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**Interpreting taxing Statutes # 27 – Implications**

**The meaning to be attributed to an enactment consists not just of what is expressed, but also what may properly be implied.<sup>^1</sup>**

SYNOPSIS

Ellipsis

Necessary v proper implication

Implication contradicting grammatical meaning

Implications worded accordingly

Implied ancillary powers and limitations

**Ellipsis**

It is a fact of language that a statement consists not only of what is expressed but also of what is implied. Implication may arise from the language used, from the context, or from the application of some external rules of principle.

In ordinary speech or writing it is a recognized method to say expressly no more than is required to make the meaning clear, the obvious implications remaining unexpressed. The drafter of legislation, striving to be concise, may need to adopt the same method. As Reed Dickerson said:

“It is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication.”<sup>^2</sup>

In order to produce reasonably concise, readable text that is capable of being applied in wide variety of situations over an extended period of time, drafters are forced to leave much of

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<sup>1</sup> Bennion 2020 s 11.5

<sup>2</sup> Reed Dickerson Materials on legal Drafting (1981) p 133 cited in Bennion 2020 p 401

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what they intend to implication. Judging when this can safely be done, and when on the other hand express provision is necessary, is one of the trickiest drafting decisions. It might indeed have been easy to say whatever it is that is relevant in the instant case. But it would have been impossible to say everything that was intended; and one may need to ask why the particular statement should have been singled out.<sup>^3</sup>

The device of leaving unsaid some portion of what the writer means, or must be taken to mean, is known as **ellipsis**.<sup>^4</sup>

The finding of proper implications within the express words or an enactment is a legitimate, indeed necessary, function of the interpreter.<sup>^5</sup>

When an implied meaning is suggested by the advocate, this is sometimes rejected on the basis that if the legislature had intended such a qualification of the express words, it could easily have said so. This is not a reliable test. For example, the drafter may think that the qualification goes without saying, or may it not be possible to be comprehensive.<sup>^6</sup>

However, there are many cases where judges have recognized the existence of implied meaning. There is nothing new in this – Blackstone said of a 17<sup>th</sup> century statute that it ‘does not prohibit, but rather impliedly allows’ innocent Sunday amusements after the time of divine service.<sup>^7</sup>

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<sup>3</sup> Bennion 2020 p 401

<sup>4</sup> Bennion 2020 p 401

<sup>5</sup> Bennion 2020 p 401

<sup>6</sup> Bennion 2020 p 401

<sup>7</sup> Blackstone Commentaries on the laws of England (1<sup>st</sup> edition 1765-1769) iv 63 cited in Bennion 2020 p 402

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The possibility of implied meanings is sometimes acknowledged in an Act by a statement that a particular implication is not to be taken as intended.<sup>8</sup>

### **Necessary v proper implication**

It is sometimes said that only necessary implication may legitimately be drawn from the wording of Acts. For example, in a classic English case it was said

“What the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either in expressed words or by reasonable and necessary implication.”<sup>9</sup>

Necessary implication was explained thus:

“A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for parliament to have included or what parliament would, if it had thought about it, probably have included and what it is clear that express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.”<sup>10</sup>

So, a ‘necessary implication’ is one that is logically necessary. This logical necessity of context, however, was modified to include purpose of the enactment as follows:

““A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context”

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<sup>8</sup> Bennion 2020 p 403

<sup>9</sup> Salomon v A Salomon Co Ltd (1897) AC 22 cited in Bennion 2020 p 404

<sup>10</sup> R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax (2003) 1 AC 563 cited in Bennion 2020 p 404

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must be modified to include the purpose, as well as context, of  
the legislation.”<sup>11</sup>

The fact that the court is to have regard to both context and purpose when deciding whether there is necessary implication means that the test is not simply one of logic. Accordingly, it is suggested that there is not a distinct category of implications that are ‘necessary’ and that in all cases the court must decide whether it is proper to find the implication.<sup>12</sup>

**Court to decide necessary and proper** - The questions of whether an implication should be found within the express words of an enactment depends on whether it is proper or legitimate to find the implication in arriving at the legal meaning of the enactment, having regard to accepted guides to legislative intention. It is for the court to decide whether a suggested implication is ‘proper’. This may involve a consideration of the rules of language of the rules or principals of laws, or both together. Where the point is doubtful it will, as always in interpretation, call for a weighing and balancing of the relevant factors. For example, it may be held improper to find an implication when it imposes onerous burdens. Similarly, where the court is concerned with a potential interference with fundamental rights, this may well lead the court to decide that is improper to find an implication unless the implication is necessary (ie necessary as a matter of logic).

**Imprecise language** - Where the language of the enactment is insufficiently precise to determine the point at issue, the court may readily draw implications. In such cases, the problem will

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<sup>11</sup> R (Black) v Secretary of State for Justice (2017) UKSC 81 cited in Bennion 2020 p 404

<sup>12</sup> Bennion 2020 p 404

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frequently be to decide which of various competing implications is the true one.

### **Implication contradicting grammatical meaning**

An implication cannot properly be found which goes against an express statement. This principle is stated in the maxim *expressum facit cessare tacitum* (statement ends implications). It is not permissible to find an implied meaning where this contradicts the grammatical meaning. Where therefore the court holds that the legal meaning of an enactment contradicts the grammatical meaning, it is not finding an implication but applying a strained construction.

### **Implications worded accordingly**

A consequence of the facts that the express words of an enactment fall to be treated as enlarged by all proper implications is that, so far as relevant in the case before it, the court may treat the enactment as if it were worded accordingly as said so:

“If the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less cogent because not expressed.”<sup>13</sup>

This echoes Coke’s maxim the *verba illata est inesse videntur* (words inferred are to be considered as incorporated).<sup>14</sup>

While it may be helpful to treat the words as incorporated, it is not essential. What is implied is meaning, and not necessarily a particular verbal formula.

### **Implied ancillary powers and limitations**

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<sup>13</sup> Gwynne v Burnell [(1840) 7 Cl & Fin 572 cited in Bennion 2020 p 406

<sup>14</sup> Co Litt 359 cited in Bennion 2020 p 406

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An express statutory power carries implied ancillary powers where needed.<sup>15</sup>

Where powers are conferred by statute there may be implied limitation.<sup>16</sup>

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<sup>15</sup> A-G v Great Eastern Rly Co [(1880) 5 App Cas 473 cited in Bennion 2020 p 406

<sup>16</sup> Bennion 2020 p 408