Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust -

Decision impact statement

Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust

Court citation/s:	[2023] FCAFC 3
Venue:	Federal Court of Australia
Venue reference no:	QUD 36 of 2022; QUD 37 of 2022
Judge name/s:	Perry, Derrington, Hespe JJ
Judgment date:	24 January 2023
Appeals on foot:	No
Decision outcome:	Partly favourable to the Commissioner

Impacted advice

The ATO is reviewing the impact of this decision on related advice and guidance products.

- TR 2022/4
- PS LA 2005/24

Summary

This Decision impact statement outlines the ATO's response to this case, which concerns the application of the anti-avoidance provisions in section 100A and Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936).

All legislative references in this Decision impact statement are to the ITAA 1936.

Brief outline of facts

Mr Springer had conducted several business ventures in Australia through various entities, collectively known as the Springer Group. The Springer Group included the Australian Investment Trust (AIT), the trustee of which in relevant years was Guardian AIT Pty Ltd (Guardian).[1]

Mr Springer was a member of the eligible class of beneficiaries of the AIT and a non-resident for tax purposes during the 2012, 2013 and 2014 income years. In June 2012, AIT Corporate Services Pty Ltd (AITCS) was incorporated (with Guardian holding 100% of the issued shares) and became a member of the eligible class of beneficiaries of the AIT. During the relevant income years, Mr Springer exercised

[1] In this Decision impact statement, all references to Guardian will be in its capacity as trustee for the AIT.

control over the AIT, Guardian and AITCS, and received professional advice from an accounting firm.

Following the incorporation of AITCS, the following series of steps occurred, starting in the 2012 income year:

1. Guardian appointed income that was not in the form of franked dividends to AITCS. The distribution was not paid to AITCS, creating an unpaid present entitlement (2012 UPE).
2. In the 2013 income year
   (i) AITCS drew on the 2012 UPE (which represented its only retained earnings) to discharge its liability to tax for the 2012 income year
   (ii) AITCS declared a fully franked dividend to the AIT which was an amount equal to the remaining 2012 UPE. The dividend was paid by way of set-off, reducing the balance of the 2012 UPE to nil
   (iii) Guardian appointed so much of the income of the AIT in the 2013 income year as was attributable to franked dividends (including the fully franked dividend paid by AITCS) to Mr Springer. No additional Australian tax was payable on this amount.

   (Collectively the 2012 scheme).

Steps 1 and 2 were repeated in relation to the 2013 distribution from Guardian (the 2013 scheme).

A series of steps starting in the 2014 income year also had some similarities to Steps 1 to 2(ii) but instead of declaring a fully franked dividend at Step 2(ii), AITCS lent the funds representing the remaining UPE back to Guardian on loan terms complying with section 109N (a 'Division 7A loan').

Federal Court proceedings

On 21 December 2021[2], Logan J allowed the taxpayer's appeals against assessments made by the Commissioner based on section 100A and Part IVA (in the alternative) in each of the 2012 to 2014 income years.

Section 100A

His Honour concluded that based on the contemporaneous evidence, including the testimony of witnesses, section 100A did not apply, as the agreements contended for by the Commissioner did not exist (including for the reason that on that evidence, his Honour took the view that the 'requisite temporal sequence' between the steps was lacking, such that there was no 'relevant connection').[3]

Part IVA

His Honour further held that Part IVA did not apply, as neither Mr Springer nor anyone else had obtained a 'tax benefit' from the arrangements[4] and the

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[2] *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation* [2021] FCA 1619 (*Guardian FCA*).
[3] *Guardian FCA* at [132].
[4] *Guardian FCA* at [190] and [198].

arrangements were not entered into for the dominant purpose of obtaining a tax benefit.[5]

His Honour did not expressly consider whether the amendments to Part IVA (principally concerning the insertion of section 177CB), required any different application of Part IVA to the schemes argued by the Commissioner.[6]

Issues decided by the Full Federal Court

The decision of Logan J was appealed to the Full Federal Court (the Court).[7]

The case on appeal considered:

1. whether section 100A applied in the 2013 income year
2. whether Part IVA applied to enable the Commissioner to make a determination in either the 2012 income year or the 2013 income year.

Section 100A

In determining whether section 100A applied to the 2013 income year[8], the Court found, based on the factual findings by Logan J, that there was no reimbursement agreement within the meaning of section 100A at the time the present entitlement arose.[9]

The Court observed that, in order for a relevant arrangement or understanding to exist, it must be adopted in the sense that it must be assented to, whether expressly or impliedly.[10] This could not be established on the evidence (which included the testimony of witnesses), given the absence of a finding that Mr Springer's advisers had communicated a plan or recommendation to him for the payment of a dividend or that they were otherwise acting on his behalf at the relevant time.[11]

Having decided on the facts that there was no reimbursement agreement, the Court found it unnecessary to consider the issues of purpose and the scope of the phrase 'ordinary commercial or family dealing'.[12]

Part IVA

The Commissioner argued that if the 2012 and 2013 schemes had not been entered into, Mr Springer would, or might reasonably be expected to have had included in his assessable income, the amounts of AIT income appointed to AITCS in each of those years.

The Court held that Part IVA applied to Mr Springer in the 2013 income year. The Court found that a party entering into or carrying out the 2013 scheme did so for the dominant purpose of enabling Mr Springer to obtain a tax benefit in the year ended 30 June 2013.

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[5] *Guardian FCA* at [191] and [198].
[6] *Guardian FCA* at [177].
[7] *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (*Guardian FCAFC*).
[8] The 2012 and 2014 income years were not appealed for section 100A.
[9] *Guardian FCAFC* at [125].
[10] *Guardian FCAFC* at [111(3)].
[11] *Guardian FCAFC* at [124].
[12] *Guardian FCAFC* at [126].

Tax benefit

The Court found that Mr Springer received a tax benefit in each of the 2012 and 2013 income years.[13] Mr Springer had not discharged his onus on appeal of showing that, absent the scheme, the income would have been received and retained by AITCS, or alternatively loaned to Guardian on Division 7A terms.[14]

In respect of the 2013 income year, this conclusion was strengthened by the application of subsection 177CB(4), which the Court observed prevented the Court having regard to[15]:

> the higher Australian income tax cost that would have applied had the income been distributed directly to Mr Springer in determining what might reasonably be expected to have happened had the 2013 … scheme not been entered into or carried out.

Dominant purpose

The Court concluded that a party entered into or carried out the 2013 scheme for the dominant purpose of enabling Mr Springer to obtain a tax benefit.[16] In contrast to its finding that there was no such purpose in respect of the 2012 scheme, the Court considered that 'the form of the 2013 ... scheme was not the product of an evolving set of circumstances'; rather, it was a further implementation of a strategy that had already been developed.[17]

ATO view of decision

Part IVA

The Court's decision illustrates that an arrangement which does not satisfy the requirements of section 100A may nonetheless be subject to Part IVA.

The Court's observations in relation to the 2013 income year confirm that, in identifying an alternative postulate for post-15 November 2012 schemes[18]:

- particular regard must be had to the substance of the scheme and its result or consequence, and
- the income tax result of the alternative postulate must be disregarded.

Section 100A

The Commissioner considers that a number of observations of the Court confirm the views in Taxation Ruling TR 2022/4 *Income tax: section 100A reimbursement agreements* (TR 2022/4), including that:

- Section 100A requires a reimbursement agreement to exist at, or prior to, the time by which a beneficiary is made presently entitled to income of the trust.[19]
- An arrangement that constitutes an agreement may be both informal and unenforceable, and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it.[20]

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[13] *Guardian FCAFC* at [171].
[14] *Guardian FCAFC* at [160–164] and [170].
[15] *Guardian FCAFC* at [174].
[16] *Guardian FCAFC* at [223].
[17] *Guardian FCA* at [222–223].
[18] Section 177CB.
[19] *Guardian FCAFC* at [108]; paragraph 16 of TR 2022/4.
[20] *Guardian FCAFC* at [110] citing *Re Day* [2017] HCA 2; paragraph 69 (second dot point) of TR 2022/4.

- There needs to be a common intention, or consensus existing between at least two parties.[21]

Beyond this, the Court's decision on section 100A largely turned on the particular facts of this case (including no finding of a relevant 'agreement' at the time the present entitlement arose).

Existence of the reimbursement agreement at the relevant time

As illustrated by the decision at first instance and on appeal, the concept of 'agreement' is broadly defined in section 100A; and the question of whether an agreement exists at a particular time entails a fact-finding exercise which may require the examination of evidence from a range of sources.

In administering the law, the Commissioner will evaluate the reliability of particular assertions regarding the existence or otherwise of an agreement in light of all of the surrounding circumstances. This approach recognises that an agreement may comprise or include understandings which are informal or unwritten. In some cases, it will be necessary to interview participants in the transactions under consideration, or those with knowledge of those transactions.

Requirement of consensus or adoption where advisers involved

The Commissioner notes the Court's conclusion that, in circumstances where the advisers were not parties to the agreement, the advisers' plan or recommendation could not form part of a reimbursement agreement without a finding that they had communicated it to the participants or were otherwise authorised to act on their behalf.[22]

The Court did not elaborate on the nature of the authorisation required in this context. The Commissioner accepts that a mere 'general practice' of following advice will be insufficient. However, the Commissioner considers that the requisite authorisation may exist in other cases where the evidence establishes that the relevant parties have agreed in advance to follow an adviser's plans or recommendations.[23]

We will update TR 2022/4 to take into account the Court's observations on the adoption of plans or recommendations from advisers.

Necessary parties to the agreement

The Commissioner notes the Court's observation that, ordinarily, a beneficiary will need to be a party to the reimbursement agreement where the payment of moneys is proposed to be made to the trustee by a beneficiary.[24]

This is consistent with our understanding of the law[25]; though we will make a minor update to TR 2022/4 to make this clear.

Implications for impacted advice or guidance

We will make minor updates to TR 2022/4 to reflect aspects of the Court's decision in accordance with the comments made in this Decision impact statement.

We will also update Law Administration Practice Statement PS LA 2005/24 *Application of General Anti-Avoidance Rules* to reflect the views expressed by the

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[21] *Guardian FCAFC* at [111(1)], paragraphs 68 and 69 (second dot point) of TR 2022/4.
[22] *Guardian FCAFC* at [124].
[23] *Guardian FCAFC* at [111(4)].
[24] *Guardian FCAFC* at [111(2)].
[25] Paragraph 16 of TR 2022/4.

Court with respect to the application of the Part IVA provisions post-amendments in 2013.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Forward your comments to the contact officer.

Date issued: 24 April 2023

Due date: 19 May 2023

Contact officer details have been removed as the comments period has expired.

Legislative references

Income Tax Assessment Act 1936

Div 7A

99A

100A

109N

177CB

Part IVA

Case references

Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation [2021] FCA 1619; 2021 ATC 20-813

Re Day [2017] HCA 2; 340 ALR 368; 91 ALJR 262

Other References

PS LA 2005/24

TR 2022/4

ATO references

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