It is submitted that in its approach to the problem the High Court is now out of step with current English judicial thinking on the method of determining the ownership of matrimonial property. In England the presumptions of resulting trust and advancement now have no place where there is evidence as to the inferred common intention of the parties.

The attitude of the courts towards the principles in *Pettitt* and *Gissing* is well characterised by Mr. Justice Bagnall in *Cowcher* v. *Cowcher*:

> In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate—by precedent out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.[61]

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WHEN AND HOW SHOULD THE INCOME OF A SOLICITOR BE BROUGHT TO ACCOUNT FOR TAXATION PURPOSES?

HENDERSON v. *COMMISSIONER OF TAXATION OF THE COMMONWEALTH*[1]

The problem of what is the correct or appropriate mode of accounting in any fact situation is one which has recently exercised the minds of Canadian as well as Australian lawyers. The Canadian Royal Commission on Taxation,[1a] recently reported that professional persons should *all* be assessed on the accrual basis of tax accounting unless their gross revenue is less than $10,000 per annum.[2] Strenuous opposition was expressed to such a compulsory application of the accrual basis to lawyers. The Canadian Bar Association Brief on the Report of the Royal Commission criticized the accrual basis as too complicated, and argued that it raised problems of getting in accounts and of the valuations of work in progress. Nevertheless in the White Paper proposals on tax reform the Minister of Finance declared that "professional persons should be required to use the accrual method".[3] This was done without accepting or answering the arguments put forward by the Bar Association. A rather similar declaration has come in Australia from the Federal Commissioner of Taxation though it does not purport to extend to *all* professionals.

In his Press Release of 16th June, 1970, the Federal Commissioner of

[61] (1972) 1 All E.R. at 948.
[1] (1970) 44 A.L.J.R. 115.
[1a] Report, Vol. IV, 250.
[2] Which is said to be an "insignificant" exception. E. C. Harris, XIX *Canadian Tax Journal* No. 1 Jan.-Feb. 1971 at 65.
[3] *Id.* at 57.

Taxation declared that it was intended to tax professional income of certain types of persons (*inter alia,* solicitors) who provide *professional services as a business*[4] on the basis that their fees become assessable income at the date on which they become "earnings" on an accrual basis of tax accounting. In this press release the Commissioner drew a distinction between professional men who provide professional services in the form of personal services, and those who provide professional services "as a business". His examples of the former included barristers, doctors and dentists. One might well ask whether this distinction is a valid way of separating solicitors from, for example, doctors or dentists. As Challoner recently pointed out, if this notion of "personal services" refers to the services of a particular person (Dr. A or Dentist B) then, it may be asked whether it includes the services of a doctor or dentist who is a member of a group practice and is consulted by a patient who is prepared to be treated by any member of the practice.[5] And if the notion refers to services to a particular person, it may be asked whether it includes the services of a doctor or dentist who is prepared to treat any person, even though that person is not known to him. Can one therefore really justify the apparent conclusion of the Commissioner, that the services of a solicitor are less "personal services" in their nature than the services of such doctor or dentist? If the Commissioner is saying that solicitors provide their services as a business while doctors do not, then his statement conflicts with the very words of the Act. This is because s. 6 defines a "business" as including any profession.

One might be forgiven for inclining towards the conclusion that the distinction made is, at the very least, unclear. It is submitted that the Commissioner's reference to such a distinction is both wrong and right. If it is taken as intended to focus one's attention upon the differences in the content and nature of the services provided by different professions then little else but the confusion alluded to by Challoner[6] may follow. To the extent that confusion is created and a workable distinction is impracticable. if not impossible, the distinction can be criticized as misconceived and wrong. On the other hand, if one may be permitted to read the distinction less strictly, a more workable meaning can be extracted. This result is achieved if one reads the reference to the existence of a distinction between professional services as personal services and professional services as a business as a reference to a difference of degree rather than as a reference to a difference in nature. It is submitted that this notion of difference of degree is fundamental to a proper understanding of *Henderson's Case.* In so far as this is so, the Commissioner's allusion to the existence of a distinction is correct. However, this writer will seek to show that the Commissioner has misunderstood the true distinction drawn by the cases.

The basic problem focuses upon the appropriate manner in which the derivation of income of a professional man should be brought to account for purposes of tax accounting. A short background is necessary to place this problem into context. Section 17 of the Income Tax Assessment Act, 1936-71 taxes income "derived. . . ." Section 25 of the Act defines assessable income as including "gross income derived. . . ." The question then arises: when is there a derivation of income? This question can be answered only after one has employed one or other of the two bases of tax accounting which concern us:

[4] To be distinguished from those professional men who provide professional services in the form of *personal services*, e.g., barrister, doctor, dentist.

[5] N. E. Challoner, "Basis of Determining Taxable Income of Professional and Other Persons Derived in Consideration of Services Rendered", v. *Taxation in Australia*, official Journal of the Taxation Institute of Australia, 53 (August, 1970).

[6] *Ibid.*

(a) the cash basis, where no income is held to be derived until it is *received;* and

(b) the accrual basis, where income is held to be derived when it is *due* or *receivable.*

In *Commissioner of Taxation (S.A.)* v. *Executor Trustee and Agency Co. of South Australia*[7] *(Carden's Case)* the taxpayer involved was a medical practitioner who was carrying on a sole practice in South Australia. Until the end of the financial year ending 30th June, 1929 Dr. Carden had included in his return all fees earned—that is, he had operated on an accrual basis. However, from his next return until his death in November, 1935, he made out his tax returns on a cash basis.[8] This change involved for Dr. Carden a double tax consequence because some of his fees (those earned prior to 1st July, 1929, but paid after that date) which had been taxed on an accrual basis, would have been taxed again on a cash basis (as moneys received after 30th June, 1929). One would presume that Dr. Carden considered that this would be more than balanced by tax savings. These would follow as a result of the changeover being made at a time of depression which had generated a heavy incidence of bad debts throughout the profession. However these presumably could have been written off as such. After Dr. Carden's death the Commissioner assessed him in respect of the broken period to the date of his death, and by amended assessments in respect of the previous year of income, on the basis that fees ought to have been returned by him in the years they were earned, that is, on an accrual basis.

Before proceeding to the legal principles determining the validity or otherwise of the Commissioner's action, it should be noted that in *Carden's Case* the court was concerned with a one-man medical practice. Surely the doctor was rendering professional services. Just as surely a one-man solicitor's practice also renders professional services. One may ask whether there are any inherent differences between the nature of the services rendered by one and those rendered by the other. It is submitted that the Commissioner would have very hard put indeed to show why the services of one are "personal" while the services of the other are in the nature of a business.[9]

The appeal of the High Court was to test the correctness of the assessment for the broken period and the amended assessments issued by the Commissioner. It was suggested in the case that the Commissioner had the right to choose which basis of tax accounting he would apply to any particular taxpayer. But Dixon, J.[10] answered this submission in the negative. He said that the question as to which basis of accounting is applicable was a question for courts of law with jurisdiction to hear appeals from assessments to determine. Moreover, he said, "It is a question to be decided according to legal principles" and since the answer is not to be found in the provisions of the legislation there is no point to searching for an intention hidden in the text of the Act. He then noted that the law draws on business principles and concluded that "the tendency of judicial decision has been to place increasing reliance upon the conceptions of business and the principles and practices of commercial accountancy".[11]

His Honour's view seems in essence to have been that the law

[7] (1938) 63 C.L.R. 108.

[8] One effect of this charge was that later year receipts of money could have included fees earned prior to 1st July, 1929 which had already been taxed (on the accrual basis) that is, a double tax consequence.

[9] This is the form which the distinction drawn by the Commissioner in the press release takes.

[10] *Supra* n. 7 at 151-2.

[11] *Id.* at 153.

shaped and influenced to some undefined extent by principles of the commercial world, determines what basis of tax accounting shall apply to a taxpayer. He offered some guidance[12] as to how the choice between the bases of tax accounting will be made by the courts. He said that, subject to a contrary intention in the Act, "the admissibility of the method . . . pursued must depend upon its actual *appropriateness*", that is, "whether in the circumstances . . . it is calculated to give a *substantially correct reflex* of the taxpayer's true income".[13] But it must be stressed that this does not amount to a determinate test because no certain criteria are set out in order to provide anyone with an answer to the question of whether one basis reflects his income more correctly than the other. His Honour did, however, go on and attempt to provide us with something a little more concrete when he applied his general observations in order to determine which basis would, as a matter of fact, truly reflect the professional income of Dr. Carden.

In coming to a conclusion on the question of whether a particular basis truly reflected the professional income of Dr. Carden, Dixon, J. pointed to the following factors as the factors to be considered:

(1) the nature of the profession concerned, and
(2) the actual mode in which it is practised in a given case.[14]

He decided that the cash basis formed a fair and appropriate basis for estimating professional income[15] in circumstances where:

(a) there is nothing analogous to a stock of vendible articles to be acquired or produced and carried by the taxpayer;
(b) outstandings on the expenditure side do not correspond to and are not naturally connected with the outstandings on the earning side;
(c) there is no fund of circulating capital from which income or profit must be detached for actual enjoyment; and
(d) the receipts represent a reward for professional skill and personal work to which the expenditure on the other side of the account contributes only in a subsidiary or minor degree.[16]

He expressed one qualification however: there must be continuity in the practice of the profession.

It is submitted that it will be very seldom indeed that circumstances other than these would be present in the case of any professional person working alone, whether he is a solicitor, doctor, accountant or dentist. Furthermore, if any of these four types is to be excluded it appears that the dentist would be first affected. This is submitted to be so in view of the fact that he is the only one who has "vendible articles"—dentures—which are produced by himself. More to the point, however, Dixon, J. draws the distinction between the professional and the businessman. It might then follow that a professional firm, run in the nature of a business (a question of degree), could appropriately be assessed on an accrual basis. If this is what the Commissioner meant to say in his press release of June 1970—when he distinguished professional persons providing their services as a business from those providing their services as personal services—he was justified in so

[12] The use of the word "guide" is appropriate especially in the light of later application of the statements. They are general observations which do not offer determinate criteria by which one can effectively tell whether one basis reflects income more truly than another.

[13] *Supra* n. 7 at 154; emphasis added.

[14] *Id.* at 157.

[15] It will be noted that his Honour spoke of professional income generally and did not appear to seek to make any distinction between the different types of professions.

[16] *Supra* n. 7 at 157-8. One may ask whether this could be what the Commissioner meant when he sought to distinguish professional services as a business from professional services as personal services in his press release.

saying. But when he went on to say that *all* solicitors should in future be assessed on an accrual basis it is respectfully submitted that he went too far.

His Honour then appealed to general or common business practice and found that in the United Kingdom and Australia this involved a determination of the assessable income of professional men on a cash basis, and cited *Commissioner of Inland Revenue* v. *Morrison*[17] as indicating that the practice has been treated by the case law as well-founded. He then weighed all the facts and concluded that Dr. Carden's income had been properly assessed upon the cash basis. Almost as an afterthought he added what appears to be another factor which is to be considered, that is, that where there is "little certainty about the payment of fees, I should have thought that a receipts basis (cash basis) of accounting would alone reflect truly the income and for most professional incomes it is the more appropriate".[18] This factor, however, has no effect upon the conclusion of this writer that the circumstances outlined by his Honour (as making the cash basis appropriate in the case of professional income) do not provide a basis for distinguishing between a one-man office in one of the professions and a one-man office in any of the others. This is so because no sensible distinction can be drawn between the certainty with which a doctor will be paid and the certainty with which a solicitor will be paid.

In *Henderson* v. *Federal Commissioner of Taxation*[19] the facts were as follows: Henderson was a partner in a firm of accountants and during the financial years from 1963 through 1966 the partnership was his sole source of income. The firm never distributed profits as such, but rather distributed them as salary and bonuses. The problem arose from the fact that the firm changed its basis of accounting from a cash basis in 1963-64 to an accrual basis in 1964-65. However, the Commissioner objected to Henderson's returns for 1964-65 and 1965-66, saying that the cash basis was the proper basis on which to assess the income of the partnership. The Commisioner therefore adjusted the partnership return, assessed its income on a cash basis, and then determined, from the amount at which he arrived, the income of Henderson.[20]

Counsel for the Commissioner took the point that the Commissioner was not satisfied with the return and that he could therefore determine for himself the taxable income of Henderson on the basis of s. 167. The Commissioner pointed out that if the taxpayer objects, then it is the taxpayer who must show that the determination of the Commissioner was made on an impermissible basis.

Windeyer, J. at first instance[21] would have none of this line of argument and approved Dixon, J. in *Carden*,[22] where the latter said: "Unless in the statute itself some definite direction is discoverable . . . the admissibility of the method which in fact has been pursued must depend on its actual appropriateness". On this basis, Windeyer, J. concluded that if a taxpayer followed a certain method in his return and used an appropriate method of accounting to calculate his income, s. 167 did *not* enable the Commissioner to require the application of another method just by saying he is unsatisfied with the return. Furthermore, he added, s. 167 "does not put the Commissioner's decision beyond examination by the court".[23] This, it may be noted

[17] (1932) 17 Tax. Cas. 325.
[18] *Supra* n. 7 at 159.
[19] *Supra* n. 1.
[20] One may note the slight peculiarity of the situation in that Henderson was objecting that he was not being taxed hard enough.
[21] 43 A.L.J.R. 172 at 173.
[22] *Supra* n. 7 at 154.
[23] *Supra* n. 21 at 174 (emphasis added).

is in accord with Dixon, J.'s theme in *Carden*—namely that the question of the appropriate method of calculating income is one for the courts and legal principles.

Turning then to application of those legal principles, Windeyer, J. ordered that the assessable income of Henderson should be the sum which represented his share of the income of the partnership, which latter income had been properly calculated on an accrual basis. It was in relation to this order that the Commissioner appealed to the Full High Court. Windeyer, J. also ordered that the income of the partnership for the changeover year (June 1964-June 1965) should be calculated in a special way, and it was in relation to this order that Henderson appealed. His Honour reached his conclusion in regard to the changeover year in the following way: although the accrual basis is the appropriate basis for determining the income of this firm, nevertheless the firm's calculation for that year did not produce a true reflex of its income. The reason for this was that the changeover year was only one in a series of years during which the business ran. Income in such a case is not in the nature of "annual produce" of a number of seasons like a "crop" but is rather a part of a "continuous incoming". In this way, he said, a change at one time as to the mode of calculation of that continuous flow could distort the income determined by the new mode, from its old role of true reflex.[24] Although the change was appropriate, some special provision was required to make up for the effect on the periods taken as a whole. On this basis, therefore, although any one year could not be challenged separately, by taking the two years ending June 1964 and June 1965 together, his Honour was able to conclude that the return did not reflect truly the income of the two years.[25] Relying as he did on Dixon, J.'s general notions of appropriateness it is submitted that his Honour in no way alluded to a situation like that which the Commissioner has taken to be the case (see the press release). His Honour made it clear that, "considered in the abstract, this method (accrual basis) is quite appropriate for the kind of business which the partners were carrying on".[26] It was not till after his Honour had made this finding that he went on to say that, in addition, the result must give a "substantially correct reflex of the taxpayer's true income". As has been shown above, he found that the accrual basis *per se* did not meet the latter requirement.

Setting aside his reasons for concluding that the figure resulting from use of the accrual basis in the changeover year was no true reflex,[27] we are left with his statement that that basis was appropriate "for the kind of business which the partners were carrying on". What kind of business was it in relation to which his Honour concluded that the accrual basis was appropriate? It was a vast accounting firm with nineteen persons legally recorded as partners, and his Honour noted, there were at all relevant times "between sixty and seventy or more persons who shared with the nineteen 'partners' the annual profits. . . ."[28] This was a result of the Western Australian Companies Act (1961) which limited partnerships to twenty persons. He was speaking of a huge and growing firm with some ninety to one hundred (or more) "partners" or quasi-partners.

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[24] *Id.* at 176-7.

[25] Some $179,000 never brought to tax, because it was *earned* in the year ending June 1964 or earlier years (for which years the taxpayer was assessed on a cash basis) but it was *received* in the year ending June 1965 (not taxed because an assessment on an accrual basis only includes income *earned* in that year).

[26] *Supra* n. 21 at 176.

[27] As these reasons were rejected by Barwick, C.J. in the full High Court, with whom Menzies, J. and McTiernan, J. agreed. See later.

[28] *Supra* n. 21 at 175.

Clearly, therefore, the Commissioner was not justified, from the findings at this level of the proceedings, in declaring that all solicitors operate on the accrual basis. He could sustain his declaration in respect of a very large firm with a large number of partners (on analogy with the firm in *Henderson's Case*) but not in respect of a very small firm.

Can we find anything in the Full High Court judgment which might bring us a little closer to being able to justify the Commissioner's press release?[29]

It was again contended at the appeal that the Commissioner had an "initiative" to determine the assessable income of a taxpayer and that "so long as in determining that income he employed a method not inconsistent with . . . the Act, there would be no ground for setting aside the figure at which he arrived for that income". Counsel for the Commissioner called in aid the majority in *Carden* and claimed that "the computation of the income of a professional practice upon a cash basis was an appropriate method of ascertaining the income derived in the year of tax and not in any respect inconsistent with . . . the Act". The Commissioner therefore claimed that not only must Henderson establish that the accrual basis was "also appropriate" and not only must he show that the accrual basis yields a "better indication of that income than the figure at which the Commissioner assessed by . . . a cash basis", but that Henderson must prove "that the basis of calculation was inconsistent with . . . the Act" before he could have an assessment set aside.[30]

Barwick, C.J., with whose judgment Menzies and McTiernan, JJ. concurred found this argument unacceptable. He said that:

1. s. 17 taxes "taxable income derived . . .;"
2. taxable income is a function of the effect of the Act on the assessable income of the taxpayer; and
3. assessable income, once ascertained, must be expressed as a figure. He concluded that there "cannot in fact be alternative figures for such assessable income" and this remains so even though the figure could include estimates and opinions. Therefore, "however arrived at, the result is a figure, the assessable income of the particular taxpayer for the year of tax". In effect Barwick, C.J. rejected the possibility of two possible figures, one of which is more appropriate than the other. Only one is "*the*" appropriate figure and he concluded that although opinions may differ as to the mode of computation which will yield the correct figure for assessable income "the opinion of this court will determine it".[31]

Barwick, C.J.[32] then endorsed Windeyer, J.'s conclusion that the accrual basis was appropriate in relation to this firm's income. He based this upon (1) the nature (much credit) and extent (vast, with some 295 employees and earnings in excess of one million dollars per annum) of the partnership operations *and* (2) the contrast between this firm's operations and the operations of the sole practice doctor in *Carden's Case*.[33] Where he parted company with Windeyer, J. was at the stage at which the latter suggested that

[29] Windeyer, J. did little more than endorse Dixon, J.'s guide in *Carden's Case* and concluded that, applying the legal principles which are relevant, the accrual basis was appropriate to this firm. Why? Because of its growth, the change in the character of its work and by the increase in the amount of work performed on credit. This clearly is a reference to a change in degree and does not justify the distinction between solicitors and, e.g. doctors, made by the Commissioner.

[30] *Supra* n. 1 at 117.

[31] Much the same as Dixon, J. in *Carden* and Windeyer, J. in *Henderson* when they stressed the role of the courts and legal principles in the solution of the problem.

[32] Menzies and McTiernan, JJ. agreeing.

[33] *Supra* n. 1 at 117.

one should look to the overall effect of two years to determine the presence or absence of appropriateness in the *Carden* sense. To this suggestion Barwick, C.J. retorted that in a scheme of annual taxation on income derived in any one year "*there cannot be any warrant . . . for combining the results of more than one year in order to obtain the assessable income for a particular year of tax*".[34] However, the Chief Justice was not content to allow this sum of $179,000 to escape being brought to tax (which is the *prima facie* result of his rejecting Windeyer, J.'s "special" calculation in respect of the year ending June, 1965.) To prevent that result following the Chief Justice argued:

1. The accrual basis was appropriate for the year ending June, 1965.
2. Since the same factors as made it appropriate to that year were already present in the year ending June 1964 the partnership income for the latter year (which was calculated and assessed on a cash basis) was not the proper amount of partnership income for that year.
3. Therefore the 1964 assessment must have been erroneous and could have been the subject of an amended assessment within three years of the original assessment.[35] He cited s. 170 of the Act as authority for this line of action and noted that it would be irrelevant had more than three years passed.

One comment must be made in relation to this reasoning. If it was based on the assumption that the Commissioner could easily bring the elusive $179,000 to tax in the way his Honour suggested, then it may be that the Chief Justice did not fully consider the matter. True, s. 170(1) gives the Commissioner a right to issue an amended assessment but that right is stated to be "subjected to this section". Section 170(2) is irrelevant because there was no suggestion that the taxpayer had failed to make a full and true disclosure. However, when we look to s. 170(3) we find that "where a taxpayer has made . . . a full and true disclosure of all material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment . . . increasing the liability of the taxpayer in any particular shall be made except to correct an error in calculation or a mistake of fact. . . ." The only thing that is clear about these two phrases "error in calculation" and "mistake of fact" (especially the latter) is that they are unclear. Certainly it was not the former (not an error in adding up) and the difficulty of distinguishing the latter from a mistake of law is acute,[36] to say the least. Just when can it be said that a person has made a mistake of fact? It would obviously be objected to any amended assessment in respect of Henderson's return for 1964, that if there was a mistake it was one of law and not of fact because all facts were made available to the Department of Taxation. However, what could counsel do if the assessor gave evidence that he fully appreciated the law but that he had momentarily forgotten a certain fact in respect of this return and that this caused the error?[37] Short of calling the witness a liar, counsel would have no alternative but to accept the evidence. If no such evidence is forthcoming (and one would hope that it could not happen too often) then the situation which the writer respectfully submits both Windeyer, J. and the Full Court in *Henderson* tried to avoid, would

[34] *Id.* at 118 (emphasis added).

[35] It should, however, be noted that the Commissioner has stated that he will not attempt to reopen old assessments in accordance with Barwick, C.J.'s view.

[36] 26 *Halsbury* 829.

[37] A situation which in fact arose in the Board of Review case 13 C.T.B.R. (N.S.) case 24.

result; namely, the $179,000 would not be brought to tax at any stage.[38]

If Barwick, C.J.'s non-acceptance of Windeyer, J.'s solution to this problem was partly based on the Chief Justice's belief that he had a solution more reconcilable with the Act (that is, reliance upon s. 170; and it is submitted that the Chief Justice was just as concerned that the Commissioner have "the power" to bring at least a proportion of the $179,000 to tax) it might be that, had he made a closer study of s. 170 he would not have been so ready to reject Windeyer, J.'s solution.

Can we, in the light of the above, say that the Commissioner's statement was justified? The cases have done little more than act upon the guide presented by Dixon, J. in *Carden's Case*. But what the Commissioner appears to have overlooked is that *Carden's Case* and *Henderson's Case* are what we might almost call the two extremes of a particular legal spectrum. At one extreme we see a doctor, working alone and earning income through his own personal exertions, with nothing to place him within the category of a professional carrying on his practice in the way of a business. At the other extreme we are presented with what at one stage was described as the biggest accountancy firm in Western Australia and possibly the biggest in Australia. It had almost 300 employees and their fees exceeded one million dollars in each of the financial years with which the court was concerned. In respect of the latter it is clearly not difficult to say:

> It is apparent . . . that what such a business earns in a year will represent its income derived in that year for the purposes of the Act. The circumstances which led the majority . . . to conclude in *Carden's Case* that a cash basis was appropriate to determine the income of the professional practice carried on by the taxpayer personally are not present in this case.[39]

But one may be forgiven for asking how much further guidance does that really provide in respect of the situation, which is more prevalent, of a small group of solicitors who together carry on a practice?

We find the Full High Court concluding in no uncertain terms (but unfortunately citing no certain criteria) that not only was the accrual basis a true reflex of the income of the accounting firm, but that it was a question to be determined on legal principles (also unfortunately stated in terms of the far too general test of "appropriateness") and therefore having one and only one answer to the question of which basis of tax accounting was "the" basis in these circumstances. It is stressed that in *Carden* there was no possibility of incomings not being brought to tax. On the other hand, that result was very possible on the facts of *Henderson's Case*. With this possibility in mind, it is submitted that *both* Windeyer, J. and Barwick, C.J. reasoned at least partly on the basis that the $179,000 should not, or should not entirely, avoid being brought to tax, that is, that at least part of it should be placed in the position of being *capable* of being brought to tax. (See Barwick, C.J.'s reference to s. 170). On this basis, it is respectfully submitted that Barwick, C.J., had he more fully considered s. 170, might have been persuaded to come to a different conclusion.

Finally, therefore, in the light of the above, to declare that *all* solicitors in the future must furnish returns on the accrual basis is, it is submitted, not justified. This is because, even though no certain criteria were presented

[38] It should be made clear that the Chief Justice's approach could only "cure" the tax avoidance completely if the Commissioner is able to amend every assessment back to the first assessment relating to professional income. However, on the assumption that earnings had been increasing at an increasing rate, amending the last three years' returns could well have brought a good proportion of the $179,000 to tax.

[39] *Supra* n. 1 at 117.

for determining which basis applied, it was made patently clear that the question was one to be decided on the facts of each individual case and the nature of the business and the extent of its operation (vastness of the size of the firm and the huge scale of the business). How then can this be reconciled with a declaration limiting to the accrual basis a one-man solicitor's practice in a small suburb? It cannot, it is submitted, be so reconciled.

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