IT 2235 - Income tax : "Curran" type tax avoidance scheme - application of section 6BA

There is an Addendum notice for this document.

There is an Addendum notice for this document.

TAXATION RULING NO. IT 2235

INCOME TAX : "CURRAN" TYPE TAX AVOIDANCE SCHEME - APPLICATION OF SECTION 6BA

F.O.I. EMBARGO: May be released

REF H.O. REF: 83/6423 DATE OF EFFECT: Immediate

B.O. REF: DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1205247	COST OF SHARES	6(1) 6BA 51(1)

PREAMBLE Section 6BA was inserted into the Income Tax Assessment Act 1936 ("the Act") by Act No. 57 of 1978 and has retrospective application to 16 August 1977 (date of the 1977-78 Budget speech). That section was designed to overcome the High Court decision in Curran v. FCT 131 CLR 409. Promoters of "Curran" type tax avoidance schemes sought to circumvent the application of section 6BA by altering certain features of the original "Curran" type scheme.

2. Such a case was recently considered by Yeldham J. of the Supreme Court of New South Wales in Grant v. FCT (as yet unreported). His Honour found that the partnership of which Grant was a partner was carrying on a business of share trading and that shares acquired in a victim company were part of that business and therefore, in accordance with the decision in Curran's Case (supra), the taxpayer was prima facie entitled to treat bonus shares, which were issued to him by the victim company, as having been purchased at their par value. However, his Honour found that section 6BA applied to deny any deduction otherwise allowable under sub-section 51(1) of the Act. The promoter's attempts to put the arrangements outside the scope of section 6BA were unsuccessful.

3. Sub-section 6BA(1) (as originally enacted and as applicable in Grant's Case (supra)) provided that where "a dividend (including an amount debited against an amount standing to the credit of a share premium account) is payable to a taxpayer by a company in respect of shares ... in the company" then, in terms of sub-section (2) of section 6BA, no part of the dividend shall be treated "... as being an amount paid or payable by the taxpayer in respect of the bonus shares or as in any other way constituting any part of the cost to the taxpayer of the bonus shares ...".

4. What was done in the Grant Case to attempt to avoid the application of section 6BA was quite typical of what happened in other Curran type schemes promoted at the time. Those

arrangements were:

- the partnership acquired a number of $1 shares (paid to 1/) in a private victim company at a premium of $99 each, thus resulting in the creation of a share premium reserve

- one day later, a call was made for the unpaid amount on those shares. Funds to pay for this call, which was substantial, were made available to the partners by a pre-arranged interest free loan from a promoter controlled entity

- on the same day, the directors of the victim company resolved that the share premium account credit be applied in paying up the company's unissued ordinary shares and that such shares be issued as fully paid bonus shares to the holders of ordinary shares

- the shares and bonus shares in the victim company were then sold.

5. It was argued by the taxpayer's counsel in the Grant Case that section 6BA did not apply to disentitle the taxpayer to a deduction otherwise allowable under sub-section 51(1) because:-

- what was done in relation to the bonus shares in the victim company did not amount to a dividend for the purposes of the Act and hence section 6BA is of no relevance

- in any event, "dividend" as defined in sub-section 6(1) of the Act specifically excludes "amounts paid or credited by a company to a shareholder ... where the amount of the moneys paid or credited ... is debited against an amount standing to the credit of a share premium account of the company". Further, the use of the words in brackets in paragraph 6BA(1)(a) (see paragraph 3) were not intended to amplify the definition of "dividend" in sub-section 6(1)

- no amount was paid or payable to the partnership (which is required by section 6BA) because the whole of the debit to the share premium account was credited directly to uncalled capital

- the "original shares" - see paragraph 6BA(1)(a) - could only be those shares issued at 1/ and subsequently called up. This was because the partners were registered jointly as holders of the shares and sub-section 6(1) defines "taxpayer" as "a person" deriving income, a description which does not apply to a partnership of three which does not pay tax. Consequently no dividend could

be found "payable to a taxpayer"

6. His Honour made the following findings in relation to the taxpayer's counsel's submissions:-

- section 6BA did apply to disentitle the taxpayer to a deduction otherwise allowable under sub-section 51(1)

- as a matter of construction of section 6BA, the words in brackets in paragraph (1)(a) indicate a clear legislative intention that the word "dividend" wherever used in the section is to be extended to include "an amount debited against an amount standing to the credit of the share premium account"

- in determining if an amount was paid or was payable to the partnership, it is the reality of the transaction to which regard must be had. The book entry on which the appellant relied could not alter the essential nature of the transaction

- when a dividend is payable to three joint holders of shares it is payable to each of the owners of the shares

RULING 7. The decision of Yeldham J. will apply in principle to any "Curran" type tax avoidance scheme where, in an attempt to circumvent the application of section 6BA, a share premium reserve is used for the issue of bonus shares.

8. The finding of fact that the partnership was carrying on a business and the finding that the shares acquired in the victim company were part of that business should be seen as only applying to the facts of this case. It does not necessarily mean that similar findings would be made in other cases where it is claimed that a business was carried on or that shares acquired in a private company were part of that business.

COMMISSIONER OF TAXATION
6 January 1986

<