15 July 2006

Committee Secretary
Joint Committee of Public Accounts and Audit
Department of the House of Representatives
Parliament House
Canberra ACT 2600
Australia

by Email jcpa@aph.gov.au

Attention Senator Mrs. Bronwyn Bishop

Dear Secretary

Re: **Inquiry reviewing a range of taxation issues within Australia**

I made a submission to the Committee dated 27 January 2006.

One aspect I raised in that submission was the position adopted by the Commissioner that Section 51(1) of the Act (now Section 8-1) required a direct test to trace the use of funds pertaining to the deductibility of interest. The Commissioner relied upon the wording of Section 50(a) of the Act to read that sections wording into Section 51(1) to contend that Section 51(1) required a direct trace of funds.

The Commissioner's position was that where any borrowed funds whatsoever were co–mingled in a bank account with any other funds the interest deductibility was lost.

As I pointed out in my submission that interpretation has wide ranging ramifications because it is inevitable that borrowed funds would be co-mingled with other funds in an operating account. Commercial reality dictates that commingling of funds is unavoidable.

My submission addressed that Section 50(a) has nothing whatsoever to do with Section 51(1) and that both those sections of the Act are stand alone sections. Section 50(a) relates to the determining the level of rebates under Section 46 of the former Act to be applied to any dividends received by a company. A company entitled to a rebate under Section 46, to determine the amount of any rebate, the dividend received had to be first netted off against any allowable deductions (including interest) allowed by Section 51(1) that could be directly traced, as required by Section 50(a), to the dividend received.

Prior to any netting off to determine the quantity of any rebate the outgoing had to be first deductible under Section 51(1), then the provisions of Section 50(a) become applicable.

The High Court of Australia decided in *Palvestments* that where borrowed funds had been co-mingled with other funds, the direct trace requirement in Section 50(a) was not met and any interest deductible under Section 51(1) was not required to be netted off against dividends for determining the quantum of rebate. The interest incurred by *Palvestments* was allowed under Section 51(1), but was not required to be offset under Section 50(a), but any interest that could not be directly traced that was allowable under Section 51(1) was to be successively offset against income from personal exertion, then property and finally dividend income in accordance with Section 50(c).

As far as a direct trace of funds being required to establish deductibility under Section 51(1) that was rejected by the High Court of Australia in Ronpibbon Tin (1949) and by the Federal Court, Foster J., in the case of Reed refer my submission at Pages 15 and 16.

The policy of the Commissioner expressed in several rulings has been based on the decision of *Ronpibbon Tin* that Section 51(1) does not have a requirement for a direct trace of funds as I also expressed in my submission to the Committee at Pages 15 and 16.

When the Administrative Appeals Tribunal supported the position of the Commissioner in my case in disallowing interest under Section 51(1) where funds had been co-mingled, relying on the wording in Section 50(a), I requested in writing that in light of established principle and the wide ranging implications of the decision that the Commissioner fund an appeal to the Federal Court as a test case. The amount of tax involved in my case was so small that it did not warrant my incurring further costs.

The Commissioner did not reply to my representations or to a reminder that the time to lodge an appeal to the Federal Court was approaching, until after the expiry date to lodge an appeal. When the time to appeal had lapsed, the Commissioner advised I should have completed a particular form to seek funding as a test case. I did not even know a specific form was required to be completed. Why the appeal's officer did not point that out in a timely manner on receipt of my letter is disturbing but is consistent with the actions of the Commissioner that I addressed in my submission to the Committee.

I read with interest the transcript of the Committee prepared in draft form of the public hearing held on 22 June 2006, which was made available recently. In reading the questioning of M/s Bronwyn Bishop at Pages 14 and 15 of the Commissioner on the process of funding test cases I believe the above highlights the lack of timely attention to the approach adopted by the Commissioner.

My original submission highlights countless examples of inconsistent application of administrative and interpretive positions applied by the Commissioner, including an uncompromising application of the remission guidelines on both penalties and GIC. I have been advised that the Commissioner is personally aware of my representations and has ignored having my concerns addressed in a professional manner.

If the Commissioner is going to change policy that he has applied stemming from High Court decisions that he has applied for many years it is worrying when that change in interpretation is also applied with the imposition of penalties and GIC as well.

Yours faithfully

W. D. Domjan.