Ltd v Commissioner of Taxation* [1946] HCA 34; 72 CLR 634 ('*Hallstroms*') at 648 ('what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process').

51 On the other hand, as the Commissioner noted, 'the legal rights obtained by the expenditure are not be disregarded': *South Australian Battery Makers* at 662 per Aickin and Stephen JJ; *AusNet* at 455 [22], 474 [74]. Goldberg J synthesised these two principles, which may in some cases perhaps be thought to exhibit a certain degree of tension, in *Commissioner of Taxation v Star City Pty Ltd* [2009] FCAFC 19; 175 FCR 39 at 49 [30] in concluding that it was consistent with earlier authority to say that (at 49 [30]):

> the characterisation of a payment of an outgoing is not necessarily to be determined only by reference to the contractual document pursuant to which it is paid but may be determined having regard to the circumstances surrounding, and leading up to, the payment.

52 The correct question was 'what was the payment truly for?': at 53 [49]. Dowsett J agreed at 65-66 [110] and Jessup J at 104 [253]. Of course, Fullagar J made the same point in *Colonial Mutual Life Assurance Company Ltd v Commissioner of Taxation* (1953) 89 CLR 428 ('*Colonial Mutual Life Assurance*') at 454: 'What is the money really paid *for*?'

Application of the relevant principles

Character of the advantage sought

General considerations

53 The Applicant submitted that the lump sum payments were part of a process by which Idameneo operated to obtain regular returns by means of regular outlay. The outgoings had not been paid to establish the structure or organisation of Idameneo's business. The structure and organisation of Idameneo's business was the provision of services, rooms, equipment and facilities to doctors. It was that structure which was then used to generate revenue from the doctors who were then to be seen as its customers. The recruitment of new doctors was not to be seen as adding to that structure but rather as the use by the doctors of that structure for their own purposes and in their own businesses for which they then paid Idameneo fees. Consequently, each lump sum payment was a payment for the winning of a customer: *Tyco Australia Pty Ltd v Commissioner of Taxation* [2007] FCA 1055; 67 ATR 63 ('*Tyco*') at 78 [76] per Allsop J. It was part and parcel of the business of effecting sales and it was a payment made by a trader to a customer for the purpose of securing orders: *BP Australia Ltd v Commissioner of Taxation* (1965) 112 CLR 386 ('*BP Australia*') at 413 per Kitto J; *National Australia Bank Ltd v Commissioner of Taxation* (1997) 80 FCR 352 ('*NAB*') at 365. The Applicant submitted that the character of the advantage Idameneo sought was to secure the

commitment of each doctor to practice for the specified hours from its medical centre for the five year period of the contract so that Idameneo could earn fees from each doctor. So viewed, it was a payment in pursuit of a five year revenue stream. As such, it was to be seen as a payment to win a customer and, therefore, like the payments made in *BP Australia* at 398, *NAB* at 367 and *Tyco* at 79 [78].

54 I accept these submissions. Idameneo's profit-making structure was the provision of its premises and services for a fee to its customers who were the doctors. They had their own businesses, to be sure, but their businesses were emphatically not Idameneo's business which was quite different and which did not, and could not, involve any patients. Its business structure or organisation was the different business of providing premises and services to medical practitioners at its medical centres in return for fees. The identification of Idameneo's business, structure or organisation is important because the distinction between expenditure and outgoings on revenue account and capital account corresponds with the distinction between 'the business entity, structure or organisation set or established for the earning of profit and the process by which such an organisation operates to obtain regular returns by means of regular outlay': *Sun Newspapers* at 359 per Dixon J. Consequently, as Dixon J observed at 360, it is necessary to identify the profit yielding subject and to distinguish it from the process of operating the profit yielding structure.

55 Here, in my opinion, the payments of the lump sums are to be seen as recurrent and ongoing as Idameneo consistently tried to engage doctors to meet its ongoing demand for them. It did so 505 times in the relevant period and this shows the expenditure was in every sense recurrent. That recurrence pointed to the outgoings being on the revenue account for, as Dixon J observed in *Sun Newspapers* at 361, in assessing whether outgoings were on the capital or revenue accounts:

> the courts have relied to some extent upon the difference between an outlay which is recurrent, repeated or continual and that which is final or made 'once and for all', and to a still greater extent upon the a distinction to be discovered in the nature of the asset or the advantage obtained by the outlay.

56 This approach is supported by authority. In *Hallstroms* at 647 Dixon J referred to the distinction between:

> the acquisition of the means of production and the use of the them; between establishing or extending a business organisation and carrying on the business; between the implements employed in work and the regular performance of the work in

> which they are employed; between the enterprise itself and the sustained effort of those engaged in it.

57 It is therefore necessary to ask what Idameneo made the lump sum payments for (that is, the character of the advantage sought by the payment) and then to ask whether it was made for something which was part of Idameneo's profit-yielding structure: *Colonial Mutual Life Assurance* at 454 per Fullagar J; *AusNet* at 456 [24] per French CJ, Kiefel and Bell JJ. The identification of what is to be acquired by an outgoing 'ultimately requires a counterfactual, not an historical, analysis: specifically, a comparison of the expected structure of the business after the outgoing with the expected structure *but for* the outgoing, not with the structure *before* the outgoing': *Commissioner of Taxation v Sharpcan Pty Ltd* [2019] HCA 36; 93 ALJR 1147 at 1159 [33] per Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ. Applying that approach, what existed after the lump sums were paid was the medical centres with their various facilities. If the lump sums had not been paid, Idameneo's business structure would still have consisted of the medical centres and their facilities although if none of them had been paid the medical centres would no doubt have had the feel of the *Mary Celeste*. But, and this is the point, a business structure without customers is just as much a business structure in the same way that a yacht without passengers is still a boat. This was the very point made in *Heavy Minerals Pty Ltd v Commissioner of Taxation* [1966] HCA 60; 115 CLR 512 ('*Heavy Minerals*') which I discuss below. Consequently, the lump sums are not to be seen as having been made to acquire something which was part of the profit-yielding structure.

58 I would reject the Commissioner's contentions to the contrary. He submitted that Idameneo had paid the lump sums for the acquisition of each doctor's medical practice and goodwill and for securing the doctor's commitment to provide medical services exclusively from the medical centres for a period, usually five years. The facts I have found above suggest that the acquisition of the doctor's practice and goodwill was neither the commercial reality of the transaction nor the legal reality of the Sale Deed and Practitioner Agreement. Consequently, it is not accurate to say, as the Commissioner submitted, that Idameneo's business was the development and operation of medical centres at which health services were provided to members of the public at least to the extent that this suggests that Idameneo provided health services to members of the public. The Commissioner advanced a number of reasons to support that contention, but none is persuasive.

59 I do not accept, for example, that the fact the parties agreed a liquidated damages clause (cl 5.2) under which the doctor agreed to pay 50% of the fees earned in breach of the restraint clause shows that the business of the doctors was part of the structure of Idameneo's business. Nor would I accede to the submission that it was a fact that the doctor's medical records were transferred to Idameneo when the doctor moved to a medical centre and that this too entailed that the doctors' practices were part of Idameneo's business structure for the evidence did not support this contention. Mr Duff gave evidence that sometimes the doctor's patient records were included in a schedule to the Sale Deed with an apportioned part of the purchase price in which case they passed as chattels. But Dr PH's schedule did not include his patient records and the evidence does not suggest there was any consistent practice about this.

60 Mr Davies QC for the Commissioner took me to the decision of Stone J in *Primary Health Care Ltd v Commissioner of Taxation* [2010] FCA 419; 186 FCR 301 where, at 304-306 [5] and [10], her Honour recorded the uncontested fact in that case that at the time a doctor transferred to a medical centre 'the patient records from the sample practice were taken in some form or other to the PHC centre and used for that centre'. However, I do not think it appropriate to act upon facts found in other cases in this way. I do accept that under cl 5.5 of the Practitioner Agreement the doctor was bound to keep medical records for each patient, that these records belonged to Idameneo and that under cl 8.2, if the contract were terminated, the records would remain with it. But I do not think that this assists in demonstrating that the business structure of Idameneo included the provision of medical services. No doubt, making sure that no single doctor owned the medical records which were generated was apt to assist a business model where patients could consult with any doctor at the medical centre (and, critically for that model, the next available doctor) but that phenomenon does not alter the nature of the structure of Idameneo's business.

61 Nor can I embrace the Commissioner's alternate submission that the doctor's goodwill had become part of Idameneo's business (even if, as I understood the submission, it were not otherwise assigned). Idameneo no doubt had goodwill in the business it was conducting but this was a goodwill distinct from the goodwill possessed by the doctors and of a different nature. The former was not slowly transmogrified into the latter, although clearly they were not unrelated. It was a 'practice goodwill' and related to the attractive force of the medical centre itself as a venue for meeting the public's health needs as distinct from the attractive force of any particular doctor: *Symbion Medical Centre Operations Pty Ltd v Alexander* [2010] NSWSC 1047 at [66] per Gzell J; *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA

418 at [66] per Young JA (Beazley P and Basten JA agreeing). It was this goodwill which Idameneo was seeking to protect with the restraint of trade clauses and it reflected a real concern on its part. For example, the board minutes for a meeting held on 22 February 2002 record the directors' concerns about particular doctors 'doing medical reports elsewhere'.

62 Consequently, I cannot accept the Commissioner's submission that by paying the lump sums Idameneo acquired the practices of the doctors or their goodwill. It is not consistent with the reality of the transaction, or 'what the payments were really for'. The evidence of Mr Duff was to the contrary: the payments were for many things, principally increasing the number of doctors working from Idameneo's medical centres. He was not cross-examined to suggest that his evidence about this was incorrect and, as I have said, I accept it. The submission was also inconsistent with the description of Idameneo's own business in its prospectus and the brochures it provided to doctors it was seeking to entice into the fold. And, importantly, it was inconsistent with the contractual documentation.

63 Thus whilst it may ordinarily be the case, as the Commissioner submitted, that where a payment can be viewed as part of the consideration for the acquisition of a business this weighs heavily in favour of its character being as a capital outlay (see, for example, *AusNet* at 453 [18]) this is of little moment when that is not how the consideration should be viewed.

64 Nor, in this, do I think the answer is altered when one brings to account, as the Commissioner submitted one should, the fact that each doctor was required to work exclusively for Idameneo at least within a particular region for five years. Of course, sometimes the consideration paid for a restraint of trade clause may be on capital account but it depends on the restraint in question and it is difficult safely to generalise. The outgoing in *Sun Newspapers* was a payment by one newspaper to another to prevent the publication of a less expensive newspaper for a period of three years and this, it is true, was held to be on capital account. But I would pause before accepting the Commissioner's more ambitious submission that expenditure on trade restrictions has generally been held to be of a capital nature. In support of that submission the Commissioner relied upon *Associated Portland Cement Manufacturers v Kerr* [1946] 1 All ER 68 ('*Associated Portland Cement Manufacturers*'), *Broken Hill Theatres Pty Ltd v Commissioner of Taxation* (1952) 85 CLR 423 ('*Broken Hill Theatres*') at 429 per Williams J, *Box v Commissioner of Taxation* [1952] HCA 61; 86 CLR 387 ('*Box*') at 394, 397 and *Murry* at [26]. I do not think these decisions assist him.

65 Lord Green's reasons in *Associated Portland Cement Manufacturers* are certainly an example of a case where expenditure on a restraint of trade clause was found to be on capital account, but as Professor Parsons pointed out, the restraint in that case was substantial and of significant commercial importance to the taxpayer: RW Parsons, *Income Taxation in Australia* (LBC, 1985) at 438 [7.33]. In fact, the restraint was global in its geographical reach and lasted for the rest of the lives of the two directors in question. Nor am I by any means persuaded that the significance of the restraint in this case is of the commercial gravity of the restraint under consideration in that case (which related to the ongoing viability of the taxpayer's concrete business).

66 *Broken Hill Theatres Pty Ltd* holds that legal expenses incurred by a cinema operator to oppose a competitor being given a cinema licence are on revenue account. That is not quite the present question but in any event it does not support the Commissioner's contention. *Box* is not a case concerned with the revenue/capital dichotomy at all so far as I can see and contains no statement to the effect for which it is now cited although it does hold at 394 that a restraint of trade clause can enhance the goodwill of a business, a proposition which does not appear especially controversial. The passage cited by the Commissioner at 397 does not appear material to any issue in this case.

67 *Murry* at [26] merely states that a restraint of trade covenant 'may also enhance the goodwill of the business' but it too does not appear to say that a restraint of trade covenant is generally indicative of the consideration paid for it being on the capital account.

68 The Commissioner also relied upon [7.10] of *Income Taxation in Australia* to this effect: 'The costs of acquiring a restrictive covenant given by an employee are not deductible, though the advantage of immunity from competition is a business advantage that wastes over the period of the covenant'. But at [7.33], in Professor's Parsons more detailed treatment of immunity from competition, he merely said that 'immunity from competition *may* be a structural asset' (my emphasis) before noting the Privy Council's advice in *BP Australia* where, of course, it was held that the fees paid for the contracts in that case containing restraints were on revenue account. In those circumstances, I conclude that the presence of a covenant conferring immunity from competition may be, but is not necessarily, indicative of the outgoing being on capital account. One must in each case examine the restraint in question.

69 In this case, I do not think that the restraints in cll 5.1 and 5.2 were the principal object for which the lump sum payments were made. Rather, the principal purpose was securing the

doctors' presence at the medical centre where fees could be won from them. As the restraint of trade cases concerned with equivalents of cll 5.1 and 5.2 show, the restraints were really just the other side of the coin to that obligation. This is not to say they were unimportant but it is to say they were ancillary or subordinate. Consequently, I do not think that the covenants in cll 5.1 and 5.2 are like the restraints provisions in *Sun Newspapers* or *Associated Portland Cement Manufacturers*. In this case, they are not indicative of the outgoing paid to secure them being on the capital account. I therefore do not accept the Commissioner's submission that the lump sum payments were made to expand or replace components of Idameneo's profit-yielding structure. Rather, they were made to obtain the benefit of having as many doctors as possible working in its medical centres with a view to maximising its revenues.

70 Nor would I be disposed to affirm the correctness of the Commissioner's submission that the outgoings were of an enduring nature. I accept, of course, that the enduring nature of an outgoing is a very relevant matter to the current issue (see *Sun Newspapers* at 355) but I do not think that the five year term obtained under the contracts here was of such a nature. At the end of the five year period, the doctor was free to go and the evidence disclosed several examples where Idameneo had had to make further payments to keep a doctor whose five year term had expired working in one of its medical centres.

71 The Commissioner next submitted that Idameneo had, for accounting purposes, treated the various agreements as involving an outgoing for the acquisition of a practice. Mr Davies accepted that the actual accounting treatment did not really matter but what it did reveal was Idameneo's own understanding, from a business or commercial perspective, of the nature of the outgoings and, more particularly, that they had increased its goodwill and had not been recorded as a cost of marketing. I have recorded above my conclusion that the accounting treatment did not reveal anything about Idameneo's attitude to the correct categorisation of the outgoings as being on revenue or capital accounts so this argument fails at the threshold. In any event, it is likely correct, as Mr Richmond submitted, that the task for the Court is to determine whether the lump sum payments were deductible or not 'and it would be nothing to the point to say that the company could properly or did, in fact, debit the expenditure in question to its profit and loss account for the income year in question': *Broken Hill Theatres* at 434 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Tyco* at [82] per Allsop J ('I do not think that the accounting treatment undertaken by TAPL assists greatly').

72 Consequently, I conclude that the character of the outgoings was as a payment to win a customer. It was a payment which secured the service of each doctor for a period of five years and ensured that during that period, and within a defined geographical area, the doctor worked only at its medical centre. And, by so doing, it locked in a valuable set of customers who were tied to it and who were bound to purchase its services.

73 Since I do not accept that Idameneo acquired the doctors' goodwill it is not necessary to deal with the Applicant's alternate submission that even if the payments had been for goodwill this was not inconsistent with them being on revenue account: *Sun Newspaper* at 360-361; *NAB* at 364; *Magna Alloys and Research Pty Ltd v Commissioner of Taxation* [1980] FCA 150; 49 FLR 183 at 201 per Brennan J.

Long term contracts

74 Reference above has been made to *BP Australia*, *NAB* and *Tyco*. It is useful to discuss these cases (and others), which concern outgoings to secure long term contracts, a little more closely. 'Normally, in order for a contract to be regarded as a capital asset it must be a contract which is of substantial importance to the structure of the business itself. This is a factual matter and inevitably a matter of degree': *Allied Mills Industries Pty Ltd v Commissioner of Taxation* (1989) 20 FCR 288 ('*Allied Mills*') at 311-312. A question at once arises as to whether in assessing what was of substantial importance to Idameneo's business structure one looks at each individual contract or instead at all 505 contracts as a conglomerate. The Applicant submitted that the individual contracts could not meet that description and it was not to the point that the bundle of 505 independent contracts of which Dr PH's contract was but an example, may have been of substantial importance.

75 I think it is implicit in the Commissioner's submission that Idameneo acquired each doctor's practice and goodwill that he approaches the matter on the same basis and that what is to be assessed is the significance of the individual contracts to the structure of Idameneo and not the significance of all of the contracts viewed together. He made no explicit submission about the matter but he did make a submission, to which I will return, that the payments made by Idameneo were not recurrent because they happened only once in relation to each contract. There may well have been a problem of coherence if, in the same breath, the Commissioner had sought to submit that what was to be examined were not individual contracts but all contracts. In any event, I propose to proceed on the basis that it is the significance of the

individual contracts which is to be examined. In any event, and regardless of the Commissioner's position, that is my view.

76 There are dangers in reasoning from the factual constellations in one case in this area to the situation in a different case. Most of the litigation which occurs in this area concerns factual scenarios which are, to an extent, novel and difficult to characterise—they would not occur otherwise. I accept the Commissioner's submission that there may be dangers in reasoning by analogy in this area. He submitted that this was established by *Commissioner of Taxation v CityLink Melbourne Ltd* [2006] HCA 35; 228 CLR 1 ('*CityLink*') at 43 [151] per Crennan J. Whilst I would accept that as a matter of general theory, one always needs to be careful about one's analogies and not to fall into false reasoning, in fact, reasoning by analogy is at the core of the doctrine of precedent. I do not think the passage in *CityLink* holds otherwise. That passage merely noted that the Full Court in that case had itself observed in *CityLink Melbourne Ltd v Commissioner of Taxation* [2004] FCAFC 272; 141 FCR 69 at 72 [67] the need to be cautious when reasoning by analogy (and had then gone on to reason by analogy). With that salutary caution, it is then useful to examine some of the cases concerned with long term contracts.

77 In my opinion, the doctors' contracts in this case may be seen as being to an extent analogous to the contractual rights in *Allied Mills.* In that case, the contract had conferred upon the taxpayer a right to distribute Peak Frean biscuits for a period. The Full Court concluded that '[t]he contracts here in themselves yielded profit; they did not simply provide the means of making profit': at 312. Consequently, the lump sum payment was on the revenue account. A similar result was obtained in *Heavy Minerals*, a case I mentioned above. The taxpayer was a miner of rutile during a boom period. It entered into contracts to sell rutile at high prices over periods of up to five years. The market for rutile went down and the purchasers paid the rutile miner amounts to discharge their obligations under the contracts. The question was whether the contracts were capital assets or not. Windeyer J thought that the business of the taxpayer was rutile mining and that its capital assets were its mining lease and plant equipment. It retained those even after the forward contracts were cancelled. Consequently, the contracts were not capital assets: 'Even if these contracts were such that they seemed to ensure that the taxpayer would have a secure market and some regular customers, that would not of itself make them part of the capital of its business': at 517. It seems to me that that the contracts with Idameneo's doctors were similar—they were contracts with customers (doctors/rutile

purchasers) to secure revenue (fees/fixed prices for rutile) from the use of the capital structure of the business (premises/rutile mine).

78 I also accept the Applicant's submission that the Privy Council's decision in *BP Australia* assists it. It bears a strong resemblance to what has occurred in this case. Prior to 1951 (and leaving aside the period during the Second World War) the differing brands of petrol were sold in direct competition with each other at each service station. This entailed that each brand had its own pump and tank at each service station. In 1951 the Shell Company announced that it would henceforth supply petrol only to petrol stations which dealt exclusively with it. At the time of this announcement BP had pumps at around 4,000 retailers. Immediately after Shell's announcement 437 of these retailers asked BP to remove its pumps and by December 1951 this had risen to 1,012 which is to say that in a very short period of time BP lost 25% of its market share. BP then sought to engage retailers to sell its fuel in the same way (it did so in co-operation with other fuel companies but this complexity is not presently relevant and may be ignored). As a result of these efforts BP had by December 1951 gained 326 stations (although it had also by then lost the ability to sell its petrol at 1,012 stations). Shell responded by then offering its retailers financial incentives to deal with it. BP was forced to respond to this measure and this resulted, over time, in contracts with a large number of retailers. These contracts were of at least five years' duration and bound the retailer to purchase BP's petrol. BP paid these retailers lump sums to enter into these contracts and these lump sums which were in part referrable to the quantity of petrol which a retailer sold but not in such a way as to constitute a rebate or discount. The lump sums were also related the value of the retailer's site from a strategic perspective and the intensity of competition for the site. Lord Pearce, delivering the opinion of the Judicial Committee said this (at 397-398):

> The advantage which B.P. sought was to promote sales and obtain orders for petrol by up-to-date marketing methods, the only methods which could now prevail. Since orders were now and would in future be only obtainable from tied retailers, it must obtain ties with retailers. Its real object however was not the tie but the orders which would flow from the tie. To obtain ties it had to satisfy the appetite of the retailers by paying out sums for a period of years, whose amount was dependent on the estimated value of the retailer as a customer and the length of the period. The payment of such sums became part of the regular conduct of the business. It became one of the current necessities of the trade.

79 His Lordship concluded that the payment of the lump sums was a recurrent expenditure and, at 406, that the payments were of a revenue nature. The High Court summarised what it took *BP Australia* to stand for in *Sharpcan* at [38]-[39] in these terms:

> *BP Australia* is more complex. As has been seen, in that case the Privy Council held that the payments made by BP Australia to petrol retailers to secure each retailer's agreement to stock only BP Australia products and to make reasonable endeavours to promote retail sales of BP Australia products were incurred on revenue account. And as has been observed, some of their Lordships' observations are problematic. In substance, however, the main thrust of their reasoning relied on the following considerations:
>
> (1) that the tying arrangements were not of such duration as to indicate that the ties were a structural solution;
>
> (2) that the payments were made to particular customers to secure their particular custom;
>
> (3) that the benefit of each payment to BP Australia was to be used in the continuous and recurrent struggle to get orders and sell petrol;
>
> (4) that, although not strictly "bundles of orders", the agreements were the basis of orders and made orders inevitable; and
>
> (5) that, for a durable company operating in the wholesale petroleum market after the rapid change from multi-brand franchises to solo-brand sites, the payments were essentially recurrent.
>
> In the result, *BP Australia* is perhaps best understood as a decision that, where an oil company paid particular customers on a recurrent basis to induce those customers to buy quantities of a product which the oil company sought to sell to those customers on a recurrent basis, the payments were an expense incurred on revenue account in gaining or producing sales and, therefore, deductible.

80 Each of the elements in [38] is present in this case with the possible exception of the point at [38(5)]. In *BP Australia*, BP had been presented with a rapidly changing retail environment to which it was required urgently to respond. It was forced to embark on a campaign of acquiring as many retail sites as it could. Presumably at some point, this process of competition between the oil companies would reach a point of stasis where each had acquired a sufficient number of retail outlets from the formerly independent petrol stations. Although it is not entirely clear, I take the implication of point at [38(5)] to be that in such a stabilised market the continued use of lump sum payments might cease to be recurrent since the number of such contracts being entered into would fall dramatically once the market stasis point was reached. On the assumption that is correct, however, it would seem that *BP Australia* nevertheless applies to the position of Idameneo. No doubt, when it first opened a medical centre it needed rapidly to engage sufficient doctors to staff it but even in the case of mature medical centres, the facts I

have found show that Idameneo was permanently engaged in a perpetual process of engaging doctors for whom it appears to have had an unquenchable thirst.

81 Further, the contracts were of the same duration, the ongoing need of BP to obtain and retain customers in the form of retailers to buy its petrol was the same as the need of Idameneo to engage doctors to purchase its services and the obligation of the retailers to sell to the public only BP's petrol was analogous to the obligation of the doctors to provide their medical service to the public only from Idameneo's premises.

82 I do not accept the Commissioner's submission that a material difference between this case and *BP Australia* was that the latter was not concerned with lump sum payments but instead with payments made by BP to retailers to sell only its products during a three year period in return for a fee calculated by reference to the volume of petrol sold. I do not accept that this means a lump sum was not involved. In any event, the more important matter seems to me to be the advantage sought. The advantage that the High Court found that BP had pursued was the 'to promote sales and obtain orders for petrol' (at 397-398) and that finding was essential to its conclusion. The same advantage is present here.

83 I also accept the Applicant's submission that this case has useful parallels with the outcome in *NAB*. In that case, the bank had paid $42 million to the Commonwealth for the exclusive right for 15 years to participate as the lender under a scheme of housing loan assistance to members of the Australian Defence Force ('ADF'). Under the scheme the Commonwealth paid a subsidy on the interest cost for the borrower of 40%. Although the members of the ADF were not bound to deal with the Bank the fact that it could discount its interest rates by 40% by reason of that subsidy made it attractive to them. The Full Court concluded that the outgoing was of a revenue nature and at 365-366 said:

> The payment secured access to a new body of customers, and while the Bank had no monopoly over their business, there was at least the reasonable expectation that because of the subsidy most of them would deal with the Bank rather than with other lenders. Its nature as a commission or marketing expense points to the payment having a revenue rather than a capital aspect. It is true, as the primary judge pointed out, that even advertising expenses can be of a capital nature, as where the expenses are non-recurrent and directed towards the establishment of a market for a new business or new product: *Sun Newspapers* at 360-361. But the Bank's business is of long standing, and its existing framework well established. Any expense it incurs which is of an advertising, promotional or marketing nature will prima facie be on revenue account.

84 The same is true in this case—the payment of the lump sum fee secured access to a doctor who would then be obliged to purchase its services. The Commissioner submitted that *NAB* could be distinguished because it was not concerned with lump sum outgoings or with medical centres. I do not accept the former proposition for the $42 million would appear to be a lump sum payment. As to the latter, whilst I would agree that *NAB* concerned banks and this case concerns medical centres, the Commissioner did not expand upon why, from the perspective of the distinction between capital and revenue, this might be a material distinction and I do not think that it is.

85 Useful comparison may also be made with *Tyco*. In that case, the taxpayer retained agents who signed up customers for Tyco's home security systems. The agents then assigned the agreements to Tyco in return for an assignment fee. Allsop J concluded that the assignment fee was on revenue account. At 78 [76] his Honour observed that '[t]he advantage sought by each payment was the winning of a customer, so that he, she or it might be retained and exploited (using that word in a neutral sense) for future revenue for services to be provided.' Correspondingly (at 80 [83]) the 'advantage obtained was the addition of each customer to the business of TAPL. This was to be used in the continuous and recurrent task of providing services during, and hopefully after, the contract period.' The same was true here. The Commissioner submitted that *Tyco* did not apply because it was a case concerned with payments made to win customers but this appears to be contrary to the finding by Allsop J at 76 [78].

86 I am not sure, however, that I would accept the Applicant derives much assistance from *Kelsall Parsons & Co v Commissioner of Inland Revenue* (1938) SC 238 ('*Kelsall*'). The Applicant sought to establish that there could be businesses which have as an incident to them entry into contracts. The passage relied upon was in the judgment of the Lord President at 620 but I do not think that it is establishes that proposition. Rather his Lordship appeared to be discussing the fact that in the business there in question it was an ordinary incident of that business that contracts might be varied or cancelled. That mattered because the question in that case was whether a payment made on such a modification or cancellation was on revenue or capital account. The question in *Kelsall* would correspond in this case to the situation where a doctor sought to reduce the hours worked by repaying part of the lump sum. The question then would be whether receipt of that refund payment was on revenue or capital accounts and in that inquiry it might be useful to know whether such refunds were an incident of Idameneo's business. That was the question in *Kelsall*. I do not think it assists in the current case.

Manner in which the advantage is to be used, relied upon or enjoyed

87 The Applicant submitted that the advantage it obtained by making the lump sum payments was not of an enduring nature. I accept this submission. As I have already found, the agreements were generally of a five year period which was not a duration which was suggestive of capital. At the end of the five year period the doctor was free to leave the medical centre. Mr Duff's evidence was that at the end of the five year period some doctors did remain whilst others left. The Applicant accepted that the duration of the benefit was not a decisive factor (noting Lord Pearce's observation to that effect in *BP Australia* at 399) but it did submit that the brevity of the contracts weighed its favour. The Commissioner submitted, to the contrary, that the contracts did confer an enduring advantage. I have rejected that submission above at [70]. I reject too the Commissioner's submission that the manner in which the advantage was used, relied upon or enjoyed also pointed to the outgoings being on capital account. On this view, the engagement of the doctors achieved for Idameneo an essential component in its profit-yielding structure. Without the doctors it could generate no income and it also enjoyed the benefit of enhancing its goodwill and removing competition. I have rejected this submission above at [57].

Means adopted to obtain the advantage

88 As I have already noted, the lump sum payments made by Idameneo were recurrent. I reject the Commissioner's submission that they were one off payments which is only true when attention is confined to each single contract. It is true that viewed at that level of granularity the lump sum payments appear to be one off payments but that appearance vanishes when one brings to account that in the relevant period there were 505 contracts. As I have already observed, this suggests that Idameneo was constantly making the payments to satisfy its need to enlist more doctors. Mr Duff gave evidence that Idameneo's board referred to the need to recruit more doctors and the fact that its earnings were constrained by having insufficient doctors. The minutes of meetings of its directors bear this out. For example, they record Dr Bateman reporting to the board on one occasion that 'the key limiting factor remained the number of available doctors and there are vacancies currently in the City, Darlinghurst, Maroubra and Leichardt centres' and on another occasion that 'a number of medical centres were below budget for September as a result of a shortage of GPs at particular centres'. In respect of a South Australian medical centre Dr Bateman could report that it had opened on 31 October 2005 with six doctors but there was a target of 40 by the end of the year. This

evidence is consistent with the proposition that Idameneo was confronted with an ongoing need to engage doctors which I accept.

89 This is analogous to the position of the petrol company in *BP Australia* where Lord Pearce at 405 had referred to the fact that '[t]he benefit was to be used in the continuous and recurrent struggle to get orders and sell petrol'. Here Idameneo's continuous and recurrent struggle was to enlist more doctors and, as such, the 505 lump sum payments were to be seen as expenditures made to meet this continuous demand: *Sun Newspapers* at 362 per Dixon J. Further, the lump sum payments only procured the doctors' services for a five year period. As such, they could not be seen as a final provision and lack the once and for all quality indicative of outgoings of capital: *Sun Newspapers* at 363; *BP Australia* at 406.

90 In all of those circumstances, it seems to me that the correct answer is that the lump sum payments were on the revenue account.

Result

91 The appeal should be allowed, the Commissioner's objection decision set aside for each relevant year and the Applicant's objections allowed in full. The matter should be remitted to the Commissioner for reassessment according to law. The Commissioner must pay the Applicant's costs of the appeal.

I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 29 November 2019