PS LA 2005/24 - Application of General Anti-Avoidance Rules

This cover sheet is provided for information only. It does not form part of *PS LA 2005/24 - Application of General Anti-Avoidance Rules*

Note: The escalation aspects of this practice statement are being amended as a result of the publication of PS LA 2012/1 and the withdrawal of PS LA 2004/4. Until this is finalised, guidance on this can be obtained from the contact officer.

This document has changed over time. This version was published on *13 December 2005*

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2005/24

Note: This practice statement is being amended to reflect recent case law decisions. In addition, references within this practice statement to escalation of issues should be read in light of the publication of PS LA 2012/1.

FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by Tax office staff unless doing so creates unintended consequences. Where this occurs Tax office staff must follow their Business Line's escalation process.

SUBJECT: **Application of General Anti-Avoidance Rules**

PURPOSE: **This practice statement provides instruction and practical guidance to Tax officers on the application of Part IVA and other General Anti-Avoidance Rules (GAARs). Officers proposing to make a determination under section 177F (including for deemed tax benefits under section 177E), 177EA(5) or 177EB(5) of the *Income Tax Assessment Act 1936*, to make a determination under subsection 67(1) of the *Fringe Benefits Assessment Act 1986*, to make a declaration under section 165-40 of the *A New Tax System (Goods and Services Tax) Act 1999*, or to rule on the application of Part IVA or other GAARs in a private ruling, Class Ruling or Product Ruling should follow this practice statement.**

This practice statement also outlines the role and operation of the GAAR Panel of the Tax Office.

This practice statement will be subject to review from time to time in light of judicial or other consideration of the GAARs.

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HOW TO USE THIS LAW ADMINISTRATION PRACTICE STATEMENT

1. This practice statement is designed to assist Tax officers who are contemplating the application of Part IVA or other GAARs to an arrangement, including in a private ruling, Public Ruling (including a Product Ruling or a Class Ruling) or other document setting out the ATO view.

2. All references to legislation within this practice statement and attachments are to the *Income Tax Assessment Act 1936* (ITAA 1936) unless otherwise specified.

3. The first part of this practice statement discusses private ruling applications and Part IVA and also contains the rules about referring GAAR matters to the Tax Counsel Network (TCN) and the GAAR Panel. The role and procedures of the Panel are contained in paragraphs 17 to 40.

4. The second part of this practice statement on the GAAR provisions (commencing at paragraph 44) discusses the operation of key aspects of Part IVA and other GAARs, covering scheme, tax benefit or GST benefit, purpose, determinations or declarations, assessments, compensating adjustments, time limits and penalties.

5. The guidance on the operation of

   - Part IVA is contained in paragraphs 44 to 144.
   - section 67 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) is contained in paragraphs 145 to 152.
   - Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) is contained in paragraphs 153 to 202.
   - the general anti-avoidance rule for the Luxury Car Tax is contained in paragraph 203.
   - the general anti-avoidance rule for the Wine Equalisation Tax is contained in paragraph 204.

6. The practice statement has nine attachments:

   - Attachment 1 provides guidance on the proper execution of Part IVA determinations.
   - Attachment 2 contains a ‘Framework for decision-making’. This table provides essential and structured guidance on the steps involved in applying a GAAR.
   - Attachment 3 helps Tax officers who prepare papers for consideration by the GAAR Panel.
   - Attachment 4 is a Tax Office paper released by the Commissioner of Taxation on 17 March 2005 titled ‘Tax Office Comments on Part IVA’.

- Attachment 5 is a flowchart for the decision making process outlined in paragraphs 9 to 12 for private ruling applications and Part IVA.

- Attachment 6 is a list of taxation rulings and taxation determinations which deal with the application of the GAARs to particular arrangements.

- Attachment 7 contains the relevant provisions of Part IVA.

- Attachment 8 contains the relevant provisions of section 67 of the FBTAA.

- Attachment 9 contains the relevant provisions of Division 165 of the GST Act.

7. This practice statement replaces PS LA 2000/10 which is withdrawn.

Proper application of GAARs

8. The application of a GAAR is a serious matter. Its potential application should not be raised lightly. It should be made clear to a taxpayer or advisor that a careful analysis of the facts will be undertaken before a decision is taken to apply a GAAR. The process leading to a decision, including consideration by the GAAR Panel, should also be explained. As explained in this practice statement, the application of a GAAR is based on an objective analysis of an arrangement against a set of factors specified in the relevant provisions of the law. It is not a test of a taxpayer's motives and care should be taken to avoid any implication that a decision to apply a GAAR is a judgment on a taxpayer's ethics.

Private ruling applications and Part IVA

Private ruling requested on Part IVA

9. If a taxpayer requests a private ruling on whether Part IVA applies to an arrangement, Tax officers must follow the practice for dealing with ruling requests on Part IVA contained in the Online Resource Centre for Law Administration (ORCLA) (internal link only) on the intranet.

Private ruling not requested on Part IVA

10. If a taxpayer applies for a private ruling in respect of an arrangement but has not requested a ruling on whether Part IVA applies to the arrangement, Tax officers must consider if Part IVA may apply to the arrangement based on the information provided in connection with the ruling application. In responding to the taxpayer the instructions in either paragraph 11 or paragraph 12 must be followed, whichever is applicable.[1] These instructions apply whether or not the taxpayer has advised in their ruling application that Part IVA need not be considered by the Commissioner.

[1] This gives effect to Recommendation 2.12 of the *Report on Aspects of Income Tax Self Assessment* which was adopted by the Government on 16 December 2004: refer to Treasurer's Press Release No. 106 of 2004.

11. If the Tax officer considers that on the basis of the information provided in connection with the ruling application it is either not clear whether Part IVA applies, or it seems that Part IVA may apply to:

- the particular arrangement for which the private ruling is requested; or
- an associated arrangement(s) or a wider arrangement of which the particular arrangement for which the ruling is requested is part,

then the following words must be included in the private ruling:

> Part IVA is a general anti-avoidance rule that can apply in certain circumstances if you or another taxpayer obtains a tax benefit in connection with an arrangement and it can be concluded that the arrangement, or any part of it, was entered into or carried out by any person for the dominant purpose of enabling a tax benefit to be obtained. If Part IVA applies the tax benefit can be cancelled, for example, by disallowing a deduction that was otherwise allowable.
>
> We have not fully considered the application of Part IVA to the arrangement you asked us to rule on, or to an associated or wider arrangement of which that arrangement is part.
>
> If you want us to rule on whether Part IVA applies we will first need to obtain and consider all the facts about the arrangement which are relevant to determining whether Part IVA may apply.

12. If there is no reason to suggest on the basis of the information provided in connection with the ruling application that Part IVA may apply to:

- the particular arrangement for which the private ruling is requested; and
- any associated arrangement(s) or a wider arrangement of which the particular arrangement for which the ruling is requested is part,

then any ruling that is given does not need to refer to Part IVA. However, in applying this instruction, the guidance provided by senior Tax officers in ORCLA (internal link only) must be followed.

Summary of decision making process

13. Attachment 5 is a flowchart illustrating the decision making process involved in following the directions in paragraphs 9 to 12.

Referral to the Tax Counsel Network

14. Where officers seek to apply a GAAR, including sections 177CA, 177E, 177EA and 177EB, they must, before making a determination or declaration cancelling a tax benefit or a GST benefit, refer the matter to the TCN using the relevant business line or Centre of Expertise escalation processes. In the usual case, the matter will be referred to the TCN prior to the issue of a Tax Office position paper indicating that Part IVA may apply. Also, where officers propose to give a private ruling, Product Ruling or Class Ruling that a GAAR applies to an arrangement, they must, before giving the private ruling, Product Ruling or Class Ruling, refer the matter to the TCN using the same escalation processes.

15. Where a request for a Class Ruling includes the application of a GAAR the matter must be referred to the TCN including where it is proposed that the GAAR would not apply. However, a decision that a GAAR would not apply in response to an application for a private ruling or a Product Ruling does not always require referral to the TCN. Similarly, a decision not to apply a GAAR in the context of an audit does not always require referral to the TCN. The business line will make a judgment about whether such matters need to be referred to the TCN depending on whether the application of the GAAR could be seriously contemplated. The above referral rules are summarised in Section 1 of Attachment 2 to this practice statement which provides a framework for decision making by Tax officers in relation to applying a GAAR.

16. When a matter is referred to the TCN before a decision not to apply a GAAR is made and a member of the TCN confirms the Commissioner should not seek to apply the GAAR, the matter is returned to the decision-maker in the business line as a preliminary step to the making of the decision. If, however, the TCN officer is of the view that the GAAR may apply to the matter, the TCN officer will provide interim advice to the decision-maker and arrange for that advice and relevant papers to be provided to a Deputy Chief Tax Counsel (DCTC) for further consideration before the decision is made.

THE GENERAL ANTI-AVOIDANCE RULES PANEL

17. The application of a GAAR is a serious matter and the Commissioner is conscious of the need to ensure that a GAAR is applied only after a careful and full consideration of the facts. The Commissioner has therefore established the GAAR Panel (the Panel) to advise on the application of GAARs to particular arrangements.

18. Unless indicated otherwise below, matters for which a decision-maker is proposing to apply a GAAR must be referred to the Panel before a final decision is made. In the usual case a matter will be referred to the Panel after the TCN officer to whom it has been referred under the rules in paragraphs 14 to 16 above has fully considered the matter.

19. Applications for private rulings, Class Rulings and Product Rulings in respect of the application of a GAAR are not generally referred to the Panel for advice. Referral to the Panel would delay the issue of a ruling. However, a private ruling or Class Ruling application must be referred to the Panel for advice where the applicant requests the referral and by doing so agrees to a delay in the issue of the ruling. Any ruling that a GAAR applies to a particular transaction must be approved by a TCN officer.

20. A taxpayer who receives a private ruling that a GAAR applies may request that the matter be referred to the Panel for advice as part of seeking a review of the ruling. This may be done before the lodgment of an objection against the private ruling or at the same time as, or after, the lodgment of the objection.

21. Matters considered to raise substantially identical issues on facts essentially comparable with a matter previously referred to the Panel are not referred to the Panel again. However any decision to apply a GAAR without referring the matter to the Panel must receive clearance from the Chair of the Panel or a DCTC. It is not expected that there will be many matters in this category and, where there is any doubt, the matter will be referred to the Panel.

22. Upon a matter being referred to the Panel, the Chair of the Panel has a discretion whether or not to put that matter to the Panel for its consideration. The Commissioner or the Chief Tax Counsel (CTC) may also direct that a matter shall be decided without reference to the Panel. However, a decision to apply a GAAR will not generally be made without first obtaining advice from the Panel.

Role of the Panel

23. The primary purpose of the Panel is to assist the Tax Office in its administration of the GAARs in the sense that decisions made on the application of GAARs are objectively based and there is a consistency in approach to various issues that arise from time to time in the application of the GAARs. The Panel does this by providing independent advice to a GAAR decision-maker in those matters which are referred to it. This includes advice regarding the appropriate imposition of penalties. The Panel is made up of business and professional people chosen for their ability to provide expert and informed advice, with the other members of the Panel being senior Tax officers. The Chair of the Panel is a senior Tax officer.

24. The Panel has no statutory basis; its role is purely consultative. The relevant decision under a GAAR is that of the decision-maker; the Panel does not make a decision but its advice is taken into account by the Tax Office decision maker. The Panel does not investigate or find facts, or arbitrate disputed contentions. Rather, the Panel provides its advice on the basis of the contentions of fact which have been put forward by the officers of the Tax Office and by the taxpayer. In providing advice the Panel is able to advise on any differences between the Tax Office and taxpayer on conclusions or inferences to be drawn from the facts. If there is a dispute as to the facts, the Panel may suggest that the Tax officers make additional enquiries or may indicate whether the difference would, in its opinion, change its advice. Where a matter referred to the Panel arises from an application for a private ruling, the Panel has regard to the arrangement in relation to which the Commissioner is asked to rule.

25. Upon a matter being referred to the Panel, a decision-maker will not (other than in exceptional circumstances) make a decision before receiving advice from the Panel. Where exceptional circumstances are considered to exist, any decision is not to be made without first discussing the matter with the Chair of the Panel. A decision-maker is not obliged to follow the advice of the Panel one way or the other; the decision to apply or not to apply the GAAR is that of the decision-maker. However, a decision to apply a GAAR contrary to the advice of the Panel is not to be made without first escalating the matter to the Chair of the Panel or the CTC.

26. A member of the TCN must provide interim advice in respect of a matter that is to be referred to the Panel. A TCN member will be present at the Panel meeting when the case is discussed.

27. Attachment 3 to this practice statement contains guidelines on making submissions to the Panel.

When matters are referred to the Panel

28. A matter is generally referred to the Panel following the issue of the Tax Office's position paper and a consideration by the decision-maker of all available information, including any responses by the taxpayer to the position paper. However, important, sensitive, novel or complex cases may be referred to the Panel at an earlier time for preliminary advice. While there is no requirement to do so, a Tax officer may inform a taxpayer that he or she is seeking preliminary advice from the Panel in relation to a matter. It is important for officers to ensure that sufficient time is allowed in the conduct of an audit for referral to, and consideration of advice from, the Panel before the date allowed for amendment of an assessment to give effect to a decision to apply a GAAR.

29. Apart from private rulings and Class Rulings and cases where preliminary advice is sought, a case will not generally be referred to the Panel until after the issue of a Tax Office position paper and the receipt of the taxpayer's response (if any) to the paper. The position paper represents the Tax Office's preliminary view of the facts and the law applying to those facts.

30. Matters initially referred to the Panel for preliminary advice should be referred again to the Panel following the consideration of a taxpayer's response to the Tax Office's position paper and any other information before a decision is made to apply a GAAR.

Attendance by taxpayers at Panel meetings

31. To assist the deliberative process of the Panel in providing advice to the decision-maker, a taxpayer (and/or a representative of the taxpayer at the taxpayer's election) will usually be invited to attend a Panel meeting and address the Panel. (No such invitation will be extended to a taxpayer in relation to matters which are referred to the Panel at an early stage for preliminary advice.)

32. The Panel generally meets on a monthly basis. The dates for Panel meetings are decided in advance in order to facilitate the orderly working of the Panel. Panel meetings are not rescheduled other than in exceptional circumstances. The unavailability of a taxpayer's preferred representative on a particular date will not usually constitute exceptional circumstances that would justify the rescheduling of a Panel meeting.

33. An invitation given to a taxpayer to attend a Panel meeting and address the Panel is not extended on the basis that it will provide a platform for a hearing as part of a quasi-judicial process of review. This is not the function of the Panel, nor in any event does it have power to undertake a review process; it is there

merely to provide advice to decision-makers so as to assist in the making of objective decisions by decision-makers and to ensure consistency in the approach to various issues that arise in the application of the GAARs. Of course, the decision-maker is always available to receive and address any submissions that a taxpayer may wish to put to the decision-maker at any time.

34. Where an arrangement involves numerous taxpayers in essentially similar circumstances only one representative taxpayer will ordinarily be invited to address the Panel. On occasions, promoters or facilitators of the arrangement may also be invited in such cases to address the Panel.

35. Generally, the decision-maker will (if possible) attend the Panel meeting to which the taxpayer is invited to attend. A taxpayer may accept or decline the invitation as the taxpayer sees fit. No adverse inference will be drawn against the taxpayer should the taxpayer decline to attend the Panel meeting. A taxpayer who accepts an invitation to attend must do so on the basis that the Chair has the control of the Panel meeting. If a taxpayer who has been invited to attend the Panel meeting fails to provide a written submission (referred to in paragraph 37), the invitation may be withdrawn.

36. A taxpayer invited to attend the Panel meeting will, by a reasonable time prior to the meeting, be informed of the contentions of fact giving rise to the issue referred to the Panel, and of the substance of the Tax Office's proposed approach to the application of the GAAR. Generally, this advice will be by way of reference to a position paper already provided to the taxpayer or by an updated paper prepared following consideration of a response by the taxpayer to the position paper.

Written submission by taxpayer to Panel

37. In extending an invitation to a taxpayer, the Chair will request the taxpayer to provide a written submission (unless the taxpayer chooses to rely upon a written submission already made to the Tax Office). If in relying upon an earlier submission the taxpayer wishes to add to or correct some part of an earlier submission, the taxpayer may do so. Written submissions should be concise. The appropriate timeframe for a written submission to the Panel will depend on the circumstances of each case. As a general guide, a taxpayer can expect to be given around 28 days notice of a Panel meeting and will be asked to make any written submission no later than 7 days before that meeting.

Oral submissions by a taxpayer to Panel

38. Ordinarily, the Panel will have had an opportunity to review the papers before the meeting and may wish to question or hear an oral submission by Tax officers, or discuss the matter, before hearing from the taxpayer. This will occur in the absence of the taxpayer. The taxpayer will then be given an opportunity to address the Panel. The Chair will set the time for this address as appropriate in each case, but it is expected that in most cases it would be no more than one hour. This oral submission should seek to emphasise or elaborate upon the key points of the taxpayer's written submission. While the Panel is not open for questioning or debate about the application of the

GAAR, Panel members may ask questions and discuss issues with the taxpayer to ensure the Panel has a clear understanding of the taxpayer's submission. Other Tax officers (i.e., in addition to Panel members and the decision-maker) will usually be present during the meeting but they will not (nor will the decision-maker) be available for questioning.

39. Taxpayers attending a Panel meeting should address or be prepared to respond to questions relating particularly to the tax benefit and the objective factors in paragraph 177D(b) of Part IVA or equivalent provisions in other GAARs.

40. Written and oral submissions to the Panel will not be on a without prejudice basis. However, a person appearing before the Panel who is asked a question may request the Chair to allow a particular response to be made on a without prejudice basis. The Chair has a discretion whether or not to accede to any such request.

Recording GAAR decisions

41. Tax officers should refer to PS LA 2002/16 in relation to the obligation of officers involved in interpretative work to use mandatory reporting systems.

42. If a determination cancelling a tax benefit or declaration negating a GST benefit is made, the reasons for making the determination or declaration should be documented separately. The reasons should state as succinctly as possible how the tax benefit or GST benefit was determined by reference to the counterfactual or counterfactuals: refer to paragraphs 61 to 78, 148 and 151, and 162 to 171 (as applicable).

43. A taxation ruling or determination or an ATO Interpretative Decision (ATOID) could be prepared after a decision is made about the application of a GAAR in a matter. In accordance with PS LA 2001/8, the decision whether an ATOID should be prepared for an interpretative decision involving Part IVA must be made by a TCN officer. The decision whether an ATOID should be prepared for an interpretative decision involving a GAAR other than Part IVA must also be made by a TCN officer.

THE GAAR PROVISIONS

PART IVA – INCOME TAX

44. Part IVA contains a number of anti-avoidance provisions. The discussion in relation to Part IVA below focuses on the application of sections 177A, 177C, 177D and 177G. A reference to Part IVA in the following paragraphs should therefore be read as a reference to these sections. However, while this practice statement does not contain specific guidance on the operation of 177CA (withholding tax avoidance), section 177E (stripping of company profits), 177EA (creation of franking debit or cancellation of franking credits), 177EB (cancellation of franking credits for head company of consolidated group) or 177H, the following guidance is useful as a background reference for officers exercising powers in respect of those provisions.

Background to Part IVA

45. Part IVA of the ITAA 1936 is a general anti-avoidance provision. It replaced former section 260 of the ITAA 1936 and should be construed and applied according to its terms, not under the influence of 'muffled echoes of old arguments' concerning other legislation, such as section 260: *Federal Commissioner of Taxation v. Spotless Services Ltd* (1996) 186 CLR 404 at 414; 141 ALR 92 at 96; 96 ATC 5201 at 5205; 34 ATR 183 at 186; *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [51].

46. Part IVA gives the Commissioner the discretion to cancel a 'tax benefit' that has been obtained, or would, but for section 177F, be obtained, by a taxpayer in connection with a scheme to which Part IVA applies. This discretion is found in subsection 177F(1).

47. Before the Commissioner can exercise the discretion in subsection 177F(1), the requirements of Part IVA must be satisfied. These requirements are that:

    (i) a 'tax benefit', as identified in section 177C, was or would, but for subsection 177F(1), have been obtained;

    (ii) the tax benefit was or would have been obtained in connection with a 'scheme' as defined in section 177A; and

    (iii) having regard to section 177D, the scheme is one to which Part IVA applies.

48. Regard must be had to the individual circumstances of each case in making a determination under section 177F to cancel a tax benefit.

49. Where the Commissioner exercises the discretion in subsection 177F(1) to make a determination, 'he shall take such action as he considers necessary to give effect to that determination: subsection 177F(1).

50. Officers should be aware that Part IVA is a general anti-avoidance provision and that there are specific provisions which may or may not apply in a particular case. Officers should be aware of subsections 177B(3) and (4) which reflect the last resort character of Part IVA.

51. Part IVA is not limited by provisions in the ITAA 1936 or by the *International Tax Agreements Act 1953* or the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990*: subsection 177B(1).

52. Part IVA was inserted into the ITAA 1936 in 1981 and it applies to schemes entered into after 27 May 1981. It applies whether a scheme is carried out in Australia or abroad: section 177D.

Part IVA must be construed as a whole

53. Focussing on the various elements of Part IVA should not obscure the way in which the Part as a whole is intended to operate. What constitutes a scheme is ultimately meaningful only in relation to the tax benefit that has been obtained since the tax benefit must be obtained in connection with the scheme. Likewise, the dominant purpose of a person in entering into or carrying out the scheme, and the existence of the tax benefit, must both be considered against a comparison with an alternative.

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [6] per Gleeson CJ and McHugh J, at [36], [37] and [54] per Gummow and Hayne JJ, and at [89] per Callinan J.

Scheme – section 177A

54. For Part IVA to apply, the identified scheme must fall within the wide definition of 'scheme' in subsection 177A(1).

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [43] per Gummow and Hayne JJ:

> Th[e] definition is very broad. It encompasses not only a series of steps which together can be said to constitute a "scheme" or a "plan" but also (by its reference to "action" in the singular) the taking of but one step.

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [89] per Callinan J:

> The use of the singular, narrow words, proposal, action or course of action in s177A(1)(b) in juxtaposition with, for example, agreement or arrangement in s177A(1)(a) indicates that something done which is less than the whole of an arrangement or agreement may be capable of itself being a scheme. This view is I think not only consistent with, and a true reflection of the statutory language, but also with the legislative intention discernible from the Explanatory Memorandum.

55. The definition of scheme includes a unilateral scheme, plan etc: subsection 177A(3).

Example

An example of a unilateral action constituting a scheme could be an action taken solely by a trustee of a discretionary trust.

56. The definition of scheme can include the failure to do something.

Relevant case law

Corporate Initiatives Pty Ltd v. Commissioner of Taxation [2005] FCAFC 62; 142 FCR 279; 219 ALR 339; 2005 ATC 4392; 59 ATR 351 at [26]:

> Part of the statutory definition of "scheme" is "any … course of action or course of conduct". This conveys the notion of a series of interrelated acts by a person or persons over a period of time. The non-doing of an act can form part of such a course, as for example where it is said that a student regularly fails to hand in essays.

57. The Commissioner may advance alternative schemes including a narrower scheme within a wider scheme in support of a Part IVA determination.

Relevant case law

Federal Commissioner of Taxation v. Peabody (1994) 181 CLR 359 at 382; 123 ALR 451 at 459; 94 ATC 4663 at 4670; 28 ATR 344 at 351:

> But the Commissioner is entitled to put his case in alternative ways. If, within a wider scheme which has been identified, the Commissioner seeks also to rely upon a narrower scheme as meeting the requirement of Pt IVA, then in our view there is no reason why the Commissioner should not be permitted to do so, provided it causes no undue embarrassment or surprise to the other side. If it does, the situation may be cured by amendment, provided the interests of justice allow such a course.

58. The need for the Commissioner to identify the scheme is simply an aspect of the requirement for a party to legal proceedings to particularise the case the other party or parties will have to meet. A reformulation of the scheme in connection with which the tax benefit is obtained after the close of evidence will be impermissible only if it affects the evidence that the other party might have led.

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [44] per Gummow and Hayne JJ.

59. Officers should be aware that section 177D, which identifies schemes to which Part IVA applies, allows the objectively determined purpose or dominant purpose to be tested against a person who entered into or carried out the scheme or any part of the scheme. Hence, Part IVA will apply to a scheme if a person enters into or carries out only a part of the scheme for the dominant purpose of enabling the taxpayer to obtain a tax benefit in connection with the scheme. This is important where the scheme is complex and involves a number of parties and connected transactions. This does not, however, affect the identification of a 'scheme' under subsection 177A(1). Whether a scheme is wider or narrower should not be relevant in determining if the test in section 177D is met with respect to the scheme, as long as the tax benefit in question is sufficiently connected with the scheme.

Relevant case law

Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 at [96]:

> Objection was also taken to what was said to be the artificiality of the selection of part of the overall transaction as the scheme. This, it was said, was not warranted by Peabody or Spotless. The artificiality was said to result from the fact that the overall transaction was for the clearly commercial purpose of financing the Group's participation in the takeover bid for BAT. However, as was held in Spotless, a person may enter into or carry out a scheme, within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business. The fact that the overall transaction was aimed at a profit making does not make it artificial and inappropriate to observe that part of the structure of the transaction is to be explained by reference to a s 177D purpose.

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [47] per Gummow and Hayne JJ:

> There is no reference to a scheme having some commercial or other coherence. Far from the Part requiring reference only to the purpose of those who carry out *all* of what is identified as the scheme, s 177D specifically refers to it being concluded "that the person, or one of the persons, who entered into or carried out … *any part of the scheme*" did so for the purpose of enabling the relevant taxpayer (alone or with others) to obtain a tax benefit in connection with the scheme (emphasis added).

See also *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [55], [68] and [69] per Gummow and Hayne JJ, and at [89] per Callinan J.

60. If the Commissioner erroneously identifies a scheme, this will not usually result in the wrongful exercise of the discretion conferred by subsection 177F(1). The discretion will only be wrongfully exercised if the identified tax benefit is not in fact a tax benefit within the meaning of Part IVA.

Relevant case law

Federal Commissioner of Taxation v. Peabody (1994) 181 CLR 359 at 382; 123 ALR 451 at 458-459; 94 ATC 4663 at 4669; 28 ATR 344 at 351:

> The erroneous identification by the Commissioner of a scheme as being one to which Pt IVA applies or a misconception on his part as to the connexion of a tax benefit with such a scheme will result in the wrongful exercise of the discretion conferred by s. 177F(1) only if in the event the tax benefit which the Commissioner purports to cancel is not a tax benefit within the meaning of Pt IVA. That is unlikely to be the case if the error goes to the mere detail of a scheme relied upon by the Commissioner.

Tax benefit – section 177C

61. The breadth of what may constitute a scheme reflects the objective nature of the inquiry to be made under Part IVA. The scheme ultimately matters only in the

context of whether there is a tax benefit obtained by the taxpayer in connection with the scheme for which the conclusion in paragraph 177D(b) can be reached.

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [43] and [44] per Gummow and Hayne JJ, and at [87] and [88] per Callinan J.

62. Part IVA cannot apply unless a taxpayer has obtained, or would, but for section 177F obtain, a tax benefit in connection with a scheme. Subsection 177C(1) defines four kinds of tax benefit, relating broadly to:

    (i) an amount not being included in the assessable income of the taxpayer of a year of income;

    (ii) a deduction being allowable to the taxpayer in relation to a year of income;

    (iii) a capital loss being incurred by the taxpayer during a year of income;

    (iv) a foreign tax credit being allowable to the taxpayer.

63. The reference in paragraph 177C(1)(a) to 'an amount not being included in the assessable income of the taxpayer' is a reference to an amount not being included that would be or might reasonably be expected to be included in the taxpayer's assessable income under the counterfactual scenario(s): refer to paragraphs 64, 69, 71 to 78, and 118. The fact that an amount was included in the assessable income of the taxpayer under the scheme by virtue of a different provision or circumstance does not affect the amount of a tax benefit, nor the provision by virtue of which it is to be included. Paragraph 177C(1)(a) focuses on what has been left out of assessable income by the scheme – not on what has been included: refer to Taxation Ruling IT 2456.

Relevant case law

Australia & New Zealand Banking Group Ltd v. Federal Commissioner of Taxation [2003] FCA 1410; 137 FCR 1; 203 ALR 644; 2003 ATC 5041; 54 ATR 449 at [54].

Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404 at 423 to 424; 141 ALR 92 at 103 to 104; 96 ATC 5201 at 5211; 34 ATR 183 at 193.

64. Subsection 177C(1) allows two ways of determining whether a tax benefit has been obtained in connection with a scheme. The first is that the relevant tax benefit would not have been obtained if the scheme had not been entered into or carried out. The second is that the relevant tax benefit might reasonably be expected not to have been obtained if the scheme had not been entered into or carried out. If it is possible to say that a tax benefit would not have been obtained but for the scheme, it is not necessary to refer to the reasonable expectation test. In relation to determining what 'might reasonably be expected' to have happened, see the discussion commencing at paragraph 69.

Exclusions from tax benefit – subsections 177C(2) and 177C(2A)

65. Subsection 177C(2) excludes a tax benefit from Part IVA where:

    (i) the tax benefit is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person expressly provided for under the ITAA 1936 or the *Income Tax Assessment Act 1997* (ITAA 1997) (other than an agreement or election specifically dealt with by subsection 177C(2A): refer to paragraph 67); and

    (ii) the relevant scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the election or choice etc. to be made.

66. It follows that the relevant tax benefit will not be excluded under subsection 177C(2) if it was obtained in connection with a scheme that was entered into or carried out by any person for the sole or dominant purpose of enabling that person or any other person to make the election or choice etc.

67. Subsection 177C(2A) excludes from Part IVA a tax benefit that is the non-inclusion of assessable income or is the incurring of a capital loss where:

    (i) these tax benefits are attributable to making a CGT rollover election or agreement under Subdivision 126-B of the ITAA 1997 or making a net capital loss transfer agreement under Subdivision 170-B of the ITAA 1997; and

    (ii) the relevant scheme consisted solely of the making of the agreement or election.

68. Subsection 177C(3) provides that a particular tax benefit will be 'attributable' to an election or choice etc. for the purpose of subparagraph (i) of paragraphs 177C(2)(a), (b), (c) and (d) and subparagraph (i) of paragraphs 177C(2A)(a) and (b) if, but for the election or choice etc., the tax benefit would not have been obtained. This will be the case if, for example, the non-inclusion of assessable income for a tax benefit under paragraph 177C(1)(a) necessarily results from the making of the election or choice etc.

Counterfactual

69. The identification of a tax benefit necessarily requires consideration of the income tax consequences, but for the operation of Part IVA, of an 'alternative hypothesis' or an 'alternative postulate'. This is what would have happened or might reasonably be expected to have happened if the particular scheme had not been entered into or carried out. This alternative hypothesis or postulate also forms the background against which the objective ascertainment of the dominant purpose of a person occurs in accordance with section 177D. The alternative hypothesis(es) or postulate(s) is referred to in this practice statement as the 'counterfactual(s)'.

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [6] per Gleeson CJ and McHugh, and at [66] per Gummow and Hayne JJ.

70. The eight factors that must be considered in applying the purpose test in paragraph 177D(b) are considered against the background of the counterfactual(s): refer to paragraph 92.

What might reasonably be expected

71. A reasonable expectation requires more than a possibility.

Relevant case law

Federal Commissioner of Taxation v. Peabody (1994) 181 CLR 359 at 385; 123 ALR 451 at 461; 94 ATC 4663 at 4671; 28 ATR 344 at 353:

> A reasonable expectation requires more than a possibility. It involves a prediction as to events which would have taken place if the relevant scheme had not been entered into or carried out and the prediction must be sufficiently reliable for it to be regarded as reasonable.

72. The full Federal Court in *Federal Commissioner of Taxation v. Consolidated Press Holdings (No. 1)* (1999) 91 FCR 524 at 549; 99 ATC 4945 at 4964; 42 ATR 575 at 599, referring to *Federal Commissioner of Taxation v. Spotless Services Ltd* (1996) 186 CLR 404; 141 ALR 92; 96 ATC 5201 at 5211; 34 ATR 183 stated:

> The language [in *Spotless*] suggests less of a predictive and more of a reasonable hypothesis approach than the passage earlier quoted from *Peabody*.

73. It is possible for different conclusions to be reached as to what might reasonably be expected to have happened if the particular scheme had not been entered into or carried out. In that event, the Commissioner may rely on both or all the reasonable expectations, and therefore on more than one counterfactual, to support a determination made under subsection 177F(1). See paragraph 122 in relation to making determinations where there are alternative counterfactuals.

74. In applying the reasonable expectation test to identify the counterfactual(s), it may be useful to consider the following[2]:

- the most straightforward and usual way of achieving the commercial and practical outcome of the scheme (disregarding the tax benefit);
- commercial norms, for example, standard industry behaviour;
- social norms, for example, family obligations;
- behaviour of relevant parties before/after the scheme compared with the period of operation of the scheme; and
- the actual cash flow.

[2] This list includes examples only and is not intended to be exhaustive.

75. If the scheme had no effect or outcome other than the obtaining of the relevant tax benefit(s), it will be reasonable to assume that nothing would have happened if the scheme had not been entered into or carried out.

76. Conversely, if a tax benefit is obtained in connection with a scheme that also achieves a wider commercial objective (disregarding the tax benefit), then it is reasonable to expect that in the absence of the scheme the wider commercial objective would still have been pursued by the means of a transaction or dealing with a different form or shape.

Relevant case law

Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404 at 424; 141 ALR 92 at 103-104; 96 ATC 5201 at 5211; 34 ATR 183 at 193:

> The [taxpayer's] submission is that the reference in this case is to the amount of interest actually received from EPBCL after the imposition of withholding tax. It is said that without the scheme there would have been no investment in EPBCL, that amount would not have existed, and par (a) of s 177C(1) would have had no subject-matter upon which to operate.
>
> In our view, the amount to which [paragraph 177C(1)(a)] refers as not being included in the assessable income of the taxpayer is identified more generally than the taxpayers would have it. The paragraph speaks of the amount produced from a particular source or activity. In the present case, this is the investment of $40 million and its employment to generate a return to the taxpayers. It is sufficient that at least the amount in question might reasonably have been included in the assessable income had the scheme not been entered into or carried out.

77. It may be difficult for a Tax officer to obtain evidence to support the counterfactual, i.e., the reconstructed version of events. In applying the reasonable expectation test in situations where there is a lack of information, reasonable inferences may be drawn, and reasonable assumptions may be made. For example, care needs to be taken in applying the reasonable expectation test to a scheme involving a trust. Officers may need to consider whether it was reasonable to expect that a particular beneficiary of a trust would, but for the scheme, have received a trust distribution (see paragraphs 124 and 125 and also *Federal Commissioner of Taxation v. Peabody* (1994) 181 CLR 359; 123 ALR 451; 94 ATC 4663; 28 ATR 344).

78. Officers should be aware that where the relevant taxpayer is a non-resident, the question of source must also be considered in determining if there is a tax benefit.

Section 177D – the core of Part IVA – objective purpose

79. Section 177D provides that Part IVA applies to a scheme in connection with which the taxpayer has obtained a tax benefit if, after having regard to eight specified factors, it would be concluded that a person who entered into or carried out the scheme, or any part of it, did so for the purpose of enabling the taxpayer to obtain the tax benefit.

80. The objective test in paragraph 177D(b) is the core of Part IVA and has been described by the High Court as the 'pivot' or 'fulcrum' on which Part IVA turns. It is frequently referred to as the 'statutory predication test'.

81. Section 177D refers to 'the purpose' of the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme. The person need not be the taxpayer. Subsection 177A(5) clarifies that the 'purpose' includes the dominant purpose where there are two or more purposes.

82. The dominant of two or more purposes is the ruling, prevailing or most influential purpose.

Relevant case law

Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404 at 416; 141 ALR 92 at 98; 96 ATC 5201 at 5206; 34 ATR 183 at 188:

> Much turns upon the identification, among various purposes, of that which is "dominant". In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose.

83. It is possible for Part IVA to apply notwithstanding that the dominant purpose of obtaining the tax benefit was consistent with the pursuit of commercial gain. The key issue under Part IVA is whether the particular scheme, or any part of it, was entered into or carried out by any person for the relevant purpose having regard to the objective factors in paragraph 177D(b).

Relevant case law

Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404 at 415 and 416; 141 ALR 92 at 97 and 98; 96 ATC 5201 at 5206; 34 ATR 183 at 187 and 188:

> A person may enter into or carry out a scheme, within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.
>
> ...
>
> A particular course of action may be, to use a phrase found in the Full Court judgments, both "tax driven" and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question whether, within the meaning of Pt IVA, a person entered into or carried out a "scheme" for the "dominant purpose" of enabling the taxpayer to obtain a "tax benefit".

Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 at [96]:

> Objection was also taken to what was said to be the artificiality of the selection of part of the overall transaction as the scheme. This, it was said, was not warranted by Peabody or Spotless. The artificiality was said to result from the fact that the overall transaction was for the clearly commercial purpose of financing the Group's participation in the takeover bid for BAT. However, as was held in Spotless, a person may enter into or carry out a scheme, within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer

> to obtain a tax benefit where that dominant purpose is consistent with the pursuit of a commercial gain in the course of carrying on a business. The fact that the overall transaction was aimed at a profit making does not make it artificial and inappropriate to observe that part of the structure of the transaction is to be explained by reference to a s 177D purpose

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [16] per Gleeson CJ and McHugh J:

> Even so, the transaction may take such a form that there is a particular scheme in respect of which a conclusion of the kind described in s 177D is required, even though the particular scheme also advances a wider commercial objective.

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [64] per Gummow and Hayne JJ:

> But so too, as was held in Spotless, there is a false dichotomy between a "rational commercial decision" and "the obtaining of a tax benefit as 'the dominant purpose of the taxpayers in making the investment'". Pointing to the "commercial end" of the scheme reveals the adoption of the same, or at least a substantially similar, false dichotomy. The presence of a discernible commercial end does not determine the answer to the question posed by s177D.

See also *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [6] and [12] per Gleeson CJ and McHugh J, and [68] per Gummow and Hayne JJ.

84. The conclusion to be reached under section 177D is the conclusion of a reasonable person.

Relevant case law

Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404 at 422; 141 ALR 92 at 102; 96 ATC 5201 at 5210; 34 ATR 183 at 192:

> [T]he conclusion reached, having regard to the matters in par (b) as to the dominant purpose of a person or one of the persons who entered into or carried out the scheme or any part thereof, is the conclusion of a reasonable person.

85. The consideration of purpose or dominant purpose under paragraph 177D(b) requires an objective conclusion to be drawn. The conclusion required by section 177D is not about a person's actual, i.e., subjective, dominant purpose or motive. Section 177D requires an objective conclusion as to purpose to be reached having regard to objective facts. The actual subjective purpose of any relevant person is not a matter to which regard may be had in drawing the conclusion under section 177D. In other words, a conclusion about a relevant person's purpose for section 177D is the conclusion of a reasonable person based on all the facts and evidence that are relevant to considering the eight factors for the scheme (see paragraphs 79 and 87 to 112). Tax officers must therefore focus on these facts and not on what a relevant person actually intended or what the taxpayer's motivations were for entering into the scheme.

Relevant case law

Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404 at 421; 141 ALR 102; 96 ATC 5201 at 5210; 34 ATR 183 at 192:

> The eight categories set out in par (b) of s 177D as matters to which regard is to be had "are posited as objective facts", [citing *FC of T v. Peabody* (1994) 181 CLR 359 at 382].

Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 at [89] and [95].

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [65] per Gummow and Hayne JJ:

> Of course the loan was structured in the way it was in order to achieve the most desirable taxation result. But those are statements about why *the respondents* acted as they did or about why the lender (or its agent) structured the loan in the way it was. They are not statements which provide an answer to the question posed by s 177D(b). That provision requires the drawing of a conclusion about purpose from the eight identified objective matters; it does not require, or even permit, any inquiry into the subjective motives of the relevant taxpayers or others who entered into or carried out the scheme or any part of it. [italics not added]

86. It may be relevant in determining what objectively was the purpose of any person entering into or carrying out the scheme, or any part of the scheme, to have regard to the purposes of the advisers or other agents of any of those persons. This, of course, will be appropriate only where a person acts on professional advice and what was done on professional advice is relevant to considering the eight matters required to be considered in applying the purpose test in paragraph 177D(b) – refer to paragraphs 87 to 112.

Relevant case law

Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 at [95]:

> [I]t is expected that those who participate in a complex, international, commercial transaction will be concerned about its tax implications, and will seek expert advice. Attributing the purpose of a professional advisor to one or more of the corporate parties in the present case is both possible and appropriate. In some cases, the actual parties to a scheme subjectively may not have any purpose, independent of that of a professional advisor, in relation to the scheme or part of the scheme, but that does not defeat the operation of s 177D. If, in the present case, there had been evidence which showed that no director or employee of the Group had ever heard of s 79D, that would not conclude the matter in favour of the taxpayer. One of the reasons for making s 177D turn upon the objective matters listed in the section, it may be inferred, was to avoid the consequence that the operation of Pt IVA depends upon the fiscal awareness of the taxpayer.

87. The section requires the Commissioner to have regard to each of the eight matters in paragraph 177D(b) in reaching an objective conclusion about purpose. However, not all of the matters will be equally relevant in every case.

Relevant case law

Peabody v. Federal Commissioner of Taxation (1993) 40 FCR 531 at 543; 112 ALR 247 at 258; 93 ATC 4104 at 4113-4114; 25 ATR 32 at 42:

> In arriving at his conclusion, the Commissioner must have regard to each and every one of the matters referred to in s177D(b). This does not mean that each of those matters must point to the necessary purpose referred to in s177D. Some of the matters may point in one direction and others may point in another direction. It is the evaluation of these matters, alone or in combination, some for, some against, that s177D requires in order to reach the conclusion to which 177D refers.

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [70] per Gummow and Hayne JJ.

88. The eight matters in paragraph 177D(b) are to be each individually taken into account for the scheme having regard to all the relevant evidence, and then weighed together, in arriving at the conclusion as to dominant purpose. This is reflected in the Guidelines on making submissions to the GAAR Panel which make it clear that each of the eight factors must be considered and weighed in applying paragraph 177D(b): refer to Attachment 3 to this practice statement, paragraph 3 and Section 9 of Appendix 3 (paragraphs 41 to 64).

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [92] per Callinan J:

> The next question, which is of purpose, is whether under s 177D the scheme is one to which Pt IVA applies. This will, in my view, in most cases be the critical question. The answer to it, both as a matter of statutory interpretation and as the Explanatory Memorandum indicates, was intended to be the fulcrum upon which most Pt IVA cases will turn, because the definition of a scheme, being as wide as it is, will relatively easily be satisfied, and the presence or absence of the tax advantage will also usually be readily apparent. The Act requires the questions raised by s 177D be answered by reference to the indicia stated in the section. It is not necessary of course that every one of them be relevant to every scheme. Indeed, the presence or overwhelming weight of one factor alone may of itself in an appropriate case be of such significance as to expose a relevant dominant purpose.

89. The eight matters listed in paragraph 177D(b) enable consideration of the context in which the particular scheme occurs.

Relevant case law

Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 at [96]:

> Nor is there any inconsistency involved, as was submitted, in looking to the wider transaction in order to understand and explain the scheme, and the eight matters listed in s 177D.

90. Provided the eight matters identified in paragraph 177D(b) are each taken into account, it is possible to arrive at the conclusion as to purpose by making a global assessment of purpose.

Relevant Case Law

Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 at [94]:

> In the Full Court, the taxpayer argued that Hill J's reasoning did not refer to, or pay regard to, the eight matters listed in s 177D(b). This argument was rejected. It was pointed out, correctly, that it was not necessary for the judge to refer to the matters individually, and that an examination of the whole of his reasons for judgment showed that he took all the specified matters into account in forming "a global assessment of purpose".

91. The eight factors in paragraph 177D(b) consist of three overlapping sets. The first set is about how the scheme was implemented: how its results were obtained. It comprises the first three factors in subparagraphs (i), (ii) and (iii) of paragraph 177D(b) and deals with manner, form and substance, and timing. The second set comprises the next four factors in subparagraphs (iv), (v), (vi) and (vii) of paragraph 177D(b) and deals with the effects of the scheme: the tax results, financial changes, and other consequences of the scheme. The third set is the eighth factor in subparagraph (viii) of paragraph 177D(b) which deals with the nature of any connection between the taxpayer and other parties.

The eight factors are considered against the background of the counterfactual

92. Consideration of the eight factors involves comparison of the scheme with the 'alternative hypothesis', i.e., the counterfactual: refer to paragraphs 69 to 78. In other words, the conclusion about the dominant purpose of a person entering into or carrying out the scheme, or any part of it, necessarily requires consideration of what may otherwise have occurred.

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [66] per Gummow and Hayne JJ:

> When that [i.e. s 177C(1)] is read with s 177D(b) it becomes apparent that the inquiry directed by Pt IVA requires comparison between the scheme in question and an alternative postulate. To draw a conclusion about purpose from the eight matters identified in s 177D(b) will require consideration of what other possibilities existed.

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [94] per Callinan J:

> An aspect of the question to which s 177D(b)(ii) gives rise, is whether the substance of the transaction (tax implications apart) could more conveniently, or commercially, or frugally have been achieved by a different transaction or form of transaction.

See also *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [69] per Gummow and Hayne JJ.

The first three factors – how the scheme was implemented

93. These first three factors are very important because they examine exactly how a scheme achieves its effects. The first factor which examines 'the manner in which the scheme was entered into or carried out' enables contrivance and artificiality to be identified by comparing the manner in which the scheme was entered into or carried out with the manner in which the counterfactual would have been implemented, for example, by the presence of a step or steps in a relevant transaction or arrangement that would not be expected to be present in a more straightforward or ordinary method of achieving the outcome of the transaction or arrangement. Conversely, if a scheme is entered into and carried out in the manner in which ordinary business or family dealings are conducted, the manner of the scheme will not indicate the purpose of obtaining the tax benefit.

94. The identification of any step or aspect of the scheme that is apparently explicable for no purpose but a tax purpose will go to the manner in which the scheme was entered into or carried out. To illustrate from the decided cases, in *Federal Commissioner of Taxation v. Peabody* (1994) 181 CLR 359; 28 ATR 344; 94 ATC 4663; 123 ALR 451 there was a share devaluation with no non-tax rationale; in *Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd* [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 there was a company which lacked any non-tax reason for being in the corporate structure; in *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 there was an election to split the loan to permit all repayments to be allocated to the private residence and the capitalisation and compounding of interest on the part of the loan allocated to the investment property; and, in the area of mass marketed schemes, in *Federal Commissioner of Taxation v. Sleight* [2004] FCAFC 94; 136 FCR 211; 206 ALR 511; 2004 ATC 4477; 55 ATR 555 there was a round-robin exchange of cheques.

95. The second factor, which examines 'the form and substance of the scheme', requires that substance, rather than form, be the subject of inquiry. Put simply the factor directs attention to whether there is a discrepancy between the form of the scheme and its substance, meaning its commercial and economic substance. A discrepancy between the business and practical effect of a scheme on the one hand, and its legal form on the other, may well indicate the scheme has been implemented in a particular form as the means to obtain a tax benefit if the substance of the scheme may be achieved or available by some other more straightforward or commercial transaction or dealing.

96. In practice these first two factors are likely to be related. For example, a divergence between form and substance could involve a roundabout way of implementing the scheme by steps that have no effect on the substance of what is achieved but lead directly to the obtaining of the tax benefit.

97. In considering the second factor for the split loan scheme in *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712, Gummow and Hayne JJ said at [71]:

> As Hill J rightly pointed out, the form and substance of the scheme (s 177D(b)(ii)) also point to the purpose of a relevant person obtaining a tax advantage. What was one advance, to be repaid by 300 instalments, was treated as if it were 2 separate loans. The only persons obtaining any

> advantage from the treatment were the … [taxpayers]. And the only advantages which they obtained depended upon the taxation treatment resulting from the application of payments and accumulation of interest for which the scheme (however identified) provided.

98. In considering the second factor in relation to the tea tree oil scheme in *Federal Commissioner of Taxation v. Sleight* [2004] FCAFC 94; 136 FCR 211; 206 ALR 511; 2004 ATC 4477; 55 ATR 555, Hill J said at [81] and [82]:

> There is a difference between the form and the substance of the present scheme. In form there is an option whether to farm alone or to employ the management company. There is a management agreement and financing and interest payments. The form, involving pre-payment of management fee and interest is, it may be concluded readily, designed to increase the taxation deductions available to an investor. The substance is, however, quite different. As senior counsel for the Commissioner put it, in substance the investor is a mere passive investor in what, once the tax features are removed, is a managed fund where no deduction would be available, or perhaps an alternative characterisation of the substance of the scheme is an investment in shares in the land company which at the expiration of 15 years is to own the tea tree plantation.
>
> With respect to the learned primary judge it is not correct to say that form and substance are the same. Rather the particular shape the investment took was clearly fashioned in a way that would maximise the tax deductions. They were geared up by the loan agreement with up front interest payments. But for the tax deductions the form the investment might be expected to take would clearly relate more to the substance of what happened.

99. The first two factors in relation to a scheme enable the particular 'shape' of the transaction or arrangement to be identified for the purpose of determining whether that particular shape is the means by which the tax benefit is obtained. The first two factors require consideration of any elements or aspects of how the particular scheme is implemented that make the scheme more complicated than a straightforward or ordinary commercial or family arrangement that achieves the same overall effect, disregarding the tax effects.

100. The presence of material steps in a scheme consistent with no other explanation than the purpose of obtaining a tax benefit will be critical in characterizing the purposes of the persons who entered into or carried out the scheme. It will be they which lend an air of artifice and contrivance to the manner in which the scheme is carried out, and usually it will be they which separate form from substance.

101. The third factor draws attention to particular 'timing' aspects of the manner in which a scheme is entered into or carried out. It will include consideration of the time the scheme, or any part of it, was entered into or carried out, and the length of the period during which it was carried out. This factor will enable consideration of the extent to which the timing and duration of the scheme go towards delivering the relevant tax benefit or are related to commercial opportunities or requirements. For example, this factor will identify whether the scheme is entered into shortly before the end of a financial year (or other tax sensitive date such as the date of a change in the rate of tax), or carried out for only a brief period. It is noted that a taxpayer is able to benefit from a scheme entered into well before the end of a year by having Pay-As-You-Go tax instalments varied. It follows that a scheme entered into well before the end of a year does not necessarily mean that timing would point to a neutral

or non-tax purpose. It may also be relevant to note that the time at which a scheme is entered into is not proximate to any commercial occasion; that is, the timing of the scheme does not seem to be associated with an opportunity or need that might point to a non-tax purpose. In other circumstances timing and duration is more likely to be neutral or point to a non-tax purpose.

102. In considering the third factor for the tea tree oil scheme in *Federal Commissioner of Taxation v. Sleight* [2004] FCAFC 94; 136 FCR 211; 206 ALR 511; 2004 ATC 4477; 55 ATR 555, Hill J said at [83]:

> This factor clearly points to taxation as a predominating purpose. The scheme was entered into on the last day of the year of income. This was not accidental as it was necessary for a large portion of the deductions to be incurred in the 1995 year of income. If what may be called the tea tree or investment purpose predominated, then there would be no need for a "flurry of activity" to occur, as it did, at the end of the year of income. The investment could be entered into at any time.

103. In considering the third factor for the employee bonus scheme in *Pridecraft Pty Ltd v. Commissioner of Taxation* [2004] FCAFC 339; 213 ALR 450; 2005 ATC 4001; 58 ATR 210, Sackville J (with whom Sundberg J and Ryan J agreed) said at [90]:

> His Honour [Merkel J at first instance] correctly found that there was no commercial need or advantage for any contribution to be made in the 1996/1997 year of income, let alone on the last day of the financial year. The post-1997 scheme could have achieved its (non-tax related) commercial objectives without **any** contribution having been made to the Incentive Trust in the 1996/1997 year of income. When the timing of the contribution of $15,000,000 is taken into account, the contribution is inexplicable except as a means of Spotlight obtaining a tax deduction for the whole of that amount in the 1996/1997 year. It is true that had the Pt IVA scheme not been entered into, Spotlight would have made a small contribution to the trust fund in the next year of income and would have paid out, or set aside, about $15,000,000 in bonuses over a 5 year period. But an integral element of the Pt IVA scheme, in effect, constituted a means of deferring a very large amount of tax that otherwise would have been payable by Spotlight in the 1996/1997 year of income. [Original emphasis]

The next four factors - the effect of the scheme

104. The second set of factors focuses on the tax, financial and any other consequences or effect of carrying out the scheme. These factors require consideration of the tax result, financial change and any other consequences of the scheme for the taxpayer and for related parties.

105. The fourth factor expressly focuses on the tax benefit and any other tax consequence resulting from the scheme.

106. The fifth, sixth and seventh factors focus on the non-tax effects of the scheme, not only for the relevant taxpayer, but also for all connected parties. These factors look to the practical financial, legal, economic and any other outcomes achieved by the scheme for the taxpayer and connected parties. For example, the change in the position of a taxpayer may mean little if there is an inverse change in the position of another person as a result of the

scheme, and that other person is an associate or alter ego of the taxpayer such as a spouse or a wholly-owned company. It may also be relevant to observe that an allowable deduction is, or is not, matched by a corresponding amount of assessable income among the other parties who are affected by the scheme. These factors will often require consideration in conjunction with the second factor.

107. The fifth, sixth and seventh factors involve identifying changes in financial position or any other consequences that may be reasonably expected to result from the scheme, not just changes that have resulted or will result. In *Federal Commissioner of Taxation v. Hart & Anor* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712, the fact that there was a 'very real chance' over the life of the split loan entered into by the taxpayers that the amount owing on their investment property would exceed its value (due to the compounding of interest on the investment portion) and that their private residence would remain as security for the debt was considered by Callinan J at [94] in the context of the second set of factors.

108. The absence of any practical change in the overall financial, legal or economic position of a taxpayer and connected parties that are affected by the scheme is likely to add weight to the dominance of the tax purpose when all the paragraph 177D(b) factors are weighed together. For example, in *Pridecraft Pty Ltd v. Commissioner of Taxation* [2004] FCAFC 339; 213 ALR 450; 2005 ATC 4001; 58 ATR 210, the 'round robin' of funds was relevant in considering the fifth factor for the employee bonus scheme. Sackville J (with whom Sundberg J and Ryan J agreed) said at [91]:

> These conclusions are reinforced by the "round robin" arrangement (s 177D(b)(i), (ii) and (v)). As [counsel for the taxpayer] … pointed out, the secured advance to Spotlight had a commercial benefit for the Incentive Trust, in that interest was payable on the loan. But the fact remains that Spotlight was able to obtain a very large and immediate tax benefit - amounting to several million dollars - without having to part with any more than $200,000 in the 1996/1997 year of income and relatively modest amounts in the succeeding years. (By 30 June 2003, only $9.7 million of the $15,000,000 contribution had actually been paid out as bonuses to or for the benefit of employees.) The obtaining of a large tax benefit without any substantial change in Spotlight's cash position suggests that its "most influential and prevailing or ruling" purpose in entering into or carrying out the Pt IVA scheme, or part of that scheme, was to obtain a tax benefit.

109. In considering the second set of factors it should be kept in mind that the application of Part IVA turns on an objective determination of the purpose of a person entering into a scheme, not the effect or purpose of the scheme. The fourth to seventh factors cannot simply be compared and weighed to determine purpose for to do so is to ignore the other factors. The bare fact that a taxpayer pays less tax if one form of the transaction rather than another is adopted, does not by itself demonstrate that Part IVA applies. Nevertheless, the effect of the scheme can contribute to a conclusion about the objective purpose of a person in entering into the scheme.

The eighth factor – the nature of the connection between the taxpayer and any other person

110. The eighth factor inquires into the nature of the connection between the taxpayer and any other person whose financial position is reasonably expected to change as a result of the scheme or for whom there are any other consequences from the scheme. The existence of any connection between the taxpayer and these other persons is relevant to the identification of the other factors, such as the manner of the scheme, the form and substance of the scheme, and the tax, financial and other consequences of the scheme. This factor requires the circumstance that parties are not dealing with each other at arm's length in connection with the scheme to be taken into account. For example, a transaction having the form of a loss-making transaction when only the taxpayer's position is considered may not produce a loss in substance if an associate of the taxpayer makes a corresponding non-taxable gain. In *CC (NSW) Pty Ltd (In Liq.) v. Federal Commissioner of Taxation* (1997) 97 ATC 4123; 34 ATR 604, the fact that the income injection scheme, if it had been effective for income tax purposes, would have transferred the right to income from the taxpayer to a unit trust with tax losses in the same corporate group, was considered by Sackville J in the context of the eighth factor at 97 ATC 4149; 34 ATR 632:

> The shares in both CC NSW [i.e., the taxpayer company] and QAPL were held by companies within the CC Group. All units in the QUT were held by CC PL, the parent of CC NSW. The effect of the principal-agent arrangement, if implemented, was to transfer assessable income from CC NSW to the QUT, where it was available to be offset against losses.

Conversely, in some cases this factor may permit consideration of offsetting tax liabilities incurred by associates as a result of the scheme to demonstrate absence of the relevant purpose.

111. This factor requires attention to be paid to the existence of any family relationship between the taxpayer and the persons who are affected in any way by the scheme. This could assist a taxpayer in some cases. Many dealings which would be decidedly odd between strangers may be entirely explicable between family members. For example, a businessman who gives assets to strangers for less than they are worth may be subject to suspicion but a gift to his family could stand in a different light. Of course, it would be a different matter again if the family members do not benefit in substance from the arrangement.

112. The eight factors referred to in paragraph 177D(b) have been considered in some detail in the following cases:

- *W.D. & H.O. Wills (Australia) Pty Ltd v. Federal Commissioner of Taxation* (1996) 65 FCR 298; 96 ATC 4223; 32 ATR 168;
- *CC (NSW) Pty Ltd (In Liq.) v. Federal Commissioner of Taxation* (1997) 97 ATC 4123; 34 ATR 604;
- *Re Clough Engineering Ltd and Deputy Commissioner of Taxation* (1997) 97 ATC 2023; 35 ATR 1164;
- *Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd* [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229;

- *Howland-Rose and Ors v. Commissioner of Taxation* [2002] FCA 246; 118 FCR 61; 2002 ATC 4200; 49 ATR 206 at [137] to [143];

- *Krampel Newman Partners Pty Ltd & Ors v. Federal Commissioner of Taxation* [2003] FCA 123; 126 FCR 561; 2003 ATC 4304; 52 ATR 239 at [89] to [99];

- *Puzey v. Commissioner of Taxation* [2003] FCAFC 197; 131 FCR 244; 201 ALR 302; 2003 ATC 4782; 53 ATR 614 at [63] to [80];

- *Federal Commissioner of Taxation v. Zoffanies Pty Ltd* [2003] FCAFC 236; 132 FCR 523; 2003 ATC 4942; 54 ATR 280;

- *Federal Commissioner of Taxation v. Sleight* [2004] FCAFC 94; 136 FCR 211; 206 ALR 511; 2004 ATC 4477; 55 ATR 555 at [69] to [94] per Hill J, and at [209] to [238] per Carr J;

- *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [68] to [71] per Gummow and Hayne JJ and at [93] to [95] per Callinan J;

- *Macquarie Finance Limited v. Commissioner of Taxation* [2005] FCAFC 205; 2005 ATC 4829;

- *Pridecraft Pty Ltd v. Commissioner of Taxation* [2004] FCAFC 339; 213 ALR 450; 2005 ATC 4001; 58 ATR 210 at [88] to [92] per Sackville J (with whom Sundberg J and Ryan J agreed).

The analysis in each of these cases of the facts of the case against the eight paragraph 177D(b) factors is very instructive in understanding how these matters are to be properly considered against a set of facts.

Part IVA Warning Signs

113. The presence of any of the following features whether alone or in combination in an arrangement means that Part IVA may apply to the arrangement. These features represent warning signs that the arrangement may be 'tax driven' and lead to a conclusion that the arrangement was entered into for the dominant purpose of enabling a taxpayer to obtain a tax benefit. The list of features is not meant to be exhaustive or exclusive and is provided only by way of guidance to officers who must consider and apply the provisions of Part IVA. The purpose in paragraph 177D(b) can only be objectively ascertained by reference to the eight factors. Where any of the following features are present officers must consider the possible application of Part IVA in undertaking audits or issuing rulings to taxpayers:

- the arrangement (or any part of the arrangement) is out of step with ordinary family dealings or the sort of arrangements ordinarily used to achieve the relevant commercial objective;

- the arrangement seems more complex than is necessary to achieve the relevant family or commercial objective, or includes a step or a

series of steps that appear to serve no real purpose other than to gain a tax advantage, for example:

- o transactions which interpose an entity to access a tax benefit;
- o intra-group or related party dealings that merely produce a tax result;
- o arrangements involving a circularity of funds or no real money;

- the tax result of the arrangement appears at odds with its commercial or economic result, for example:
  - o a tax loss is claimed for what was a profitable commercial venture or transaction;
- the arrangement results in little or no risk in circumstances where significant risks would normally be expected, for example:
  - o use of non-recourse or limited recourse loans which limit the parties' risk or actual detriment in relation to debts/investments;
  - o arrangements where the taxpayer's risk is significantly limited because of the existence, for example, of a 'put' option;
- the parties to the arrangement are operating on non-commercial terms or in a non-arm's length manner, for example:
  - o financial arrangements made on unusual terms, such as interest rates above or below market rates, insufficient security, or deferment of repayment of the loan until the end of a lengthy repayment period;
  - o transactions which do not occur at market rates/value;
- there is a gap between the substance of what is being achieved under the arrangement (or any part of it) and the legal form it takes, for example:
  - o arrangements where a series of transactions taken together produce no economic gain or loss, such as where the whole scheme is self-cancelling.

List of public rulings dealing with Part IVA

114. Attachment 6 includes a list of taxation rulings and taxation determinations which deal with the application of Part IVA to particular kinds of arrangements. It does not include taxation rulings and taxation determinations that need to be updated in the light of current case law or changes to legislation.

Determinations and Assessments – section 177F

115. Subsection 177F(1) gives the Commissioner a discretion to make a determination cancelling a tax benefit that has been obtained, or would but for section 177F be obtained, in connection with a scheme to which Part IVA applies. The discretion can only be exercised where a tax benefit has been obtained, or would but for the section be obtained, by a taxpayer in connection with a scheme to which Part IVA applies.

116. Officers should be aware that regard must be had to the individual circumstances of each case in applying Part IVA. However, where two or more taxpayers participate on the same terms in a single scheme, or in identical schemes, for example, in the case of mass marketed schemes, the individual circumstances of the case will have features in common, and there may be no further distinguishing circumstances.

117. In all cases a determination should be evidenced in writing and provided to the taxpayer concerned. The format suggested in the Appendices to Attachment 1 for the relevant scenario should be used unless an alternative form is needed and approved in accordance with the referral procedure referred to at paragraph 14 of this practice statement.

118. Where the Commissioner cancels a tax benefit that is omitted assessable income under paragraph 177F(1)(a), the relevant amount is deemed to be included in assessable income by virtue of such provision of the Act as the Commissioner determines: refer to subsection 177F(2). Therefore a provision should be specified in the determination.

119. Where a determination is made, subsection 177F(1) directs the Commissioner to take such action as he considers necessary to give effect to that determination: refer to paragraphs 126 to 130.

Making one or more determinations in particular scenarios

120. In the discussion of particular scenarios below, a reference to:

- a ‘single scheme’ is intended to include both wider and narrower ‘alternative’ schemes in connection with which the same tax benefit is obtained; and

- ‘multiple schemes’ is to be read as a reference to different schemes in connection with which different tax benefits are obtained.

This use of the term ‘single scheme’ is appropriate because a conclusion as to dominant purpose under paragraph 177D(b) is made in the broader context of the relevant scheme in any event. In those cases where the same tax benefit arises in connection with both wider and narrower alternative schemes, the application of Part IVA should be unaffected by whether a wider or narrower scheme is examined: see paragraphs 57 to 59 and 89.

Single scheme, multiple tax benefits (but not alternative counterfactuals) – same taxpayer and same income year

121. If a taxpayer obtains two or more separate 'tax benefits' under Part IVA in the same counterfactual scenario, i.e., if the 'tax benefits' do not all come within the same paragraph in subsection 177C(1) (for example, assessable income is omitted, and either excessive deductions are claimed or a capital loss is incurred), a separate determination should be made for each kind of tax benefit that is obtained in connection with the scheme. However, it is only necessary to issue a single amended assessment that takes into account the cumulative effect of all the individual tax benefits being cancelled.

Single scheme, alternative counterfactuals – same taxpayer and same income year

122. If a taxpayer obtains a different amount of the same kind of tax benefit in different counterfactual scenarios in connection with a single scheme to which Part IVA would apply in a particular year, the correct approach is to make a single determination under subsection 177F(1) for the kind of 'tax benefit' that is obtained. The highest 'tax benefit' of the same kind for the counterfactual scenarios should be used in the determination, unless there are special circumstances (for example, the highest tax benefit would result in juridical double taxation). If a tax benefit obtained in connection with the scheme includes a tax benefit of the kind specified in paragraph 177C(1)(a), i.e., an amount that was not included in assessable income, then for the purposes of subsection 177F(2), the determination cancelling the omitted income tax benefit should state the provisions of the Act, for all the alternative counterfactuals, under which the amount is deemed to be included in assessable income.

Multiple schemes, multiple tax benefits – same taxpayer and same income year

123. If a taxpayer can be assessed to two or more 'tax benefits' under Part IVA from more than one scheme in a particular year, it will be necessary to issue determinations in respect of each scheme, and if relevant, for each different kind of tax benefit obtained in connection with each scheme. However, it may only be necessary to issue a single amended assessment that takes into account all of the tax benefits being cancelled for each of the schemes in appropriate cases.

Single scheme and tax benefit – different taxpayers

124. The Commissioner has power to make subsection 177F(1) determinations, and to issue assessments to give effect to the determinations, to more than one taxpayer in respect of the same tax benefit. This can occur where the Commissioner forms the view that each determination and consequent assessment could be correct, based on what is known by the Commissioner at the time. This situation commonly arises in relation to a scheme involving a trust where the trustee or any one or more of its beneficiaries may be ultimately taxable on a tax benefit obtained in connection with the scheme. However, although it is possible for multiple concurrent assessments in

respect of the same amounts to co-exist, the Act does not authorise double taxation of the same income, and tax must only be collected from the taxpayer ultimately held to be liable.

Relevant case law

Deputy Commissioner of Taxation v. Richard Walter Pty Ltd (1995) 183 CLR 168 at 201-203; 127 ALR 21 at 42-44; 95 ATC 4067 at 4082-4084; 29 ATR 644 at 663-665.

Dan v. Federal Commissioner of Taxation (No. 2) [2000] FCA 752; 2000 ATC 4350; 44 ATR 338 at [48]-[51].

Kordan Pty Limited v. Federal Commissioner of Taxation [2000] FCA 1807; 2000 ATC 4812; 46 ATR 191 at [33]:

> Bad faith is not to be inferred merely because the Commissioner issued assessments charging to tax more than one taxpayer in respect of the same income. His Honour [at first instance] noted that while this is so it did not follow from *Richard Walter*, or the earlier case of *Richardson v FCT* (1932) (1932) 48 CLR 192, that in every case it was necessarily open and appropriate for the Commissioner to do so. It would be necessary to examine all of the circumstances. It will be different if none of the multiple assessments could as in *Darrell Lea* be correct for, as was said by the full Court in that case [(1996) 72 FCR 175; 141 ALR 713; 97 ATC 4040; 34 ATR 491] at FCR 186; ATR 501; ATC 4049:
>
> > "[I]t was critical in *Richard Walter* that at the time the Commissioner made each of the two assessments he was *bona fide* able to form the view that each **could** be correct. While it is true that both could not stand together, it was equally true that one or other of them could be completely correct. Which one, if either, was completely correct, of course, was not at that stage known by the Commissioner." (Original emphasis.)

125. If the tax benefit was taken into account in calculating the 'net income of the trust estate' under section 95, the standard approach is to make Part IVA determinations cancelling the relevant tax benefits in respect of both the trustee and the beneficiaries since the objective facts will usually support a conclusion that both the trustee and the beneficiaries obtained a tax benefit in connection with the scheme. However, there is nothing to prevent the Commissioner in appropriate cases from simply cancelling the tax benefit obtained by the trustee and then relying upon Division 6 of Part III of the ITAA 1936 to assess the recalculated net income of the trust to the relevant beneficiaries under section 97, or to assess some or all of the recalculated amount to the trustee under section 99A. A similar approach is taken to making Part IVA determinations in relation to partnerships: refer to paragraphs 132 to 134.

Give effect to a determination

126. To give effect to a determination under section 177F, an assessment should be issued under section 166 of the ITAA 1936 if no assessment has been issued previously in respect of the relevant year to the taxpayer.

127. If an assessment has been issued prior to making the determination but the 'tax benefit' was not included, it is necessary to issue an amended assessment under section 170 of the ITAA 1936 to give effect to the determination.

128. If prior to making the determination under section 177F, the 'tax benefit' was included in an assessment (including an amended assessment) under sections of the Act other than Part IVA (for example, section 6-5 of the ITAA 1997), it will not be necessary to issue an amended assessment if the determination was made in connection with the consideration of an objection. When an objection to an assessment is decided, a determination under subsection 177F(1) made in connection with the consideration of the objection will be deemed to have been made when the assessment was made: subsection 169A(3). Consequently, it will be unnecessary to amend an assessment to give effect to the Part IVA determination if no change to taxable income or tax payable results. However it will still be necessary to issue and serve on the taxpayer a copy of the determination in order for Part IVA to be applied in the event that there is a tax benefit.

Relevant case law

Kordan Pty Limited v. Commissioner of Taxation [2000] FCA 1807; 2000 ATC 4812; 46 ATR 191 at [32]:

> In the case of Ryde Homes [Pty Ltd], while the two determinations under challenge did not give rise to the issue of any notice of further amended assessment, the consequence of s 169A of the ITAA 1936 when read together with s 173 was that the determinations, having been made in connection with the Commissioner's consideration of the objection lodged by that company on 31 May 1999 against the amended assessment notified on 30 March 1999, were to be treated as part of the making of the amended assessment notified on 30 March 1999 and likewise afforded the protection of s 177(1), but subject to the *Hickman* principle.

129. Where the determination is not made in connection with the consideration of an objection, officers should give effect to a determination by an amended assessment. Officers should refer to the Full Federal Court decisions in *Federal Commissioner of Taxation v. Jackson* (1990) 27 FCR 1; 96 ALR 586; 90 ATC 4990; 21 ATR 1012, *Federal Commissioner of Taxation v. Stokes* (1996) 72 FCR 160; 141 ALR 653; 97 ATC 4001, 34 ATR 478; and *Puzey v. Commissioner of Taxation* [2003] FCAFC 197; 131 FCR 244; 201 ALR 302; 2003 ATC 4782; 53 ATR 614 at [87] to [93].

130. An assessment can be defended on the following alternative bases:

- the relevant amount is included in the assessable income of the taxpayer/is not deductible to the taxpayer under the provisions of the Income Tax Assessment Acts other than Part IVA; and

- Part IVA operates to include the amount in the assessable income of the taxpayer/cancels the deduction of the amount by the taxpayer under the Income Tax Assessment Acts.

Relevant case law

Puzey v. Commissioner of Taxation [2003] FCAFC 197; 131 FCR 244; 201 ALR 302; 2003 ATC 4782; 53 ATR 614 at [94].

Spassked Pty Limited v. Commissioner of Taxation [2003] FCAFC 282; 136 FCR 441; 203 ALR 515; 2003 ATC 5099; 54 ATR 546 at [118].

Australia & New Zealand Banking Group Ltd v. Federal Commissioner of Taxation [2003] FCA 1410; 137 FCR 1; 203 ALR 644; 2003 ATC 5041; 54 ATR 449 at [70].

Schemes involving trusts

131. Where the scheme involves the 'net income of a trust estate' under Division 6 of Part III of the ITAA 1936, care should be taken to ensure that an assessment or amended assessment that gives effect to the Part IVA determination(s) issues in respect of all the appropriate taxpayers (for example, trustee and beneficiary). In this respect, refer to paragraphs 124 and 125 of this practice statement which deal with making Part IVA determinations in respect of different taxpayers for the same tax benefit in connection with the same scheme.

Schemes involving partnerships

132. Care should be taken when making a Part IVA determination involving a partnership.

133. If a tax benefit obtained in connection with a scheme to which Part IVA applies had the effect of reducing the 'net income' of the partnership or increasing the 'partnership loss' that is calculated for the purposes of Division 5 of Part III of the ITAA 1936, then Part IVA determinations cancelling the relevant tax benefits should be made in respect of both the partnership and each individual partner. A determination cancelling each relevant kind of tax benefit obtained by the partnership should be provided to either the managing partner or another senior partner. The suggested form of the determination(s) that may be provided to the partnership is contained in Appendices 3 and 4 to Attachment 1. A determination cancelling the omission of assessable income by each partner which corresponds with the reduction of their share of net income under section 92 obtained by them in connection with the scheme should be provided to each partner. The suggested form of the determination provided to a partner in this scenario is contained in Appendix 5 to Attachment 1.

134. If a tax benefit obtained in connection with a scheme to which Part IVA applies has resulted in a 'partnership loss' being calculated for the partnership for the purposes of Division 5 of Part III of the ITAA 1936, and a partner is entitled to claim a share of that partnership loss as a deduction under section 92 (disregarding Part IVA), then Tax officers may need to consider if more than one Part IVA determination needs to be made for each partner. Two determinations for each partner will generally be necessary where, under the counterfactual, a 'net income' amount would have been calculated for the partnership. In such a scenario, one determination would be required to cancel the deduction obtained by the partner under section 92 for their share of the partnership loss, while the other determination would include in the assessable income of the partner under section 92 the partner's share of the net income under the counterfactual. The suggested form of the determinations provided to a partner in this scenario is contained in Appendices 5 and 6 to Attachment 1.

Other situations not specifically dealt with

135. Where a determination is proposed to be made in situations other than described in paragraphs 120 to 134, officers should follow the referral procedure referred to at paragraph 14 of this practice statement.

Compensating adjustments – subsection 177F(3)

136. Where the Commissioner has made a determination under subsection 177F(1) or (2A), he may, if in his opinion it is fair and reasonable, make another determination under subsection 177F(3) adjusting the taxation situation of any taxpayer. A subsection 177F(3) determination is known as a 'compensating adjustment'. There is no time limit for making a compensating adjustment: refer to paragraph 141.

137. A compensating adjustment must generally be made where the application of Part IVA causes double taxation of the same income.

Example

A scheme involves the diversion of personal services income to a family trust. The income has been distributed to the beneficiaries (family members) who were taxed accordingly. The Commissioner makes a determination under subsection 177F(1) with respect to the scheme. The determination includes the whole of the personal services income in the assessable income of the taxpayer (the personal services income earner). Compensating adjustments are made in favour of the taxpayer's family members (the beneficiaries), such that the individual beneficiaries' income from the trust is determined not to have been included in their assessable incomes.

138. Any action to make or give effect to compensating adjustments (for example, amendment of assessments) should not as a general rule be undertaken while the application of Part IVA is subject to objection or review. Such an approach does not make the assessment giving effect to the relevant Part IVA determination(s) tentative or other than bona fide. The Commissioner will be in a position to determine whether it is 'fair and reasonable' that a compensating adjustment be made when the application of Part IVA is finally established. Any decision to make a compensating adjustment at a prior stage must be approved by a DCTC or the CTC. Where it is clear that a particular compensating adjustment is expected to be made when the application of Part IVA is established, the taxpayer should be informed of the expected compensating adjustment.

Relevant case law

Australia & New Zealand Banking Group Ltd v. Federal Commissioner of Taxation [2003] FCA 1410; 137 FCR 1; 203 ALR 644; 2003 ATC 5041; 54 ATR 449.

Time limits for amending assessments – section 177G

139. Subsection 177G(1) allows the Commissioner to amend an assessment at any time before the expiration of 6 years after the date on which tax became due and payable under the assessment if the amendment is for the purposes of giving effect to a determination made under subsection 177F(1). However, the Government has announced that it intends amending the law effective from the 2004–05 income year so that the period for amending an assessment to include a tax benefit under Part IVA is reduced from six to four years (Recommendation 3.6 of *Report on Aspects of Income Tax Self Assessment*). For income years before the 2004–05 income year, the Federal Court decision in *Vincent v. Commissioner of Taxation* [2002] FCAFC 291; 2002 ATC 4742; 51 ATR 18 at [88] to [94] means that the six year period for amending assessments under Part IVA cannot be relied upon where the claimed tax benefit is cancelled under the general provisions of the income tax law. In such cases, Part IVA has no application because there was no tax benefit within the meaning of section 177C.

140. Where there has been avoidance of tax, paragraph 170(2)(a) allows the Commissioner to amend an assessment at any time if he is of the opinion that the avoidance of tax is due to fraud or evasion. Such an amended assessment may give effect to a determination under subsection 177F(1). However, any such amended assessment must be approved by a DCTC or the CTC.

141. The Commissioner is entitled to amend an assessment at any time if the amendment is for the purpose of giving effect to a compensating adjustment made by the Commissioner under subsection 177F(3): see subsection 177G(2).

Penalties

142. Where Part IVA applies to cancel a tax benefit, the taxpayer is liable to pay an administrative penalty of 50% of the scheme shortfall amount, or 25% of the scheme shortfall amount if it is reasonably arguable that Part IVA does not apply: section 284-160 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). The scheme shortfall amount is the reduction in tax that the taxpayer would have got from the scheme if Part IVA did not apply: section 284-150 of Schedule 1 to the TAA 1953.

143. It will be reasonably arguable within the meaning of section 284-15 of Schedule 1 to the TAA 1953 that Part IVA does not apply if it would be concluded in all of the circumstances, having regard to relevant authorities, that what is argued for by the taxpayer is about as likely to be correct as incorrect, or is more likely to be correct than incorrect.

Relevant case law

Pridecraft Pty Ltd v. Commissioner of Taxation [2004] FCAFC 339; 213 ALR 450; 2005 ATC 4001; 58 ATR 210 at [107] to [110] per Sackville J (with whom Sundberg J and Ryan J agreed).

144. The Commissioner has a discretion to remit all or part of the additional tax or administrative penalty - see section 298-20 of Schedule 1 to the TAA 1953. Officers should refer to other practice statements or Taxation Rulings for guidance on the circumstances in which the Commissioner may exercise his discretion to remit the whole or part of a penalty. Officers must also take into account the advice of the GAAR Panel in deciding the level of penalties to be imposed.

SECTION 67 OF THE FBTAA – FBT

145. Section 67 is the general anti-avoidance provision in the FBTAA. The operation of section 67 is comparable to Part IVA, in that the section requires the identification of an arrangement and a tax benefit, includes a sole or dominant purpose test and is activated by the making of a determination by the Commissioner. The definition of 'arrangement' in subsection 136(1) of the FBTAA is virtually identical to the definition of 'scheme' in section 177A of Part IVA.

146. Subsection 67(1) of the FBTAA is satisfied where a person or one of the persons who entered into or carried out an arrangement or part of an arrangement under which a benefit is or was provided to a person, did so for the sole or dominant purpose of enabling an eligible employer or the eligible employer and another employer(s) to obtain a tax benefit.

147. An objective review of the transaction and the surrounding circumstances should be undertaken in determining a person's sole or dominant purpose in carrying out the arrangement or part of the arrangement. Section 67 differs from paragraph 177D(b) in Part IVA in that it does not explicitly list the factors that should be taken into account in determining a person's sole or dominant purpose.

148. Subsection 67(2) of the FBTAA provides that a tax benefit arises in respect of a year of tax in connection with an arrangement if under the arrangement:

(i) a benefit is provided to a person;

(ii) an amount is not included in the aggregate fringe benefits amount of the employer; and

(iii) that amount would have been included or could reasonably be expected to have been included in the aggregate fringe benefits amount, if the arrangement had not been entered into.

149. In circumstances where the Commissioner is satisfied that section 67 of the FBTAA should apply, paragraph 67(1)(c) authorises the Commissioner to cancel the tax benefit by determining that the aggregate fringe benefits amount of the eligible employer shall be increased by the amount of the tax benefit. Paragraph 67(1)(d) provides the Commissioner with the authority to determine appropriate adjustments to the aggregate fringe benefits amount of the eligible employer or another employer in respect of any year of tax.

150. After the tax benefit has been cancelled, adjustments may be appropriate to restore the situation to what it would have been if the arrangement had not been carried out. Under subsection 67(4) of the FBTAA an employer may make a written request to the Commissioner to make a determination under paragraph 67(1)(d). The process in paragraph 67(1)(d) and in subsection 67(4) is similar to the compensating adjustment process in Part IVA (refer to paragraphs 136 to 138).

151. The approach outlined in this practice statement (refer to paragraphs 69 to 113) to the counterfactual and the sole or dominant purpose test in Part IVA is relevant and should be taken into account by Tax officers who are considering the application of section 67 of the FBTAA.

152. Attachment 6 is a list of taxation rulings and taxation determinations which includes rulings that deal with the application of Section 67 of the FBTAA to particular kinds of arrangements.

DIVISION 165 OF THE GST ACT – GST

153. Division 165 of the GST Act is a general anti-avoidance provision. It is modelled on Part IVA of the ITAA 1936.

154. It gives the Commissioner the discretion to negate a ‘GST benefit’ that an entity gets or got from a scheme to which Division 165 of the GST Act applies. This discretion is contained in section 165-40 of the GST Act.

155. Before the Commissioner can exercise the discretion in section 165-40 of the GST Act, the elements of Division 165 of the GST Act must be satisfied. These may be summarised as follows:

(i) the existence of a 'scheme';

(ii) an entity ('the avoider') must have obtained a 'GST benefit' from the scheme; and

(iii) it must be reasonable to conclude that the sole or dominant purpose of any entity entering into or carrying out the scheme, or part of the scheme, or that the principal effect of the scheme, or part of the scheme, was the obtaining of a GST benefit from the scheme.

156. Regard must be had to the individual circumstances of each case in determining whether to make a declaration under section 165-40 of the GST Act to negate a GST benefit.

157. Division 165 of the GST Act applies whether the scheme, or any part of the scheme, was entered into or carried out inside or outside Australia: subsection 165-5(2) of the GST Act. Additionally, it only applies to schemes entered into on or after 2 December 1998 or carried out or commenced on or after that date; however, it does not apply to schemes carried out or commenced on or after that day that were entered into before that day: paragraph 165-5(1)(d) of the GST Act.

158. Division 165 of the GST Act and Part IVA are similar in their objects, structure and operation. However, there are key differences between Part IVA and Division 165 of the GST Act, and Division 165 has special features. These are highlighted in the following summary of the main provisions of Division 165 of the GST Act.

159. An analysis of the Part IVA cases referred to above will not be repeated. However, until any case authority on Division 165 of the GST Act develops, these cases are a useful guide to the interpretation and application of Division 165 of the GST Act, particularly where the provisions of Division 165 of the GST Act are similar to provisions of Part IVA.

Scheme – subsection 165-10(2)

160. For Division 165 of the GST Act to operate, the identified scheme must fall within the definition of 'scheme' in subsection 165-10(2) of the GST Act. The definition in this subsection is virtually identical to the one in the comparable Part IVA provisions (subsections 177A(1) and 177A(3)). Accordingly, paragraphs 54 to 60, in relation to the definition of a scheme in Part IVA, apply equally to the definition of a scheme in Division 165 of the GST Act.

161. Given the very wide definition of 'scheme' in subsection 165-10(2) of the GST Act, this element will in most cases be easily satisfied.

GST benefit – subsections 165-10(1) and 165-10(3)

162. Division 165 requires that an entity gets a 'GST benefit' from a scheme. Subsection 165-10(1) provides that an entity gets a 'GST benefit' if apart from Division 165:

(a) an amount payable by an entity under the GST Act is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme;

(b) an amount payable to an entity under the GST Act is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme;

(c) all or part of an amount payable by an entity under the GST Act is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme; or

(d) all or part of an amount payable to an entity under the GST Act is, or could reasonably be expected to be, payable earlier than it would have been apart from the scheme or a part of the scheme.

Counterfactual

163. Consideration of the GST consequences, but for the operation of Division 165 of the GST Act, of an alternative hypothesis or postulate – what would have happened or might reasonably be expected to have happened if the scheme (or part of the scheme) had not been carried out – is required. For guidance, refer to paragraph 69 and following paragraphs above regarding counterfactuals in the Part IVA context.

No economic alternative

164. A special feature of Division 165 of the GST Act, absent from Part IVA, is that Division 165 expressly provides that a GST benefit can arise even if there is no economic alternative to the scheme which produced the benefit. Subsection 165-10(3) of the GST Act provides that a GST benefit can arise even if an entity could not have engaged economically in activities other than the scheme activities. In this way, an entity will not be able to argue against the existence of a GST benefit on the basis that it would not have entered into any type of transaction had the actual scheme not been entered into: Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1999 at paragraph 6.335.

Timing benefits

165. Subsection 165-10(1) of the GST Act is not directed only at liabilities (permanent differences) but is additionally directed at timing benefits. The benefit in paragraph 165-10(1)(c) of the GST Act concerns the deferral of attribution of a liability to GST or an increasing adjustment, and the benefit in paragraph 165-10(1)(d) of the GST Act concerns the acceleration of attribution of entitlement to an input tax credit or decreasing adjustment: refer to paragraph 162.

Net amounts

166. The GST benefits referred to in subsection 165-10(1) of the GST Act operate in relation to net amounts payable by and to a taxpayer for a particular tax period, such as a particular month or quarter: sections 33-3 and 35-5 of the GST Act. Accordingly, in addressing the existence of a GST benefit, officers must determine the effect of a scheme or part of a scheme on net amounts on a tax period by tax period basis.

167. This may mean that a GST benefit could be obtained from a scheme even though a greater amount of GST would be payable under the GST Act over a period of time as a result of the scheme.

Causal nexus – paragraph 165-5(1)(a) of the GST Act

168. For Division 165 of the GST Act to operate, it is also necessary that a sufficient causal nexus between the GST benefit and the identified scheme exists. Paragraph 165-5(1)(a) of the GST Act provides that the GST benefit must be obtained 'from' the scheme. Subsection 165-10(1) of the GST Act provides that the GST benefit may also be obtained from 'part of a scheme'.

GST benefits disregarded – paragraph 165-5(1)(b) of the GST Act

169. Paragraph 165-5(1)(b) of the GST Act essentially constitutes an exclusion from the definition of GST benefit. It provides that Division 165 of the GST Act will only operate if the GST benefit that has otherwise arisen is not attributable to the making of a choice, election, application or agreement expressly provided for by the GST law.

170. The equivalent provision in Part IVA, subsection 177C(2), is worded slightly differently. It qualifies the same exclusion by additionally providing that it will not operate where a scheme is entered into or carried out 'for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice …' to be made.

171. Despite the absence of an equivalent qualification in paragraph 165-5(1)(b) of the GST Act, the Tax Office considers that the paragraph will not be interpreted so widely as to enable those artificially creating a state of affairs to take advantage of a choice to escape the operation of Division 165 of the GST Act. The wide meaning that can be attributed to 'scheme or a part of the scheme' would enable the courts to have regard to steps taken to artificially create any circumstance or state of affairs the existence of which is necessary to enable the choice, election, application, or agreement to be made.

Tax avoidance conclusion – paragraph 165-5(1)(c) and section 165-15 of the GST Act

172. For Division 165 of the GST Act to operate, the drawing of a conclusion about purpose and effect is necessary. Specifically, paragraph 165-5(1)(c) of the GST Act provides that, taking account of the matters listed in section 165-15, it must be reasonable to conclude that either:

    (i) an entity entered into or carried out the identified scheme, or a part of the scheme, with the sole or dominant purpose of that entity or another entity getting a GST benefit from the scheme; or

    (ii) the principal effect of the identified scheme, or a part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly.

    For ease of reference, a conclusion that either of these is the case will be referred to in this practice statement below as a 'tax avoidance' conclusion.

173. Accordingly, Division 165 of the GST Act requires the drawing of a conclusion as to either purpose or effect. A determination as to whether either conclusion would be reasonable must be arrived at by taking into account the same twelve matters set out in subsection 165-15(1) of the GST Act.

Dominant purpose test

174. The dominant purpose test in Part IVA, found in section 177D (see also subsection 177A(5)), is essentially mirrored in the test in subparagraph 165-5(1)(c)(i) of the GST Act. Accordingly, the propositions contained in paragraphs 79 to 111 are equally applicable to the dominant purpose test in Division 165 of the GST Act.

175. However, the application of the dominant purpose test in Division 165 of the GST Act requires consideration of the twelve matters in subsection 165-15(1). Paragraph 177D(b) only requires consideration of eight factors. This difference in the matters to be considered in determining purpose (and effect) is addressed separately below.

Principal effect test

176. Division 165 of the GST Act contains an alternative basis for a tax avoidance conclusion, being the principal effect test in subparagraph 165-5(1)(c)(ii) of the GST Act. There is no Part IVA equivalent to this test. Part IVA applies to a scheme only on the basis of it being concluded that a relevant person has the requisite dominant purpose.

177. This principal effect test focuses on the result of a scheme rather than on the purpose attributed to those entering into or carrying out the scheme. Both purpose and effect are ascertained objectively by a consideration of the matters listed in subsection 165-15(1) of the GST Act. However, the enquiry to be undertaken in relation to the principal effect test is directed to the outcome of the scheme, without regard to the imputed purpose of those entering into or carrying out the scheme. The test specifically applies to the avoider and the GST benefit obtained by the avoider: Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1999 at paragraph 6.344.

178. The effect produced by the scheme must also be 'the principal' effect. This means that the most significant or main effect of the scheme must be the securing of a GST benefit by the avoider. It is not sufficient for the GST benefit to be one of several main effects. It must be the most significant or main effect: Senate Supplementary Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1999 at paragraph 1.121.

179. The test may be satisfied even if a GST benefit, which is the principal effect of the scheme, is obtained in an indirect way. It is not confined to GST benefits directly obtained. That is, it will be satisfied even if the principal effect of the identified scheme is that the avoider got the GST benefit from the scheme 'indirectly'.

180. While the principal effect test is an alternative test, the criteria for its consideration mirror the objective analysis required to distinguish ordinary commercial dealings from tax avoidance arrangements.

The 12 matters to be considered in determining purpose or effect

181. The propositions contained in paragraphs 79 to 90 concern the correct approach to the consideration and weighing up of the eight factors in paragraph 177D(b) in determining purpose. Where context permits, and with due allowance being made for the absence of the principal effect test in Part IVA, these propositions will generally be equally applicable to a consideration and weighing up of the twelve matters in subsection 165-15(1) of the GST Act in determining purpose or effect.

182. As indicated above, paragraph 177D(b) in Part IVA requires regard to be had to eight factors in considering whether it can be concluded that a relevant person has the requisite purpose, whereas subsection 165-15(1) in Division 165 of the GST Act requires regard to be had to twelve matters.

183. The matters in paragraphs (a), (b), (f), (g), (h), (i) and (j) of subsection 165-15(1) of the GST Act correspond to the factors in subparagraphs (i), (ii), (iv), (v), (vi), (vii) and (viii) of paragraph 177D(b). Paragraph 165-15(1)(b) of the GST Act also refers to the form and substance of a scheme but, in addition to subparagraph 177D(b)(ii), elaborates on the meaning of the 'form and substance' of a scheme by indicating that this includes 'the legal rights and obligations involved in the scheme' and 'the economic and commercial substance of the scheme'.

184. The matters in paragraphs (d) and (e) of subsection 165-15(1) of the GST Act together correspond to the factor in subparagraph (iii) of paragraph 177D(b). That is, the timing and period of a scheme are combined into one factor in Part IVA whereas the timing and period of a scheme are separate matters in Division 165 of the GST Act.

185. Accordingly, paragraphs (c), (k) and (l) of subsection 165-15(1) of the GST Act are the only matters in subsection 165-15(1) for which there are no equivalents in paragraph 177D(b) of Part IVA.

186. The matter in paragraph 165-15(1)(c) of the GST Act is 'the purpose or object' of the relevant Acts. This matter requires that regard be had not only to the legislative purpose of the GST Act and the *Customs Act 1901* but also to any relevant provision of these Acts. If a scheme frustrates the legislative purpose (that is, the legislative scheme), this matter will point in the direction of tax avoidance; if the outcome of the scheme is consistent with the object of the legislation, this will point against a tax avoidance conclusion. In considering legislative purpose officers should have regard to the legislative scheme provided by the legislation together with relevant extraneous material such as explanatory memoranda as appropriate.

187. The matters in paragraphs (k) and (l) of subsection 165-15(1) of the GST Act are, respectively, 'the circumstances surrounding the scheme' and 'any other relevant circumstances'. This requires officers considering Division 165 of the GST Act to consider the surrounding circumstances or any factor that is relevant to the question of whether the arrangement has the purpose or effect of tax avoidance. For example, in determining purpose or effect, officers could have regard to prevailing economic conditions or industry practice attending the scheme.

188. The propositions contained in paragraphs 91 to 111 explain the nature and meaning of the eight factors in paragraph 177D(b). These propositions will be equally applicable to a consideration of the nature and meaning of the equivalent matters in subsection 165-15(1) of the GST Act.

Matters apply to part of a scheme as if it were the entire scheme

189. Subsection 165-15(2) of the GST Act provides that the matters in subsection 165-15(1) of the GST Act apply to part of a scheme as if the part were the entire identified scheme from which the GST benefit was obtained: Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1999 at paragraph 6.347.

List of public rulings dealing with Division 165 of the GST Act

190. Attachment 6 is a list of taxation rulings and taxation determinations which includes rulings that deal with the application of Division 165 of the GST Act to particular kinds of arrangements.

Declaration to negate GST benefit – sections 165-40, 165-50 and 165-60 of the GST Act

191. If the foregoing elements are satisfied, the Commissioner may exercise the section 165-40 discretion to negate the GST benefit obtained. Section 165-40 of the GST Act provides that the Commissioner may negate a GST benefit by making a declaration stating the net amount payable for a particular tax period or the GST payable on an importation to be a higher amount. It also allows for reductions in net amounts for other tax periods which may be required if the GST benefit is a timing benefit.

192. As is the case with the comparable Part IVA provision, subsection 177F(1), the discretion in section 165-40 of the GST Act must be exercised in good faith.

Single scheme, multiple GST benefits (but not alternative counterfactuals) – same avoider, same tax period(s)

193. If an avoider has obtained two or more separate GST benefits under Division 165 of the GST Act in the same counterfactual scenario (for example, a permanent benefit and a timing benefit), a single declaration identifying each GST benefit and stating the avoider's net amount for the tax period should be made.

Single scheme, alternative counterfactuals – same avoider and same tax period(s)

194. The correct approach in the case of alternative counterfactuals in respect of a single scheme is to make a single declaration identifying each GST benefit obtained by the avoider and stating the avoider's net amount for the tax period using the highest 'GST benefit'.

Multiple schemes, multiple GST benefits – same avoider and same tax period(s)

195. If an avoider has obtained more than one GST benefit from more than one scheme in a particular tax period, a single declaration should be made. This declaration must identify each GST benefit from each scheme and state the avoider's net amount for the tax period.

Declaration is self-executing

196. The word 'determination' is used in section 177F in Part IVA for the decision to cancel a tax benefit. Apart from terminology, another difference between Part IVA and Division 165 of the GST Act is that under subsection 177F(1), to give effect to a determination, the Commissioner must issue an assessment or amended assessment in the usual case. No such requirement exists in Division 165 of the GST Act as a declaration is self-executing: section 165-50 of the GST Act provides that a declaration under section 165-40 of the GST Act has effect according to its terms for the purposes of Division 33 and Division 35 of the GST Act, despite the provisions of the GST Act outside those Divisions and Division 165.

197. Accordingly, the comments concerning the issue of assessments and amended assessments to give effect to Part IVA determinations, in paragraphs 126 to 130, are inapplicable. Nevertheless, it is the Tax Office's practice, in the absence of extraordinary circumstances, to issue assessments. This is consistent with the Tax Office's usual practice of issuing assessments at the conclusion of GST audits where a shortfall is found to exist, even though for GST purposes the liability for GST exists independently of and without the need for an assessment.

Declaration may cover several tax periods and importations

198. A single declaration can relate to net amounts for several tax periods and several taxable importations: section 165-60 of the GST Act.

Compensatory adjustments – section 165-45

199. Section 165-45 of the GST Act provides that where an entity gets a GST disadvantage due to another entity getting a GST benefit, the Commissioner may make an adjustment to compensate the disadvantaged entity. The section operates if the following conditions are met:

    (a) the Commissioner has made a declaration under section 165-40 of the GST Act;

    (b) the Commissioner considers that another entity (the loser) gets a GST disadvantage; and

    (c) the Commissioner considers it fair and reasonable that the loser's GST disadvantage be negated or reduced.

200. The comments in relation to the comparable provision in Part IVA, subsection 177F(3), in paragraphs 136 to 138, are equally applicable. There are no substantive differences between section 165-45 of the GST Act and subsection 177F(3), save that in the case of the latter the additional procedural step of giving effect to a determination is required.

Time limits – sections 105-5 and 105-50 of Schedule 1 to the TAA

201. In the absence of fraud or evasion, the effective time limit for the Commissioner to make a declaration under section 165-40 of the GST Act is within 4 years after the time GST became payable by an entity. A declaration may be able to be made outside that period if the Commissioner has required payment of the relevant net amount of GST by giving a notice to the avoider within the period, but generally officers should make declarations within the 4 year period: section 105-50 in Schedule 1 to the TAA. However, any declaration made after 4 years because there has been fraud or evasion must be approved by a DCTC or the CTC.

Penalties

202. The same penalty regime applies to both Division 165 of the GST Act and Part IVA. Accordingly, paragraphs 142 to 144 are equally applicable.

LUXURY CAR TAX

203. Under the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act), Division 165 of the GST Act applies to amounts payable under the LCT Act as if they were amounts payable under the GST Act: section 13-5 and section 13-30 of the LCT Act. Accordingly, the comments in this practice statement concerning GST apply with necessary changes to LCT.

WINE EQUALISATION TAX

204. Under the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act), Division 165 of the GST Act applies to amounts payable under the WET Act as if they were amounts payable under the GST Act: section 21-5 and section 23-10 of the WET Act. Accordingly, the comments in this practice statement concerning GST apply with necessary changes to WET.

ATTACHMENTS

Attachment 1: Proper Execution of Part IVA Determinations

Attachment 2: Framework for decision-making

Attachment 3: Guidelines for submissions to the GAAR Panel

Attachment 4: ATO paper released by the Commissioner of Taxation on 17 March 2005 titled 'Tax Office Comments on Part IVA'

Attachment 5: Flowchart for decision making process for private rulings concerning Part IVA

Attachment 6: List of Taxation Rulings and Taxation Determinations which deal with the application of the GAARs

Attachment 7: Relevant provisions of Part IVA of the *Income Tax Assessment Act 1936*

Attachment 8: Relevant provisions of section 67 of the *Fringe Benefits Tax Assessment Act 1986*

Attachment 9: Relevant provisions of Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999*

Subject references	anti avoidance measures; anti avoidance penalties; avoidance & evasion; escalation processes; general anti avoidance provisions; tax avoidance; tax benefits under tax avoidance schemes; tax planning; tax planning, avoidance and evasion
Legislative references	ANTS(GST)A 1999 Div 33 ANTS(GST)A 1999 33-3 ANTS(GST)A 1999 Div 35 ANTS(GST)A 1999 35-5 ANTS(GST)A 1999 Div 165 ANTS(GST)A 1999 165-5(1)(a) ANTS(GST)A 1999 165-5(1)(b) ANTS(GST)A 1999 165-5(1)(c) ANTS(GST)A 1999 165-5(1)(c)(i) ANTS(GST)A 1999 165-5(1)(c)(ii) ANTS(GST)A 1999 165-5(1)(d) ANTS(GST)A 1999 165-5(2) ANTS(GST)A 1999 165-10(1) ANTS(GST)A 1999 165-10(1)(c) ANTS(GST)A 1999 165-10(1)(d) ANTS(GST)A 1999 165-10(2) ANTS(GST)A 1999 165-10(3) ANTS(GST)A 1999 165-15 ANTS(GST)A 1999 165-15(1) ANTS(GST)A 1999 165-15(1)(a) ANTS(GST)A 1999 165-15(1)(b) ANTS(GST)A 1999 165-15(1)(c) ANTS(GST)A 1999 165-15(1)(d) ANTS(GST)A 1999 165-15(1)(e) ANTS(GST)A 1999 165-15(1)(f) ANTS(GST)A 1999 165-15(1)(g) ANTS(GST)A 1999 165-15(1)(h) ANTS(GST)A 1999 165-15(1)(i) ANTS(GST)A 1999 165-15(1)(j) ANTS(GST)A 1999 165-15(1)(k) ANTS(GST)A 1999 165-15(1)(l) ANTS(GST)A 1999 165-15(2) ANTS(GST)A 1999 165-40 ANTS(GST)A 1999 165-45 ANTS(GST)A 1999 165-50 ANTS(GST)A 1999 165-60 ANTS(LCT)Act 1999 ANTS(LCT)Act 1999 13-5 ANTS(LCT)Act 1999 13-30 ANTS(WET)Act 1999 ANTS(WET)Act 1999 21-5

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	ITAA 1936 177CA ITAA 1936 177D ITAA 1936 177D(b) ITAA 1936 177D(b)(i) ITAA 1936 177D(b)(ii) ITAA 1936 177D(b)(iii) ITAA 1936 177D(b)(vi) ITAA 1936 177D(b)(v) ITAA 1936 177D(b)(vi) ITAA 1936 177D(b)(vii) ITAA 1936 177D(b)(viii) ITAA 1936 177E ITAA 1936 177EA ITAA 1936 177EA(5) ITAA 1936 177EB ITAA 1936 177EB(5) ITAA 1936 177F ITAA 1936 177F(1) ITAA 1936 177F(1)(a) ITAA 1936 177F(2) ITAA 1936 177F(3) ITAA 1936 177G ITAA 1936 177G(1) ITAA 1936 177G(2) ITAA 1936 177H ITAA 1936 260 ITAA 1997 6-5 ITAA 1997 8-1 ITAA 1997 Subdiv 126-B ITAA 1997 Subdiv 170-B ITAA 1997 Pt 2-10 Div 40 TAA 1953 8 TAA 1953 Sch 1 105-5 TAA 1953 Sch 1 105-50 TAA 1953 Sch 1 284-15 TAA 1953 Sch 1 284-150 TAA 1953 Sch 1 284-160 TAA 1953 Sch 1 298-20 Customs Act 1901 Income Tax Regulations 1936 172 International Tax Agreements Act 1953 Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990
Related public rulings	IT 2456; IT 2466; IT 2501; IT 2509; IT 2512; IT 2635; TR 98/22; TR 2000/8; TR 2001/1; TR 2001/15; TR 2002/13; TR 2002/16; TR 2002/18; TR 2002/19; TR 2005/19; TD 92/164; TD 93/187; TD 95/37; TD 1999/12; TD 1999/32; TD 1999/42; TD 2002/23; TD

	2002/24; TD 2003/3; TD 2003/9; TD 2003/32; TD 2004/26; TD 2005/29; TD 2005/33; GSTR 2004/3; GSTR 2005/3; GSTR 2005/4; GSTR 2005/5
Related practice statements	PS LA 1998/1; PS LA 2000/10; PS LA 2001/8; PS LA 2002/10; PS LA 2002/16; PS LA 2003/3; PS LA 2003/10; PS LA 2004/4
Case references	Australia & New Zealand Banking Group Ltd v. Federal Commissioner of Taxation [2003] FCA 1410; 137 FCR 1; 203 ALR 644; 2003 ATC 5041; 54 ATR 449 CC (NSW) Pty Ltd (In Liq.) v. Federal Commissioner of Taxation (1997) 97 ATC 4123; 34 ATR 604 Collis v. Federal Commissioner of Taxation 96 ATC 4831; 33 ATR 438 Commissioner of Taxation v. Mochkin [2002] FCA 675; 2002 ATC 4465; 50 ATR 134 Commissioner of Taxation v. Mochkin [2003] FCAFC 15; 127 FCR 185; 2003 ATC 4272; 52 ATR 198 Corporate Initiatives Pty Ltd v. Commissioner of Taxation [2005] FCAFC 62; 142 FCR 279; 219 ALR 339; 2005 ATC 4392; 59 ATR 351 Dan v. Federal Commissioner of Taxation (No. 2) [2000] FCA 752; 2000 ATC 4350; 44 ATR 338 Darrell Lea Chocolate Shops Pty Ltd v. Federal Commissioner of Taxation (1996) 72 FCR 175; 141 ALR 713; 97 ATC 4040; 34 ATR 491 Deputy Commissioner of Taxation (Cth) v. Purcell (1921) 29 CLR 464 Deputy Commissioner of Taxation v. Richard Walter Pty Ltd (1995) 183 CLR 168; 127 ALR 21; 95 ATC 4067; 29 ATR 644 Federal Commissioner of Taxation v. Consolidated Press Holdings (No. 1) (1999) 91 FCR 524; 99 ATC 4945; 42 ATR 575 Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 Federal Commissioner of Taxation v. Gulland (1985-1986) 160 CLR 55; 85 ATC 4765; 17 ATR 1 Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 Federal Commissioner of Taxation v. Jackson (1990) 27 FCR 1; 96 ALR 586; 90 ATC 4990; 21 ATR 1012 Federal Commissioner of Taxation v. Newton (1958) 98 CLR 1 Federal Commissioner of Taxation v. Peabody (1994) 181 CLR 359; 123 ALR 451; 94 ATC 4663; 28 ATR 344 Federal Commissioner of Taxation v. Sleight [2004] FCAFC 94; 136 FCR 211; 206 ALR 511; 2004 ATC 4477; 55 ATR 555 Federal Commissioner of Taxation v. Spotless Services

	Ltd (1996) 186 CLR 404; 141 ALR 92; 96 ATC 5201; 34 ATR 183 Federal Commissioner of Taxation v. Stokes (1996) 72 FCR 160; 141 ALR 653; 97 ATC 4001, 34 ATR 478 Federal Commissioner of Taxation v. Zoffanies Pty Ltd [2003] FCAFC 236; 132 FCR 523; 2003 ATC 4942; 54 ATR 280 Hollyock v. Federal Commissioner of Taxation (1970-1971) 125 CLR 647; 71 ATC 4202; 2 ATR 601 Howland-Rose and Ors v. Commissioner of Taxation [2002] FCA 246; 118 FCR 61; 2002 ATC 4200; 49 ATR 206 Kordan Pty Limited v. Federal Commissioner of Taxation [2000] FCA 1807; 2000 ATC 4812; 46 ATR 191 Krampel Newman Partners Pty Ltd & Ors v. Federal Commissioner of Taxation [2003] FCA 123; 126 FCR 561; 2003 ATC 4304; 52 ATR 239 Macquarie Finance Limited v. Commissioner of Taxation [2005] FCAFC 205; 2005 ATC 4829 Pettigrew v. Federal Commissioner of Taxation 90 ATC 4124; 20 ATR 1833 Pridecraft Pty Ltd v. Commissioner of Taxation [2004] FCAFC 339; 213 ALR 450; 2005 ATC 4001; 58 ATR 210 Puzey v. Commissioner of Taxation [2003] FCAFC 197; 131 FCR 244; 201 ALR 302; 2003 ATC 4782; 53 ATR 614 Re Clough Engineering Ltd and Deputy Commissioner of Taxation (1997) 97 ATC 2023; 35 ATR 1164 Richardson v. Federal Commissioner of Taxation (1932) 48 CLR 192; 2 ATD 19 Spassked Pty Limited v. Commissioner of Taxation [2003] FCAFC 282; 136 FCR 441; 203 ALR 515; 2003 ATC 5099; 54 ATR 546 Vincent v. Commissioner of Taxation [2002] FCAFC 291; 2002 ATC 4742; 51 ATR 18 W.D. & H.O. Wills (Australia) Pty Ltd v. Federal Commissioner of Taxation (1996) 65 FCR 298; 96 ATC 4223; 32 ATR 168
Other references	Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1999 Taxpayer Alert TA 2002/1 Taxpayer Alert TA 2002/2 Taxpayer Alert TA 2002/4 Taxpayer Alert TA 2002/5 Taxpayer Alert TA 2004/2 Taxpayer Alert TA 2004/6 Taxpayer Alert TA 2004/7 Taxpayer Alert TA 2004/8 Taxpayer Alert TA 2004/9
File references	Trim No. 05/3019

Date issued	13 December 2005
Date of effect	13 December 2005
Other Business Lines consulted	Large Business & International; Small Business; GST; ATO Relations
Amendment history	**8 July 2009** Contact officer details updated **13 February 2009** Contact officer details updated **1 July 2006** Update reference to section 22 of the TAA to section 105-5 of Schedule 1 to the TAA Update reference to section 35 of the TAA to section 105-50 of Schedule 1 to the TAA

Attachment 1: Proper Execution of Part IVA Determinations

1. The validity of a decision hinges on whether it is made by a person empowered to make it, and the way that the decision is signed is presumptive evidence of the capacity in which the decision was made. It is therefore essential that Part IVA determinations are properly executed.

2. The Commissioner's power under section 177F can be exercised by both delegates and authorised officers. There is an important distinction between delegates and authorised officers, including in the way that they sign decisions.

Delegates

3. A delegate exercises a power in his or her own right and signs in his or her own name. Generally a delegate cannot be directed as to how to exercise the power. For a person to be a delegate, a current instrument of delegation made under section 8 of the *Taxation Administration Act 1953* must exist that delegates the relevant power to the person.

4. It is the practice of the Commissioner to make delegations to all Senior Executive Service officers, and these delegations include his powers to make determinations under Part IVA.

5. For example, if John Brown, Deputy Chief Tax Counsel, personally exercises a power to make a determination as delegate of the Commissioner, the determination would be executed as follows:

> I, John Brown, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation ….
>
> Signed
>
> *John Brown* (signature)
>
> John Brown
>
> Deputy Chief Tax Counsel

Authorised officers

6. An authorised officer exercises a power belonging to a delegated officer on behalf of the delegated officer. The delegate can tell the authorised officer how to exercise the powers which the officer is authorised to exercise. Officers exercising the delegate's power on behalf of the delegate must have an authorisation to do so.

7. Authorised officers must sign in the name of the delegate; this means that the authorised officer writes the name of the delegate in his or her own handwriting, or applies the delegate's stamp. He or she *may* then, subject to business line additional requirements, add his or her own name. If the

authorised officer adds his or her own name, he or she should use 'for', or 'per' or 'p.p' (meaning *pro procurationem* – by proxy).

8. For example, if John Citizen is an authorised officer who exercises on behalf of Mary Brown, Deputy Commissioner of Taxation, Large Business and International, the power to make a determination, the determination would be executed as follows:

> I, Mary Brown, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation ....
>
> Signed
>
> *Mary Brown* (handwritten or stamped) _____ p.p John Citizen
>
> Mary Brown
>
> Deputy Commissioner of Taxation, Large Business and International

9. Officers should be aware of any additional business line requirements for the proper execution of documents.

10. Officers should also be aware of Law Administration Practice Statement PS LA 2002/10 which contains general advice and directions to authorised officers in relation to signing and executing documents in exercise of statutory powers.

11. Regulation 172 of the Income Tax Regulations 1936 creates certain presumptions in relation to signatures. It provides in subregulation (2) that:

> A certificate, notice or other document bearing the written, printed or stamped name (including a facsimile of the signature) of a person who is, or was at any time, the Commissioner, a Second Commissioner, a Deputy Commissioner or a delegate of the Commissioner in lieu of that person's signature shall, unless it is proved that the document was issued without authority, be deemed to have been duly signed by that person.

12. The effect of this regulation is that the initial burden of proof is placed on the person challenging the validity of a document bearing the written, printed or stamped name of a delegate of the Commissioner to adduce evidence that the document was issued without authority.

13. The making of Part IVA determinations by authorised officers was considered in *Commissioner of Taxation v. Mochkin* [2002] FCA 675; 2002 ATC 4465; 50 ATR 134 at [73] to [79] per Ryan J at first instance; and [2003] FCAFC 15; 127 FCR 185; 2003 ATC 4272; 52 ATR 198 at [120] to [123] per Sackville J (with whom Merkel J and Kenny J agreed), and *Federal Commissioner of Taxation v. Sleight* (2004) FCAFC 94; 136 FCR 211; 206 ALR 511; 2004 ATC 4477; 55 ATR 555 at [102] per Hill J (with whom Carr J and Hely J agreed).

Appendix 1 to Attachment 1

A determination cancelling a tax benefit under paragraph 177C(1)(a) – omitted assessable income

> **(excluding a determination cancelling a tax benefit for the purpose of calculating the 'net income' or 'partnership loss' of a partnership under section 90, or cancelling a tax benefit for a partner under section 92 - refer to Appendices 3 and 5 to this Attachment)**

Determination made pursuant to section 177F of Part IVA of the *Income Tax Assessment Act 1936*

I, Mary Brown, Deputy Commissioner of Taxation, Large Business and International, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation determine under paragraph 177F(1)(a) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $3,567,900, being a tax benefit that is referable to an amount that has not been included in the assessable income of XYZ Pty Ltd, TFN 99 999 999, (the taxpayer) for the year of income ended 30 June 2003, shall be included in the assessable income of the taxpayer for that year of income.

I further determine under subsection 177F(2) of the Act that the amount shall be deemed to be included in the assessable income of the taxpayer by virtue of section 6-5 of the *Income Tax Assessment Act 1997*.

Dated the 9th day of June 2005.

Mary Brown (handwritten or stamped) _____ p.p John Citizen

Mary Brown

Deputy Commissioner of Taxation, Large Business and International

> This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to include income. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that the Commissioner determines under subsection 177F(2) of the Act the provision by virtue of which the amount is to be included in assessable income: see paragraph 118 of this practice statement. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 2 to Attachment 1

A determination cancelling a tax benefit under paragraph 177C(1)(b) – allowable deduction

> **(excluding a determination cancelling a tax benefit for the purpose of calculating the 'net income' or 'partnership loss' of a partnership under section 90, or cancelling a tax benefit for a partner under section 92 – refer to Appendices 4 and 6 to this Attachment)**

Determination made pursuant to section 177F of Part IVA of the *Income Tax Assessment Act 1936*

I, Mary Brown, Deputy Commissioner of Taxation, Large Business and International, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation determine under paragraph 177F(1)(b) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $55,894, being a tax benefit that is referable to a deduction being allowable to XYZ Pty Ltd, TFN 99 999 999, (the taxpayer) for the year of income ended 30 June 2003, shall not be allowable to the taxpayer in relation to that year of income.

Dated the 9th day of June 2005.

Mary Brown (handwritten or stamped) _____ p.p John Citizen

Mary Brown

Deputy Commissioner of Taxation, Large Business and International

> This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to deny a deduction. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that a deduction or *a part of a deduction* can be determined to be not allowable (see paragraph 177F(1)(b)); the determination must state whether 'a deduction' or 'a part of a deduction' is determined to be not allowable. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 3 to Attachment 1

A determination cancelling a tax benefit under paragraph 177C(1)(a) for the purpose of calculating the 'net income' or 'partnership loss' of a partnership under section 90: see paragraphs 132 and 133 of this practice statement – omitted assessable income

Determination made pursuant to section 177F of Part IVA of the *Income Tax Assessment Act 1936*

I, Mary Brown, Deputy Commissioner of Taxation, Large Business and International, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation determine under paragraph 177F(1)(a) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $7,135,800, being a tax benefit that is referable to an amount that has not been included in the assessable income of the XYZ Partnership, TFN 99 999 999, ('the Partnership') for the year of income ended 30 June 2003, shall be included in the assessable income of the Partnership for the purpose of calculating the 'net income' or 'partnership loss' of the Partnership.

I further determine under subsection 177F(2) of the Act that the amount shall be deemed to be included in the assessable income for the purpose of calculating the 'net income' or 'partnership loss' of the Partnership by virtue of section 6-5 of the *Income Tax Assessment Act 1997*.

Dated the 9th day of June 2005.

Mary Brown (handwritten or stamped) _____ p.p John Citizen

Mary Brown

Deputy Commissioner of Taxation, Large Business and International

This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to include income for the purpose of calculating the 'net income' or 'partnership loss' of a partnership. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that the Commissioner determines under subsection 177F(2) of the Act the provision by virtue of which the amount is to be included in assessable income: see paragraph 118 of this practice statement. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 4 to Attachment 1

A determination cancelling a tax benefit under paragraph 177C(1)(b) for the purpose of calculating the 'net income' or 'partnership loss' of a partnership under section 90: see paragraphs 132 and 133 of this practice statement – allowable deduction

Determination made pursuant to section 177F of Part IVA of the *Income Tax Assessment Act 1936*

I, Mary Brown, Deputy Commissioner of Taxation, Large Business and International, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation determine under paragraph 177F(1)(b) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $111,788, being a tax benefit that is referable to a deduction being allowable to the XYZ Partnership, TFN 99 999 999, ('the Partnership') for the year of income ended 30 June 2003, shall not be allowable to the partnership for the purpose of calculating the 'net income' or 'partnership loss' of the Partnership.

Dated the 9th day of June 2005.

Mary Brown (handwritten or stamped) _____ p.p John Citizen

Mary Brown

Deputy Commissioner of Taxation, Large Business and International

This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to deny a deduction for the purpose of calculating the 'net income' or 'partnership loss' of a partnership. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that a deduction or *a part of a deduction* can be determined to be not allowable (see paragraph 177F(1)(b)); the determination must state whether 'a deduction' or 'a part of a deduction' is determined to be not allowable. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 5 to Attachment 1

A determination cancelling a tax benefit under paragraph 177C(1)(a) for a partner under section 92: see paragraphs 132 to 134 of this practice statement – omitted assessable income

Determination made pursuant to section 177F of Part IVA of the *Income Tax Assessment Act 1936*

I, Mary Brown, Deputy Commissioner of Taxation, Large Business and International, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation determine under paragraph 177F(1)(a) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $3,567,900, being a tax benefit that is referable to an amount that has not been included in the assessable income of Mr X, TFN 99 999 999, (the taxpayer) for the year of income ended 30 June 2003, shall be included in the assessable income of the taxpayer for that year of income.

I further determine under subsection 177F(2) of the Act that the amount shall be deemed to be included in the assessable income of the taxpayer by virtue of section 92 of the *Income Tax Assessment Act 1936.*

Dated the 9th day of June 2005.

Mary Brown (handwritten or stamped) _____ p.p John Citizen

Mary Brown

Deputy Commissioner of Taxation, Large Business and International

This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to include income under section 92 for a partner. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that the Commissioner determines under subsection 177F(2) of the Act the provision by virtue of which the amount is to be included in assessable income: see paragraph 118 of this practice statement. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 6 to Attachment 1

A determination cancelling a tax benefit under paragraph 177C(1)(b) for a partner under section 92: see paragraphs 132 to 134 of this practice statement – allowable deduction

Determination made pursuant to section 177F of Part IVA of the *Income Tax Assessment Act 1936*

I, Mary Brown, Deputy Commissioner of Taxation, Large Business and International, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation determine under paragraph 177F(1)(b) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $55,894, being a tax benefit that is referable to a deduction being allowable to Mr X, TFN 99 999 999, (the taxpayer) for the year of income ended 30 June 2003, shall not be allowable to the taxpayer in relation to that year of income.

Dated the 9th day of June 2005.

Mary Brown (handwritten or stamped) _____ p.p John Citizen

Mary Brown

Deputy Commissioner of Taxation, Large Business and International

This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to deny a deduction under section 92 for a partner. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that a deduction or *a part of a deduction* can be determined to be not allowable (see paragraph 177F(1)(b)); the determination must state whether 'a deduction' or 'a part of a deduction' is determined to be not allowable. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Attachment 2: Framework For Decision-Making

The following framework is designed to ensure that all relevant issues and necessary questions are fully considered before a decision to apply a GAAR is made. It is to be read in the light of the guidance provided in this practice statement about the GAAR provisions.

1. Who makes the decision?

The Business Line Officer	• The relevant business line officer will usually be the decision-maker. However, before a decision is made to apply a GAAR[1] in a matter[2], the matter must be referred to the Tax Counsel Network (TCN), and in most instances to the GAAR Panel (the Panel), in accordance with the referral guidelines in paragraphs 14 to 22 of this practice statement. • Before a decision *not* to apply a GAAR is made in a Class Ruling the relevant matter must also be referred to the TCN. • It is a matter for the judgment of the relevant business line or Centre of Expertise whether before a decision *not* to apply a GAAR is made in a private ruling, a Product Ruling or in an audit, the matter should be referred to the TCN. Refer to paragraph 15 of this practice statement.
Is the decision-maker either a delegate or authorised?	• It is necessary to confirm that the officer making the relevant GAAR decision is duly authorised or is the Commissioner's delegate. In relation to making a Part IVA determination, refer to Attachment 1 to this practice statement. • Persons who are authorised officers are required to sign the relevant determination or declaration in the name of the delegate and not in their own name. In relation to making a Part IVA determination, it is important to follow the applicable format for determinations in Attachment 1.

[1] Including sections 177CA (withholding tax), 177E (stripping of company profits), 177EA (creation of franking debit or cancellation of franking credits), and 177EB (cancellation of franking credits for head company of consolidated group).

[2] This includes giving a private ruling, a Product Ruling or a Class Ruling that a GAAR applies to an arrangement.

2. Preparation for making the decision

Obtain and understand the facts	• Obtain all the relevant factual material, including documents. • Examine the legal and commercial effects of the facts.
Have the primary legal issues (not including the GAAR) been fully considered?	• In accordance with PS LA 2003/3, PS LA 2003/10, and PS LA 2004/4, establish whether the non-GAAR issue(s) need to be escalated or referred to the TCN/Centres of Expertise.

How are the facts to be taken into account?	• Ensure that you identify and understand:
	  • all the steps of the scheme/arrangement;
	  • the counterfactual(s); and
	  • the amount and kind of the tax benefit(s)/GST benefit(s).
	Refer to paragraphs 54 to 78, 145 and 148, or 160 to 171 (as applicable) of this practice statement.
	• Consider whether the taxpayer's view of the facts is consistent with the documents and other factual material available to the Tax Office.
	• Consider the possible application of the relevant GAAR on the taxpayer's view of the facts if this view is consistent with the relevant documents and other factual material.

Is the matter within the relevant time limits for amending an assessment?	• Establish the relevant time limits: refer to paragraphs 139 to 141 or 201 (as applicable) of this practice statement.

3. What is the decision-making process?

Step One:

- Is there a scheme or arrangement? Refer to paragraphs 54 to 60, 145, or 160 to 161 (as applicable) of this practice statement.
- Is there more than one scheme or arrangement? Refer to paragraphs 57 and 59, 145, or 160 (as applicable) of this practice statement.
- What are the steps of the scheme/arrangement or schemes/arrangements?

Step Two:

- Is there a tax benefit/GST benefit? Refer to paragraphs 61 to 78, 148, or 162 to 171 (as applicable) of this practice statement.
- Is there an alternative tax benefit/GST benefit under an alternative counterfactual? Refer to paragraphs 73 and 122, or 194 (as applicable) of this practice statement.
- Are there two or more tax benefits/GST benefits? Refer to paragraphs 62 and 121, or 162 and 193 (as applicable) of this practice statement.
- What is the greatest amount that can be included or excluded as a tax benefit/GST benefit? Refer to paragraphs 120 to 123, or 193 to 195 (as applicable) of this practice statement.

Step Three:

- Who is the taxpayer/employer/GST 'avoider' (as applicable)?
- If the matter involves Part IVA, is there an alternative taxpayer? Refer to paragraphs 124 and 125 of this practice statement.
- Are there two or more taxpayers/employers/GST 'avoiders' (as applicable)?

Step Four:

- If the matter involves Part IVA, having regard to each of the eight factors referred to in paragraph 177D(b) for the scheme(s), apply the purpose test in paragraph 177D(b). Refer to paragraphs 79 to 112 of this practice statement.
- If the matter involves section 67 of the *Fringe Benefits Tax Assessment Act 1986* (FBT Act), apply the purpose test in paragraph 67(1)(b). Refer to paragraphs 146, 147 and 151 of this practice statement.
- If the matter involves Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), having regard to each of the twelve matters referred to in subsection 165-15(1) for the scheme(s), apply the purpose test and the 'principal effect' test in paragraph 165-5(1)(c). Refer to paragraphs 172 to 189 of this practice statement.

Step Five:

- Procedures for referral to TCN and the GAAR Panel as set out in paragraphs 14 to 22 of this practice statement must be followed before a decision is made.

Step Six:

- Any determination cancelling a tax benefit or declaration negating a GST benefit must be made in writing. If the matter involves Part IVA, use the format for the applicable scenario indicated in any relevant Appendix to Attachment 1 to this practice statement.
- The reasons for making the determination or declaration should be documented separately in accordance with paragraph 42 of this practice statement.
- Consider whether it is necessary to make an alternative determination or declaration. For example, in relation to matters involving Part IVA, refer to paragraphs 124 and 125 of this practice statement.
- Consider whether it is necessary to make more than one determination or declaration. Refer to paragraphs 120 to 125 and 132 to 134, or 193 to 195 (as applicable) of this practice statement.

Step Seven:

- Consider how to give effect to the determination or declaration. Refer to paragraphs 126 to 130, 149, or 196 to 197 (as applicable) of this practice statement.
- Officers should give effect to a determination to cancel a tax benefit made under subsection 177F(1) by issuing an assessment or amended assessment, except where subsection 169A(3) may be relied on to give effect to a determination made in connection with the consideration of an objection. Refer to paragraphs 128 and 129 of this practice statement.
- Consider whether it is appropriate to issue an alternative assessment(s) or amended assessment(s). In relation to matters involving Part IVA, refer to paragraphs 124 to 125 and 131 of this practice statement.

Step Eight:

- Consider whether there are circumstances that warrant making any compensating adjustment or adjustments when the application of the GAAR is finally established. Refer to paragraphs 136 to 138, 150, or 199 to 200 (as applicable) of this practice statement.

4. Who needs to be told about the decision?

The taxpayer and/or the taxpayer's tax agent or tax adviser	• A determination made under subsection 177F(1) or section 67 of the FBT Act to cancel a tax benefit or a declaration made under section 165-40 of the GST Act negating a GST benefit should be provided to the taxpayer or the taxpayer's agent/adviser. Refer to paragraphs 117, 149 or 191 (as applicable) of this practice statement.

5. Has the decision and the decision making process been documented?

In Tax Office records	• You must comply with PS LA 2002/16 'Mandatory use of ATO Information Technology systems for interpretative work – inclusion in performance agreements' in relation to the obligation of officers involved in interpretative work to use mandatory reporting systems.
In an ATO Ruling or Interpretative Decision	• After the Tax Office position in relation to the GAAR has been finalised, a taxation ruling or determination could be prepared, and the TCN officer will decide whether an ATO Interpretative Decision should be prepared. Refer to paragraph 43 of this practice statement.

Attachment 3: Guidelines on Submissions by Tax Officers to the GAAR Panel

1. These guidelines are to be followed by Tax Officers who are preparing a submission to the GAAR Panel.

Background

2. The role of the Panel is described in paragraphs 23 to 26 of this practice statement.

Submissions to the Panel

3. Matters being brought to the Panel must be supported by a submission signed off by the relevant TCN officer and sent to the Panel secretariat two weeks before the Panel meeting. The submission to the Panel should consist of an Executive Summary in the format indicated in Appendix 1 and a Submission adopting the structure indicated in Appendix 2. Please note that the Submission structure reflects the importance of considering each of the eight factors/twelve matters[1] (as applicable) for the relevant scheme in applying the applicable purpose test.

4. The Submission (excluding diagrams and attachments) should be as short as possible. It must be clear, robust and focused and include a clear conclusion and recommendation under the last section headed 'Recommendation'. The submission should be written in plain English and thought should be given to the use of abbreviations, dot points, numbering and subheadings in such a way as to assist the reader. Essential information which is not central to identifying the tax benefit(s)/GST benefit(s) or the counterfactual(s), or to applying the applicable purpose test[2] should be relegated to attachments to the Submission. Flow charts are often helpful and may also be attached. Edited copies of key legislation (other than well known provisions like Part IVA of the ITAA 1936 and section 8-1 of the ITAA 1997) should be included in an appendix with crucial passages underlined.

5. An example of a Panel submission involving the application of Part IVA to a hypothetical matter using the Executive Summary and Submission structure in Appendices 1 and 2 is contained in Appendix 3 to this Attachment.

6. Draft determinations or declarations cancelling or negating the relevant tax benefit(s)/GST benefit(s) should be attached to the Submission.

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[1] Although subsection 165-15(1) of the GST Act refers to 'matters', any general reference to 'factors' in this Attachment (including in the Appendices to this Attachment) is intended to include reference to the twelve matters in subsection 165-15(1) of the GST Act.

[2] Or the 'principal effect' test if the matter involves the GST, LCT or WET GAARs: refer to paragraphs 176 to 180 (GST), 203 (LCT) and 204 (WET) of this practice statement.

7. Tax officers present during Panel consideration of the matter will generally include a member of the TCN (usually the TCN member signing off on the submission) and, if possible, the decision-maker who is expected to be fully acquainted with the evidence (e.g., the auditor). Presenters should assume the Panel has read the Executive Summary and the Submission. Nonetheless presenters should be in a position to provide a short oral summary including a diagram of any relevant transactions or dealings. The Panel can be expected to engage in extensive questioning, not only on GAAR issues but also on the operation of primary provisions.

Executive Summary

Title

[Insert the name of the matter intended for Panel consideration.]

Issue Description

[Briefly describe the arrangement giving rise to the proposed application of the relevant GAAR, including the drivers of the arrangement.

Also briefly outline whether it is proposed to apply the general non-GAAR provisions to prevent the claimed tax benefit(s)/GST benefit(s) arising.]

Questions for Panel

[Insert a succinct outline of questions for the Panel to consider in session. This should include specific questions based on the relevant GAAR, but may also include questions on the substantive legal issues.]

Significant history of the issue

[Summarise the history of the issue commenting briefly on such matters as:

- whether the matter has arisen out of a private ruling application or audit activity;
- why the matter is being brought to the Panel at this stage (for example, for preliminary guidance on a specific issue or as a final step prior to the making of a decision on the application of the relevant GAAR);
- whether a position paper has issued and, if so, whether the taxpayer has responded;
- details of any critical dates (e.g. amendment timeframes); and
- whether the taxpayer has been invited to attend the Panel meeting and, if so, whether the taxpayer has accepted the invitation.]

Previous Panel Advice

[Where appropriate, insert a summary of the Panel's previous consideration (if any) on this matter or a similar issue. List the dates of previous Panel discussions and summarise the result of previous Panel consideration of the matter and any activities that have been completed in the light of previous advice from the Panel.]

Relevant case authorities and policy

[Refer to, for example, cases, rulings, explanatory memoranda etc.]

BSL Officers/ TCN Officers

[Insert the contact details of BSL Officer(s) and the TCN Officer.]

SUBMISSION FOR GAAR PANEL

[TITLE]

SUBMITTED BY

Name:

Segment:

Location:

Phone Number:

Date:

PTI Number ## [if applicable]

Section 1 – Which GAAR?

[Part IVA/section 67 of the FBTAA/Division 165 of the GST Act.]

Section 2 – How the GAAR issue arose

[Audit/Application for ruling.]

Section 3 – Relevant facts

Section 4 – The operation of relevant tax law, other than the GAAR

Section 5 – The operation of any relevant non-tax law

[If applicable.]

Section 6 – The scheme/arrangement (as applicable)

[Refer to paragraphs 54 to 60 (Part IVA), 145 (section 67 of the FBTAA), or 160 to 161 (Division 165 of the GST Act).]

Section 7 – The counterfactual(s)

[Refer to paragraphs 69 to 78 (Part IVA), 148 and 151 (section 67 of the FBTAA), or 163 to 164 (Division 165 of the GST Act).]

Section 8 – The tax benefit(s)/GST benefit(s) (as applicable) and the taxpayer(s)/employer/GST avoider

[Refer to paragraphs 61 to 68 and 120 to 125 (Part IVA), 148 (section 67 of the FBTAA), or 162, 165 to 171 and 193 to 195 (Division 165 of the GST Act).]

Section 9 – Weighing each of the factors in applying the applicable purpose test (and the 'principal effect' test in paragraph 165-5(1)(c) of the GST Act, if applicable)

[Refer to paragraphs 79 to 112 (Part IVA), 146, 147 and 151 (section 67 of the FBTAA), or 172 to 189 (Division 165 of the GST Act), 203 (LCT) and 204 (WET).]

Section 10 – The arguments (or potential arguments) for the taxpayer/employer/GST payer

Section 11 – Recommendation

An example of a Panel submission involving the application of Part IVA to a hypothetical matter

Executive Summary

Title

Float of iron ore business of Mining Operating Company Ltd

Issue Description

This matter involves the interposition of a holding company in a transfer of valuable mining rights between two wholly owned subsidiary companies. The mining rights were transferred at 'market value' from an operating subsidiary to a new subsidiary so that they could be floated separately from the other businesses, assets and liabilities of the operating subsidiary.

The interposition of the holding company in the transfer from the operating subsidiary to the new subsidiary may have operated to 'convert' the character of the mining rights for tax purposes from CGT treatment to Division 40 treatment. One of the consequences of Division 40 treatment is that there is no recapture of any taxable gain from the mining rights when the new subsidiary was floated. This is because, unlike under the CGT provisions, there is no taxing event under Division 40 when a company leaves a wholly-owned corporate group subsequent to intragroup rollover under Division 40 for the transfer of a depreciating asset within the group.

Questions for Panel

The questions for the Panel are:

1. Is it correct to conclude that the objectively ascertained dominant purpose of any person entering into or carrying out the scheme, or any part of it, was to enable Subsidiary Company 1 to obtain the tax benefit identified in section 8 of the Submission?

2. Sections 7 and 8 of the Submission canvass two alternative counterfactuals and tax benefits, but section 11 recommends that a Part IVA determination be made cancelling the tax benefit obtained under only the first of those counterfactuals. Is this the correct approach?

Significant history of the issue

This matter arises out of an audit. The position paper that issued in relation to this issue, and the taxpayer's subsequent responses to that position paper are attached.

The taxpayer has accepted an invitation to attend the Panel meeting.

Previous Panel Advice

There is no earlier Panel advice.

Relevant case authorities and policy

Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404; 141 ALR 92; 96 ATC 5201; 34 ATR 183

Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712

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SUBMISSION FOR GAAR PANEL

Audit

Mining Operating Company Ltd TFN XXXXXXXX

Mining Holding Company Ltd TFN XXXXXXXX

New Iron Ore Operating Company Ltd TFN XXXXXXXX

SUBMITTED BY

Name:	**John Citizen**
Segment:	**LB&I**
Location:	**Newcastle office**
Phone Number:	
Date:	**1 June 2003**
PTI Number ##	

Section 1 – Which GAAR?

1. Part IVA.

Section 2 – How the GAAR issue arose

2. This audit issue involves an arrangement entered into in the year of income ended 30 June 20xx by:

   - Mining Operating Company Ltd (**Subsidiary Company 1**);
   - Mining Holding Company Ltd, a company that has beneficially owned 100% of the shares in Subsidiary Company 1 since its establishment (**Holding Company**); and
   - New Iron Ore Operating Company Ltd, a 100% owned subsidiary of Mining Holding Company Ltd (**Subsidiary Company 2**) that was established for the purpose of the arrangement.

Section 3 – Relevant facts

The float of the iron ore assets of Subsidiary Company 1

3. The arrangement essentially involves the means by which the corporate group floated its iron ore assets that were owned by Subsidiary Company 1, and which were independently valued for this purpose at $20 million.

4. The float would not have occurred by the means of selling or issuing shares or other securities in Subsidiary Company 1. Subsidiary Company 1 owned significant businesses and assets in addition to the iron ore assets that were not floated. The float was not subject to various non-transferable liabilities of Subsidiary Company 1 in relation to those other businesses and assets.

5. The arrangement included entering into three contracts which, upon completion, resulted in:

   - the sale and transfer of the iron ore assets of Subsidiary Company 1 (**iron ore assets**) from Subsidiary Company 1 to Holding Company (**Step 1**);

   - the consequent sale and transfer of the same iron ore assets from Holding Company to Subsidiary Company 2 (**Step 2**); and

   - the consequent issue of a small number of issued shares in Subsidiary Company 2 to a third party adviser (**the float organiser**) which then arranged for the public offer of shares in Subsidiary Company 2 (**Step 3**).

6. Subsidiary Company 1 and Holding Company chose to obtain CGT rollover under Subdivision 126-B of the ITAA 1997 in relation to the disposal that occurred under Step 1 of the iron ore assets that were not trading stock, such as the iron ore mining rights (refer to paragraph 11 below). However, Holding Company and Subsidiary Company 2 did not choose to obtain CGT rollover under Subdivision 126-B in relation to the disposal that occurred under Step 2 of the iron ore assets that were not trading stock (refer to paragraphs 17 to 19 below).

Steps 1, 2 and 3 were contractually interdependent and all occurred within a matter of days

7. The completion of the contract for Step 2 was conditional upon the completion of the contract for Step 1.

8. The completion of the contracts for Step 1, Step 2 and Step 3 were conditional upon satisfaction or waiver of a number of conditions.

9. Every condition in the contracts for Step 1, Step 2 and Step 3 could be waived by agreement between the parties to the relevant contract.

10. On 31 March 20xx, the conditions to completion of the contracts were waived and completion of the arrangement occurred by transfer of the iron ore assets from Subsidiary Company 1 to Holding Company three days later, followed by transfer of the iron ore assets from Holding Company to Subsidiary Company 2 one day later, followed by the issue of shares to the float organiser.

The mining rights, their sale price, and their indexed cost base

11. The iron ore assets included mining rights consisting of identified mining leases and exploration licences granted under the *Mineral Resources Development Act 1995* (as amended) (Tasmania).

12. The total purchase price for the iron ore assets under both Step 1 and Step 2 was $20 million, which was the estimated market value of those assets determined by an arm's-length third party valuer. The contracts provided for allocation of $19 million of this purchase price to the mining rights. This allocation was also determined by the same third party valuer based on the relative market value of each of the iron ore assets.

13. The applicant has stated that the total of the indexed cost bases of all of the mining rights transferred under Step 1 and Step 2 was $1 million.

Section 4 – The operation of relevant tax law, other than Part IVA

The operation of the transitional rules for the Uniform Capital Allowance provisions in Division 40 in relation to mining rights

14. Prior to the introduction of Division 40, the disposal of post-CGT mining rights was subject to CGT treatment, as well as the operation of specific relevant provisions in Division 330 of the ITAA 1997 or Division 10 of Part III of the ITAA 1936 (sections 122 to 122U), as applicable.

15. Subsidiary Company 1 acquired the mining rights after 20 September 1985, but started to 'hold' the mining rights for the purpose of Division 40 of the ITAA 1997 before 1 July 2001. Accordingly, under the transitional rules for the capital allowance provisions in Division 40, those mining rights are not subject to Division 40 and continue only to be subject to the CGT provisions in the hands of Subsidiary Company 1. The transitional rules also provide that if a 'pre-1 July 2001' mining right is disposed of to an 'associate', the associate purchaser's (depreciable) cost for the purpose of Division 40 is limited to any costs that would have been deductible by the seller for the mining right under Division 330 of the ITAA 1997. See Attachment 1 to this Submission in relation to the operation of the relevant transitional rules for Division 40.

    [Note: the Attachments referred to in this example Submission are not included.]

Reversal of CGT rollover under CGT Event J1

16. If CGT rollover under Subdivision 126-B of the ITAA 1997 is chosen for a CGT disposal and the transferee company subsequently leaves the wholly owned group, CGT event J1 operates to effectively reverse the rollover by deeming the transferee company to have disposed of and acquired the relevant asset at the time the transferee left the wholly owned group for its market value at that time (refer subsections 104-175(5), (8) & (9) of the ITAA 1997).

The income tax advantage to the corporate group in 'converting' the mining rights from CGT treatment to Division 40 treatment under Step 1

17. Disregarding the operation of Part IVA, if Holding Company started to 'hold' the mining rights for the purpose of Division 40 of the ITAA 1997 under the arrangement (see paragraphs 20 and 24 to 27 below), the effect of Step 1 is that the mining rights became subject to the capital allowance provisions in Division 40 and any capital gain made by Holding Company on the subsequent disposal of the mining rights to Subsidiary Company 2 is disregarded pursuant to section 118-24 of the ITAA 1997. This is because Holding Company started to 'hold' the mining rights under Step 1 after 1 July 2001, and the disposal under Step 2 is a 'balancing adjusting event' (**BAE**) under Division 40 (as required for the CGT exclusion in section 118-24 of the ITAA 1997). This would mean that, as long as Step 2 resulted in the disposal of the mining rights (which is a CGT event), the transfer of the mining rights under Step 2 would 'automatically' be rolled over under the capital allowance rollover provisions pursuant to section 40-340 of the ITAA 1997 (refer to item 4 of subsection 40-340(1) that only requires that the 'transferor is able to choose a roll-over under Subdivision 126-B for the *CGT event', not that the transferor in fact chooses a CGT rollover).

18. If 'automatic' rollover occurred under section 40-340 for Step 2, there is no amount included in the assessable income of Holding Company by reason of the BAE that occurred when Holding Company disposed of the mining rights to Subsidiary Company 2 under Step 2. (Refer to subsection 40-345(1) that provides that section 40-285 does not apply to Holding Company in respect of the BAE if 'automatic' rollover applies.) Note: Holding Company's cost in the mining rights for the purpose of Division 40 is limited to Subsidiary Company 1's remaining undeducted costs for the mining rights under Division 330 of the ITAA 1997, regardless of what Holding Company paid for those rights under the contract for Step 1 (refer to paragraph 15 above).

19. Importantly, disregarding the operation of Part IVA, being able to access the capital allowance rollover under Step 2 for these pre-Division 40 mining rights (in the hands of Subsidiary Company 1) would have two advantages for the corporate group:

- Even though a BAE only occurs when you 'stop holding' a depreciating asset, CGT rollover is available for Step 2 under Subdivision 126-B (with the consequence that Division 40 rollover is available for Step 2 pursuant to subsection 40-340(1)) if the transferor and the transferee company (i.e., in the present case, Holding Company and Subsidiary Company 2) were members of the same 100% owned group 'at the trigger event'. In the case of a disposal by reason of a change in

ownership under a contract, the 'trigger event' is the time 'when [the transferor and transferee] … enter into the contract for the disposal' (refer to sections 126-45, 126-50 and 104-10 of the ITAA 1997).

So, even though Step 1 and Step 2 would not have happened unless Step 3 also happened (see paragraphs 7 to 10), at the time the contracts were entered into, but before the conditions for completion of those contracts were waived, Subsidiary Company 2 was a 100% owned subsidiary of Holding Company, and the group was able to choose CGT rollover for Step 2 (and therefore access 'automatic' Division 40 rollover for the 'post-1 July 2001' mining rights in the hands of Holding Company).

- There is no CGT J1 event equivalent in Division 40 that 'recaptures' the taxable gain if capital allowance rollover is followed by a degrouping of the transferor and transferee company.

So, CGT event J1 did not occur when Step 3 occurred because the transfer to Subsidiary Company 2 under Step 2 was subject to capital allowance rollover and not CGT rollover: refer to subsection 104-175(1) of the ITAA 1997. Note: CGT rollover is not chosen for Step 2: refer to paragraph 6 above.

In what circumstances will a taxpayer become a 'holder' of a depreciating asset under Division 40

20. Holding Company or Subsidiary Company 2 will have become the 'holder' of the mining rights under the arrangement for the purposes of Division 40 if they satisfied any of the following relevant items in the table in section 40-40 of the ITAA 1997:

- Item 5 – this item will be satisfied if and when the taxpayer has 'a right to exercise immediately' the relevant mining right and has a right to become its legal owner, and it is reasonable to expect that they 'will become its legal owner' by exercising their right, or the mining right 'will be disposed of at the[ir] direction and for the[ir] benefit'.

- Item 6 – this item will be satisfied if and when the taxpayer 'possesses [the mining right] or has a right as against the former holder to possess [the mining right] immediately' and has a right to become its holder under any other item, and it is reasonable to expect that they 'will become [the mining right's] holder [under any other item]' by exercising their right, or the mining right 'will be disposed of at the[ir] direction and for the[ir] benefit'.

- Item 10 – the taxpayer is the owner of the mining right, or is the legal owner of the mining right if there is both a legal and equitable owner (unless another person is the 'holder' of the mining right under items 5 or 6).

Carry forward tax losses

21. Subsidiary Company 1 had undeducted prior year tax losses of $1 million as at the year of income ended 30 June 20xx.

22. Accordingly, if Subsidiary Company 1 instead had transferred the mining rights directly to Subsidiary Company 2 and did not choose CGT rollover for that disposal under section 126-55, Subsidiary Company 1 may have been able to deduct its prior year losses against the amount of the assessable capital gain that thereby accrued to it.

23. By way of contrast, if Subsidiary Company 1 had instead transferred the mining rights directly to Subsidiary Company 2 and did choose CGT rollover for that disposal under section 126-55, the prior year losses incurred by Subsidiary Company 1 would not have been transferable to Subsidiary Company 2 under Subdivision 170-A of the ITAA 1997 to reduce the capital gain thereby accruing to Subsidiary Company 2 under CGT event J1. This is because Subsidiary Company 2 would have ceased to be wholly owned by the corporate group (which is why CGT event J1 would occur) before the end of the income year for which the capital gain accrued to Subsidiary Company 2. (Refer to subsection 104-175(1) in relation to when CGT Event J1 occurs, and to subsection 170-30(2) in relation to the requirement that companies must be members of the same wholly owned group the whole time they were in existence during the period from the beginning of the loss year until the end of the income year.)

Section 5 – The operation of any relevant non-tax law

Transfer of mining rights under Tasmanian law

24. The assignment of each of the iron ore mining rights was subject to the prior written consent of the responsible Tasmanian Minister pursuant to the terms of the *Mineral Resources Development Act 1995* (as amended) (Tasmania). Refer to Attachment 2 to this Submission in relation to the operation of the relevant provisions of the *Mineral Resources Development Act 1995* (as amended) (Tasmania).

25. It follows that a purchaser of these mining rights under a contract of sale could not have acquired a specifically enforceable interest in the mining rights unless and until the consent of the Minister was obtained pursuant to the Act: *Brown v. Heffer* (1966) 116 CLR 340 at 351-352, *N.S.W. Mining Co. Pty Ltd v. Attorney-General for New South Wales* (1967) 67 SR (NSW) 341, *Bahr v. Nicolay [No 2]* (1988) 164 CLR 604, *Chief Commissioner of Stamp Duties v. ISPT Pty Ltd* (1997) 45 NSWLR 639 at 655.

26. This is relevant in determining if, and when, Holding Company became the ‘holder’ of the mining rights that were ‘transferred’ to Holding Company under Step 1 for the purpose of Division 40 of the ITAA 1936.

If and when Holding Company became the 'holder' of the mining rights under Step 1 for the purpose of Division 40

27. It is arguable in all the relevant circumstances of the arrangement that Holding Company did not become the 'holder' of the mining rights for the purpose of Division 40 of the ITAA 1936 at any time under the arrangement. This is because:

    - at any time Holding Company was the legal owner of the mining rights pursuant to completion of Step 1, Subsidiary Company 2 was entitled to exercise or possess immediately the mining rights under Step 2 and it was reasonable to expect that Subsidiary Company 2 would become the legal owner of the mining rights upon exercise of its rights under Step 2; and

    - at any time Holding Company would have been entitled to exercise or possess the mining rights pursuant to Step 1, Subsidiary 2 was entitled to exercise or possess immediately the mining rights under Step 2 and it was reasonable to expect that Subsidiary 2 would become the legal owner of the mining rights upon exercise of its rights under Step 2.

    In relation to this issue refer to paragraphs 7 to 10, 20 and 24 to 26 above and to Attachment 3 to this Submission.

Stamp duty liability on Steps 1, 2 or 3

28. The taxpayers have stated that Step 1 of the arrangement was entered into to avoid liability for Tasmanian stamp duty that would have been payable in the amount of $1 million if the iron ore assets had simply been transferred directly from Subsidiary Company 1 to Subsidiary Company 2 followed by the float of Subsidiary Company 2.

29. The taxpayers' corporate group received legal advice in relation to liability to stamp duty on this arrangement.

30. However, our advice is that notwithstanding the advice obtained by the corporate group, Tasmanian stamp duty is in fact payable in the amount of $1 million on Step 1. Refer to Attachment 4 to this Submission in relation to liability for Tasmanian stamp duty on this transaction.

    [Note: the stamp duty liability referred to in this example Submission is not intended to reflect any actual amount of duty to which Step 1 would be liable under the *Duties Act 2001* (as amended) (Tasmania), or otherwise.]

Section 6 – The scheme

31. The scheme consists of Step 1, Step 2 and Step 3 as outlined in paragraph 5 above.

Section 7 – The counterfactual(s)

32. Having regard to the facts, particularly to the facts summarised in paragraphs 3, 4 and 7 to 13 above, it might reasonably be expected that if the scheme had not been entered into or carried out, either of the following would have happened:

- During the year of income ended 30 June 20xx **(20xx income year**), Subsidiary Company 1 would have *directly* transferred the iron ore assets to Subsidiary Company 2 (instead of indirectly transferring those assets via Holding Company under Step 1 and Step 2) and then issued shares in Subsidiary Company 2 in preparation for the float (as occurs under Step 3), and Subsidiary Company 1 and Subsidiary Company 2 would *not* have elected CGT rollover under Subdivision 126-B in relation to the disposal of the mining rights (referred to below as '**counterfactual 1**'); or

- During the 20xx income year, Subsidiary Company 1 would have *directly* transferred the iron ore assets to Subsidiary Company 2 (instead of indirectly transferring those assets via Holding Company under Step 1 and Step 2) and then issued shares in Subsidiary Company 2 in preparation for the float, and Subsidiary Company 1 and Subsidiary Company 2 *would have* elected CGT rollover under Subdivision 126-B in relation to the disposal of the mining rights (referred to below as '**counterfactual 2**').

33. Which of these two counterfactuals would be more likely to have happened is affected by whether the prior year tax losses incurred by Subsidiary Company 1 would have been deductible by the taxpayer who obtains the relevant tax benefit in the 20xx income year. It is submitted that counterfactual 1 is more likely to have happened since it is only under counterfactual 1 that Subsidiary Company 1's tax losses could be deducted in the 20xx income year against the tax benefit obtained (refer to paragraphs 21 to 23 above and to paragraphs 35 and 37 below).

Section 8 – The tax benefit(s) and the taxpayer(s)

Tax benefit and taxpayer under counterfactual 1

34. Under counterfactual 1, a capital gain of $18 million would have been made by Subsidiary Company 1 in respect of the disposal of the mining rights from Subsidiary Company 1 to Subsidiary Company 2 in the 20xx income year (total consideration in respect of disposal, $19 million, less total indexed cost bases of $1 million: refer to paragraphs 11 to 13 above).

35. It follows that under counterfactual 1, the tax benefit obtained by a taxpayer in connection with the scheme would be an amount of $18 million for the 20xx income year under paragraph 177C(1)(a), and the taxpayer would be Subsidiary Company 1. A draft determination made under subsection 177F(1) for counterfactual 1 is in Attachment 5 to this Submission.

Tax benefit and taxpayer under counterfactual 2

36. Under counterfactual 2, a capital gain of $18 million would have been made by Subsidiary Company 2 by reason of CGT Event J1 having occurred in the 20xx income year in respect of the mining rights: refer to paragraph 16 above. Note: Subsidiary Company 2 would have 'inherited' Subsidiary Company 1's cost base of $1 million in the mining rights because of the CGT rollover: refer to subsection 126-60(2) of the ITAA 1997. Also note that this capital gain of $18 million would not have been disregarded under section 118-24 of the ITAA 1997 because CGT Event J1 would not have also been a BAE under Division 40.

37. It follows that under counterfactual 2, the tax benefit obtained by a taxpayer in connection with the scheme would be an amount of $18 million for the 20xx income year under paragraph 177C(1)(a), and the taxpayer would be Subsidiary Company 2. A draft determination made under subsection 177F(1) for counterfactual 2 is in Attachment 6 to this Submission.

The tax benefit is not an excluded tax benefit under subsections 177C(2) or 177C(2A)

38. Subsection 177C(2A) will not operate so that the tax benefit under either counterfactual 1 or counterfactual 2 is not a tax benefit under Part IVA. Either of these tax benefits was attributable to Subsidiary Company 1 and Holding Company having chosen to make a CGT rollover election under Subdivision 126-B for Step 1. However, the subsection does not apply because the scheme did not consist 'solely of the making of the … election' as required by subparagraph 177C(2A)(a)(ii).

39. Further, paragraph 177C(2)(a) is not relevant in relation to the 'automatic' rollover under Division 40 for the transfer of the mining rights from Holding Company to Subsidiary Company 2 under Step 2 of the scheme. First, this rollover did not result in either tax benefit being 'attributable to the making of an agreement, choice, declaration, election or selection, the giving of a notice or the exercise of any option', within the meaning of subparagraph 177C(2)(a)(i). The rollover occurred 'automatically' under section 40-340 of the ITAA 1997 because the 'transferor was able to choose a roll-over under Subdivision 126-B for the *CGT event': refer to paragraph 17 above.

40. Second, even if subparagraph 177C(2)(a)(i) was satisfied by the 'automatic' rollover of the mining rights under Step 2, the requirements of subparagraph 177C(2)(a)(ii) would not be satisfied because the scheme was entered into or carried out by Subsidiary Company 1, by Holding Company, and/or by Subsidiary Company 2 for the purpose of 'creating any circumstance or state of affairs, the existence of which is necessary to enable the [election or choice etc.] … to be made'. It is not merely the obtaining of rollover under section 40-340 that resulted in either tax benefit being obtained, it is the interposition of Holding Company under Step 1 and Step 2 in order to enable the Division 40 rollover to be accessed.

Section 9 – Weighing each of the eight factors in applying the purpose test in paragraph 177D(b)

41. It has been concluded in this Submission that counterfactual 1 was more likely to have happened: refer to paragraph 33 above. The purpose test in paragraph 177D(b) is applied below in respect of the tax benefit obtained by Subsidiary Company 1 under counterfactual 1.

    [Note: if a determination under section 177F in relation to another taxpayer, such as Subsidiary Company 2 in this example, was also under consideration, the application of the purpose test in relation to the tax benefit obtained by that other taxpayer would generally be included in the Submission to the Panel. However, in this example Submission, the weighing of each of the eight factors in applying the purpose test in paragraph 177D(b) to the tax benefit obtained in connection with the scheme by Subsidiary Company 2 under counterfactual 2 is omitted.]

The first factor in subparagraph 177D(b)(i) – manner in which the scheme is entered into or carried out

42. The manner in which the scheme was entered into or carried out is more complicated and contrived when compared with counterfactual 1. Specifically, the interposition of Holding Company between Subsidiary Company 1 and Subsidiary Company 2 in the transfer of the mining rights from Subsidiary Company 1 to Subsidiary Company 2 prior to the float of the iron ore assets was the insertion of a step into the transaction which is not commercially explicable when compared with counterfactual 1. The taxpayer contends that the manner in which the scheme was entered into and carried out was explicable by a purpose of avoiding stamp duty. However, it is submitted that the way in which the scheme was carried out did not affect the stamp duty payable in respect of the scheme. If that submission is incorrect, this factor would also point to a purpose of avoiding stamp duty and the question of which purpose is dominant would then arise. This is considered further at paragraph 66 below.

The direction the first factor points

43. The first factor points toward the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

The second factor in subparagraph 177D(b)(ii) – form and substance of scheme

44. The economic and commercial substance of the scheme was the transfer of the iron ore assets out of Subsidiary Company 1 to Subsidiary Company 2 followed by sale of those assets (or more correctly, interests in those assets) by the issue of securities in Subsidiary Company 2 to third parties. In contrast, the form of the scheme involved steps interposing Holding Company in the transfer of the assets to Subsidiary Company 2 which had no effect on the economic or commercial substance or effect of the scheme (other than obtaining the tax benefit). See also paragraph 55 below in relation to the sixth factor.

The direction the second factor points

45. The second factor also points toward the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1. See also paragraphs 58 and 59 below in relation to the sixth factor.

The third factor in subparagraph 177D(b)(iii) – timing

46. The interposition of Holding Company in the transfer of the assets from Subsidiary Company 1 to Subsidiary Company 2 was implemented under contracts that were designed to ensure that Step 1 would not occur unless Step 1, Step 2 and Step 3 also occurred. Further, once the conditions to completion of the contracts were waived, Step 1 and Step 2 were completed within a very short time frame, i.e., 4 days in total. Refer to paragraphs 7 to 10 above.

The direction the third factor points

47. The third factor also points toward the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

The fourth factor in subparagraph 177D(b)(iv) – income tax result achieved by scheme

48. The income tax result that was achieved by the scheme (but for Part IVA) for Subsidiary Company 1 when compared with counterfactual 1 is the avoidance of an assessable capital gain of $18 million in respect of the disposal of the mining rights (refer to paragraphs 32 and 34 above).

49. The income tax result that was achieved by the scheme (but for Part IVA) for Subsidiary Company 2 is the same as the income tax result that would have occurred for Subsidiary Company 2 under counterfactual 1. That income tax result is that CGT Event J1 does not occur when Subsidiary Company 2 ceases to be a member of the wholly owned group when shares are issued in Subsidiary Company 2 to the float organiser (refer to paragraphs 5, 6, 16, 17 and 19 above).

50. The income tax result that was achieved by the scheme (but for Part IVA) for Holding Company is that any capital gain it made from the disposal of the mining rights to Subsidiary Company 2 under Step 2 was disregarded pursuant to section 118-24 of the ITAA 1997, and any gain from a balancing adjustment event for the mining rights was 'rolled over' under section 40-340 (refer to paragraphs 17 and 18 above), subject to it being concluded that Holding Company began to 'hold' the mining rights under Step 1 for the purpose of Division 40 of the ITAA 1997 (refer to paragraphs 6, 16, 19, 20 and 24 to 27 above and to Attachments 2 and 3 to this Submission).

The direction the fourth factor points

51. The fourth factor also points toward the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

The fifth factor in subparagraph 177D(b)(v) – change in financial position of the taxpayer resulting from scheme

52. The financial consequences for Subsidiary Company 1 (i.e., the taxpayer who obtains the tax benefit under counterfactual 1) that resulted from the scheme was the disposal of its iron ore assets for their estimated market value to a subsidiary in the same corporate group, for the purpose of the corporate group floating those assets. Thus, as a result of the scheme the assets of Subsidiary Company 1 decreased by the iron ore assets and increased by cash or receivables in the amount of $20 million. In addition, Subsidiary Company 1 is considered to be liable to Tasmanian stamp duty of $1 million in respect of the transfer of the iron ore assets under the scheme: refer to paragraphs 28 to 30 above and to Attachment 4 to this Submission.

The direction the fifth factor points

53. The fifth factor would appear to be neutral in indicating whether Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1. This is because the change in financial position of the taxpayer, i.e., Subsidiary Company 1, resulting from the scheme is exactly the same as would have occurred under the counterfactual, i.e., counterfactual 1.

The sixth factor in subparagraph 177D(b)(vi) – change in financial position of any connected person resulting from scheme

54. The financial consequences for Subsidiary Company 2 that resulted from the scheme was the acquisition of the iron ore assets for their estimated market value from a subsidiary in the same corporate group, followed by it being floated. Thus, as a result of the scheme Subsidiary Company 2 acquired the iron ore assets, incurred a liability for the purchase price of $20 million, and was floated.

55. The financial position of Holding company changes under the scheme, first by its acquisition of the iron ore assets for the purchase price of $20 million under Step 1, then by disposal of the same iron assets for the same purchase price of $20 million under Step 2. There was no net change in the financial position of Holding Company that resulted from the scheme being carried out. The liability it incurred to Subsidiary Company 1 for the purchase price for the iron ore assets under the contract for Step 1 was exactly offset by the amount payable to it by Subsidiary Company 2 for the same assets under the contract for Step 2. This was achieved by the means of a promissory note drawn by Subsidiary Company 2 that was endorsed by Holding Company in favour of Subsidiary Company 1.

The direction the sixth factor points

56. The sixth factor in itself could be viewed as favourable for the taxpayer, or neutral, in indicating whether Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1. However, when the sixth factor is considered in conjunction with the second, third and fourth factors, it tends to point toward the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

57. As is the case for Subsidiary Company 1 when considering the fifth factor, the change in financial position of Subsidiary Company 2 resulting from the scheme is exactly the same as would have occurred under the counterfactual, i.e., counterfactual 1.

58. However, the changes in the financial position of Holding Company under Step 1 and then under Step 2 would not have occurred under the counterfactual, i.e., counterfactual 1. They point strongly to the purpose of the parties entering into the scheme being to obtain the tax benefit. The changes occur very briefly, a matter to which regard is had under the third factor. After the short period in which the scheme is carried out those changes are cancelled out by Steps 1 and 2, a matter going to form and substance considered under the second factor. Further, the actual use or possession of the iron ore assets, and the assumption of any liabilities in relation to those assets, for example, insurance liabilities, were not altered or affected by the transfer of the iron ore assets to Holding Company. Transfer to Holding

59. Accordingly, while a change in financial position of Holding Company considered under this sixth factor might have provided a rationale for the scheme apart from the obtaining of the tax benefit, the fact that there was in substance no actual change in the financial position of Holding Company as a result of carrying out the scheme supports the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

The seventh factor in subparagraph 177D(b)(vii) – any other consequences of the scheme for the taxpayer or any connected person

60. There appears to have been no consequences for Subsidiary Company 1, Holding Company, or Subsidiary Company 2 of the scheme having been entered into or carried out other than the financial consequences referred to above, and the obtaining of a tax benefit by Subsidiary Company 1 under counterfactual 1.

The direction the seventh factor points

61. The seventh factor would appear to be neutral in indicating whether Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

The eighth factor in subparagraph 177D(b)(viii) – nature of connection between taxpayer and persons affected by the scheme

62. Subsidiary Company 1, Holding Company, and Subsidiary Company 2 were all members of the same wholly-owned corporate group until Step 3 occurred, when Subsidiary Company 2 ceased to be a wholly owned subsidiary in preparation for its subsequent float.

The direction the eighth factor points

63. If it were not for this connection between Subsidiary Company 1, Holding Company, and Subsidiary Company 2, the tax benefit could not have been obtained by Subsidiary Company 1 in connection with the scheme. This connection enabled Subsidiary Company 1 and Holding Company to choose CGT rollover for Step 1, and enabled ‘automatic’ rollover to occur under Division 40 for Step 2 (refer to paragraphs 6 and 17 above). Accordingly, the eighth factor points toward the conclusion that Subsidiary Company 1,

Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

Conclusion as to purpose after considering the eight factors

64. While some factors are neutral, most of the factors point towards the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1. Accordingly, consideration of all the eight factors together leads to the conclusion that Subsidiary Company 1, Holding Company, or Subsidiary Company 2 entered into or carried out the scheme, or any part of it, for the dominant purpose of enabling Subsidiary Company 1 to obtain the tax benefit under counterfactual 1.

Section 10 – The arguments (or potential arguments) for the taxpayer

65. The taxpayers' argument is that Step 1 and Step 2 of the scheme were entered into for the purpose of avoiding stamp duty and that therefore it cannot be concluded that the dominant purpose of any person entering into or carrying out the scheme was to obtain a tax benefit.

66. It is submitted this argument does not prevent it being concluded that the dominant purpose of Subsidiary Company 1, Holding Company, or Subsidiary Company 2 in entering into or carrying out the scheme, or any part it, was to enable Subsidiary Company 1 to obtain the tax benefit under counterfactual 1 for the following reasons:

- There are grounds for concluding that Step 1 is in fact liable to the same amount of Tasmanian stamp duty as a direct transfer of the iron ore assets from Subsidiary Company 1 to Subsidiary Company 2 (without interposing Holding Company). Refer to paragraphs 28 to 30 and to Attachment 4 to this Submission.

- The dominant purpose of a person for the purpose of applying the test in paragraph 177D(b) is not their actual subjective dominant purpose. It is their objectively ascertained dominant purpose having regard to each of the eight factors considered against the background of the counterfactual(s): *Federal Commissioner of Taxation v. Spotless Services* Ltd (1996) 186 CLR 404 at 421 and *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [65], [66] and [69] per Gummow and Hayne JJ and at [94] per Callinan J. It can be objectively concluded that the dominant purpose of Subsidiary Company 1, Holding Company, or Subsidiary Company 2 in entering into or carrying out the scheme, or any part it, was to avoid an $18 million assessable capital gain rather than to avoid a $1 million stamp duty liability.

Section 11 – Recommendation

67. Part IVA applies to the scheme and the Commissioner should make a determination under paragraph 177F(1)(a) that the tax benefit of $18 million obtained by Subsidiary Company 1 under counterfactual 1 be included in the assessable income of Subsidiary Company 1 in the 20xx income year.

Attachment 4: ATO paper released by the Commissioner of Taxation on 17 March 2005

TAX OFFICE COMMENTS ON THE OPERATION OF PART IVA

The recent decision in *Hart's* case[1] in our view, means business as usual. The judgments of the High Court in *Hart* represent no change in our understanding of Part IVA. What they decided was, we think, already settled law, settled since the decision in *Spotless*[2]; moreover, we think it was what Part IVA's designers intended. Yet we have heard and read concerns that the High Court went too far, or that we went too far, take your pick. There seem to be several strands to this concern: that it makes life too uncertain for taxpayers, that it gives the Tax Office too much power, and, above all, that Part IVA goes further than was intended—that it applies to more than the blatant artificial and contrived dealings that the then Treasurer said it would when he announced it in 1981.

But when one reads these concerns one feels a certain déjà vu. From 1979 to 1981 pretty much all these issues were debated: in the Tax Office, in Parliament, and in the community at large. How far should a good anti-avoidance provision go? What principle should it apply? What counts as tax avoidance? What makes it hard to write a general anti-avoidance rule?

The Development of Part IVA

There is a certain conundrum involved in designing a general anti-avoidance rule. The function of a general anti-avoidance rule is to limit the opportunities that might otherwise be available to taxpayers to reduce tax. That is all it does. But a general anti-avoidance provision will necessarily appear in the context of a statute many of whose other provisions exist to *offer* opportunities to reduce tax. This contradiction has to be reconciled. It cannot be reconciled by saying that the anti-avoidance applies if your main purpose in doing something is to reduce tax because there are provisions in the Act framed on the assumption that taxpayers will act to reduce tax.[3]

The possession by taxpayers of an actual purpose of reducing tax in the ordinary course of business is taken as given by tax policy makers. However, one cannot say that a general anti-avoidance rule will *not* apply merely because the Act otherwise provides an opportunity to reduce tax. The opportunity itself may be unintended, and even if it is intended it may still be abused in unintended ways. So we require some sort of touchstone, some criteria to distinguish the permissible exploitation of opportunities to reduce tax from abusive exploitation of those same opportunities.

This conundrum bedevilled s. 260. Section 260 had the effect of making void as against the Commissioner any arrangement so far as it had the purpose or effect of avoiding tax, very broadly defined[4]. Consider the range of transactions that have the effect of changing the incidence of income tax. The formation of a company by, say,

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[1] [2004] HCA 26; 2004 ATC 4599; 55 ATR 712.

[2] 96 ATC 5201; 34 ATR 183; (1996) 186 CLR 404.

[3] Apart from the obvious case of tax concessions intended to encourage certain behaviour, many transactions have the effect of reducing tax, for example expenditure incurred in carrying on a business is generally deductible. See also Dawson J in *Gulland's* case 85 ATC 4765 at p 4793; (1985-1986) 160 CLR 55 at p 105; 17 ATR 1 at p 33.

[4] Specifically, altering the incidence of any income tax; relieving any person from any liability to pay income tax or make any return; defeating, evading, or avoiding any duty or liability imposed on any person by the Act; or preventing the operation of the Act in any respect.

a grocer who had formerly traded on his own account, to carry on his grocery business, can have that effect. Any business re-organization or re-arrangement of one's affairs will most likely alter the incidence of income tax, as can, indeed, mere trading. As Knox CJ pointed at in *DFC of T v Purcell*:

> "The section, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer."[5]

Lord Denning articulated an approach for determining whether an arrangement had a tax avoidance character to which section 260 and a rule like Part IVA should apply[6].

> "But, said Sir Garfield, if such a wide interpretation is given to the words, where is the section to stop? Does it enable the commissioner to avoid all transactions by which a man seeks to escape a liability to tax which is about to fall upon him? … The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every … arrangement … which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement *itself* and see which is *its* effect—what *it* does—irrespective of the motives of the persons who made it. *Williams*, J., put it well when he said 'The purpose of a contract agreement or arrangement must be what *it* is intended to effect and that intention must be ascertained from its terms.' … In order to bring the arrangement within the section you must be able to predicate —by looking at the overt acts by which it was implemented—that it was implemented *in that particular way* [emphasis added] so as to avoid tax. If you cannot so predicate, but that have to acknowledge that the transactions are capable of explanation by reference to ordinary business and family dealing, without necessarily being labelled a means to avoid tax, then the arrangement does not come within the section"

Newton's case was referred to in the Explanatory Memorandum accompanying the Bill introducing Part IVA.

> "Some writers on the subject suggest that tax avoidance involves conduct entered into for the sole or dominant purpose of obtaining a particular tax advantage. That description could be expected to cover the types of tax avoidance that, again using the language of social or political debate, are blatant, artificial or contrived, and which are indeed intended to be covered by this Bill. But it is also apt to describe other arrangements, including some family arrangements, which are beyond the appropriate scope of general anti-avoidance measures and ought, if need be, to be dealt with by specific measures. …
>
> The test for the application of the new provision is intended to have the effect that arrangements of a normal business or family kind, including those of a tax planning nature, will be beyond the scope of the Part IVA.
>
> In this respect, Part IVA may be seen as effectuating … a position akin to that which appears to emerge from the decision in… *Newton*. The essence of the

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[5] (1921) 29 CLR 464 at 466.
[6] *FC of T v Newton* (1958) 98 CLR 1 at p 8.

> views expressed in that case was that a tax avoidance situation covered by section 260 exists only if it can be predicated from looking at an arrangement that it was implemented *in that particular way* so as to avoid tax. [emphasis added]

If the tax avoidance purpose of a scheme has to be deduced from the overt acts by which it was implemented, it will only be possible to infer such purpose from schemes that differ in some relevant way from the character of usual business or family planning. Within the field of ordinary dealing a taxpayer would be free to take up the opportunities to reduce tax offered to them by the other provisions of the Act. So the scope for tax planning would be limited, but the limit would not prevent or foreclose any normal dealing or transaction. On the other hand, an arrangement that exhibited contrivance or artifice would show its tax avoidance purpose on its face, and could fall within the provision. A taxpayer would therefore not be free to take up opportunities to reduce tax that required artifice or contrivance to achieve.

Such an approach makes good sense. When a provision is inserted into the income tax law, policy-makers may be taken to contemplate the obvious exploitation or use of the provision. The ordinary dealing or obvious case should not result in uncontemplated consequences. It is reasonable to assume that the tax opportunities of straight-forward dealing have been considered by those who design tax laws, and having been considered, if not then prevented, have in effect been implicitly sanctioned. Moreover, from a taxpayer's perspective a provision will be seen to offer, for straightforward dealings, tax opportunities that are untainted with any notion of abuse. Doing the obvious is use, not abuse.

The same cannot be said of contrivance and artifice. This, to generalise, is precisely what is not contemplated by those who design tax laws, and when they do contemplate it, they generally put something in the law to try to prevent it. Some people say that we should be used to it by now—surely some of the dodges ought to be obvious. However, the product of human ingenuity when it is wasted on tax avoidance is not as easy to predict as you might think, but anyway, this is not the point. The point is that there is a very big difference between what flows naturally from the Act, and what can be extracted from its provisions by contrivance and artifice. In the first case it may be said that the opportunity to reduce tax was *given* by Parliament through the design of the tax laws; the second, it can only be said that it was taken. What one wants is a rule that allows tax reduction opportunities to be given by policy-makers, but prevents them from being taken unilaterally by taxpayers where that was not intended.[7] That, in a nutshell, is what section 260 meant to achieve, and indeed, it is what Part IVA is meant to achieve.

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[7] As Lockhart J. said in *Pettigrew v FC of T* 90 ATC 4124 at p 4126; 20 ATR 1833 at p 1836: "If in all the circumstances the use of the specific or particular provision of the Act warrants the description of an 'abuse' of it … sec. 260 will apply."

THE SCOPE OF PART IVA

The scope of Part IVA is determined by an objective conclusion, based on weighing up of the factors in s.177D that the scheme was entered into for the sole or dominant purpose of obtaining a tax benefit.

As noted by Mr Justice Callinan in *Hart's* case.

> "The next question, which is of purpose, is whether under s.177D the scheme is one to which Part IVA applies. This will, in my view, in most cases be the critical question. The answer to it, both as a matter of statutory interpretation and as the explanatory memorandum indicates, was intended to be the fulcrum upon which most Part IVA cases will turn, because the definition of a scheme, being as wide as it is, will relatively easily be satisfied, and the presence or absence of a tax advantage will also usually be readily apparent".

This question is posed on the basis of a comparison – "the inquiry directed by Part IVA requires a comparison between the scheme in question and an alternative postulate. To draw a conclusion about purpose from the eight matters identified in s177D(b) will require consideration of what other possibilities existed."[8]

The objective conclusion reached has to be determined by reference to the eight factors in s.177D(b), and only to these eight factors. These factors are designed to make you focus on what it is that, in Parliament's view, makes unacceptable or acceptable the way in which a taxpayer obtains a tax benefit. This is what the Explanatory Memorandum said:

> "In order to confine the scope of the proposed provisions to schemes of the 'blatant' or 'paper' variety, the measures in this Bill are expressed so as to render ineffective a scheme whereby a tax benefit is obtained and an objective examination, having regard to the scheme itself and to its surrounding circumstances and practical results, leads to the conclusion that the scheme was entered into for the sole or dominant purpose of obtaining a tax benefit."

In order to get the right answer for a particular case, one has to apply those eight factors properly using their actual words. They contain a built-in logic, as it were; they are not just a list.

To highlight this point, take as the starting point the proposition that a taxpayer seeking certain commercial ends in a transaction often has a choice of means by which to achieve those ends; and it is possible, in the words of the court in *Spotless*, to 'shape' the transaction in several ways according to the means chosen. *Prima facie*, how taxpayers arrange their affairs, or shape their transactions, is of no concern to the Commissioner. However, when the manner in which they go about establishing or implementing the transaction, when there is a divergence between the form of the transaction and its substance, and/or when the transactions' timing and so on, indicate that they have carried out a scheme in that particular way (or shaped it in particular way) mainly or solely to obtain a tax benefit, Part IVA is applicable, even when the tax benefit is the means of obtaining some further commercial goal. Conversely, however, when the manner in which the scheme is established or implemented, when there is congruence between form and substance, and the timing and so on do not point to the transaction as having been carried out in that particular

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[8] Gummow and Hayne JJ *FC of T v Hart* 2004 ATC 4599 at 4614; 55 ATR at 730.

way so as to obtain the tax benefit, Part IVA is inapplicable, even though a reduction of tax is a substantial effect of the scheme, and even though the actual subjective purpose for doing in that way was to get a tax break.

The eight factors in s.177D consist of three overlapping sets. The first set is about how the scheme was implemented: how its results were obtained. That is to say, manner, form and substance and timing. Then we have the effects of the scheme: the tax results, financial changes, and other consequences of the scheme. Finally, we are referred to the nature of any connection between the parties to the scheme.

First Set of Factors: Enquiring into How the Scheme Was Implemented
It is not coincidence that s.177D starts by looking at how the scheme achieves its effects before it looks at what the effects are. If one is asking, why this particular scheme, *how* is likely to be informative.

(1) The Manner of Implementation

The famous reference to 'contrivance' and 'artificiality' in the second reading speech upon the introduction of Part IVA was a short-hand description of the intended effect of this factor: 'contrived' dealings are those whose particular manner of formation and implementation is only explicable by the purpose of obtaining a tax benefit. Conversely if a scheme is entered into and carried out in the manner in which ordinary business or family dealings are conducted, the manner of scheme will not indicate the existence of any artificiality or contrivance.

This factor thus expresses the policy intent that transactions capable of explanation by reference to ordinary business and family dealing are not to be caught by the section. If the manner of the scheme does not bespeak tax avoidance, a taxpayer is a long way towards showing their purpose is not to obtain a tax benefit. However, it is a mistake to read manner narrowly—*Spotless* tells us not to—and it is a mistake to think a step in a scheme cannot contribute to a conclusion on manner. There is no statutory concept of 'step'. So if a scheme includes a round-robin of cheques in creation or discharge of liabilities, that goes to the manner in which the scheme is carried out: see *Sleight's* case[9].

In a practical sense a step apparently taken for no purpose but a tax purpose will often set off an alarm under this heading. A step taken for two purposes can look bad under this heading but retrieved later, when considering the other factors. But when a scheme has elements with no non-tax justification, the taxpayer is likely to have a problem. That, of course, is offered as pragmatic guidance, not as a proposition of law, and relates only to elements of material significance.

For example, *Peabody*[10] had a share devaluation with no non-fiscal rationale; *Consolidated Press*[11] had a company which lacked another reason for being; and *Hart* had an election to split the loan.

(2) Questions of Form and Substance

As Callinan, J., says in *Hart*, s.177D(b) requires that substance rather than form be the focus[12]. Thus, the second factor directs an enquiry into whether there is a

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[9] 2004 ATC 4477, at p 4510; 55 ATR 555 – particularly where the scheme has non-recourse features which may limit the funds available for any real investment.
[10] 94 ATC 4663; (1994) 181 CLR 359; 28 ATR 344.
[11] 2001 ATC 4343; (2001) 207 CLR 235; 47 ATR 229.

discrepancy between the form of the scheme and its substance, meaning its commercial and economic substance (as well as, and not merely, as some say, the 'legal' substance of any rights created by the scheme.)

To examine the form in which the substance of the scheme has been obtained is, in a sense, a species of examining the manner in which its effects are obtained. In an ordinary business or family dealing, the form of a transaction is congruent with its substance.

It might be added, the manner of implementing a scheme whose form and substance correspond is likely to be straightforward, commercial, and uncontrived. However, a discrepancy between the business and practical effect of a scheme, on one hand, and its legal form on the other, may well indicate that the scheme has been implemented in a roundabout way and in a particular form, or with particular attributes, as the means of obtaining a tax benefit, given that the substance of the scheme is usually available by some more straightforward and commercial mode of dealing. That is to say, a transaction may be 'shaped' to be the means of obtaining a tax benefit.[13]

This factor enables one to take into account what may actually be achieved by a scheme, whether that is "found within the four corners of an agreement" or not.[14]

(3) Timing Issues

The time at which a scheme is entered into, and the length of the period during which it is carried out, also draws attention to a particular aspect of the manner in which a scheme is entered into and carried out. Specifically, a scheme that is entered into shortly before the end of a financial year, and carried out for a brief period, is one whose timing indicates the purpose of obtaining a tax benefit. There are dates other than the end of the year of income that may also be significant, such as the date of a change in the rate of tax.

It may also be relevant to note that the time at which a scheme is entered into is not proximate to any commercial occasion; that is, the timing of the scheme does not seem to be associated with an opportunity or need that might point to a non-tax purpose. In other circumstances timing and duration is more likely to be neutral or point to a non-tax purpose.

However, in *Hart*, as Mr Justice Callinan points out[15], the timing of principal and interest repayments (formally in respect of the investment property) over a long period of time indicated something odd was going on, something to be explained by the purpose of obtaining a tax benefit.

Second Set of Factors: Enquiring into the Effects of the Scheme

The fourth to seventh factors, inclusive, are described shortly and aptly as the effects of the scheme. They cannot simply be compared and weighed to determine purpose, for to do so is to ignore the other factors. The bare fact that a taxpayer

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[12] 2004 ATC 4599 at p.4625; 55 ATR 712 at p 741-742.
[13] Refer to the well-known passage in *Spotless*, 96 ATC 5201 at p.5206; (1996) 186 CLR 404 at 416; 34 ATR 183 at p 188.
[14] Per Callinan, J., 2004 ATC 4599 at p. 4625; 55 ATR 712 at p 741.
[15] 2004 ATC 4626; 55 ATR 712.

pays less tax, if one form of transaction rather than another is made does not by itself demonstrate that Part IVA applies.[16]

Similarly one cannot simply assert that Part IVA applies because a tax saving is greater than any financial advantage. Here too the question has to be asked, how were the advantages obtained? In principle at least, one could conceive of a scheme where the tax saving was greater than any financial advantage that was obtained under it, and yet, it was entered into in a manner that spoke of nothing but business as usual, and whose form and substance corresponded, and so on. Of course if the tax saving exceeds any financial advantage and there is a problem with manner or form and substance, there is a distinct probability that Part IVA will apply.

While the fourth and seventh factors are self-explanatory—they are simply directions to look at the tax effects and the commercial and family effects of the scheme—the specific direction to enquire into the change in financial and tax position of the taxpayer, any other party to the scheme, and any person who has any connection with taxpayer requires comment.

The absence of any change in the financial position of a taxpayer under a scheme will usually indicate a tax purpose depending, of course, on its other consequences. But under most schemes there is a change of some sort. The question naturally arises, change in comparison with what? A change that would have resulted anyway if the scheme was not entered into and carried out does not tell you much about the purpose of the taxpayer in entering into the scheme. And a change in the position of the taxpayer may mean little if there is an inverse change in the position of another person, and the other person is an *alter ego* of the taxpayer.

The result in relation to the operation of the Act that, but for Part IVA, would be achieved by the scheme, examined under these factors, is not confined to the result achieved for the taxpayer. For example, it may be relevant to observe that a deduction that might otherwise be allowable to the taxpayer is not matched by a corresponding amount of assessable income in the hands of another party, and it may be relevant to observe that it is. The extent to which it is relevant may depend on the nature of the connexion between the persons involved. Similarly, a transaction having the form of a loss-making transaction may not have that substance if an associate makes a corresponding (but non-taxable) gain. Conversely, in some cases, these factors may permit regard to offsetting tax liabilities incurred by associates to demonstrate absence of the relevant purpose.

Third Set of Factors: Enquiring into the Nature of the Connection between Parties to the Scheme

The eighth factor is the nature of any connexion between the taxpayer and other parties to the scheme. The existence of certain connexions between taxpayers will be directly relevant to the assessment one makes of manner, form and substance, tax result, financial change and other consequences. There is often a clearly discernible relationship between contrivance in manner and an association in relationship.

This factor requires the circumstance that parties are not at arm's length to be taken into account.

[16] Per Gummow and Hayne JJ, 2004 ATC. 4599 at p. 4612; 55 ATR 712 at p 727.

But again, the mere absence or presence of some association between taxpayers is relatively uninformative in itself without consideration of the manner of dealing between them. Taxpayers not at arm's length but who deal with each other as if they were, will deal with each other in a *manner* that may not exhibit a purpose of obtaining a tax benefit; whereas taxpayers who are otherwise independent of each but who act in concert for the purpose of obtaining a tax benefit, may exhibit that purpose by dealing in the *manner* of persons who are not at arm's length.[17]

This factor also requires attention to be paid to the existence of family relationships in a way that assists taxpayers. Many dealings whose manner would be decidedly odd between strangers may be entirely explicable between family members. A businessman who gives assets to strangers for less than they are worth would be the subject of enquiry. A gift to one's family stands on a different footing. *Purcell*, an old s.260 case[18], provides as an example. *Purcell* settled assets on trust for the benefit of his wife and children, retaining, however, wide, and at the time unusual, powers of management and control. Possibly his motivation was to reduce tax through income splitting. On the other hand, his subjective purpose might have been to benefit his wife and children because he was fond of them. Objectively one cannot infer the purpose of tax avoidance just from a gift of property to one's family. Of course it is a different matter if the family does not benefit in substance from the arrangement. That was a consideration in *Hollyock*, another s.260 case that well illustrates the sort of family dealing that would not pass Part IVA[19].

The Importance of Weighing the Eight Factors

Taken together, the criteria in s177D form a coherent basis for the examination of transactions which test the way in which the results of the scheme were obtained to objectively determine the purpose of the taxpayer for entering into, or carrying out, that particular scheme.

In summary, section 177D, correctly applied, does not derogate from taxpayers' choosing to organize their affairs in a way that results in the least tax; it simply circumscribes the choice by requiring that the way in which the taxpayer obtains a tax benefit must not be such as to show the purpose of obtaining the benefit on the face of the scheme. This, in effect, limits the choices open to taxpayers to ordinary, straightforward dealings that have a commercial rationale. Or, to put it another way, it leaves taxpayers free to enter into ordinary straightforward dealings.

The Role of "an Alternative Postulate"

One of the important points that emerges from the High Court decision in *Hart* is that in working out whether Part IVA applies to a scheme, and in applying the s.177D factors, the scheme must be compared with the probable alternative.[20]

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[17] See *Collis v FC of T* 96 ATC 4831; 33 ATR 438.

[18] (1921) 29 CLR 464, esp. at p.473f.

[19] 71 ATC 4202; 2 ATR 601; (1970-1971) 125 CLR 647: Hollyock was a pharmacist who wished, or so it seemed, to share his income with his wife. Pharmacists earn most of their income by selling trading stock, and ordinarily he might have achieved his purpose by forming a partnership or company; but he was prevented from doing so in a straightforward way by regulation. So he entered into a complicated scheme that in itself spoke of tax avoidance. The income shown as drawn by his wife was not actually enjoyed by her. The substance of the scheme in such a case would show that the family connection could not explain the taxpayer's purpose as to benefit his wife; while its manner would point to obtaining a tax benefit.

[20] 2004 ATC at p.4614, paragraph 66; 55 ATR 712 at p 730, paragraph 66.

But the fact that there are different ways of doing a transaction or organizing your business affairs does not mean that Part IVA applies if you choose the one that produces less tax. This is where the s.177D factors operate. The choice of the most tax efficient structure might, as matter of subjective intention, have been chosen solely for tax reasons. (Of course, it might not.) But it is a mistake to say well of course they chose this one for tax, so Part IVA applies.

This point may be illustrated by the use of a partnership, recalling the statement of the then Treasurer when Part IVA was introduced that a taxpayer who carried on business in partnership with his spouse need have no fear of Part IVA applying to his affairs. Suppose the Smiths want to start a small grocery business. The Smiths could organize their affairs in several ways. Mr Smith might employ Mrs Smith and pay her a wage, or vice a versa. They would get an allowable deduction for it, to the extent it was reasonable in amount, and the employee would be assessable on it. Alternatively, they could incorporate, or Mr and Mrs Smith might carry on business in partnership. If they chose the latter and they had no specific agreement to the contrary, under the Partnership Act they would share in profit and loss in equal shares. They would then be assessable in equal shares on the profit, or have equal shares in any tax loss. From the point of view of income tax this division of profit might seem more attractive than the employment or, incorporation option. On the other hand, there are other, very real non-tax consequences that follow: for example, Mrs Smith becomes fully liable for the debts of the partnership. Now even though there might be a tax advantage, in this hypothetical example, the formation (which may have involved contributions to partnership capital) and conduct of a partnership in the ordinary way would not of itself show that the tax advantage was the dominant purpose of the arrangement.

That purpose has to show up, as it did in *Hart*, in a way that is relevant to s.177D. Look at how the court approached it in *Hart*. In that case there was a very artificial division of the loan in question into two parts, with deductible interest being incurred but not paid on the deductible part, and then compounded, in a way that in made interest in substance on a home loan tax deductible. This artifice was essential to the outcome.

Gummow and Hayne, JJ., drew attention to the finding by Hill, J., that "the manner in which the scheme was formulated … is certainly explicable *only* by taxation consequences."[21] (Their emphasis.) Of course, they wrote, manner is not determinative; all eight factors must be considered. But the other factors—they went through them—all pointed to the same conclusion or were neutral. None pointed against the conclusion, they said. But if it were not for the obvious contrivance involved in the terms of that loan, as it showed up under the headings of manner, form and substance, change in financial position and so on, there would only have been one factor which pointed to a tax purpose, that being under the heading of "result under the Act", which would not have sufficed.

Defining a scheme Widely or Narrowly – Is it Important?

It is claimed by some that the Commissioner can isolate some microscopic element that produces a tax benefit and not much else, but which in the overall scheme of things is just a normal part of an everyday commercial transaction, and say that Part IVA applies. This is not so.

[21] 2004 ATC 4599 at p.4612; 55 ATR 712 at p 728.

Their Honours' conclusion in *Hart* as to manner followed whether the scheme was identified widely or narrowly.

> "The conclusions just described, as being indicated by the manner in which the scheme was entered into or carried out, are indicated by a consideration of how else the loan might have been arranged. They are not conclusions which depend on identifying the scheme in one of the ways put forward by the Commissioner rather than another."[22]

A scheme, cannot by a narrow definition, put out of consideration in characterizing it under s.177D matters going to a non-tax purpose in such a way as to produce an artificial outcome. Mr Justice Callinan rightly observed that:

> "it is not for the appellant [i.e., the Commissioner] to attempt to seize upon the and isolate one event, or a series of events, which standing alone may appear to have a complexion which it or they cannot truly bear when other, relevant, connected events are taken, as they should be, into account." :[23]

If there were any doubt in that respect, it was settled by the previous decision of the High Court in *CPH*.[24] That decision clearly held that context is to be taken into account in explaining a scheme.

That is a very important point. The context of a scheme is to be taken into account when the factors under s.177D are applied to characterize the purposes of those who participate in it. Clearly, there has been an assumption behind the arguments about the permissible width of a scheme that once something is omitted from the scheme it no longer counts in characterizing the purpose of those who participate in it. But if what is omitted is still brought to bear *as context* in characterizing the purpose of the participants in the scheme, the width or narrowness no longer seems so important. One will appreciate that once it is understood that the context is to be taken into account, the width or narrowness of a scheme may not necessarily matter. That was the case in *Spotless*. Part IVA applied to both the wide and narrow schemes. It was also the case in *Hart*.

As *Spotless* and *Hart* show the critical question is whether the factors in s.177D(b) point to a tax avoidance purpose. In *Hart*, Gleeson, C.J., and McHugh J said:

> "A transaction may take such a form that there is a particular scheme in respect of which a conclusion of the kind described in s.177D is required, even though the particular scheme also advances a wider commercial objective." [25]

Then they quote the well-known passages from *Spotless*, emphasising that the application of Part IVA flowed from—

> "the conclusion that, viewed objectively, it was the obtaining of the tax benefit which directed the taxpayer in *taking steps which they would not otherwise have taken by entering into the scheme*." [26]

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[22] 2004 ATC 4599 at p.4614; 55 ATR at p 731.
[23] 2004 ATC 4599 at p.4625; 55 ATR 712 at p 742.
[24] (2001), 207 CLR 235 at pp.254, 264, paragraphs 52 and 96; 2001 ATC 4343 at pp.4354, 4360; 47 ATR 229 at pp 240, 247, paragraphs 52 and 96.
[25] 2004 ATC at p.4604; 55 ATR 712 at p 718.
[26] (1996) 186 CLR at pp. 416, 423; 96 ATC at pp. 5206, 5210; 34 ATR 183 at p 193.

The question for Gleeson C.J. and McHugh J was not why did the taxpayers borrow money, but why did they do it on the terms of a split loan? Why take *these* steps? Why this *particular* form of borrowing, in other words. This was their answer.

> "Let it be assumed that, in the present case, even if the 'wealth optimiser structure' had not been available, the respondents would have borrowed money to buy their new home, and also borrowed money in order to retain their former home as an income-earning investment. The 'wealth optimiser structure' depended entirely for its efficacy upon tax benefits generated by arrangements between the respondents and the lender that had no explanation other than their fiscal consequences. What 'optimised' the respondents' 'wealth' was the tax benefit earlier described: not the deductibility of interest as such; but the deductibility of additional interest on loan account 2 *contrived by the particular form of the borrowing transaction.* [27] [emphasis added]

So, the presence of material steps in a scheme consistent with no other explanation than the purpose of obtaining a tax benefit will clearly be critical in characterizing the purposes of the persons who entered into or carried out the scheme. It will be they which lend an air of artifice and contrivance to the manner in which the scheme is carried out, and usually it will be they which separate form from substance, and of course it will be they which change the outcome for tax purposes, while contributing little or nothing to the non-tax effects of the scheme.

Where they are present in a scheme it will often not matter whether the scheme in which they are present is defined widely or narrowly, provided they are included, for when the s.177D factors are considered it will be they which establish the existence of the relevant purpose. *Hart* is an example.

The scheme is the particular means adopted to advance the taxpayer's commercial ends. If the dominant purpose disclosed by examination of the s.177D factors for advancing those ends by that particular means is to obtain a tax benefit, Part IVA will apply to the scheme.

The moral is that the outcome under Part IVA cannot be manipulated by tactics. The conclusion whether Part IVA applies has been made an objective one: it is a matter for ultimate decision by the courts. The Commissioner cannot manipulate it to produce an outcome favourable to the revenue by disregarding the context of a scheme, but neither can a taxpayer prevent the application of Part IVA to steps inserted into transactions solely to obtain a tax benefit by 'burying' them, or embedding them, in a wider transaction.

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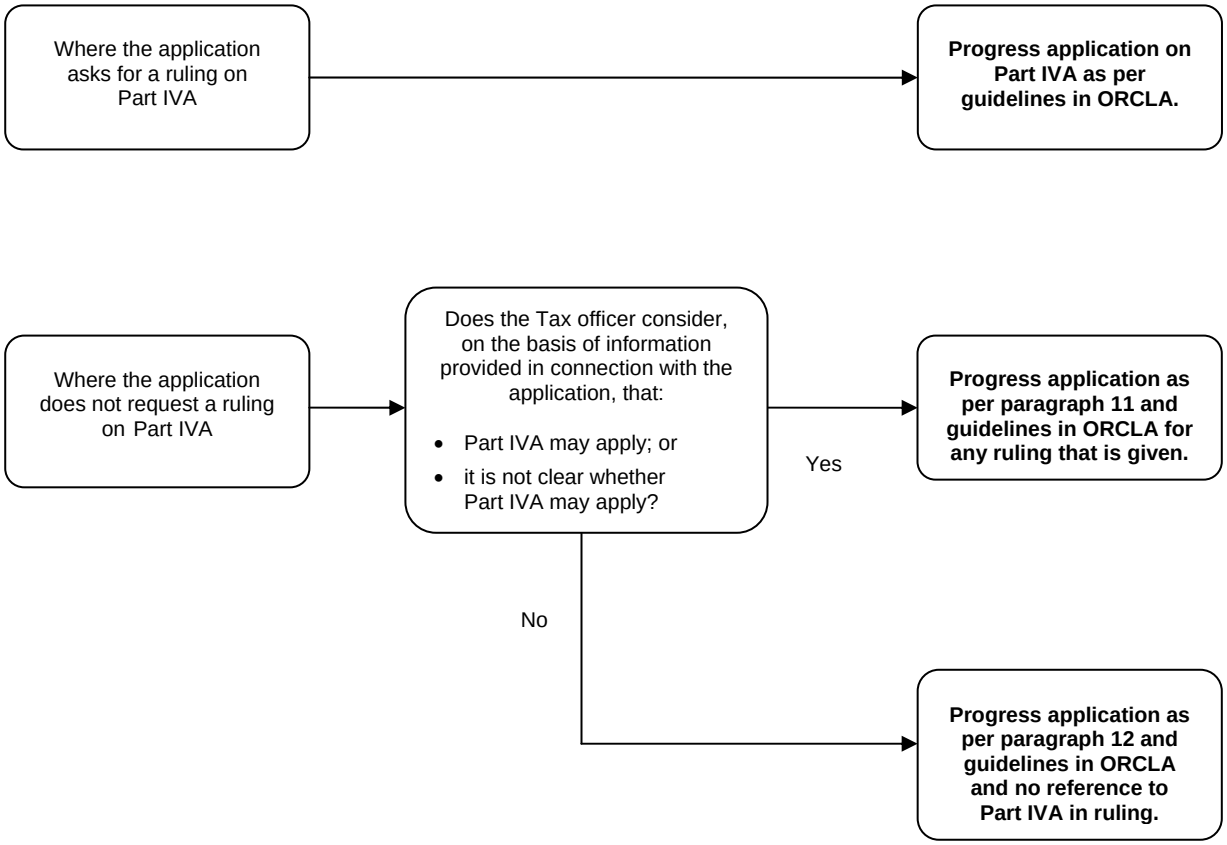
[27] 2004 ATC 4599 at p. 4605; 55 ATR 712 at p 719.

Attachment 5: Decision making process for private rulings on Part IVA



Attachment 6: Taxation Rulings and Determinations which deal with the application of the GAARs

Part IVA

Ruling or Determination	Subject of Ruling or Determination
Taxation Ruling IT 2466, paragraph 5	Income tax: trust distributions of group interest to non-resident beneficiaries
Taxation Ruling IT 2501, paragraph 9	Income tax: assignment of partnership interests
Taxation Ruling IT 2512, paragraph 26	Income tax: financing unit trusts
Taxation Ruling IT 2635, paragraphs 2, 29-33 and 35	Income tax: syndicated research and development arrangements
Taxation Ruling TR 98/22, paragraphs 1, 15-26, 32-33, 49-71, 78, 79-83, 87, 97 and 98-100	Income tax: the taxation consequences for taxpayers entering into certain linked or split loan facilities
Taxation Ruling TR 2000/8, paragraphs 32, 60-63, 64, 66, 110, 132, 181-191, 193-194, 212, 215-225, 226-229 and 231-233	Income tax: investment schemes
Taxation Ruling TR 2001/1, paragraphs 21-22 and 104	Income tax: assessability of amounts from the sale of wheat and grain to AWB (International) Limited or ABB Grain Limited
Taxation Ruling TR 2001/15, paragraphs 21-22 and 104	Income tax: assessability of amounts from the sale of barley, grain or other commodities to ABB Grain Export Limited or ABB Grain Limited
Taxation Ruling TR 2002/13, paragraphs 31-32 and 87-135	Income tax: Australian films – Division 10B – tax avoidance schemes
Taxation Ruling TR 2002/16, paragraphs 3, 25-30, 34-35, 156-168 and 174-175	Income tax: the taxation consequences for taxpayers issuing certain stapled securities
Taxation Ruling TR 2002/18, paragraphs 9, 12-16 and 26-47	Income tax: home loan unit trust arrangement
Taxation Ruling TR 2002/19, paragraphs 20, 29-31 and 80-119	Income tax: licence arrangements for intellectual property – Division 40 – tax avoidance schemes
Taxation Ruling TR 2005/19, paragraphs 18-24 and 79-116	Income tax: scrip for scrip roll-over arrangements – application of Subdivision 124-M of the Income Tax Assessment Act 1997 – Part IVA of the Income Tax Assessment Act 1936
Taxation Determination TD 92/164, paragraph 3	Income tax: insurance: are amounts paid by an employer on behalf of an employee as premiums on a life insurance policy exempt income of the employee where it is expected that the employee will obtain the amounts paid as premiums shortly after they are paid?

Taxation Determination TD 93/187, paragraph 4	Income tax: is a lease acceptable if the lessee or an associate has an option to purchase the shares of, or a controlling interest in, the lessor company?
Taxation Determination TD 95/37	Income tax: stripping of company profits: section 177E: does a scheme by way of or in the nature of dividend stripping require the purchaser of the shares in the target company to subsequently dispose of the shares at a deductible loss or to otherwise obtain, for tax purposes, a deduction for the depreciation in value of the stripped shares?
Taxation Determination TD 1999/12	Income tax: withholding tax avoidance - do the withholding tax avoidance provisions of Part IVA and, in particular, section 177CA of the Income Tax Assessment Act 1936 apply to a decision by a company to establish a programme for the issue of debentures in respect of which interest is exempt from interest withholding tax pursuant to the operation of section 128F?
Taxation Determination TD 1999/32, paragraphs 4 and 6	Income tax: is a cash collateralisation arrangement acceptable for parties entering into a Land Transport Facilities borrowings agreement?
Taxation Determination TD 1999/42, paragraphs 6-9 and 11	Income tax: do the principles set out in Taxation Ruling 98/22 apply to line of credit facilities?
Taxation Determination TD 2002/23, paragraphs 15-16	Income tax: is a taxpayer entitled to an income tax deduction for any part of the marketing fee paid in respect of the Internet marketing expenses scheme described in Taxpayer Alert TA 2002/1?
Taxation Determination TD 2002/24, paragraphs 10-14 and 17	Income tax: what are the results for income tax purposes of entering into a ‘partnership’ of the type described in Taxpayer Alert TA 2002/4?
Taxation Determination TD 2003/3, paragraphs 4-10 and 20	Income tax: Can Part IVA of the Income Tax Assessment Act 1936 (the ‘1936 Act’) apply to a ‘Capital Gains Tax reduction arrangement’ of the type described in this Taxation Determination?
Taxation Determination TD 2003/9, paragraphs 15-17	Income tax: is a taxpayer entitled to an income tax deduction for purported partnership losses claimed to have been incurred as a result of entering a prepaid service warrant arrangement as described in Taxpayer Alert TA 2002/5?
Taxation Determination TD 2003/32, paragraphs 13-14	Income tax: what are the tax consequences for a taxpayer as a result of entering into a scrip loan and call option arrangement as described in Taxpayer Alert 2002/2?

Taxation Determination TD 2004/26, paragraphs 5-6	Income tax: does an arrangement under which an employee and his employer lease and leaseback the employee's private residence and some of the employee's remuneration is replaced with income from property entitle the employee to a deduction for expenditure in relation to the residence under section 8-1 of the *Income Tax Assessment Act 1997*?
Taxation Determination TD 2005/29, paragraphs 1-3, 9-12 and 14-15	Income tax: will Part IVA of the Income Tax Assessment Act 1936 always apply if a taxpayer who carries on a business (including a personal services business) pays superannuation contributions that do not exceed the age-based limits but are considerably in excess of the value of the services provided by the employer?
Taxation Determination TD 2005/33, paragraphs 1 and 4-12	Income tax: does expenditure – which is a non-capital cost of ownership of a CGT asset – form part of the cost base of the asset, if it is a tax benefit in connection with a scheme to which the general anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936* apply?

Division 165 of the GST Act

Goods and Services Tax Ruling GSTR 2004/3, paragraphs 43-56	Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/2: Avoidance of GST on the sale of new residential premises
Goods and Services Tax Ruling GSTR 2005/3, paragraphs 3, 18, 23, 27, 30-31 and 56-152	Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/9 – exploitation of the second-hand goods provisions to obtain input tax credits
Goods and Services Tax Ruling GSTR 2005/4, paragraphs 2, 27 and 58-100	Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises
Goods and Services Tax Ruling GSTR 2005/5, paragraphs 2, 18, 25 and 40-81	Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/8: use of the Going Concern provisions and the Margin Scheme to avoid or reduce the Goods and Services Tax on the sale of new residential premises

Section 67 of the FBTAA

Taxation Ruling IT 2509, paragraph 22	Income tax: income tax and fringe benefits tax consequences of an employee leasing a car to an employer which is subsequently provided back to the employee

Attachment 7: Relevant provisions of Part IVA of the *Income Tax Assessment Act* 1936

Section 177A Interpretation

(1) In this Part, unless the contrary intention appears:

capital loss has the meaning given by subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

foreign tax credit means a credit within the meaning of Division 19 of Part III.

scheme means:

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and

(b) any scheme, plan, proposal, action, course of action or course of conduct;

taxpayer includes a taxpayer in the capacity of a trustee.

(2) The definition of ***taxpayer*** in subsection (1) shall not be taken to affect in any way the interpretation of that expression where it is used in this Act other than this Part.

(3) The reference in the definition of ***scheme*** in subsection (1) to a scheme, plan, proposal, action, course of action or course of conduct shall be read as including a reference to a unilateral scheme, plan, proposal, action, course of action or course of conduct, as the case may be.

(4) A reference in this Part to the carrying out of a scheme by a person shall be read as including a reference to the carrying out of a scheme by a person together with another person or other persons.

(5) A reference in this Part to a scheme or a part of a scheme being entered into or carried out by a person for a particular purpose shall be read as including a reference to the scheme or the part of the scheme being entered into or carried out by the person for 2 or more purposes of which that particular purpose is the dominant purpose.

Section 177B Operation of Part

(1) Subject to subsection (2), nothing in the provisions of this Act other than this Part or in the *International Tax Agreements Act 1953* or in the *Petroleum (Timor Sea Treaty) Act 2003* shall be taken to limit the operation of this Part.

(2) This Part shall not be taken to affect the operation of Division 16C of Part III or the operation of Schedule 2G.

(3) Where a provision of this Act other than this Part is expressed to have effect where a deduction would be allowable to a taxpayer but for or apart from a provision or provisions of this Act, the reference to that provision or to those provisions, as the case may be, shall be read as including a reference to subsection 177F(1).

(4) Where a provision of this Act other than this Part is expressed to have effect where a deduction would otherwise be allowable to a taxpayer, that provision shall be deemed to be expressed to have effect where a deduction would, but for subsection 177F(1), be otherwise allowable to the taxpayer.

Section 177C Tax benefits

(1) Subject to this section, a reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as a reference to:

(a) an amount not being included in the assessable income of the taxpayer of a year of income where that amount would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out; or

(b) a deduction being allowable to the taxpayer in relation to a year of income where the whole or a part of that deduction would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out; or

(ba) a capital loss being incurred by the taxpayer during a year of income where the whole or a part of that capital loss would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out; or

(bb) a foreign tax credit being allowable to the taxpayer where the whole or a part of that foreign tax credit would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out;

and, for the purposes of this Part, the amount of the tax benefit shall be taken to be:

(c) in a case to which paragraph (a) applies - the amount referred to in that paragraph; and

(d) in a case to which paragraph (b) applies - the amount of the whole of the deduction or of the part of the deduction, as the case may be, referred to in that paragraph; and

(e) in a case to which paragraph (ba) applies - the amount of the whole of the capital loss or of the part of the capital loss, as the case may be, referred to in that paragraph; and

(f) in a case where paragraph (bb) applies - the amount of the whole of the foreign tax credit or of the part of the foreign tax credit, as the case may be, referred to in that paragraph.

(2) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as not including a reference to:

(a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of an agreement, choice, declaration, election or selection, the giving of a notice or the exercise of an option (expressly provided for by this Act other than section 160ZP or 160ZZO or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(b) a deduction being allowable to the taxpayer in relation to a year of income the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out where:

(i) the allowance of the deduction to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act or the *Income Tax Assessment Act 1997*, except one under Subdivision 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be; or

(c) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:

(i) the incurring of the capital loss by the taxpayer is attributable to the making of a declaration, agreement, choice, election or selection, the giving of a notice or the exercise of an option (expressly provided for by this Act or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B, 170-B or 960-D of the *Income Tax Assessment Act 1997*; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, notice or option to be made, given or exercised, as the case may be; or

(d) a foreign tax credit being allowable to the taxpayer the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer if the scheme had not been entered into or carried out, where:

(i) the allowance of the foreign tax credit to the taxpayer is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice or option expressly provided for by this Act; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised, as the case may be.

(2A) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme is to be read as not including a reference to:

(a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and

(ii) the scheme consisted solely of the making of the agreement or election; or

(b) a capital loss being incurred by the taxpayer during a year of income the whole or part of which would not have been, or might reasonably be expected not to have been, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out where:

(i) the incurring of the capital loss by the taxpayer is attributable to the making of a choice under Subdivision 126-B of the *Income Tax Assessment Act 1997* or an agreement under Subdivision 170-B of that Act; and

(ii) the scheme consisted solely of the making of the agreement or election.

(3) For the purposes of subparagraph (2)(a)(i), (b)(i), (c)(i) or (d)(i) or (2A)(a)(i) or (b)(i):

(a) the non-inclusion of an amount in the assessable income of a taxpayer; or

(b) the allowance of a deduction to a taxpayer; or

(c) the incurring of a capital loss by a taxpayer; or

(ca) the allowance of a foreign tax credit to a taxpayer;

is taken to be attributable to the making of a declaration, election, agreement or selection, the giving of a notice or the exercise of an option where, if the declaration, election, agreement, selection, notice or option had not been made, given or exercised, as the case may be:

(d) the amount would have been included in that assessable income; or

(e) the deduction would not have been allowable; or

(f) the capital loss would not have been incurred; or

(g) the foreign tax credit would not have been allowable.

(4) To avoid doubt, paragraph (1)(a) applies to a scheme if:

(a) an amount of income is not included in the assessable income of the taxpayer of a year of income; and

(b) an amount would have been included, or might reasonably be expected to have been included, in the assessable income if the scheme had not been entered into or carried out; and

(c) instead, the taxpayer or any other taxpayer makes a discount capital gain (within the meaning of the *Income Tax Assessment Act 1997*) for that or any other year of income.

(5) Subsection (4) does not limit the generality of any other provision of this Part.

Section 177CA Withholding tax avoidance

(1) This section applies in relation to a particular amount if a taxpayer is not liable to pay withholding tax on an amount where that taxpayer would have, or could reasonably be expected to have, been liable to pay withholding tax on the amount if a scheme had not been entered into or carried out.

(2) For the purposes of this Part, if this section applies in relation to an amount, the taxpayer is taken to have obtained a tax benefit in connection with the scheme of an amount equal to the amount mentioned in subsection (1).

Section 177D Schemes to which Part applies

This Part applies to any scheme that has been or is entered into after 27 May 1981, and to any scheme that has been or is carried out or commenced to be carried out after that date (other than a scheme that was entered into on or before that date), whether the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia, where:

(a) a taxpayer (in this section referred to as the ***relevant taxpayer***) has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme; and

(b) having regard to:

(i) the manner in which the scheme was entered into or carried out;

(iii) the form and substance of the scheme;

(iv) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;

(v) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;

(vi) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;

(vii) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;

(viii) any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and

(ix) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi),

it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme or of enabling the relevant taxpayer and another taxpayer or other taxpayers each to obtain a tax benefit in connection with the scheme (whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers).

Section 177E Stripping of company profits

(1) Where:

(a) as a result of a scheme that is, in relation to a company:

(i) a scheme by way of or in the nature of dividend stripping; or

(ii) a scheme having substantially the effect of a scheme by way of or in the nature of a dividend stripping,

any property of the company is disposed of;

(b) in the opinion of the Commissioner, the disposal of that property represents, in whole or in part, a distribution (whether to a shareholder or another person) of profits of the company (whether of the accounting period in which the disposal occurred or of any earlier or later accounting period);

(c) if, immediately before the scheme was entered into, the company had paid a dividend out of profits of an amount equal to the amount determined by the Commissioner to be the amount of profits the distribution of which is, in his opinion, represented by the disposal of the property referred to in paragraph (a), an amount (in this subsection referred to as the ***notional amount***) would have been included, or might reasonably be expected to have been included, by reason of the payment of that dividend, in the assessable income of a taxpayer of a year of income; and

(d) the scheme has been or is entered into after 27 May 1981, whether in Australia or outside Australia,

the following provisions have effect:

(e) the scheme shall be taken to be a scheme to which this Part applies;

(f) for the purposes of section 177F, the taxpayer shall be taken to have obtained a tax benefit in connection with the scheme that is referable to the notional amount not being included in the assessable income of the taxpayer of the year of income; and

(g) the amount of that tax benefit shall be taken to be the notional amount.

(2) Without limiting the generality of subsection (1), a reference in that subsection to the disposal of property of a company shall be read as including a reference to:

(a) the payment of a dividend by the company;

(b) the making of a loan by the company (whether or not it is intended or likely that the loan will be repaid);

(c) a bailment of property by the company; and

(d) any transaction having the effect, directly or indirectly, of diminishing the value of any property of the company.

(2A) This section:

(a) applies to a non-share equity interest in the same way as it applies to a share; and

(b) applies to an equity holder in the same way as it applies to a shareholder; and

(c) applies to a non-share dividend in the same way as it applies to a dividend.

(3) In this section, ***property*** includes a chose in action and also includes any estate, interest, right or power, whether at law or in equity, in or over property.

Section 177EA Creation of franking debit or cancellation of franking credits

(1) In this section, unless the contrary intention appears:

relevant circumstances has a meaning affected by subsection (17).

relevant taxpayer has the meaning given by subsection (3).

scheme for a disposition in relation to membership interests or an interest in membership interests, has a meaning affected by subsection (14).

(2) An expression used in this section that is defined in the *Income Tax Assessment Act 1997* has the same meaning as in that Act, except to the extent that its meaning is extended by subsection (16), (18) or (19), or affected by subsection (15).

Application of section

(3) This section applies if:

(a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and

(b) either:

(i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or

(ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and

(c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and

(d) except for this section, the person (the ***relevant taxpayer***) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

(e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

Bare acquisition of membership interests or interest in membership interests

(4) It is not to be concluded for the purposes of paragraph (3)(e) that a person entered into or carried out a scheme for a purpose mentioned in that paragraph merely because the person acquired membership interests, or an interest in membership interests, in the entity.

Commissioner to determine franking debit or deny franking credit

(5) The Commissioner may make, in writing, either of the following determinations:

(a) if the corporate tax entity is a party to the scheme, a determination that a franking debit or exempting debit of the entity arises in respect of each distribution made to the relevant taxpayer or that flows indirectly to the relevant taxpayer;

(b) a determination that no imputation benefit is to arise in respect of a distribution or a specified part of a distribution that is made, or that flows indirectly, to the relevant taxpayer.

A determination does not form part of an assessment.

Notice of determination

(6) If the Commissioner makes a determination under subsection (5), the Commissioner must:

(a) in respect of a determination made under paragraph (5)(a) – serve notice in writing of the determination on the corporate tax entity; or

(b) in respect of a determination made under paragraph (5)(b) – serve notice in writing of the determination on the relevant taxpayer.

The notice may be included in a notice of assessment.

Publication in national newspaper of determination in relation to listed public company denying imputation benefit

(7) If the Commissioner makes a determination under paragraph (5)(b), in respect of a distribution made by a listed public company, the Commissioner is taken to have served notice in writing of the determination on the relevant taxpayer if the Commissioner causes the notice to be published in a daily newspaper that circulates generally in each State, the Australian Capital Territory and the Northern Territory. The notice is taken to have been served on the day on which the publication takes place.

Evidence of determination

(8) The production of:

(a) a notice of a determination; or

(b) a document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of a determination;

is conclusive evidence:

(c) of the due making of the determination; and

(d) except in proceedings under Part IVC of the *Taxation Administration Act 1953* on an appeal or review relating to the determination, that the determination is correct.

Objections

(9) If a taxpayer to whom a determination relates is dissatisfied with the determination, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Effect of determination of franking debit or exempting debit

(10) If the Commissioner makes a determination under paragraph (5)(a):

(a) on the day on which notice in writing of the determination is served on the entity, a franking debit or exempting debit of the corporate tax entity arises in respect of the distribution; and

(b) the amount of the franking debit or exempting debit is such amount as is stated in the Commissioner's determination, being an amount that:

(i) the Commissioner considers reasonable in the circumstances; and

(ii) does not exceed the amount of the franking debit or exempting debit of the entity arising under item 1 of the table in section 205-30 of the *Income Tax Assessment 1997* or item 2 of the table in section 208-120 of that Act in respect of the distribution.

Effect of determination that no imputation benefit is to arise

(11) If the Commissioner makes a determination under paragraph (5)(b), the determination has effect according to its terms.

Application of section to non-share dividends

(12) This section:

(a) applies to a non-share equity interest in the same way as it applies to a membership interest; and

(b) applies to an equity holder in the same way as it applies to a member; and

(c) applies to a non-share dividend in the same way as it applies to a distribution.

Meaning of interest in membership interests

(13) A person has an interest in membership interests if:

(a) the person has any legal or equitable interest in the membership interests; or

(b) the person is a partner in a partnership and:

(i) the assets of the partnership include, or will include, the membership interests; or

(ii) the partnership derives, or will derive, income indirectly through interposed companies, trusts or partnerships, from distributions made on the membership interests; or

(c) the person is a beneficiary of a trust (including a potential beneficiary of a discretionary trust) and:

(i) the membership interests form, or will form, part of the trust estate; or

(ii) the trust derives, or will derive, income indirectly through interposed companies, trusts or partnerships, from distributions made on the membership interests.

Meaning of ***scheme for a disposition***

(14) A scheme for a disposition of membership interests or an interest in membership interests includes, but is not limited to, a scheme that involves any of the following:

(a) issuing the membership interests or creating the interest in membership interests;

(b) entering into any contract, arrangement, transaction or dealing that changes or otherwise affects the legal or equitable ownership of the membership interests or interest in membership interests;

(c) creating, varying or revoking a trust in relation to the membership interests or interest in membership interests;

(d) creating, altering or extinguishing a right, power or liability attaching to, or otherwise relating to, the membership interests or interest in membership interests;

(e) substantially altering any of the risks of loss, or opportunities for profit or gain, involved in holding or owning the membership interests or having the interest in membership interests;

(f) the membership interests or interest in membership interests beginning to be included, or ceasing to be included, in any of the insurance funds of a life assurance company.

(15) In determining whether a distribution flows indirectly to a person, assume that the following provisions had not been enacted:

(a) section 282B, 283 or 297B of this Act (certain income derived by an eligible entity within the meaning of Part IX of that Act); or

(b) paragraph 320-37(1)(a) of the *Income Tax Assessment Act 1997* (segregated exempt assets) or paragraph 320-37(1)(d) of that Act (income bonds, funeral policies and scholarship plans).

When imputation benefit is received

(16) A taxpayer to whom a distribution flows indirectly receives an ***imputation benefit*** as a result of the distribution if:

(a) the taxpayer is entitled to a tax offset under Division 207 of the *Income Tax Assessment Act 1997* as a result of the distribution; or

(b) where the taxpayer is a corporate tax entity – a franking credit would arise in the franking account of the taxpayer as a result of the distribution.

Note: Where the distribution is made directly to the taxpayer, see subsection 204-30(6) of the *Income Tax Assessment Act 1997* for a definition of ***imputation benefit***.

*Meaning of **relevant circumstances** of scheme*

(17) The ***relevant circumstances*** of a scheme include the following:

(a) the extent and duration of the risks of loss, and the opportunities for profit or gain, from holding membership interests, or having interests in membership interests, in the corporate tax entity that are respectively borne by or accrue to the parties to the scheme, and whether there has been any change in those risks and opportunities for the relevant taxpayer or any other party to the scheme (for example, a change resulting from the making of any contract, the granting of any option or the entering into of any arrangement with respect to any membership interests, or interests in membership interests, in the corporate tax entity);

(b) whether the relevant taxpayer would, in the year of income in which the distribution is made, or if the distribution flows indirectly to the relevant taxpayer, in the year in which the distribution flows indirectly to the relevant taxpayer, derive a greater benefit from franking credits than other entities who hold membership interests, or have interests in membership interests, in the corporate tax entity;

(c) whether, apart from the scheme, the corporate tax entity would have retained the franking credits or exempting credits or would have used the franking credits or exempting credits to pay a franked distribution to another entity referred to in paragraph (b);

(d) whether, apart from the scheme, a franked distribution would have flowed indirectly to another entity referred to in paragraph (b);

(e) if the scheme involves the issue of a non-share equity interest to which section 215-10 of the *Income Tax Assessment Act 1997* applies – whether the corporate tax entity has issued, or is likely to issue, equity interests in the corporate tax entity:

(i) that are similar, from a commercial point of view, to the non-share equity interest; and

(ii) distributions in respect of which are frankable;

(f) whether any consideration paid or given by or on behalf of, or received by or on behalf of, the relevant taxpayer in connection with the scheme (for example, the amount of any interest on a loan) was calculated by reference to the imputation benefits to be received by the relevant taxpayer;

(g) whether a deduction is allowable or a capital loss is incurred in connection with a distribution that is made or that flows indirectly under the scheme;

(h) whether a distribution that is made or that flows indirectly under the scheme to the relevant taxpayer is equivalent to the receipt by the relevant taxpayer of interest or of an amount in the nature of, or similar to, interest;

(i) the period for which the relevant taxpayer held membership interests, or had an interest in membership interests, in the corporate tax entity;

(j) any of the matters referred to in subparagraphs 177D(b)(i) to (viii).

Meaning of ***greater benefit from franking credits***

(18) The following subsection lists some of the cases in which a taxpayer to whom a distribution flows indirectly receives a ***greater benefit from franking credits*** than an entity referred to in paragraph (17)(b). It is not an exhaustive list.

(19) A taxpayer to whom a distribution flows indirectly receives a ***greater benefit from franking credits*** than an entity referred to in paragraph (17)(b) if any of the following circumstances exist in relation to that entity in the income year in which the distribution giving rise to the benefit is made, and not in relation to the taxpayer if:

(a) the entity is not an Australian resident; or

(b) the entity would not be entitled to any tax offset under Division 207 of the *Income Tax Assessment Act 1997* because of the distribution; or

(c) the amount of income tax that would be payable by the entity because of the distribution is less than the tax offset to which the entity would be entitled; or

(d) the entity is a corporate tax entity at the time the distribution is made, but no franking credit arises for the entity as a result of the distribution; or

(e) the entity is a corporate tax entity at the time the distribution is made, but cannot use franking credits received on the distribution to frank distributions to its own members because:

(i) it is not a franking entity; or

(ii) it is unable to make frankable distributions.

Note: Where the distribution is made directly to the taxpayer, see subsections 204-30(7), (8), (9) and (10) of the *Income Tax Assessment Act 1997* for a list of circumstances in which the taxpayer will be treated as deriving a greater benefit from franking credits than another entity.

Section 177EB Cancellation of franking credits – consolidated groups

Expressions to have same meanings as in section 177EA and Income Tax Assessment Act 1997

(1) Unless the contrary intention appears, expressions used in this section:

(a) if those expressions are defined in section 177EA – have the same meanings as in that section (subject to subsection (10) of this section); and

(b) otherwise – have the same meanings as in the *Income Tax Assessment Act 1997*.

This section and section 177EA do not limit each other

(2) This section does not limit the operation of section 177EA, and section 177EA does not limit the operation of this section.

Application of section

(3) This section applies if:

(a) there is a scheme for a disposition of membership interests in an entity (the ***joining entity***); and

(b) as a result of the disposition, the joining entity becomes a subsidiary member of a consolidated group; and

(c) a credit arises in the franking account of the head company of the group because of the joining entity becoming a subsidiary member of the group; and

(d) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the credit referred to in paragraph (c) to arise in the head company's franking account.

Bare acquisition of membership interests

(4) It is not to be concluded for the purposes of paragraph (3)(d) that a person entered into or carried out a scheme for a purpose mentioned in that paragraph merely because the person acquired membership interests in the joining entity.

Commissioner to determine no franking credit

(5) The Commissioner may make, in writing, a determination that no credit is to arise in the head company's franking account because of the joining entity becoming a subsidiary member of the consolidated group. A determination does not form part of an assessment.

Effect of determination

(6) A determination under subsection (5) has effect according to its terms.

Notice of determination

(7) If the Commissioner makes a determination under subsection (5), the Commissioner must serve notice in writing of the determination on the head company. The notice may be included in a notice of assessment.

Evidence of determination

(8) The production of:

(a) a notice of a determination; or

(b) a document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner purporting to be a copy of a determination;

is conclusive evidence:

(c) of the due making of the determination; and

(d) except in proceedings under Part IVC of the *Taxation Administration Act 1953* on an appeal or review relating to the determination, that the determination is correct.

Objections

(9) If a taxpayer to whom a determination relates is dissatisfied with the determination, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

Relevant circumstances

(10) The ***relevant circumstances*** of a scheme include the following:

(a) the extent and duration of the risks of loss, and the opportunities for profit or gain, from holding membership interests in the joining entity that are respectively borne by or accrue to the parties to the scheme, and whether there has been any change in those risks and opportunities for the head company or any other party to the scheme (for example, a change resulting from the making of any contract, the granting of any option or the entering into of any arrangement with respect to any membership interests in the joining entity);

(b) whether the head company, or a person holding membership interests in the head company, would, in the year of income in which the joining entity became a subsidiary member of the group or any later year of income, derive a greater benefit from franking credits than other persons who held membership interests in the joining entity immediately before it became a subsidiary member of the group;

(c) the extent (if any) to which the joining entity was able to pay a franked dividend or distribution immediately before it became a subsidiary member of the group;

(d) whether any consideration paid or given by or on behalf of, or received by or on behalf of, the head company in connection with the scheme (for example, the amount of any interest on a loan) was calculated by reference to the franking credit benefits to be received by the head company;

(e) the period for which the head company held membership interests in the joining entity;

(f) any of the matters referred to in subparagraphs 177D(b)(i) to (viii).

Section to apply to exempting credits

(11) This section applies to exempting credits arising in the exempting account of the head company of a consolidated group in the same way that it applies to credits arising in the head company's franking account.

Section 177F Cancellation of tax benefits etc

(1) Where a tax benefit has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies, the Commissioner may:

(a) in the case of a tax benefit that is referable to an amount not being included in the assessable income of the taxpayer of a year of income – determine that the whole or a part of that amount shall be included in the assessable income of the taxpayer of that year of income; or

(b) in the case of a tax benefit that is referable to a deduction or a part of a deduction being allowable to the taxpayer in relation to a year of income – determine that the whole or a part of the deduction or of the part of the deduction, as the case may be, shall not be allowable to the taxpayer in relation to that year of income; or

(c) in the case of a tax benefit that is referable to a capital loss or a part of a capital loss being incurred by the taxpayer during a year of income – determine that the whole or a part of the capital loss or of the part of the capital loss, as the case may be, was not incurred by the taxpayer during that year of income; or

(d) in the case of a tax benefit that is referable to a foreign tax credit, or a part of a foreign tax credit, being allowable to the taxpayer – determine that the whole or a part of the foreign tax credit, or the part of the foreign tax credit, as the case may be, is not to be allowable to the taxpayer;

and, where the Commissioner makes such a determination, he shall take such action as he considers necessary to give effect to that determination.

(2) Where the Commissioner determines under paragraph (1)(a) that an amount is to be included in the assessable income of a taxpayer of a year of income, that amount shall be deemed to be included in that assessable income by virtue of such provision of this Act as the Commissioner determines.

(2A) Where a tax benefit that is covered by section 177CA has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies:

(a) the Commissioner may determine that the taxpayer is subject to withholding tax under section 128B on the whole or a part of that amount; and

(b) if the Commissioner makes such a determination, he or she must take such action as he or she considers necessary to give effect to that determination.

(2B) A determination under paragraph (1)(c) or subsection (2A) must be in writing.

(2C) Notice of the determination must be given to the taxpayer and, in the case of a determination under subsection (2A), to the person who paid the amount.

(2D) More than one determination may be included in the same notice.

(2E) A failure to comply with subsection (2C) does not affect the validity of a determination.

(2F) If the Commissioner makes a determination under subsection (2A), the amount that the Commissioner determines is taken to be subject to withholding tax is taken to have been subject to withholding tax at all times by virtue of such provision of section 128B as the Commissioner determines.

(2G) If the taxpayer is dissatisfied with a determination under paragraph (1)(c) or subsection (2A), the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

(3) Where the Commissioner has made a determination under subsection (1) or (2A) in respect of a taxpayer in relation to a scheme to which this Part applies, the Commissioner may, in relation to any taxpayer (in this subsection referred to as the ***relevant taxpayer***):

(a) if, in the opinion of the Commissioner:

(i) there has been included, or would but for this subsection be included, in the assessable income of the relevant taxpayer of a year of income an amount that would not have been included or would not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income if the scheme had not been entered into or carried out; and

(ii) it is fair and reasonable that that amount or a part of that amount should not be included in the assessable income of the relevant taxpayer of that year of income,

determine that that amount or that part of that amount, as the case may be, should not have been included or shall not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income; or

(b) if, in the opinion of the Commissioner:

(i) an amount would have been allowed or would be allowable to the relevant taxpayer as a deduction in relation to a year of income if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, but for this subsection, be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; and

(ii) it is fair and reasonable that that amount or a part of that amount should be allowable as a deduction to the relevant taxpayer in relation to that year of income,

determine that that amount or that part, as the case may be, should have been allowed or shall be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; or

(c) if, in the opinion of the Commissioner:

(i) a capital loss would have been incurred by the relevant taxpayer during a year of income if the scheme had not been entered into or carried out, being a capital loss that was not incurred or would not, but for this subsection, be incurred, as the case may be, by the relevant taxpayer during that year of income; and

(ii) it is fair and reasonable that the capital loss or a part of that capital loss should be incurred by the relevant taxpayer during that year of income;

determine that the capital loss or the part, as the case may be, should be incurred by the relevant taxpayer during that year of income; or

(d) if, in the opinion of the Commissioner:

(i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as a foreign tax credit if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as a foreign tax credit to the relevant taxpayer; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as a foreign tax credit to the relevant taxpayer;

determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as a foreign tax credit to the relevant taxpayer;

and the Commissioner shall take such action as he considers necessary to give effect to any such determination.

(4) Where the Commissioner makes a determination under subsection (3) by virtue of which an amount is allowed as a deduction to a taxpayer in relation to a year of income, that amount shall be deemed to be so allowed as a deduction by virtue of such provision of this Act as the Commissioner determines.

(5) Where, at any time, a taxpayer considers that the Commissioner ought to make a determination under subsection (3) in relation to the taxpayer in relation to a year of income, the taxpayer may post to or lodge with the Commissioner a request in writing for the making by the Commissioner of a determination under that subsection.

(6) The Commissioner shall consider the request and serve on the taxpayer, by post or otherwise, a written notice of his decision on the request.

(7) If the taxpayer is dissatisfied with the Commissioner's decision on the request, the taxpayer may object against it in the manner set out in Part IVC of the

(8) *Act 1953*.

Section 177G Amendment of assessments

(1) Nothing in section 170 prevents the amendment of an assessment at any time before the expiration of 6 years after the date on which tax became due and payable under the assessment if the amendment is for the purposes of giving effect to subsection 177F(1).

(2) Nothing in section 170 prevents the amendment of an assessment at any time if the amendment is for the purpose of giving effect to subsection 177F(3).

Section 177H Amendment of foreign tax credit determinations

(1) Section 160AK does not prevent the amendment of a foreign tax credit determination at any time before the end of 6 years after the original determination date if the amendment is for the purposes of giving effect to subsection 177F(1).

(2) Section 160AK does not prevent the amendment of a foreign tax credit determination at any time if the amendment is for the purpose of giving effect to subsection 177F(3).

(3) For the purposes of this section, a ***foreign tax credit determination*** is a determination under Division 19 of Part III.

(4) For the purposes of this section, the ***original determination date*** for a foreign tax credit determination has the same meaning as in section 160AK.

Attachment 8: Relevant provisions of section 67 of the *Fringe Benefits Tax Assessment Act 1986*

(1) Where:

(a) an employer (in this subsection referred to as the ***eligible employer***) has obtained or, but for this section, would obtain, a tax benefit in respect of a year of tax in connection with an arrangement under which a benefit is or was provided to a person, being an arrangement that was entered into, or commenced to be carried out, on or after 19 September 1985; and

(b) it would be concluded that the person, or one of the persons, who entered into or carried out the arrangement or any part of the arrangement did so for the sole or dominant purpose of enabling the eligible employer to obtain a tax benefit in connection with the arrangement or of enabling the eligible employer and another employer or other employers each to obtain a tax benefit in connection with the arrangement (whether or not that person who entered into or carried out the arrangement or any part of the arrangement is the eligible employer or is the other employer or one of the other employers),

the Commissioner:

(c) may determine that the aggregate fringe benefits amount (if any) of the eligible employer of the year of tax be increased by the amount of the tax benefit; and

(d) may determine that appropriate adjustments (if any) be made to the aggregate fringe benefits amount of the eligible employer in respect of another year of tax or of another employer in respect of any year of tax,

and any such determination has effect accordingly.

(2) A reference in this section to the obtaining by an employer of a tax benefit in respect of a year of tax in connection with an arrangement under which a benefit is provided to a person is a reference to an amount not being included in the aggregate fringe benefits amount of the employer of the year of tax in respect of that benefit where the amount would have been included, or could reasonably be expected to have been included, in that aggregate fringe benefits amount if the arrangement had not been entered into or carried out.

(3) A reference in this section to the obtaining by an employer of a tax benefit in respect of a year of tax in connection with an arrangement under which a benefit is provided to a person does not include a reference to an amount not being included in the aggregate fringe benefits amount of the employer of the year of tax in respect of that benefit, being an amount that would have been included, or could reasonably be expected to have been included, in that aggregate fringe benefits amount if the arrangement had not been entered into or carried out, where the non-inclusion of the amount in that aggregate fringe benefits amount is attributable to the payment or provision by a person of consideration in respect of the provision of the benefit.

(4) Where, at any time, an employer considers that the Commissioner ought to make a determination under paragraph (1)(d) in relation to the employer in relation to a year of tax, the employer may post to or lodge with the Commissioner a request in writing for the making by the Commissioner of a determination under that paragraph.

(5) The Commissioner shall consider the request and serve on the employer a written notice of the Commissioner's decision on the request.

(6) If the employer is dissatisfied with the Commissioner's decision on the request, the employer may object against the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

(7) (Omitted by No 216 of 1991)

(8) Nothing in section 74 prevents the amendment of an assessment at any time before the end of 6 years after the original assessment date if the amendment is for the purposes of giving effect to subsection (1) of this section as it applies by virtue of paragraph (1)(c).

(9) Nothing in section 74 prevents the amendment of an assessment at any time if the amendment is for the purpose of giving effect to subsection (1) of this section as it applies by virtue of paragraph (1)(d).

(10) In this section, a reference to an employer, in relation to an arrangement, includes a reference to a person who would be, or might reasonably be expected to be, an employer but for the arrangement.

(11) A reference in this section to the carrying out of an arrangement by a person shall be read as including a reference to the carrying out of an arrangement by a person together with another person or other persons.

(12) Nothing in the provisions of this Act other than this section or in the *International Tax Agreements Act 1953* or in the *Petroleum (Timor Sea Treaty) Act 2003* shall be taken to limit the operation of this section.

Attachment 9: Relevant provisions of Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999*

165-1 What this Division is about

The object of this Division is to deter schemes to give entities benefits by reducing GST, increasing refunds or altering the timing of payment of GST or refunds.

If the dominant purpose or principal effect of a scheme is to give an entity such a benefit, the Commissioner may negate the benefit an entity gets from the scheme by declaring how much GST or refund would have been payable, and when it would have been payable, apart from the scheme.

This Division is aimed at artificial or contrived schemes. It is not, for example, intended to apply to:

- an exporter electing to have monthly tax periods in order to bring forward the entitlement to input tax credits; or
- a supplier of child care applying to be approved under the *A New Tax System (Family Assistance) (Administration) Act 1999* (this would make the supplies of child care GST-free); or
- a supplier choosing under section 9-25 of the *A New Tax System (Wine Equalisation Tax) Act 1999* to use the average wholesale price method for working out the taxable value of retail sales of grape wine; or
- a bank having its car fleet serviced earlier than usual, and before 1 July 2000, so that the servicing does not, at least initially, bear the GST.

Subdivision 165-A – Application of this Division

165-5 When does this Division operate?

General rule

(1) This Division operates if:

(a) an entity (the ***avoider***) gets or got a *GST benefit from a *scheme; and

(b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the *GST law, the *wine tax law or the *luxury car tax law; and

(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:

(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a *GST benefit from the scheme; or

(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and

(d) the scheme:

(i) is a scheme that has been or is entered into on or after 2 December 1998; or

(ii) is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).

Territorial application

(2) It does not matter whether the *scheme, or any part of the scheme, was entered into or carried out inside or outside Australia.

165-10 When does an entity get a GST benefit from a scheme?

(1) An entity gets a ***GST benefit*** from a *scheme if:

(a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme; or

(b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or

(c) all or part of an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme; or

(d) all or part of an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, payable earlier than it would have been apart from the scheme or a part of the scheme.

*What is a **scheme**?*

(2) A **scheme** is:

(a) any arrangement, agreement, understanding, promise or undertaking:

(i) whether it is express or implied; and

(ii) whether or not it is, or is intended to be, enforceable by legal proceedings; or

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

GST benefit can arise even if no economic alternative

(3) An entity can get a *GST benefit from a *scheme even if the entity or entities that entered into or carried out the scheme, or a part of the scheme, could not have engaged economically in any activities:

(a) of the kind to which this Act applies; and

(b) that would produce an effect equivalent (except in terms of this Act) to the effect of the scheme or part of the scheme;

other than the activities involved in entering into or carrying out the scheme or part of the scheme.

165-15 Matters to be considered in determining purpose or effect

(1) The following matters are to be taken into account under section 165-5 in considering an entity's purpose in entering into or carrying out the *scheme from which the avoider got a *GST benefit, and the effect of the scheme:

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme; and

(ii) the economic and commercial substance of the scheme;

(c) the purpose or object of this Act, the *Customs Act 1901* (so far as it is relevant to this Act) and any relevant provision of this Act or that Act (whether the purpose or object is stated expressly or not);

(d) the timing of the scheme;

(e) the period over which the scheme was entered into and carried out;

(f) the effect that this Act would have in relation to the scheme apart from this Division;

(g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme;

(h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a *connected entity*) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;

(i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;

(j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length;

(k) the circumstances surrounding the scheme;

(l) any other relevant circumstances.

(2) Subsection (1) applies in relation to consideration of an entity's purpose in entering into or carrying out a part of a *scheme from which the avoider gets or got a *GST benefit, and the effect of part of the scheme, as if the part were itself the *scheme from which the avoider gets or got the GST benefit.

Subdivision 165-B – Commissioner may negate effects of schemes for GST benefits

165-40 Commissioner may negate avoider's GST benefits

For the purpose of negating a *GST benefit the avoider mentioned in section 165-5 gets or got from the *scheme, the Commissioner may make a declaration stating either or both of the following:

(a) the amount that is (and has been at all times) the avoider's *net amount for a specified tax period that has ended;

(b) the amount that is (and has been at all times) the amount of GST on a specified *taxable importation that was made (or is stated in the declaration to have been made) by the avoider.

Note: A declaration of the Commissioner under this section is a reviewable GST decision (see Section 110-50 in Schedule 1 to the *Taxation Administration Act 1953*).

165-45 Commissioner may reduce an entity's net amount or GST to compensate

(1) This section operates if:

(a) the Commissioner has made a declaration under section 165-40 to negate the *GST benefit an entity gets or got from a *scheme; and

(b) the Commissioner considers that another entity (the *loser*) gets or got a *GST disadvantage from the scheme; and

(c) the Commissioner considers that it is fair and reasonable that the loser's GST disadvantage be negated or reduced.

(2) An entity gets a ***GST disadvantage*** from a *scheme if:

(a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would have been apart from the scheme or a part of the scheme; or

(b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would have been apart from the scheme or a part of the scheme; or

(c) all or part of an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be,

payable earlier than it would have been apart from the scheme or a part of the scheme; or

(d) all or part of an amount that is payable to the entity under this Act apart from this Division is, or could reasonably expected to be, payable later than it would have been apart from the scheme or a part of the scheme.

(3) For the purposes of negating or reducing the loser's *GST disadvantage from the *scheme, the Commissioner may make a declaration (under this section) stating either or both of the following:

(a) the amount that is (and has been at all times) the loser's *net amount for a specified tax period that has ended;

(b) the amount that is (and has been at all times) the amount of GST on a specified *taxable importation that was made (or is stated in the declaration to have been made) by the loser.

Note: A declaration of the Commissioner under this section is a reviewable GST decision (see Section 110-50 in Schedule 1 to the *Taxation Administration Act 1953*).

(4) An amount stated in a declaration as the loser's *net amount or the amount of GST on a *taxable importation must not be less than the net amount or amount of GST (as appropriate) would have been apart from the *scheme, or part of the scheme, and the declaration.

(5) An entity may give the Commissioner a written request to make a declaration under this section relating to the entity. The Commissioner must decide whether or not to grant the request, and give the entity notice of the Commissioner's decision.

Note: A decision of the Commissioner under subsection (5) is a reviewable GST decision (see Section 110-50 in Schedule 1 to the *Taxation Administration Act 1953*).

165-50 GST or refund payable in accordance with declaration

A statement in a declaration under this Subdivision has effect according to its terms, for the purposes of Division 33 (about payments of GST) and Division 35 (about refunds), despite the provisions of this Act outside those Divisions and this Division.

165-55 Commissioner may disregard scheme in making declarations

For the purposes of making a declaration under this Subdivision, the Commissioner may:

(a) treat a particular event that actually happened as not having happened; and

(b) treat a particular event that did not actually happen as having happened and, if appropriate, treat the event as:

(i) having happened at a particular time; and

(ii) having involved particular action by a particular entity; and

(c) treat a particular event that actually happened as:

(i) having happened at a time different from the time it actually happened; or

(ii) having involved particular action by a particular entity (whether or not the event actually involved any action by that entity).

165-60 One declaration may cover several tax periods and importations

To avoid doubt, statements relating to different tax periods and different *taxable importations may be included in a single declaration under this Subdivision.

165-65 Commissioner must give copy of declaration to entity affected

(1) The Commissioner must give a copy of a declaration under this Subdivision to the entity whose *net amount or GST liability is stated in the declaration.

(2) A failure to comply with subsection (1) does not affect the validity of the declaration.