

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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This post had been temporarily unpublished upon request of Mr Vanda Gould's lawyers while he was awaiting trial in the District Court.

Mr Gould had been "charged with attempting to pervert the course of justice in connection with legal proceedings with the Australian Tax Office (ATO)" as per his lawyer's letter to us dated 18 July 2018.

His lawyers sent us the following note on 30 August 2018, "The (current) trial ended last Thursday with the jury unable to reach an unanimous verdict. We await to hear from the prosecution whether they intend to run the trial again before a new jury.

As any retrial that may occur would not be before 2019, we are content for the article to be republished at this point. However we may seek your cooperation again in the future in suspending the article if it goes to retrial."

So here is the podcast and show notes again.

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We have all heard of Bywater, but what actually happened? How was it set up? And how did the ATO find out about it?

The Story Behind the Bywater Case

Here is the story behind the Bywater Case, pieced together from publicly available information. It is only a small insight but throws a fascinating light into a case that left many shaking their heads – and led the ATO to withdraw its longstanding TR 2005/17 ultimately replacing it with TR 2018/5.

To listen while you drive, walk or work, just access the episode through a podcast app on your mobile phone.

The Beginning

The Bywater tax saga began long before anybody had ever heard of Bywater. Vanda Gould had split with his wife of 19 years, Narelle, in August 1991. By 1993, he had remarried. The acrimonious divorce was still in the courts and was likely to cost him a lot of money. So by January 1994 aged 45 Vanda Gould found himself at crossroads in his life.

From his experience as a liquidator, tax adviser and investor, Gould had developed a close knowledge of tax havens. He controlled companies in Jersey and the British Virgin Islands. And had worked on a trust in the Turk and Caicos Islands. All this put him in good stead to create his offshore empire.

The Companies

On January 5, 1994, a lawyer in George Town on the Cayman Islands incorporated a new company, MH Investments. Three weeks later, a second company, JA Investments followed, also on the Cayman Islands.

In 1994 Mr Gould applied through intermediaries for a banking licence in Western Samoa. The banking application states, “designed to avoid the Australian [Controlled Foreign Corporation] rules.” The banking licence came through and Hua Wang Bank Berhad Limited entered Gould’s empire.

Four other companies followed in a similar fashion – Bywater Investments Ltd in the Bahamas as well as Chemical Trustee Ltd, Derrin Brothers Properties Ltd and Southgate Investment Fund Ltd in Britain.

Bywater, Chemical, Derrin and Hua Wang Bank soon started earning their income from trading on the Australian Stock Exchange. Since no Australian tax resident owned any shares of these companies – Gould’s business associate in Switzerland Peter Borgas did – nobody paid tax on this income in Australia. .

The Looming Storm

The ATO soon started asking questions. From 2004 onwards Vanda Gould made a series of sworn statements denying he owned the Cayman companies. “I am not the beneficial owner of the shares issued by the two Cayman Islands companies in question...[the assets belong to] clients who are resident all over the world, ” the *AFR Weekend* quoted him saying.

Nevertheless, in 2010 the ATO issued tax assessments for \$40 million to five of the companies linked to Gould. The assessments claimed that Gould was controlling these companies. Proving it would take years.

In late 2010, the Bywater companies launched a Federal Court appeal against the assessments. This was the beginning of a long journey through the courts with charges and appeals of every point. In Britain, the Cayman Islands and Samoa, the companies fought to stop the release of documents to Australian authorities but lost.

The Tax Office discovered an additional \$100 million cash in British bank accounts and added another \$30 million to the tax bill.

It would turn out that MH Investments and JA investments owned all these companies.

During a court hearing, Mr Borgas told the Federal Court that he owned JA Investments on the Cayman Islands. But then faced arrest just as he was leaving Australia. Mr Gould suffered the same fate in October 2013. Upon arrest they received charges for tax fraud and money-laundering. But then the Commonwealth dropped charges and even agreed to pay Mr Gould’s legal costs of \$364,500. That was a clear win. Maybe this gave them courage.

But then things got worse again. Justice Nye Perram found in December 2014 that all companies involved were owned and controlled by Gould.

Judge Perram referred the case to authorities. The AFP charged Mr Gould with conspiring to pervert the course of justice. And the ATO charged Mr Gould with a \$300m tax bill. No criminal charges were laid against Mr Borgas. This time Mr Gould was alone when he appeared at Sydney’s Downing Centre Local Court on 29 November 2016 facing the threat of up to 10 years in jail.

The Accountant

Mr Vanda Gould is a former teacher living in Chatswood in northern Sydney. Being a keen supporter of evangelism he had been the honorary treasurer of Sydney Anglican Schools Corporation since 1996. Hence the donations to various Anglican schools and institutions. In his second career as an accountant, he built his own accounting firm, with a focus on international tax advice, which he left in 1998. And he is the former chairman of listed investment company CVC.

Gould still denies that he ever owned or controlled the offshore companies. He seems to be a well-educated man, judging from this comment about Judge Perram, quoted in the AFR.

“Unfortunately, we appear to have very different world views which possibly resulted in him calling me a ‘white-washed tomb’, using modern English for the King James translation he used in his judgment...Curiously, a Pharisee was punctilious in observing the law!”

The Associate

Mr Peter Borgas plays a central role in the Bywater case. He acted as the front man of Gould’s empire. A lawyer and Belgian national born in Rockhampton residing in Switzerland, Borgas holds the shareholdings of most of the Bywater companies.

In a supplementary ruling on 12 February 2016, Justice Perram said that “Mr Borgas’ evidence that he managed them was deliberately false and part of an elaborate charade orchestrated by Mr Gould”.

Borgas paid the many donations made by the Bywater companies to Anglican institutions in Sydney and testified during the trial that these were his donations. Mr Borgas is a Lutheran. When asked why he chose to give money to a church he didn’t belong to, he said: “I am a Christian first, a Protestant second and a Lutheran third.”

“With this, as with almost all of Mr Borgas’ evidence, I am satisfied that he was lying.” the judge stated and found that the documents had been falsely contrived to appear to corroborate Borgas’s testimony.

The Wife

Gould married his second wife Deborah Gould in 1993. Being the assistant minister at St Paul’s at Chatswood, she seems to share Vanda’s interest in evangelism and the Anglican faith. While she might have used debit cards that tapped into the offshore funds, just as her husband did, she didn’t take part in the Bywater set up.

The Parents

Here is an interesting side story that sheds more light on Mr Vanda Gould.

In 2010, Vanda Gould’s parents Russell and Joan Gould, gave a birthday gift to their housekeeper of 14 years, whom they regarded as a surrogate daughter, and paid off her \$228,000 mortgage.

When Vanda Gould learned of this gift a year later, he launched legal action to recover the money in NSW Supreme Court, claiming that his father had dementia at the time of making the gift. Justice Lindsay noted there were no medical reports to support the claim of dementia, so he rejected the claim for return of the money in 2013. Mr Vanda Gould appealed but was turned down again.

The Scheme

Gould’s clients invested in a super fund and an employee welfare fund in Samoa, which they claimed as a tax deduction. On what grounds is unclear, but let’s put that aside for now. The funds were transferred to Gould’s Hua Wang Bank in Samoa, which loaned the money back to Gould’s clients. The clients paid interest to Hua Wang Bank and claimed a tax deduction for these interest payments.

Gould’s clients also paid life insurance premiums to a Vanuatu insurance company. And claimed these as tax deduction. The insurance company forwarded the money to Hua Wang Bank, who then loaned the funds back for another round of tax deductible interest payments.

In all, Hua Wang loaned \$95 million back to Gould’s clients, which suggests they claimed nearly \$30 million in tax refunds on what were essentially round-robin exchanges.

But the loans, the super fund payments and the bogus insurance contracts were just small change. The real money was in share trading.

In 2008, Austrac reported money flows into and out of Australia from Gould-related companies totalling \$1 billion.

The offshore companies used the money to buy and sell Australian shares. As foreign investors, they were exempt from capital gains tax on the profits they made. The network's total returns may have been as high as \$400 million, so a hugely profitable undertaking.

Another issue was the possible breach of disclosure laws and the takeover codes. The offshore companies held large blocks of shares without declaring these shareholdings to other investors or ASIC.

The Clients

Mr Vanda Gould had wealthy clients in Sydney's eastern suburbs who trusted their funds to Mr Gould, in a case that the tax office has described as "blatant tax evasion".

The newspapers mention a director of an investment bank fighting a \$20 million tax bill; a married couple in their 70s fighting a \$10 million tax bill, living in Mauritius since 2013 and unable to return to Australia for fear of arrest.

They mention Joe Ross, a former anaesthetist who testified to have had a net worth of more than \$A350 million before the financial crisis.

They mention John Leaver arrested at his Point Piper home in October 2013 for tax and money-laundering offences.

And they mention others. They all are clients of Vanda Gould, and the firm he founded. And their total tax bill is above \$300 million.

The Donations

The Bywater companies donated \$1 million to Moore Theological College, \$256,000 to the Church Army, \$100,000 to Mary Andrews College and \$500,000 to evangelism group Ellel Ministries to buy a property from the Anglican Church, freeing up church funds for mission.

The Bywater companies also paid \$160,000 for Archbishop Peter Jensen's son Michael to do his PhD at Oxford. Michael Jensen publicly acknowledged the gift in gratitude. He had just been appointed rector of St Mark's Darling Point, when the ATO subpoenaed him in October 2013.

So this got the ATO thinking: If Borgas claimed to own all the assets in the offshore companies, why was he giving money to Sydney Anglicans? Especially since he couldn't claim a tax deduction for any of these.

With Mr Gould denying any involvement or wrong-doing, these donations held a key role in the court case. Especially since Gould is a keen supporter of evangelism and had a close relationship with the recipients of these donations.

The Barrister

Besides the court cases in Australia, there are related legal proceedings in Britain, Samoa, Cayman Islands and Bahamas. Most of these proceedings are a result of the former inter-agency Project Wickenby. Wickenby is a seven-year investigation targeting international tax avoidance schemes.

And almost all of them feature barrister John Hyde Page. “The Wickenby era is disgusting,” Page said in October 2013. “One of the top priorities of the Abbott government should be shutting down this Gestapo unit, and sacking all its members.”

The Courts

The Bywater case had a long walk through the courts – including 19 challenges to the evidence and procedure at the Federal Court – 34 court judgments – 4 Full Court appeals and 1 application to the High Court.

“This is the worst case I have come across in my entire career,” Justice Nye Perram said in February 2014. “The facts I have found strongly suggest widespread money laundering, tax fraud of the most serious kind and... insider trading. The conduct revealed in this case is disgraceful.”

The Verdict

In an unanimous decision the High Court upheld earlier judgements by the Full Court of the Federal Court. It found that the Bywater companies were Australian tax residents since they had their business and central management and control in Australia. And so rejected the argument that the overseas board meetings meant that central management and control was overseas.

“It is a nonsense to say that Mr Borgas was effectively managing each entity from Switzerland,” the High Court judgement said. “The place of effective management was with Mr Gould in Australia.”

The judge found that Vanda Gould controlled the companies and not Mr Borgas. He labelled the set up a “crooked pantomime”, “fake” and a “sham”. And expressed, “deep suspicions on my part that Mr Gould had engaged in serious criminal misconduct.”

The companies will now have to pay just over \$16 million in outstanding tax and penalties to the ATO. Mr Gould’s own legal bills may be as high as \$20 million. And on top of that he will have to cover the ATO’s legal costs.

The Commissioner

After the verdict Tax Commissioner Chris Jordan advised that, “this was not an easy process. I have made it clear that the ATO will not shy away from difficult and complex cases. No matter how long they take to run.”

The Ruling

So this is the story behind the Bywater case and how a 40 years commercial practice (since *Esquire Nominees*) came to an end.

The ATO withdrew its ruling on central management and control ([TR 2004/15](#)), released a new draft ruling [TD 2017/D2](#) and then subsequently finalised this in [TR 2018/5](#). And that one raises more questions than it gives answers.

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