

# ***TR 95/31 - Income tax: the operation of section 80E, section 50D, section 63C and section 80F***

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## Taxation Ruling

### Income tax: the operation of section 80E, section 50D, section 63C and section 80F

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*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

## What this Ruling is about

### Class of person/arrangement

1. This Ruling is about the tests based on continuity of business which permit losses incurred by a company to be deductible despite events such as a change in ownership of the company's shares. The Ruling describes the operation of section 80E, section 50D, section 63C and section 80F of the *Income Tax Assessment Act 1936* ('ITAA').

### General outline of the operation of section 80E

2. Where a company does not satisfy the requirements concerning its continuing ownership and control as described in section 80A and section 80B, the general rule is that the company cannot claim a deduction for losses incurred prior to the relevant change in ownership or control. The only exception to this general rule is where the company satisfies certain tests pertaining to the continuity of business.

3. Where a company does not satisfy the requirements concerning the occurrence of certain events or circumstances as described in section 80DA, the general rule is that the company cannot claim a deduction for prior year losses incurred prior to the occurrence of the relevant event or circumstance. The only exception to this general rule is where the failure to satisfy section 80DA is attributable to a change in the beneficial ownership of shares in a company (not necessarily the taxpayer) and the taxpayer satisfies certain tests pertaining to the continuity of business of the company.

4. The tests relating to the continuity of business are set out in section 80E. Where the requirements of section 80E ('**80E test**') are

satisfied, the company will not be prevented under section 80A or section 80DA from claiming a deduction for a prior year loss.

5. The conditions for complying with section 80E are set out in paragraphs 8 to 16 of this Ruling. However, broadly speaking, the 80E test will be satisfied where a company, at all times during the year in which it claims a deduction for a prior year loss:

- carried on the same business (meaning the business of the company as an entirety, or its 'overall business') that it carried on immediately before the change in the beneficial ownership of shares by reason of which it ceased to satisfy the continuing ownership and control requirements described in section 80A, or the tests in section 80DA;
- did not carry on any business (meaning a particular undertaking or enterprise) other than a business of a kind carried on before the disqualifying change as part of the overall business;
- only derived income from transactions of a kind that it had entered into in the course of the overall business before the change of ownership; and
- the anti-avoidance provisions in subsection 80E(2) do not apply to the company.

## **Similar provisions in section 50D, section 63C and section 80F**

6. Tests relating to the continuity of business which are similar to the 80E test are also set out in:

- subsections 50D(4) to (9) ('**50D test**');
- section 63C ('**63C test**'); and
- section 80F ('**80F test**').

Statements made in this Ruling on the application of the 80E test also represent statements on the application of the 50D test, the 63C test or the 80F test to the extent that the 50D test, the 63C test and the 80F test contain the same words or use the same concepts as the 80E test.

## **Previous Rulings**

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7. This Ruling replaces Taxation Rulings IT 97, IT 118, IT 2399 and, to the extent that it relates to section 80E, Canberra Income Tax Circular Memorandum No 857. To the extent replaced, those Rulings are withdrawn.

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## Ruling

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8. Paragraphs (b) and (c) of subsection 80E(1) contain three tests, each of which must be satisfied by a company in order for the company to meet the requirements of section 80E and thereby not be prevented by section 80A or section 80DA from deducting prior year losses. The first test is contained in paragraph (b) of subsection 80E(1) and comprises a positive requirement that the company carry on at all times during the period of recoupment<sup>1</sup> the same business as the business which it carried on at the change-over<sup>2</sup>. The second and third tests are contained in paragraph (c) of subsection 80E(1) and they comprise the respective negative requirements that the taxpayer does not carry on certain businesses and does not enter into certain transactions during the period of recoupment.

9. The requirement in paragraph (b) of subsection 80E(1) (or the equivalent provision in the 50D test, the 63C test and the 80F test) is referred to in this Ruling as the '**same business test**'<sup>3</sup>. For the purpose of the same business test, a company is treated as carrying on one overall business at the change-over and during the period of recoupment since the reference to 'business' in the same business test is a reference to all of the activities carried on by the company at the change-over and during the period of recoupment, irrespective of whether those activities constitute or are treated by the company as constituting separate or distinct activities, enterprises, divisions or undertakings carried on by the company<sup>4</sup>.

10. In the same business test, the meaning of the word 'same' in the phrase 'same business as' imports identity and not merely similarity; the phrase 'same business as' is to be read as referring to the same business, in the sense of the identical business. However, this does not mean identical in all respects: what is required is the continuation of the actual business carried on immediately before the change-over. Nevertheless, it is not sufficient that the business carried on after the change-over meets some industry wide definition of a business of the same kind; nor would it be sufficient for there to be mere continuance of business operations from immediately before the change-over into the period of recoupment, if the business had so changed that it could no longer be described as the same business. The analysis of whether the same business continues after the change-over may give rise to

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<sup>1</sup> see paragraph 19 for the definition of this term

<sup>2</sup> see paragraph 18 for the definition of this term

<sup>3</sup> see paragraphs 26 to 58 for discussion of this term

<sup>4</sup> see paragraphs 20 to 25

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questions of degree and ultimately depends on the facts of the case. In making the analysis it needs to be acknowledged that a company may expand or contract its activities without necessarily ceasing to carry on the same business. The organic growth of a business through the adoption of new compatible operations will not ordinarily cause it to fail the same business test provided the business retains its identity; nor would discarding, in the ordinary way, portions of its old operations. But if through a process of evolution a business changes its essential character, or there is a sudden and dramatic change in the business brought about by either the acquisition or the loss of activities on a considerable scale, a company may fail the test<sup>5</sup>.

11. The requirement in paragraph (c) of subsection 80E(1) (or the equivalent provision in the 50D test, the 63C test and the 80F test) relating to 'business of a kind' is referred to in this Ruling as the **'new business test'**<sup>6</sup>. In the new business test there is a reference to 'business of a kind' that the company did not carry on before the change-over. In the new business test the word 'business' has a different meaning from the word 'business' in the same business test; it refers to each kind of enterprise or undertaking comprised in the overall business carried on by the company at the change-over and during the period of recoupment<sup>7</sup>. The new business test puts a limit on the type of expansion the company may undertake if it is to retain the benefit of accumulated losses; for the taxpayer may not engage in an undertaking or enterprise of a kind in which it did not engage before the change-over, and still benefit from accumulated losses<sup>8</sup>.

12. The requirement in paragraph (c) of subsection 80E(1) (or the equivalent provision in the 50D test, the 63C test and the 80F test) relating to a 'transaction of a kind' not entered into in the course of the taxpayer's business operations is referred to in this Ruling as the **'new transactions test'**<sup>9</sup>. The new transactions test is directed to preventing the injection of income into a loss company which has satisfied the same business test and the new business test. The new transactions test includes all transactions entered into in the course of the company's business operations and not merely those which are 'isolated' or 'independent'. However, generally speaking, the new transactions test will not be failed by transactions of a type which are usually unmotivated by tax avoidance, namely transactions which could have been entered into ordinarily and naturally in the course of the business operations carried on by the company before the change-

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<sup>5</sup> see paragraphs 26 to 54, especially 34 to 42

<sup>6</sup> see paragraphs 63 to 73 for discussion of this term

<sup>7</sup> see paragraphs 20 to 25, 65-6

<sup>8</sup> see paragraphs 62-3, 66-9

<sup>9</sup> see paragraphs 77-88 for discussion of this term

over. Conversely, a transaction which is entered into during the period of recoupment and which is outside the course of the business operations before the change-over, or which is extraordinary or unnatural when judged by the course of the business operations before the change-over, will usually be a transaction of a different kind to the transactions actually entered into by the company before the change-over<sup>10</sup>.

13. The content of the word 'kind' in the new transactions test and the new business test, when applied in a particular case, is to be derived from the course of the company's business operations before the change-over. A transaction from which income is derived during the period of recoupment which could have been entered into before the change-over in the course of the company's business operations, and which is neither extraordinary nor unnatural in the context of the business carried on by the company at the change-over, will generally be a transaction of the same kind as transactions actually entered into by the company before the change-over<sup>11</sup>.

14. In the new transactions test 'transaction' refers to any operation or dealing from which income directly or indirectly flows or arises, and a company enters into a transaction for the purposes of the new transactions test if it engages or participates in it. The new transactions test is intended to extend to every means by which a company may derive income, including transactions of a passive or investment character<sup>12</sup>. The words 'business operations' refer to everything which a company undertakes or does; together the business operations constitute the business, meaning the overall business, of the company<sup>13</sup>.

15. The word 'income' in paragraph (c) of sub-section 80E(1), and equivalent provisions, means assessable income<sup>14</sup>. The word 'income' does not include amounts which are *de minimis*<sup>15</sup>.

16. The section 80E test will not be satisfied by a company if the anti-avoidance provisions in subsection 80E(2) apply. The anti-avoidance provisions in subsection 80E(2), subsections 50D(5) or 50D(7), or subsection 63C(2) are referred to in this Ruling as the '**anti-avoidance test**'<sup>16</sup>. In those anti-avoidance provisions, the word 'business' has the same meaning that it has for the purpose of applying

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<sup>10</sup> see paragraphs 74-7

<sup>11</sup> see paragraphs 77, 82-3

<sup>12</sup> see paragraphs 78 to 81

<sup>13</sup> see paragraphs 24, 81

<sup>14</sup> see paragraphs 87-9

<sup>15</sup> see paragraphs 85-6

<sup>16</sup> see paragraphs 89 to 93 for discussion of this term

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the new business test; and 'transaction', 'entered into', and 'business operations' have the same meanings they have in the new transactions test. The anti-avoidance provisions will apply where the purpose or one of the purposes of the company in commencing to carry on the business or entering into the transaction was the purpose of enabling the company to take into account prior year losses. This is so notwithstanding that, where there is more than one purpose, the tax avoidance purpose was not the dominant purpose of the company in commencing to carry on the business or enter into the transaction.

## Date of effect

17. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## Explanations

### What do 'change-over' and 'period of recoupment' mean?

18. In this ruling '**change-over**' means:
- (a) for the 80E test - the point when a change in the beneficial ownership of shares in the company, or another company, takes place which results in the company being unable to claim a deduction for a prior year loss or part of a prior year loss in a year of income under section 80A (see paragraphs (a) and (b) of subsection 80E(1));
  - (b) for the 50D test:
    - (i) when applying subsection 50D(4) in respect of a 'subsequent continuous business period' - the end of the income period (see the definition of 'subsequent continuous business period' in subsection 50D(8));  
or
    - (ii) when applying subsection 50D(6) in respect of a 'prior continuous business period' - the end of the loss period (see the definition of 'prior continuous business period' in subsection 50D(8));
  - (c) for the 63C test - the point when a change takes place in the beneficial ownership of shares in the company or another company which results in the company being

unable to treat a bad debt write off as an allowable deduction under sections 63A or 63B in the Write Off Year, or to treat a swap loss as an allowable deduction in the Swap Year (see paragraphs (a) and (b) of subsection 63C(1) and subsection 63C(4));

- (d) for the 80F test - the point when a change takes place in the beneficial ownership of shares in the company or another company which results in the company being unable to claim a deduction under sections 63A or 63B for a bad debt written off in the Write Off Year, or to claim a deduction for a swap loss which arises under section 63E in the Swap Year (see paragraphs (b) and (f) of subsection 80F(1) and subsection 80F(3)).
19. In this ruling '**period of recoupment**' means:
- (a) for the 80E test - the year of income in which the company seeks to claim a deduction for a prior year loss or part of a prior year loss under section 80E (see paragraph (b) of subsection 80E(1));
  - (a) for the 50D test:
    - (i) when applying subsection 50D(4) in respect of a 'subsequent continuous business period' - the period commencing at the end of the loss period and ending at the end of the income period (see the definition of 'subsequent continuous business period' in subsection 50D(8)); or
    - (ii) when applying subsection 50D(6) in respect of a 'prior continuous business period' - the period commencing at the end of the income period and ending at the end of the loss period (see the definition of 'prior continuous business period' in subsection 50D(8));
  - (c) for the 63C test - the shorter of:
    - (i) the period commencing the day after the debt was incurred and ending at the end of the year of income in which the debt is written off as bad ('**Write Off Year**') or ending at the end of the year of income in which a swap loss arises under section 63E ('**Swap Year**'); and
    - (ii) the Write Off Year or the Swap Year (see paragraph (b) of subsection 63C(1) and subsection 63C(4));
  - (d) for the 80F test - the year of income in which the prior year loss or the part of the prior year loss representing the



bad debt write off or the swap loss is to be taken into account under sections 79E, 79F, 80, 80AAA or 80AA (see paragraph (f) of subsection 80F(1) and subsection 80F(3)).

### **The structure of sub-section 80E(1) and equivalent provisions**

20. Subsections 80E(1), 50D(4), 50D(6), 63C(1), and 80F(1) contain the following three tests

- the same business test;
- the new business test; and
- the new transactions test.

These tests form a descending hierarchy which first tests the business of the company as an entirety (its 'overall business'), then the component undertakings or enterprises, if any, of that business, and finally the individual transactions by which the business is carried on.

21. The same business test, which is the primary test, is a positive test: it looks to see whether the business of the company in the year of recoupment is actually the same business that was carried on at the change-over. The same business test is intended to ensure continuing identity between the whole of the business activities carried on by the taxpayer at the change-over and the whole of the business activities carried on by the taxpayer during the period of recoupment.

22. Accordingly, for the purpose of applying the same business test to a taxpayer, the taxpayer will always be treated as carrying on only one business at the change-over and during the period of recoupment. The reference in the same business test to 'business' is a reference to all of the activities carried on or undertaken by the company at the change-over and during the period of recoupment, irrespective of whether those activities constitute or are treated by the taxpayer as constituting separate or distinct activities, enterprises, divisions or undertakings carried on by the taxpayer.

23. The second and third tests are secondary, cumulative, negative tests, and they look to see whether the component undertakings or enterprises and the transactions of the overall business are the same **in kind** as previously. These tests are intended to prevent the injection of income into the company while leaving appropriate scope for the development and expansion of the company's business. They do not, however, depend for their operation on the existence of a purpose of tax avoidance.

**The meaning of 'business' in subsection 80E(1) and equivalent provisions**

24. The word 'business' is capable of different meanings in different contexts. In the new business test in the second limb of section 80E, and its statutory equivalents, the word 'business' is clearly intended to mean a particular undertaking or enterprise, while the expression 'business operations' must refer to all the activities of the company<sup>17</sup>. As the tests which the second limb comprises, i.e., the new business and new transactions tests, are intended to prevent the injection of income into a loss company which has satisfied the primary, positive test in the first limb of section 80E and its equivalents, i.e., the same business test, it may be supposed that the second limb is examining activities carried on within **the** business of the company.

25. A purposive interpretation would give to the word 'business' where it first occurs the meaning 'overall business'<sup>18</sup>. The word 'business' in the same business test has thus the same scope as the expression 'business operations' in the new transactions test, but a different meaning from the word where it appears in the new business test. Such an interpretation is consistent with the conclusion of Gibbs J in *Avondale Motors (Parts) Pty Ltd v. FC of T*<sup>19</sup> that paragraphs (b) and (c) of subsection 80E(1)

'together show that the legislature intended that where there has been the specified change in the beneficial shareholding of a company the accrued losses can only be treated as deductions if the company after the change was carrying on the same business it was carrying on before the change and no other business.'

**The same business test*****What does the same business test mean?***

26. In order for a company to satisfy the same business test, the company must be able to show that it carried on at all times during the period of recoupment the **same business** as the business which the company carried on at the change-over.

27. *Avondale Motors (Parts) Pty Ltd v. FC of T*<sup>20</sup>, a judgment of Gibbs J (as he then was) sitting as a single justice of the High Court, is

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<sup>17</sup> see paragraphs 78 to 81 *infra*

<sup>18</sup> See *Cooper Brookes (Wollongong) Pty Ltd v. FC of T* (1981) 147 CLR 297 at 320; 11 ATR 949 at 961; 81 ATC 4292 at 4305

<sup>19</sup> (1971) 124 CLR 97 at 106; 2 ATR 312 at 318; 71 ATC 4101 at 4106

<sup>20</sup> (1971) 124 CLR 97; 45 ALJR 280; 2 ATR 312; 71 ATC 4101

the leading authority on the application of section 80E<sup>21</sup>. In *Avondale Motors*, Gibbs J held that the reference to 'same business' in section 80E required that the taxpayer carry on the 'identical business' at all times during the period of recoupment rather than a business of the same kind or of a similar kind. Gibbs J said<sup>22</sup>:

'The meaning of the phrase "same as", like that of any other ambiguous expression, depends on the context in which it appears. In my opinion in the context of the section the words "same as" import identity and not merely similarity and this is so even though the legislature might have expressed the same meaning by a different form of words. It seems to me natural to read the section as referring to the same business, in the sense of the identical business, and this view is supported by a consideration of the purposes of the section. The relevant sections of the Act show an intention on the part of the legislature to impose, in the case of companies, a special restriction on the ordinary right of a taxpayer to treat losses incurred in previous years as a deduction from income...This restriction [that is, the continuity of majority beneficial ownership and control tests in sections 80A and 80B] is imposed to prevent persons from profiting by the acquisition of control of a company for the sole purpose of claiming its accrued losses as a tax deduction.

...

No injustice would, in my opinion result from a refusal to treat an accrued loss as a tax deduction where the company after the change carried on a different business, although one of a similar kind. In such a case, as a general rule, there would have been no business reason for the purchase of the shares, but only the wish to obtain the right to claim another's losses as a deduction from one's own income.'

28. In *Avondale Motors* the taxpayer company had ceased business completely at the change-over. However, Gibbs J concluded<sup>23</sup> that even if the company's former business had been carried on at the change-over the taxpayer would not have satisfied the same business test since during the period of recoupment 'it carried on the **same**

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<sup>21</sup> The decision of Gibbs J in *Avondale Motors* has been referred to with approval by Sheppard J in *J Hammond Investments Pty Ltd v. FC of T* (1977) 31 FLR 349 at 355; 7 ATR 633 at 638; 77 ATC 4301 at 4315; by the New South Wales Court of Appeal in *Boyded (Holdings) Pty Ltd v. FC of T* (1982) 13 ATR 127 at 131; 82 ATC 4236 at 4239; and, *semble*, by Campbell J in *Fielder Downs (WA) Pty Ltd v. FC of T* (1979) 45 FLR 242 at 248; 9 ATR 460 at 464f; 79 ATC 4019 at 4023

<sup>22</sup> (1971) 124 CLR at 105; 2 ATR at 317; 71 ATC at 4106

<sup>23</sup> see (1971) 124 CLR at 104; 2 ATR at 316; 71 ATC4101 at 4105

**kind**<sup>24</sup> of business but under a different name, at different places, with different directors and employees, with different stock and plant and in conjunction with a motor dealer having different franchises'.

***Whether the same business is carried on is a question of fact***

29. In *Avondale Motors*, Gibbs J said<sup>25</sup>:

'The question whether a company has commenced a new business or has continued an old business under different conditions is simply one of fact.'

In *J Hammond Investments*, Sheppard J said<sup>26</sup>:

'The answer to the question of whether the business was the same after the entry into the partnership agreement as it was before involves a factual inquiry; *Avondale Motors*.'

***Identifying the business carried on by the company at the change-over: what it is relevant to examine***

30. The issue of fact to be determined in applying the same business test is to identify the business carried on by the taxpayer immediately before the change-over, and to determine whether the taxpayer carried on the same business at all times during the period of recoupment. In so identifying the business, it is relevant to examine every activity of the business, although those activities must be considered as a whole. However, it is not correct to single out certain activities as the heart or core of the business, and identify it merely by reference to those activities. As Lord Donovan observed in *J G Ingram & Son Ltd v. Callaghan*<sup>27</sup>:

'I doubt if one can as a rule segregate the various activities involved in carrying on a trade, select one of them as being of the essence, and then designate the one selected as the real trade. There is, I think, an organic unity about a trade which invalidates this sort of dissection, and I think Rowlatt J was saying much the same thing, though more incisively, when he remarked in *Graham v. Greene*<sup>28</sup> that a trade differs from the individual acts which go to make it up, just as a bundle differs from odd sticks.'

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<sup>24</sup> emphasis added

<sup>25</sup> (1971) 124 CLR at 104; 2 ATR at 317; 71 ATC 4101 at 4105

<sup>26</sup> (1977) 31 FLR 349 at 355; 7 ATR633 at 638; 77 ATC4311 at 4315

<sup>27</sup> (1968) 45 TC 151 at 165f

<sup>28</sup> (1925) 9 TC 309 at 312; [1925] 2 KB 37

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And as Walton J concluded in *Rolls-Royce (Motors) Ltd v. Bamford*<sup>29</sup>:

'[I]t follows from this that "the essence of the trade" ...comprises every activity which goes to constitute that trade. Or, put in another way, however the trade of [the taxpayer at the change-over] is to be defined, it includes the activities, whatever they were, all ultimately directed towards making the profits, whatever their actual result, in all its...divisions.'

31. Identifying the business carried on by the taxpayer immediately before the change-over will thus involve looking at all the things done and the activities carried on by the taxpayer in the course of that business, i.e, during the period beginning at the change-over and extending into the past to a point where it can be said that the same business was not being carried on. The length of this period will vary in each particular case and will depend upon the nature of the business activities carried on by the taxpayer.

32. Note that the use of the word '**immediately**' in the same business test does not mean that only those things done immediately before the change-over in the course of the business are relevant to the application of the same business test. The word 'immediately' in the same business test refers to the overall business being carried on at change-over rather than to the particular activities being taking place at that time as part of it. That is to say, the word requires reference to be made to the **business** carried on immediately before the change-over, but it does not require everything which that business comprises to be carried on immediately before the change-over. For not every activity which is properly to be identified as part of the overall business will necessarily be taking place at the change-over: some kinds of activity may be intermittent or in temporary suspension.

33. Although all activities which may be properly identified as part of the business, because they form part of the operations by which it is carried on, will be relevant when the business at change-over is compared with the business carried on during the period of recoupment, activities carried on some time before the change-over which are different in kind from those carried on immediately before the change-over, and which cannot be meaningfully associated with them, are likely to represent a different business. In particular, activities which have been **permanently** discontinued before the change-over are unlikely to be relevant to the identification of the business carried on **immediately** before that change-over. Moreover, a business is identified and characterised by its ordinary course. Transactions not in the ordinary course of business which occur before the change-over may be of significance in relation to the new

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<sup>29</sup> (1976) 51 TC at 346

transactions test but will rarely assist in identifying the business carried on before the change-over.

### *Changes of Activities*

34. In order to satisfy the same business test a taxpayer must be able to show that it carried on the same business, in the sense of the identical business, at all times during the period of recoupment as the business it carried on at the change-over. However, this does not mean that the business carried on by the taxpayer during the period of recoupment must be identical in every respect with the business which was carried on immediately before the change-over. A business may be the same even though there have been some changes in the way in which it is carried on, provided the identity of the business is not changed. In *Laycock v. Freeman, Hardy & Willis*<sup>30</sup>, in relation to similar provisions in the United Kingdom, the English Court of Appeal said:

'That does not, of course, mean that the business, regarded after the succession [i.e. the change-over] must be in every respect and in every detail identical with the business which was carried on before the succession. The successor may succeed to a business with, let me say, 50 shops. He may choose to shut up some of those shops. He may make alterations in the goods that he sells. All sorts of alterations of that kind may take place. He may change his supplier. He may cut out a particular class of customer or a particular area. All questions of that kind appear to me to be really matters of fact for the determination of the [tribunal of fact] who, when matters of that kind arise, have to set themselves the question whether or not it is true and fair to say that the business in respect of which the successor is said to be making profits is the business to which he succeeded [i.e., the same business<sup>31</sup>]. Changes of that kind may or may not be so substantial as to make it right to say, as a matter of fact...that the business is not the same as the one to which he succeeded. The differences may be so substantial as to justify a finding to that effect.'

35. Mere expansion or contraction of the taxpayer's business may not result in a change in the identity of the business carried on by the taxpayer. In *Avondale Motors*, Gibbs J said<sup>32</sup>:

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<sup>30</sup> (1938) 22 TC 288 at 297-8; [1939] 2 KB 1 at 8; [1938] 4 All ER at 614

<sup>31</sup> the Commissioner's gloss

<sup>32</sup> (1971) 124 CLR at 104; 2 ATR. at 317; 71 ATC at 4105

'In some circumstances a company may expand or contract its activities, it may close an old shop and open a new one, without starting a new business, but the only conclusion that can be drawn from all the circumstances of the present case is that the business of the taxpayer after 15 March 1968 was different from that which it carried on before that date...It does not, of course, follow that a business will not be the same because there have been some changes in the way in which it is carried on; some cases under sec 80E may give rise to questions of degree which do not arise in the present case<sup>33</sup>.'

36. However, as a practical matter, expansion or reduction of business activities if carried to a sufficient extreme is likely to amount to more than a mere change in the scale of the business carried on by the taxpayer, and so may result in a change in the identity of the business. In particular, a sudden and dramatic expansion or contraction brought about by the acquisition or loss of activities on a considerable scale could mean that the same business is no longer being carried on. As Walton J observed in *Rolls-Royce Motors Ltd v Bamford*<sup>34</sup>:

'There is all the difference in the world between an organic growth of trade and a sudden and dramatic change brought about by either the acquisition or loss of activities on a considerable scale.'

Moreover, the evolution of a business is not necessarily the same as mere expansion and may also lead to change such that the business can no longer be described as the same business as that carried on immediately before the change-over, as was recognised in *Fielder Downs*<sup>35</sup>.

37. In *Fielder Downs*, Campbell J held that the taxpayer did not satisfy the same business test. Before the change-over, the taxpayer was in the business of growing clover and cereals on land situated in southern Western Australia for sale as seed and grain, whereas during the period of recoupment the taxpayer carried on the different business of cattle grazing on the same land. Campbell, J said<sup>36</sup>:

'In my opinion, there is a distinction between the kind or character of a rural business of which the proprietor is described as a pastoralist or a grazier, on the one hand, and one where he is categorised as a producer of, say, fruits, vegetables, fodder or seed, on the other...

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<sup>33</sup> (1971) 124 CLR at 105; 2 ATR. at 318; 71 ATC at 4106

<sup>34</sup> (1976) 51 TC at 344

<sup>35</sup> (1979) 45 FLR 242; 9 ATR460; 79 ATC 4019

<sup>36</sup> (1979) 9 ATR at 465f.; 79 ATC at 4024

Although dictionary definitions may be of assistance in some cases, it seems to me that the determination of the issue whether the business carried on by the company in each of the three relevant years was the same business, or one of a similar kind, as was carried on by it before March 1969 depends upon an investigation of fact so as to characterise the kind of (sic) nature of the business which was undertaken during each respective period. Before the change the company was engaged in growing clover and cereals for the sale of seed and grain, it was not then growing its clover pasture for the breeding or fattening of stock for sale. In view of the plain words of para (b) of sec 80(1), "The same business as it **carried on** immediately before the change", the fact that, had it continued with the development over a period of time of its pastoral business at Bedford Harbour it would inevitably have gone into the grazing business, the raising or the keeping on the property of large numbers of stock for money-making purposes, does not seem to me to be decisive of the issue. **If a business evolves it does not necessarily follow that the essential character of the business is not changed**<sup>37</sup>. It would not be difficult to give illustrations in support of this proposition. Moreover, although many business pursuits or occupations may be correctly included in a broad description such as "agricultural", "retailing", etc., they may be substantially different in kind from others which are in the one general category.

...

In my opinion the company did not carry on any grazing or livestock business during the years prior to the change; such livestock as were then on the property were there merely to assist the clover seed production.'

38. The decision in *Case Y45*<sup>38</sup>, *AAT Case 7272*<sup>39</sup>, indicates that the discontinuance, whether by way of cessation or sale, of a significant part of the business carried on by the taxpayer is likely to result in the taxpayer not being able to satisfy the same business test of the 80E test, the 50D test, the 63C test or the 80F test. In that case, Dr Grbich of the Administrative Appeals Tribunal determined that the taxpayer did not satisfy the same business test during the period of recoupment since the taxpayer ceased to carry on part of its business which comprised an agency for selling an agricultural machine,

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<sup>37</sup> emphasis added

<sup>38</sup> 91 ATC 426

<sup>39</sup> (1991) 22 ATR 3395



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notwithstanding that the taxpayer continued its agricultural consulting business at all times<sup>40</sup>. Dr Grbich said<sup>41</sup>:

'But Gibbs J does caution that it does not "follow that a business will not be the same" merely because "there have been some changes in the way...it is carried on". This raises "questions of degree". Differences in the nature of the business can eventually pass the point where a qualitative change in the nature of the business takes place. The issue is when that point is reached in a particular case.

The inquiry is basically a factual inquiry but such facts should be analysed in the framework of a principled set of guidelines and previous decisions have gone some way to structure the Tribunal's leeways of choice in the way it characterises particular changes. The following changes have been held sufficient for it to be held the business was not the same as that in the benchmark period:

- Company sells wholesale and retail motor parts and accessories. It disposes of its stock. Eight to nine months later it commences a similar activity with different types of trading stock (*Avondale Motors (Parts) Pty Ltd v. FC of T*<sup>42</sup>; High Court);
- Company was a brewer. It ceased brewing but bottled and sold beer brewed by another company (*Gordon & Blair Ltd v. CIR*<sup>43</sup>; Scottish Court of Sessions);
- Company manufactured, sold and installed swimming pools. After the change it merely sold and installed another company's pools (*Case K20*<sup>44</sup>; 22 CTBR (NS) Case 40; No 2 Board of Review);
- Company was a business offering its land for stock agistment for a fee. After the change it entered into a partnership which conducted a full business of producing wool, lamb and beef (*Case K36*<sup>45</sup>; 22 CTBR (NS) Case 56; No 1 Board of Review);
- Company was in the business of growing clover and cereals to sell seed and grain. After the change it fattened stock with its

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<sup>40</sup> Contrast *Highland Railway v. Special Commissioners of Income Tax* (1885) 2 TC 151. The discontinued activity accounted for only a small part of the business and was replaced by a subcontracting arrangement. It was held the same business was carried on.

<sup>41</sup> (1991) 22 ATR 3395 at 3399; 91 ATC426 at 430

<sup>42</sup> (1970) 124 CLR 97

<sup>43</sup> (1962) 40 TC 358

<sup>44</sup> 78 ATC 184

<sup>45</sup> 78 ATC 341

seed and grain and became a pastoralist (*Fielder Downs (WA) Pty Ltd v. FC of T*<sup>46</sup>; Queensland Supreme Court);

- Before the change the company carried on the business of buying partly finished houseboats, completing construction and selling them. After the change it bought other types of boats, did not carry out construction and sold them (*Case M19*<sup>47</sup>; *23 CTBR (NS) Case 91*; No 2 Board of Review);

- Rolls Royce Motors Ltd produced motor cars and aero engines. The aero engine division was the largest of six divisions. It caused large losses and put the company into financial difficulties. Four divisions of the company (including the ill-fated aero engine division) were hived off to a government owned company by special legislation. The company carried on with the two remaining divisions (*Rolls Royce Motors Ltd v. Bamford*<sup>48</sup>; English High Court);

...

The problem [of identifying the business at the change-over] is not to be resolved by empty verbal debates about denotation and connotation of particular labels for the business. Whether the business is to be characterised as an "agricultural investment and management consultant" or as a "general rural entrepreneur" cannot resolve the issue. Such denotation is the end point rather than the foundation on which reasoned decision-making should be constructed...

[Dr Grbich concluded the taxpayer did not satisfy the same business test]...having regard to the types of changes considered sufficient in the authorities and to the fact that the profits of the...agency were such an important part of the taxpayer company's income-generating activities in its early years, even allowing for the fact that most of the taxpayer's resources were deployed to building up its investment and management advisory services. This was more than a mere change in the process by which it ran its business.'

39. The question of whether the discontinuation of an activity will produce a change of business is, however, ultimately one of degree<sup>49</sup>. Sudden and dramatic change brought about by either the loss or acquisition of activities on a considerable scale is to be contrasted with

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<sup>46</sup> (1979) 9 ATR460, 79 ATC 4019

<sup>47</sup> 80 ATC 105

<sup>48</sup> (1976) 51 TC 319

<sup>49</sup> (1968) 51 TC at 344

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an organic growth of a business: per Walton J in *Rolls-Royce (Motors) Ltd v. Bamford*<sup>50</sup>. As his lordship there observed<sup>51</sup>:

'Doubtless the trade of the company would remain the same trade even though, as a result of organic growth in response to every factor which might influence it, the company adopted new compatible operations and discarded portions of its old.'

40. These principles are equally applicable to the acquisition or merger of businesses. Thus a company may generally expand and develop its business by a process of organic growth. However, if a company acquires and merges with its original business another undertaking or enterprise, even if the amalgamated businesses are of a similar kind, the company will fail the same business test when, considered as a whole, the business of the company in the year of recoupment cannot fairly be regarded as the same, albeit expanded, business carried on at the change-over. This could occur, for example, if a company whose original business had greatly contracted, commenced, or acquired as a going concern, another distinct undertaking of the same kind which preponderated in the overall business of the taxpayer. Thus, in *Seaman v. Tucketts Ltd*<sup>52</sup> a manufacturing confectionery company whose business had greatly run down but perhaps not entirely ceased<sup>53</sup>, and which had formerly bought sugar and cellophane on its own account for use in its manufacturing business, began to purchase those items for resale to its new parent, another manufacturer of confectionary. It was held that the company had commenced a new trade and that it was open to find that it had discontinued its former trade: on such facts in Australia the same business test would clearly be failed<sup>54</sup>.

41. Similarly, the acquisition of an undertaking which alters the nature of the overall business will cause a company to fail the same business test. In *George Humphries & Co v. Cook*<sup>55</sup>, two complementary businesses were merged, namely a clerical business of obtaining and subcontracting orders from film companies for photographic development and a business of developing film. It was held that the result was a new business, as the merged business was of a different nature. In the words of Singleton J<sup>56</sup>:

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<sup>50</sup> (1968) 51 TC at 344

<sup>51</sup> (1968) 51 TC at 346

<sup>52</sup> (1963) 41 TC 422

<sup>53</sup> It no longer engaged in manufacture; but it continued after a period of inactivity to buy and sell sweets in a small way, and some efforts were made to keep its goodwill alive.

<sup>54</sup> see also paragraphs 71-2 *infra* in relation to the new business test

<sup>55</sup> (1934) 19 TC 121

<sup>56</sup> (1934) 19 TC at 130

'It seems to me that prior to the date of the partnership [*i.e.*, the change-over] the business...was purely a business of a clerical nature, the getting of orders and the arranging for somebody else by contract to execute those orders. From the time the partnership began the business was of an entirely different nature. It was making things and doing work; it involved the employment of a considerable quantity of machinery brought in by Mr Terraneau, and the business, by whatever name you call it, was of a different nature altogether.'

42. Yet another illustration of the circumstances in which a change of activities may lead to a change of business is afforded by *Yarmouth Industrial Leasing Ltd v. The Queen*<sup>57</sup>. In that case a company which had leased a building and equipment to its parent for use in the manufacturing of textiles, began to engage in equipment leases to a variety of customers throughout Canada; the equipment leased consisted of heavy equipment and office equipment. Walsh J concluded that<sup>58</sup>:

'[T]he leasing of a building and equipment to a single lessee, irrespective of whether that lessee is the parent company or not, is a business of a different nature from purchasing office equipment and heavy equipment and leasing same to a series of lessees throughout Canada.'

***Business must continue from the change-over until the end of the period of recoupment***

43. The existence of a period of 'dormancy' will often raise an issue as to whether the business is truly still in existence, though greatly reduced in scale, or has actually ceased altogether. If, before the end of the period of recoupment, the taxpayer **completely** ceases to carry on the business it carried on immediately before the change-over, it will necessarily fail the same business test. Any other business which it thereafter carries on must be a new business which it has commenced after the cessation of the old business, and therefore a different business from the business carried on before the change-over.

44. In *Avondale Motors*, Gibbs J held that the taxpayer company did not satisfy the same business test on the basis that prior to the change-over, the business activities of the company which comprised dealing in motor vehicle spare parts and accessories, had ceased completely. Gibbs J said<sup>59</sup>:

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<sup>57</sup> [1985] 2 CTC 67

<sup>58</sup> [1985] 2 CTC at 71

<sup>59</sup> (1971) 124 CLR at 103; 2 ATR at 315f; 71 ATC at 4105

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'It is further submitted on behalf of the taxpayer that, quite apart from the rather artificial rule to which I have just referred, it should be held that it was still carrying on business after 29 February 1968 notwithstanding its inactivity after that date. It is said that those controlling the taxpayer had no intention of putting it into liquidation and that on the contrary it was obviously their intention that it should again engage in business of a similar kind, after its shares had been sold to a purchaser who wished to benefit by its accrued losses. To say this, however, clearly does not mean that the taxpayer was still carrying on business. There are cases in which it has been held that a company does not cease to carry on business notwithstanding that its activities are reduced to a minimum or indeed are almost entirely suspended. In *South Behar Railway Company Limited v. IRC*<sup>60</sup> Lord Sumner said: "Business is not confined to being busy; in many businesses long intervals of inactivity occur." In some cases the very nature of the business is such that its conduct may require little activity, e.g. the business...of acquiring a concession and turning it to financial benefit.

...

In other cases it has been held that a company continues to carry on business notwithstanding a suspension of activity due to causes beyond its control, e.g. where a steamship company had lost its only ship and was in the course of building another...In the present case the taxpayer's activity had ceased completely. The cessation of activity was not due to the nature of the business which the taxpayer carried on, or to some temporary adversity which the taxpayer intended to endeavour to overcome; it was due to a decision to discontinue the business previously carried on because it had been unprofitable and there was no intention to resume the conduct of that business. The plain fact of the matter is that the taxpayer was not carrying on any business immediately before 15 March 1968. It follows that [the same business test is] not satisfied.'

45. In *Northern Engineering Pty Ltd v. FC of T*<sup>61</sup>, the Full Federal Court upheld the decision of Jenkinson J in the Supreme Court of Victoria that the taxpayer company ceased to carry on its business of trading in vehicles and equipment during the period of recoupment when the taxpayer disposed of all its trading stock and assets, with the exception of a debt owing by its holding company.

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<sup>60</sup> [1925] AC 476 at 488

<sup>61</sup> (1980) 42 FLR 301; 29 ALR 563; 10 ATR 584; 80 ATC 4025

46. Brennan J, as he then was, in the full Federal Court in *Northern Engineering* said<sup>62</sup>:

'The question is whether after the last payment of the price of trading stock was received the appellant continued to carry on until 30 June 1967 a business which it had carried on at the time specified in [paragraph (b) of subsection 80E(1)]. In my judgment the question must be answered in the negative for the reason that no business was carried on after the appellant's trading credits were paid and its trading liabilities discharged. When a company's business is closing down there comes a time when the activity of a trading or profit-making nature comes to an end. The business of the company is not carried on merely by managing or disposing of the company's assets otherwise than in a business.

...

The depositing or leaving of the appellant's funds with the holding company appears merely to have been a mode of keeping, not of employing, its assets. Merely to preserve assets is not, at least in the circumstances of this case, to carry on a business.'

There was, as it seems to me, no element of business in the circumstances of the case here appearing in the movement of funds between the [taxpayer] and the other companies in the group.

47. In *Northern Engineering*, Deane J also held<sup>63</sup> that the rule of bankruptcy law in *Theopile v. The Solicitor-General*<sup>64</sup> was not authority for the proposition that a taxpayer is carrying on business for the purposes of section 80E whilesoever any debt owing to him remains uncollected or unpaid<sup>65</sup>.

48. Another Australian example of a business which had ceased may be found in *Case U105*<sup>66</sup>, *AAT Case 74*<sup>67</sup>. *Garage Henri Brassard Ltée v. Minister of National Revenue*<sup>68</sup> furnishes an example from

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<sup>62</sup> (1980) 42 FLR 301 at 304; 29 ALR 563 at 565; 10 ATR 584 at 586; 80 ATC 4025 at 4027

<sup>63</sup> (1980) 42 FLR at 306-7; 29 ALR at 567; 10 ATR at 587; 80 ATC at 4028

<sup>64</sup> [1950] AC 186

<sup>65</sup> See also *Tryka Ltd v. Newall* (1963) 41 TC 146 at 158

<sup>66</sup> 87 ATC 637

<sup>67</sup> (1987) 18 ATR 3537

<sup>68</sup> [1960] CTC 321 at 327f

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Canada in connexion with provisions similar to section 80E, while *Tryka Ltd v. Newall*<sup>69</sup> furnishes another from England.

49. To be contrasted with these cases is the case of a company whose business, while not discontinued, is undergoing a period of inactivity, e.g., the case of the taxpayers in *The Merchison Steamship Co Ltd v. Turner*<sup>70</sup>; *Kirk and Randall Ltd v. Dunn*<sup>71</sup>; and *FC of T v. Broken Hill South Limited*<sup>72</sup>: although the last must be regarded as a border line example. The circumstances accounting for the inactivity<sup>73</sup>, whether the company is actively holding itself out for business though obtaining none<sup>74</sup>, and whether there is the expectation of a resumption of active operations within a reasonable time<sup>75</sup>, are matters to be examined in determining whether the business is still being carried on.

50. In determining whether a business carried on during the period of recoupment is a new business commenced after the cessation of the business carried on immediately before the change-over, or the same business (having undergone a period of reduced activity) as the business then carried on, it is also relevant to examine the circumstances in which activity resumed, changes in those activities when resumed<sup>76</sup>, their location, and whether there is continuity of name, custom and goodwill. Thus, in *Kirk and Randall Ltd v. Dunn*, Rowlatt J noted that the 'galvanising' of a dormant company by new shareholders might happen 'in such a striking way as clearly to indicate that there was a new business altogether'<sup>77</sup>; while *The Merchison Steamship Company* case may be usefully contrasted with *Watson Bros v. Lothian*<sup>78</sup>.

51. *Watson Bros v. Lothian*, though decided in a statutory context of succession to business differing somewhat from that of section 80E<sup>79</sup>,

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<sup>69</sup> (1963) 41 TC 146. See also *Goff v. Osborne & Co (Sheffield) Ltd* (1953) 34 TC 441

<sup>70</sup> (1910) 5 TC 520

<sup>71</sup> (1924) 8 TC 663

<sup>72</sup> (1941) 65 CLR 150

<sup>73</sup> see *Avondale Motors (Parts) Pty Ltd v. FC of T* (1971) 124 CLR at 103; 2 ATR at 316; 71 ATC at 415

<sup>74</sup> see *Kirk and Randall Ltd v. Dunn* (1924) 8 TC at 669f

<sup>75</sup> see *FC of T v. Broken Hill South Ltd* (1941) 65 CLR at 159 per McTiernan J

<sup>76</sup> see paragraphs 37 to 42 *supra*

<sup>77</sup> (1924) 8 TC at 670. Cf *Rolls-Royce (Motors) Ltd v. Bamford* (1976) 51 TC 319 on 'sudden and dramatic change'

<sup>78</sup> (1902) 4 TC 441

<sup>79</sup> In both section 80E and the English provision the question posed by the statute is whether the same business is being carried on after a change-over; but in the English context the question is asked in relation to another taxpayer which has acquired the business from the original taxpayer: if it has, and if certain other

illustrates the importance of the continuity of custom and goodwill in deciding whether the same business or a new business is being carried on after a change-over. In that case, a ship was used to conduct a 'tramp steamer' business; the ship was sold, and the question was whether the purchasers had succeeded to the trade of the former owners, i.e., whether they were carrying on the same business as the former owners. The taxpayers lost: it was observed that there were 'no introductions of customers' after the change-over:

'If the books had been transferred, if a list of customers had been transferred, if there had been any introductions or recommendations given, a very different state of facts would have occurred.'<sup>80</sup>

It followed that the business had not been transferred and the purchasers had commenced a new business. See also *Tryka Ltd v. Newall*<sup>81</sup> and *Wadsworth Morton Ltd v. Jenkinson*<sup>82</sup>.

52. For the sake of completeness, it should be noted that in *AGC (Advances) Ltd v. FC of T*<sup>83</sup>, the High Court by majority (Barwick CJ and Mason J, Gibbs J dissenting) found that notwithstanding a change of name and address and a break in the business operations there was 'no change in the nature of the business at all.' However, this case concerned the 'continuing business' judicial test relating to section 51 and not the same business test in section 80E, and is not, it is believed, relevant to the same business test.

***The business carried on by a company will not be identified by reference to the business carried on by related companies***

53. In *Case K20*<sup>84</sup>; *22 CTBR (NS) Case 40*, the Board of Review said<sup>85</sup>:

'It should also be mentioned that we can take no account of the fact, if it be a fact, that the overall business had remained the same in so far as it was being carried on within a "group" of companies.'

The Board of Review in *Case N109*<sup>86</sup>; *25 CTBR (NS) Case 63* expressed a similar view and followed the general principle that each

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tests are met, the losses of the original company are deductible in the hands of the second taxpayer.

<sup>80</sup> (1902) 4 TC at 444

<sup>81</sup> (1963) 41 TC 146 at 156

<sup>82</sup> (1966) 43 TC 479 at 487

<sup>83</sup> (1975) 132 CLR 175; 5 ATR 243; 75 ATC 4057

<sup>84</sup> 78 ATC 184

<sup>85</sup> 78 ATC 184 at 187



company is a separate entity for taxation purposes (see also *Phillimore J in Kodak Ltd v. Clark*<sup>87</sup> and *Kitto J in Hobart Bridge Co Ltd (in liq) v. FC of T*<sup>88</sup>). Accordingly, the business of a company will be identified, for the purpose of applying the same business test, by reference to the business activities carried on by that company and not by reference to the business activities carried on by a commonly owned or controlled group of companies to which that company belongs.

54. However, where a company transacts much or all of its business with other members of the same group of companies, a change in the businesses or identities of those companies may be reflected by a change in the business of the taxpayer. For example, there might be a complete change in the goodwill of the taxpayer, and it might therefore be concluded that the taxpayer is carrying on a different business. Thus in *Yarmouth Leasing Ltd v. The Queen*<sup>89</sup>, the cessation of dealings with its former parent resulted in a change of business, while in *Avondale Motors (Parts) Pty Ltd v. FC of T*<sup>90</sup>, where the custom of the taxpayer in its spare parts business derived from its connexion with an associated retailer of motor vehicles, a change in parent also resulted in a change of business.

***Summary of how to determine whether the same business test is satisfied***

55. There are various factors which are relevant to take into account in determining whether the same business test is satisfied by a taxpayer. A single factor or matter might be so important that it determines the issue but, usually, it will be a combination of factors, appropriately weighted, which will decide whether the same business is carried on during the period of recoupment. A factor which in isolation has little weight may in combination with other factors have great weight, and conversely something which is significant when it appears with other changes, may have no importance when it appears alone. Nor is it only changes which must be weighed: answering the question of whether the business carried on in the year of recoupment is the same business carried on at change-over requires one to have due regard to what remains the same. In determining whether the same business test is satisfied, significant weight will be given to changes after the change-over in the income producing product or

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<sup>86</sup> 81 ATC 620

<sup>87</sup> [1902] 2 KB 450 at 459

<sup>88</sup> (1951) 82 CLR 372; 9 ATD 273; 5 AITR 184

<sup>89</sup> [1987] 2 CTC 67

<sup>90</sup> (1971) 124 CLR 97; 45 ALJR 280; 2 ATR 312; 71 ATC 4101

service of the taxpayer, how it is produced, acquired or provided and/or changes in the market for that product or service. But even these will be a question of fact and degree often to be decided in the context where some expansion or contraction would be expected.

56. Subject to the foregoing observations, the reported decisions on the application of the 80E test may be said to provide the following guidelines in determining whether a taxpayer has satisfied the same business test:

- (a) Identifying the business carried on by the taxpayer at the change-over involves identifying with specificity the actual business activities carried on and transactions entered into by the taxpayer at the change-over. The business of the taxpayer will not be identified by reference to the kind of industry to which the taxpayer belongs, or by reference to certain activities only, on the grounds that they constitute the heart or core of the business- all activities are relevant. (see *Fielder Downs*<sup>91</sup>; *Case Y45*<sup>92</sup>, *AAT Case 7272*<sup>93</sup>; *Rolls-Royce (Motors) Ltd v. Bamford*<sup>94</sup>).
- (b) The business carried on by the taxpayer will not be characterised by reference to business activities or transactions which the taxpayer intended to carry on or enter into before the change-over, or which the taxpayer had power or expressed the intent to carry on or enter into under its constituent documents before the change-over, if the evidence discloses that the taxpayer did not in fact carry on those activities or enter into those transactions at or before the change-over (see *Fielder Downs*<sup>95</sup>).
- (c) There is a distinction between a change of business and a 'mere change in the process by which [the business] is carried on' (see *Avondale Motors*<sup>96</sup> and *Case Y45*<sup>97</sup>; *AAT Case 7272*<sup>98</sup>). The second kind of change will not of itself result in a taxpayer not satisfying the same business test. However, when a change in the taxpayer's business operations or processes affects on the identification of the taxpayer's business by going beyond a mere change in the

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<sup>91</sup> (1979) 45 FLR 242; 9 ATR 460; 79 ATC 4019

<sup>92</sup> 91 ATC 426

<sup>93</sup> (1991) 22 ATR 3395

<sup>94</sup> (1976) 51 TC at 346

<sup>95</sup> (1979) 45 FLR 242; 9 ATR 460; 79 ATC 4019

<sup>96</sup> (1971) 124 CLR 97; 45 ALJR 280; 2 ATR 312; 71 ATC 4101

<sup>97</sup> 91 ATC 426

<sup>98</sup> (1991) 22 ATR 3395

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way in which the business is carried on, it is likely to result in a change in the business itself, e.g., *Gordon & Blair Ltd v. IRC*<sup>99</sup>.

- (d) An expansion or contraction of the taxpayer's business activities may not in itself result in a change in the identity of the business carried on by the taxpayer: Gibbs J in *Avondale Motors*<sup>100</sup>. However, the expansion or contraction of activities may result in a change in the identity or character of the business taking into account the nature and extent of the expansion or contraction. In particular, the organic growth of a business through the adoption of new compatible operations in the ordinary way, and similarly the discarding of old operations in that way, may not cause a taxpayer to fail the same business test, but a sudden and dramatic change brought about by the loss or acquisition of business operations on a considerable scale is likely to do so: Walton J in *Rolls-Royce (Motors) Ltd v. Bamford*<sup>101</sup>.
- (e) Hence, the discontinuance during the period of recoupment, whether by way of cessation or sale, of a significant part of the business which was carried on by the taxpayer at the change-over is likely to result in the company failing to satisfy the same business test (see the decisions in *Case K20*<sup>102</sup>; *22 CTBR (NS) Case 40*; *Case NI09*<sup>103</sup>; *25 CTBR (NS) Case 63*; *Case U105*<sup>104</sup>; *AAT Case 74*<sup>105</sup>; and *Case Y45*<sup>106</sup>; *AAT Case 7272*<sup>107</sup>).
- (f) The commencement or acquisition by merger or otherwise of new undertakings (including going concerns and similar or complementary undertakings), may cause a company to fail the same business test, e.g., if the result is to alter the character of the overall business: *George Humphries & Co v. Cook*<sup>108</sup>; *Seaman v. Tucketts Ltd*<sup>109</sup>.

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<sup>99</sup> (1962) 40 TC 358

<sup>100</sup> (1971) 124 CLR 97; 45 ALJR 280; 2 ATR 312; 71 ATC 4101

<sup>101</sup> (1968) 51 TC at 346

<sup>102</sup> 78 ATC 184

<sup>103</sup> 81 ATC 620

<sup>104</sup> 87 ATC 637

<sup>105</sup> (1987) 18 ATR 3537

<sup>106</sup> 91 ATC 426

<sup>107</sup> (1991) 22 ATR 3395

<sup>108</sup> (1934) 19 TC 121

<sup>109</sup> (1963) 41 TC 422

- (g) Other factors relevant to the issue of whether the same business is being carried on after the change-over include the name of the taxpayer, the location of the business, the existence of a period or periods of dormancy, and the circumstances accounting for the inactivity and in which activity is resumed: *Avondale Motors*<sup>110</sup>; *Yarmouth Industrial Leasing v. The Queen*<sup>111</sup>. And also the extent to which there is continuity of, or change in, custom and goodwill: *Tryka Ltd v. Newall*<sup>112</sup>; *Wadsworth Morton Ltd v. Jenkinson*<sup>113</sup>.
- (h) Where the taxpayer's activities have wound down to the extent which justifies a finding of fact that the taxpayer had ceased to carry on a business, either at the change-over or before or during the period of recoupment, the taxpayer will not satisfy the same business test (see *Northern Engineering*<sup>114</sup>).
- (i) The business carried on by one company in a commonly owned or controlled corporate group will not be characterised by reference to the business of the group as a whole (see *Case K20*<sup>115</sup>; *22 CTBR(NS) Case 40*). But changes in the businesses or identities of other companies in the group may result in a change of business: *Avondale Motors*<sup>116</sup>; *Yarmouth Leasing Ltd v. The Queen*<sup>117</sup>.

***Illustration of what factors are to be considered and how they are to be weighed in applying the same business test***

57. By way of illustration of the way in which the same business test applies, consider the case of a hypothetical manufacturer of widgets where there has been a change of ownership following a loss year. Each of the following matters would be **relevant** to consider although not necessarily **significant** in itself:

- (a) Changes in the widget manufactured by the taxpayer.  
A change in the product manufactured may vary from merely updating the model of the widget offered on one

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<sup>110</sup> (1971) 124 CLR 97; 45 ALJR 280; 2 ATR 312; 71 ATC 4101

<sup>111</sup> [1987] 2 CTC 67

<sup>112</sup> (1963) 41 TC 146

<sup>113</sup> (1966) 43 TC 479

<sup>114</sup> (1980) 42 FLR 301; 29 ALR 563; 10 ATR 584; 80 ATC 4025

<sup>115</sup> 78 ATC 184

<sup>116</sup> (1971) 124 CLR 97; 45 ALJR 280; 2 ATR 312; 71 ATC 4101

<sup>117</sup> [1987] 2 CTC 67

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hand, say the latest compact disc player in a company whose business it is to manufacture only CD players, to, on the other hand, a wholesale transformation of the business, as would be so in the extreme case of a manufacturer of compact disc players who changed the product to television sets<sup>118</sup>.

- (b) Whether the taxpayer commences any other activities in addition to manufacturing the widget (for example, the manufacture of a product which is different to the widget).

Here, the relative significance of what remained the same and what was novel would be particularly important.

- (c) Changes in the manufacturing activities of the taxpayer (for example, reduced manufacturing activities arising from the purchase of some parts that were previously manufactured, or the cessation of all manufacturing activities by converting to a purchasing and assembling operation).

The outsourcing of some components in a manufacturing business might well be a natural step in turning a loss company's business into a profitable one which, in its context, has no particular significance for the same business test; on the other hand, the conversion of what had hitherto been a manufacturing business into one of assembling parts manufactured by others is not unlikely to result in the company failing the test, even though it too is a means of making the operation a profitable one<sup>119</sup>.

- (d) Changes in the persons to whom the taxpayer sells the widget (for example, different industrialists or wholesalers).

The market for a company's products or services is an important indicator of whether the business is the same, and should be examined carefully. Consequently, it is relevant to look at the persons to whom the product is sold or the service is provided. In the case of a company with just one customer, or a very few customers, a change in the identity of that customer or those customers, will often be a matter of significance<sup>120</sup>. Similarly, where the custom of a company is derived from a connexion with another, perhaps associated, company, a sudden change in that

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<sup>118</sup> Cf *J G Ingram & Son Ltd v. Callaghan* (1968) 45 TC 151

<sup>119</sup> Cf *Gordon & Blair Ltd v. IRC* (1962) 40 TC 358

<sup>120</sup> See *Yarmouth Industrial Leasing Ltd v. The Queen* [1985] 2 CTC 67

custom following the severing of the connexion will often point to a change of business<sup>121</sup>. On the other hand, the identity of the business of a manufacturer who sells to a multiplicity of customers in the same market, assuming the absence of any sudden or dramatic change, is unlikely to change merely on this account. Business considerations for the change in market would also be relevant.

- (e) Changes in the mix of customers of the taxpayer (for example, selling only to wholesalers).

Again, this may mean no more than a refocusing of attention on the most profitable segment of the taxpayer's market within what is obviously the same business. But at the other extreme, the transformation of a retailer with an insignificant wholesale market into a wholesaler with an insignificant retail market, would have obvious significance for the same business test<sup>122</sup>.

- (f) Changes in the turnover or gross assets of the taxpayer attributable to sale of the widgets directly to companies for industrial use or attributable to the sale of the widgets to wholesalers<sup>123</sup>.

As in the case of paragraph (e) above, changes of this character may reflect no more than the consequences of better management of what is obviously the same business: but if one were to assume that industrial widgets are quite different from domestic widgets, it could equally be the case that this is one of a number of matters leading to the conclusion that better management has resulted in the taxpayer carrying on a different business.

- (g) Changes in the method of selling the widgets (for example, a change from outright sale to sale on consignment, sale on terms, sale by floor plan, or sale by hire purchase or leasing).

In some businesses the mode of sale is significant, and a change in it may result in (or be the result of) a different class of customer forming the taxpayer's market. Often, however, it will have little importance. If, however, a taxpayer was in the business of selling a product and then

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<sup>121</sup> As was found to be the case in *Avondale Motors (Parts) Pty Ltd v. FC of T* (1971) 124 CLR 97; 45 ALJR 280; 2 ATR 312; 71 ATC 4101

<sup>122</sup> See, for example, *Laycock v. Freeman, Hardy and Willis Ltd* (1938) 22 TC 288; [1939] 2 KB 1; [1938] 4 All ER 614

<sup>123</sup> Note paragraphs (d) and (f) of Revenue Canada Ruling IT 376 approved in *Yarmouth Industrial Leasing Ltd v. The Queen* [1987] 2 CTC at 71

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changed its operations so that it thereafter only leased it, there is likely to be a change of business.

- (h) Changes in the taxpayer's capital and working capital (for example, the manner and source of finance).

This a good example of a factor which is unlikely of itself to lead to a different business being carried on (except, perhaps, on some occasions in relation to a finance company), but which is not uncommonly the **result** of a different business being carried on. The nature of some changes in working capital may assist one to conclude that other factors have caused a change of business; conversely the absence of any important changes might help deprive other matters of their apparent significance.

- (i) Changes in the goodwill of the taxpayer.

Goodwill is an important indicator. Even businesses selling virtually identical products to an identical market may be sharply differentiated by goodwill, and conversely undertakings which might otherwise be thought of as distinct businesses may form part of the one business because they share the same goodwill. Where goodwill remains the same, other changes, even if fairly substantial, are likely to amount to no more than a variation in the way in which the same business is being carried on, whereas a complete change of goodwill is very likely to support a conclusion that the same business is no longer being carried on even if the means by which the business is carried on have hardly altered<sup>124</sup>.

- (j) Changes in the location or locations where the taxpayer carries on business and/or changes in the location of the taxpayer's customers.

Location is one of the more important matters affecting goodwill and the market of the taxpayer. Note, however, that often one will have to be careful to distinguish the expansion (or contraction) of an existing business which results in a change in locale, from the commencement of a new business (or the cessation of an old business) which has the same result.

- (k) Changes in the trade names, trade marks, patents, royalty arrangements or other intellectual property rights of the taxpayer.

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<sup>124</sup> see paragraphs 50-1 *supra*

A business of manufacturing may acquire new patents as a result of research which merely leads to innovation within the same business, as would be the case of a manufacturer of compact disc players which patented a new digital to analogue converter. Or the patent may be in respect of an innovation so profound that it transforms the business of the manufacturer. A change of trade name is commonly associated with a change in goodwill and may well point to a change in business, particularly if the trade name was associated with the new owners before they acquired the taxpayer. In other cases it may only be a marketing ploy. A wholesale change of intellectual property rights would normally be associated with a change in business, whereas minor changes are almost always found in manufacturers with research and development programmes.

- (l) Reductions or increases in the number of persons employed by the taxpayer or which are contracted by the taxpayer to perform services for the taxpayer, and changes in the nature of services performed by persons who are employed or contracted by the taxpayer.

Once again, rationalisations of staff are to be expected with the conversion of a loss making company into a profitable operation even where the same business is being carried on, but there are many changes of staff which will point to a change of business. For example, the sacking of all staff usually means that a business has ceased, and if new staff are recruited from the new owner that may mean that the taxpayer is acquiring its new owner's business. A huge increase in staff devoted to what previously was a minor activity may be the result of a change in business. Contracting out of staff, as in the case of outsourcing, may range from mere efficiency gains in the same business to a change in the kind of business being carried on.

- (m) Changes in the directors and/or management of the taxpayer.

This was a factor considered in *Avondale Motors*. Generally speaking, however, it has little significance as it usually follows a change in ownership regardless of what business is carried on, but its absence could point to a favourable answer to the question posed by the same business test.

It is to be emphasised that the above is not a checklist and not exhaustive.



58. To recapitulate, determining whether the taxpayer has carried on the same business at all times during the year of recoupment as the business which the taxpayer carried on in the year of loss means drawing an inference of fact after considering and weighing all the factors going to the matters listed above and any other relevant matters, and then attaching the appropriate weight to each factor having regard to all the circumstances. The application of the same business test to each case requires close analysis of the facts of each case. As Lord Kinross said in *Watson Bros v. Lothian*<sup>125</sup>, there must be:

'regard to the previous history of that trade, manufacture, adventure or concern, all upon the view that what was bought was a continuing thing, a continuing adventure, with all its prospects, with all its trade connections, and with all those things which result in the making of a profit.'

#### **The second limb of the 80E test, the 50D test, the 63C test and the 80F test**

59. The second limb of the 80E test, the 50D test, the 63C test and the 80F test respectively comprise:

- paragraph 80E(1)(c);
- paragraphs 50D(4)(a) and (b) and paragraphs 50D(6)(a) and (b);
- paragraph 63C(1)(c); and
- paragraph 80F(1)(g).

The second limb of the 80E test (or the equivalent provision in the 50D test, the 63C test and the 80F test) comprises two separate and cumulative negative tests, being the **new business test** and the **new transactions test**, which must both be met by a taxpayer in addition to satisfying the same business test in order to fulfil the requirements of section 80E (or the 50D test, the 63C test or the 80F test).

60. The new business test requires that the taxpayer company did not, at any time during the period of recoupment, derive income from (or in the case of the 50D test, incur expenditure in carrying on) a business of a kind that it did not carry on before the change-over.

61. The new transactions test requires that the taxpayer company did not, at any time during the period of recoupment, derive income from (or in the case of the 50D test, incur expenditure as a result of) a

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<sup>125</sup> (1902) 4 TC at 444

transaction of a kind that it had not entered into in the course of its business operations before the change-over.

62. Whether the new business test or the new transactions test is satisfied by a company in a particular case is a question of fact. The legislative intention underlying these provisions is to prevent the injection of income into the loss company while permitting, within limits consistent with the prevention of tax avoidance, the development and expansion of the overall business carried on immediately before the change-over. Such an injection of income might occur by means of activities which form part of the business and which would not cause the business to cease to be the same; this might occur, for example, through a new undertaking or enterprise that had not been carried on before the change-over, or through entering into a transaction in the course of the business operations of the business which was not one that would have been expected to be entered into in the natural flow of the taxpayer's business prior to the change.

63. The new business test and the new transactions test do not depend for their operation on the existence of a purpose of tax avoidance and may therefore operate in some cases to prevent a company obtaining a deduction for a prior year loss where there is no purpose of tax avoidance. However, the new business test and the new transactions test will allow a business to expand and develop provided the activities by which it produces its income remain of the same kind. The limits to expansion and development provided by these tests express the balance decided by Parliament between the prevention of tax avoidance and the facilitation of takeovers and mergers carried out for sound commercial reasons and which are unassociated with tax avoidance.

#### **New business test**

64. In the new business test the word 'business' has a different meaning from the word 'business' in the same business test: It is a reference to each of the different kinds or types of activities (if there be more than one kind or type of activity) comprised in the one business which is referred to in the same business test and which is carried on by the taxpayer at the change-over. Thus, each particular undertaking or enterprise carried on or out by the taxpayer as part of its overall business in the period of recoupment is tested by the new business test.

65. The question of whether an undertaking of a new kind has been commenced is a question of fact. If activities different in kind from those carried on before the change-over are carried on after the change-over with some degree of system, repetition and continuity and

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are distinguishable from the other activities of the taxpayer, it is likely that a new undertaking different in kind from the old undertakings of the taxpayer has been commenced.

66. The new business test is intended to limit the expansion available under the same business test. That is, the taxpayer cannot add to its operations a business, that is, an undertaking or enterprise, of a kind it had not carried on before the change-over. This test ensures that even if a company satisfies the same business test in respect of the whole of the business activities carried on by the company during the period of recoupment, the company will not be able to obtain the benefit of section 80E (or the 50D test, the 63C test or the 80F test) if the company derives income from carrying on, during the period of recoupment, activities of a different kind to the activities comprised by the one business carried on at the change-over.

67. Hence, where a taxpayer acquires or commences a new undertaking and amalgamates it in its overall business, the question posed by the legislation, in the Commissioner's view, is whether the amalgamated business is the same business as the business carried on by the taxpayer immediately before the change-over, and second, whether the new undertaking was of the same kind as the undertakings of that business. The first question involves considerations including, for example, the relative proportions of the undertakings, which in some cases could permit a company to pass the same business test notwithstanding that it had commenced an undertaking of a novel kind or character. In relation to the second question, the new business test looks at whether the same business, though expanded in scale and operations, includes business activities of a kind it did not carry on before the change. If it did, then the new business test would disqualify the company from claiming a deduction for losses incurred before the change-over. (Conversely, it might be noted, some amalgamated businesses might fail the same business test even where the new undertaking is not of a different kind and would pass the new business test.)

68. Generally speaking, the new business test will permit a company to expand or develop during the period of recoupment within the same fields of endeavour as it was engaged in before the change-over, provided the effect of expansion or development is not such as to cause it to fail the same business test. Cases where such failure occurs will tend to be cases where the injection of income is occurring or could occur, and thus not appropriate cases for the protection of section 80E or equivalent provisions.

69. However, this will not always be the case. For example, in takeover situations, it may be that acquisition of the additional operations will not result in a change in the same business. However,

some of the new business operations might constitute an undertaking or enterprise of a kind which had not been carried on by the taxpayer prior to the change-over. In these circumstances, to maintain the benefit of accumulated losses it would be necessary to avoid the acquisition of business operations that are of a kind that were not carried on by the taxpayer before the change-over.

70. As stated above, whether a new business, in the sense of a particular undertaking or enterprise, is of a different kind from the old undertakings or enterprises of a company is a question of fact. In characterising an undertaking or enterprise regard must be had to the undertaking or enterprise as a whole. A new undertaking or enterprise may be of a different kind from an old one, even though some or all of the transactions which it comprises or by which it is carried on occurred in the old undertaking or enterprise<sup>126</sup>, because in a different context those transactions, considered with the other business operations of the taxpayer, may be such as to lend a different character to the undertaking or enterprise considered as whole.

71. The facts of *Seaman v. Tucketts Ltd*<sup>127</sup> may be used to illustrate one case in which a taxpayer would, in the Commissioner's view, fail the new business test. A loss company which manufactured and sold confectionery was acquired by another company in a similar line of business. After the change-over the taxpayer began to purchase cellophane and sugar to sell to the new owner; it had previously purchased these items for its own use. It also purchased and sold, although it no longer manufactured, sweets; these were mostly sold to the new owner. The name 'Tucketts' had goodwill value which was kept alive by small scale trading. It was held to be open on these facts to conclude that the original undertaking had not been discontinued<sup>128</sup>.

72. Supposing that the taxpayer passed the same business test<sup>129</sup>, the taxpayer would nevertheless fail the new business test, as the new business of purchasing and selling sugar and cellophane would be of a different kind from the taxpayer's original business. As Pennycuik J observed<sup>130</sup>:

'It seems to me that these activities, even when glorified by the title of sugar merchants have no single significant feature in common with its previous trade of manufacturing confectioners ...[Even though the company still purchased and sold sweets] I do not think these matters are sufficient to support the

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<sup>126</sup> see Example 8

<sup>127</sup> (1963) 41 TC 422

<sup>128</sup> (1963) 41 TC at 439

<sup>129</sup> which on the actual facts of this case it would not; see paragraph 40 *supra*

<sup>130</sup> (1963) 41 TC at 439

conclusion that Tucketts' activities by way of the purchase and sale of sugar represent an extension or development of its former trade of manufacturers of confectionary.'

73. Similarly, in *Tryka Ltd v. Newall*<sup>131</sup>, a manufacturer of horticultural boxes and wooden crates and utility mark furniture, was held to have commenced a business of a different kind when it commenced to trade as timber merchants and purchased plant to plasticise a chipboard which it had not previously dealt in. Wilberforce J, as he then was, said<sup>132</sup>:

'What is said, it should be noted, is two things: first of all, it manufactured no goods...and secondly, that it acted as timber merchants in the sale of timber. Now that seems to me to be a statement that it embarked on an activity of a different character from that which it had previously carried on...I think I should reach the conclusion that the [tribunal of fact] did draw the inference that the 1954 activity was of a different type and was a different kind of trade from that which it had previously carried on.'

Thus the taxpayer would, in Australia, fail the new business test on those facts even if it passed the same business test.

### **New transactions test**

74. The new transactions test was considered at length by Sheppard J in *J Hammond Investments*. Sheppard J said<sup>133</sup>:

'Upon reflection I think it is correct, as both counsel concluded, that the word 'transaction' means 'dealing'.

One could imagine a situation where a company was taken over for the purpose of its tax losses in order to gain the benefit thereof, not for the purpose of offsetting income derived from the business against the losses of previous years, but for the purpose of offsetting against those losses an isolated or chance profit which might have been foreseen, perhaps a profit taxable by reason of the provisions of section 26(a) of the Act or some other income resulting in a chance or isolated profit or gain to the company.

The matters I have so far mentioned do not, however, in my opinion, take the matter sufficiently far to explain the presence in both provisions of the words, "in the course of its business

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<sup>131</sup> (1963) 41 TC 146

<sup>132</sup> (1963) 41 TC at 157, 158

<sup>133</sup> (1977) 7 ATR at 639; 77 ATC at 4317

operations". But I have come to the conclusion that there is a different type of transaction which probably does explain their presence. There are of course many receipts which are not properly described as being income from a business. There is an example of such a receipt in the present case. The partnership acquired a new building with a tenant in it, who remained in occupation for a short time after the acquisition. The sum of \$160 was received by way of rental. It does not seem to me that that was income derived from the business being carried on by the partnership but it was certainly income derived from a transaction entered into in the course of the partnership's business operations. Many other transactions of this general type can be imagined.

Whilst, therefore, I do not regard the matter as free from difficulty, I have reached the conclusion that the second limb of the paragraph is not intended to refer to the daily transactions involved in carrying on a business but to transactions of an isolated and independent kind, which transactions have nevertheless arisen in the course of the taxpayer's business operations.'

75. In *Fielder Downs*, Campbell J indicated a company will fail the new transactions test if the company derives income during the period of recoupment from a transaction which was of a different kind from the transactions which the company had entered into in the course of the business carried on by the company at the change-over, even if the first mentioned transaction is a transaction ordinarily involved in carrying on the business of the taxpayer during the period of recoupment. In *Fielder Downs*, Campbell J said<sup>134</sup>:

'If the business carried on beforehand should properly be held to be a business of the development of pastoral land for the eventual grazing of stock and one which was at all material times the one and the same business continuing from its commencement until the lands were fully developed and stocked [that is, if the same business test was satisfied<sup>135</sup>], it seems to me that the transaction of selling cattle (or wool or sheep) [that is, a day to day transaction or a transaction which was entered into in the ordinary course of the taxpayer's business<sup>136</sup> after the change-over] was a transaction of a kind that the company had not entered into in the course of its business operations of developing the property prior to the sale. There is a difference in kind between a dealing or transaction concerned with the selling

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<sup>134</sup> (1979) 45 FLR 242 at 251-252; 9 ATR 460 at 467; 79 ATC 4019 at 4025

<sup>135</sup> the Commissioner's gloss

<sup>136</sup> the Commissioner's gloss

of seed or cereals for income and a dealing involved with obtaining income from the sale of stock.

In *J Hammond Investments Pty Ltd v. FC of T* (supra) Sheppard J at 4318 expressed the view that the [new transactions test] "is not intended to refer to the daily transactions involved in carrying on a business but to transactions of an isolated and independent kind, which transactions have nevertheless arisen in the course of the taxpayer's business operations".

I think that the [new transactions test] contemplates that the transaction not previously carried on was one which could have been carried on in the course of the company's business operations prior to the change-over. Sales of stock had not been carried on prior to that time, and indeed prior to that time the company had no stock available which it could have sold. So, it seems to me, that the sale of stock was a transaction of a different character from any which had been previously entered into by the company.'

76. Thus Campbell J treated the reference to 'transaction of a kind' in the new transactions test as being a reference to all transactions entered into in the course of the taxpayer's business operations, regardless of whether they were transactions entered into as part of the daily or regular conduct of the business carried on by the taxpayer or were transactions which were 'independent' or 'isolated' transactions when judged by reference to the business carried on by the taxpayer. But, importantly, it would seem he did not regard transactions as being caught by the test if they were transactions which could have been carried on in the course of the company's operations prior to the change-over.

77. Interpretation of the new transactions test is not without its difficulties. However, a purposive approach would regard it as applying to all transactions entered into the course of the company's business operations and not merely those which are 'isolated' or 'independent'. But transactions which could have been entered into in the course of business operations before the change-over consistently with its ordinary course, will usually be transactions of the same kind as those that actually had been entered into.

***'Transaction', 'entered into', and 'business operations' have a broad meaning***

78. In the new transactions test 'transaction' has a broad meaning. The meaning of the word 'transaction' depends upon its context. It is clear that in the context of the second limb of section 80E, 'transaction' refers to every means or event by which the taxpayer derives income,

for the word appears in association with the expression 'business operations' as the last of a descending hierarchy of tests which examine, first, the overall business of the company, then its component undertakings or enterprises, and finally the individual acts by which the business is carried on. The new transactions test is concerned to ensure that a company deducts losses from income from transactions of the same kind as the operations by which it generated income before the change-over.

79. But the test is not concerned to distinguish income-producing activities of a bilateral kind from those of a unilateral kind. As Lord Reid noted in a case on English anti-avoidance provisions, *Greenberg v. IRC*<sup>137</sup>:

'The word 'transaction' is normally used to denote some bilateral activity but it can be used to denote an activity in which only one person is engaged. It would not be wrong to say of a person doing office work that he is transacting business.'

The payment of a dividend was held to be a transaction in that case. 'Transaction' has also been said in another context to be "a comprehensive word which includes any dealings with property": *Barron v. Littman*<sup>138</sup> per Lord Normand. To allow the injection of income into a loss company from unilateral dealings would defeat the purpose of the test, and the existence or otherwise of another party in relation to a dealing is not germane to the real issue, which is the way in which the taxpayer conducts business so as to produce income. Accordingly, the new transactions test is not confined to bilateral dealings. Appointment of the taxpayer as an object of a discretionary trust and appointment of income to the taxpayer pursuant to a discretionary trust will be transactions for the purposes of section 80E. *Barron v. Littman* also shows that a transaction may consist of a number of acts and even omissions, as the transaction in that case was the acquisition of property and a subsequent failure to let it.

80. The expression 'entered into' also has a broad meaning; it has, for example, the meanings 'to begin, to join, to engage, to become a participator, to be concerned or involved in, to be interested in'<sup>139</sup>. Its function is to indicate the connexion between the kind or class of transaction and the course of business operations before the change-over, and not the mode by which the taxpayer becomes concerned in the transaction after the change-over: the connexion between the

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<sup>137</sup> [1972] AC 109 at 136f; [1971] 3 All ER 136 at 149; (1972) 47 TC 240 at 271

<sup>138</sup> [1953] AC 96; [1952] All ER 548 at 555; (1952) 33 TC 373

<sup>139</sup> Gibbs J used the word 'engaged' as a synonym for it: *Avondale Motors (Parts) Pty Ltd v. FC of T* (1971) 124 CLR at 105; 2 ATR at 318; 71 ATC at 4106



taxpayer and the transaction after the change-over is supplied by the taxpayer deriving income from it.

81. The words 'business operations' refer to everything which a company undertakes or performs or does in the course of the business which is the same business, i.e., the overall business of the company.

***Whether a business or a transaction is 'of a kind' entered into in the course of business operations before the change-over***

82. The content of the word 'kind' in the new transactions test (and the new business test), when applied in a particular case, is to be derived from the course of the taxpayer's business operations before the change-over. A transaction which is entered into during the period of recoupment which could have been entered into in the course of business operations before the change-over, and which is neither extraordinary nor unnatural in the context of the business carried on by the company at the change-over, will generally be a transaction of the same kind as transactions actually entered into by the company before the change-over. Conversely, a transaction which is entered into during the period of recoupment and which is outside the course of the business operations carried on before the change-over, or which is extraordinary or unnatural when judged by the course of the business operations before the change-over, or which otherwise could not have been entered into in the course of the taxpayer's business operations before the change-over, will be a transaction of a different kind from the transactions actually entered into by the taxpayer before the change-over.

83. For example, technical innovations occurring during the period of recoupment which lead to transactions that could naturally have been entered into in the course of the business operations of the taxpayer carried on before the change-over, had the innovation been available, and which do not have the effect of changing the ordinary course or character of the company's operations<sup>140</sup>, will generally produce income from transactions of the same kind as the transactions actually engaged in before the change-over. On the other hand, transactions of the type discussed in *Myer Emporium v. FC of T*<sup>141</sup>, when undertaken for the first time after the change-over, or an extraordinary dealing with an associate which is not for an arm's

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<sup>140</sup> For an illustration of the circumstances in which technical innovation will result in a failure of the same business test because the adoption of the innovation actually involves the permanent discontinuance of the previous business, see *J G Ingram & Son Ltd v. Callaghan* (1968) 45 TC 151

<sup>141</sup> (1987) 163 CLR 199 at 208ff; 18 ATR 693 at 696ff; 87 ATC 4363 at 4366ff

length price<sup>142</sup>, will generally be different in kind from those previously engaged in. However, the application of this test like the others in section 80E is very much a matter of fact.

***The meaning of 'before the change' for the purposes of paragraph 80E(1)(c)***

84. Applying the new business test and the new transactions test thus involves identifying the nature of the business before the change-over and the kinds of business operations, undertakings and transactions entered into during its course. In so doing, it is relevant to examine the period from immediately before the change-over to the point in the past where the business can no longer be described as the business carried on immediately before the change-over. It is to be observed that the word 'immediately' is absent from the new business test and the new transactions test because not all undertakings or transactions carried on or out by the taxpayer in the course of the overall business will necessarily be actively carried on or out immediately before change-over; some may be intermittent or dormant. Nevertheless, while the transactions and undertakings need not themselves be carried on or out immediately before the change-over, only those transactions and undertakings which form part of the business being carried on immediately before the change-over are relevant to the new business and new transactions test, and permanently discontinued undertakings and transactions will not qualify. The purpose of the second limb is only to examine the businesses (in the sense of undertakings) and transactions which make up the overall business of the taxpayer, in order to ensure that they are the same in kind before and after the change-over. Transactions and businesses which were not relevantly part of the overall business of the company carried on by it immediately before the change-over have no role to play in this examination.

***De minimus exception to the new business test and the new transactions test***

85. There is a well established principle by which the law disregards certain things as '*de minimis*'. In *Wilkes v. Goodwin*<sup>143</sup>, Bankes LJ stated the legal maxim *de minimus non curat lex* applies where something is 'so trifling in value, or in amount, as to be negligible'<sup>144</sup>.

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<sup>142</sup> Note the observation of Wilberforce J in *Tryka Ltd v. Newall* (1963) 41 TC 146 at 156 that such a transaction may not be 'strictly a commercial transaction at all'

<sup>143</sup> [1923] 2 KB 86; [1923] All ER 61

<sup>144</sup> [1923] 2 KB at 94; [1923] All ER at 64

In the same case, Scrutton LJ said the maxim involves 'excluding things so insignificant as to be negligible'<sup>145</sup>.

86. Derivation of an amount of income which is so trifling in amount as to be negligible, as for example the amount of \$160 in rent which Sheppard J disregarded in *J Hammond Investments*<sup>146</sup>, will not cause a taxpayer to fail the new business test or the new transactions test. Whether an amount is so trifling or insignificant as to be negligible in a particular case requires consideration of the amount of the losses (or other relevant deduction) involved in that case, and the absolute size of the amount in question.

### ***The meaning of 'income'***

87. In the new business test and the new transactions test 'income' means assessable income. If income meant income according to ordinary concepts it would include exempt income, and to deny losses because a taxpayer has derived exempt income would be manifestly irrational. Exempt income is taken into account in recouping section 79E losses, and reduces the deduction otherwise allowable: it is only the excess of the loss over the exempt income which is an allowable deduction. Consequently, the derivation of exempt income by a loss company after the change-over is hardly part of the mischief which the tests were intended to prevent. Conversely, the sheltering in loss companies of assessable income, even if it is not income according to ordinary concepts, is part of the mischief intended to be prevented by the tests. Sheppard J thought the new transactions test could apply to 'a profit taxable by reason of the provisions of section 26(a) of the Act'<sup>147</sup>. The word 'income' is not infrequently used elsewhere in the Act in contexts where assessable income must be meant, for example, section 23L.

88. The alternative construction would be that it means income according to ordinary concepts. But if this construction were correct an inconvenient and improbable result would follow, whereas the preferred interpretation more closely conforms with the legislative intent discernible from the whole of the relevant provision in its context in the Act: cf *Mason and Wilson JJ in Cooper Brookes (Wollongong) Pty Ltd v. FC of T*<sup>148</sup>.

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<sup>145</sup> [1923] 2 KB at 97; [1923] All ER at 66

<sup>146</sup> (1977) 31 FLR 349; 7 ATR 633; 77 ATC 4301

<sup>147</sup> *J Hammond Investments Pty Ltd v. FC of T* (1977) 7 ATR at 640; 77 ATC at 4317

<sup>148</sup> (1981) 147 CLR 297 at 320; 11 ATR 949 at 961; 81 ATC 4292 at 4305

**The anti-avoidance test**

89. Subsection 80E(2), subsections 50D(5) and (7), and subsection 63C(2) contain provisions which are designed to prevent a taxpayer company satisfying the 80E test, the 50D test or the 63C test respectively, where the company commenced to carry on new businesses or entered into a new kind of transaction prior to the change-over in anticipation of obtaining a deduction for a prior year loss, a current year loss or a bad debt respectively. Those provisions are referred to as the '**anti-avoidance test**'.

90. The anti-avoidance test will be failed by a taxpayer where:

- (a) before the change-over, the taxpayer commenced to carry on a business which it had not previously carried on, or entered into, in the course of its business operations, a transaction of a kind which it had not previously entered into; and
- (b) the taxpayer commenced to carry on the business or entered into the transaction for the purpose (or for purposes which included the purpose) of satisfying the requirements of the 80E test, the 50D test or the 63C test (as the case may be) in relation to a prior year loss, a current year loss, or a bad debt or swap loss respectively ('**specified purpose**').

91. There are no reported decisions which clarify the operation of the anti-avoidance test. Nevertheless, the word 'business' is clearly intended to have the same meaning that it has for the purpose of applying the new business test and is a reference to each of the kinds or types of activities (if there be more than one kind or type of activity) carried on by the company as part of the one business carried on at the change-over. If there are no other activities than the business commenced to take advantage of the losses, that business would of course be the 'same business' for the purposes of the same business test.

92. Similarly, the reference in the anti-avoidance test to a taxpayer entering into 'in course of its business operations...a transaction of a kind' has the same meaning as the corresponding provision in the new transactions test.

93. Where the taxpayer commenced to carry on the same business or entered into a transaction in the course of its business operations before the change-over for a variety of purposes, the anti-avoidance test will nevertheless operate to prevent a taxpayer from satisfying the 80E test, the 50D test or the 63C test, as the case may be, where one of the purposes was the specified purpose.

## Examples

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**Important note:** the examples are only intended to illustrate various points in the ruling; they do not contain the level of detail necessary to apply section 80E in an actual case.

### Example 1

94. StoreCard Ltd is a member of the Store group of companies. The Store group operates a chain of departmental stores across Australia, selling a diverse range of products. The name and logo of the Store group is heavily advertised, widely recognised and has significant goodwill attached to it.

95. StoreCard Ltd provides a charge card, called 'Storecard', to approved customers of the other members of the group for purchases from them. By means of the card, customers are offered financial accommodation at interest. 'StoreCard' is advertised in Store shops and on television and radio as part of the Store group's advertising; it has the 'Store' logo on it; and it is associated with the Store group in the minds of its customers.

96. Store group suffers financial difficulties. Its members are eventually placed in liquidation and are wound up. The Store shops close, and the goodwill associated with its name and reputation is eventually lost. StoreCard Ltd, however, is made the subject of a scheme of arrangement. Under the scheme, the company ceases to offer fresh credit or to issue new cards: all operations cease except for the collection of outstanding debts, and all staff, except collection staff, are laid off; the company's creditors are assigned upon collection all debts collected, but bad debts remain beneficially the property of the company.

97. When all good debts have been collected the remaining staff are sacked, and the shares in the company are sold to Bank Ltd. The parties are not unmindful of the tax advantage connected with the bad debts of the company, which have yet to be written off. StoreCard Ltd is renamed Bank (Visa) Ltd, and it acquires the staff and business of Bank connected with Bank's Visa card. The company now issues Visa cards to customers of Bank, and by means of the card provides financial accommodation at interest to the customers of Bank. 'Bank Visa' is advertised by Bank as part of Bank's advertising, and has Bank's logo on it. The taxpayer now writes off its bad debts.

98. For the purposes of section 63C, immediately before the sale of the shares in StoreCard Ltd to Bank, the taxpayer was not carrying on any business: *Northern Engineering; Avondale*. The taxpayer had ceased trading operations and was no longer deriving assessable

income. The mere collection of outstanding debts is not of itself carrying on business, especially where that collection does not beneficially enure for the taxpayer. Here the collection is for the purpose of discharging the indebtedness of the taxpayer to its creditors as part of an arrangement entered into as a result of the taxpayer's insolvency and the failure and cessation of its business: it is not a step in the business itself. Although there is an intention to resume business, it is not an intention to resume the business formerly carried on. Here the intention is to commence another business of a similar kind after the failure and cessation of its original business, rather than to resume the same business after a lull in activities in that business.

99. If the taxpayer could be said to be carrying on business immediately before the change-over, it was carrying on a different business in the period of recoupment. If there is a business being carried on immediately before the change-over, it is the Store business in its final stages; and the Visa business is not the same business, although it is a similar business. The two businesses have different goodwill, customers, products, staff, management, outlets and so on.

100. Even if the taxpayer was carrying on the same (overall) business, it fails the new business test because Visa is different in kind from a retail charge card. Although the businesses are similar in kind they are not the same in kind. Note, however, the grounds for concluding that the businesses are different in kind (different range of customers, different financial product, lack of association with a trader, etc) also tend to lead to the view that the businesses are not the same.

## **Example 2**

101. **Scenario 1.** Bloggs (Finance) Pty Ltd was a wholly owned subsidiary of Bloggs (Holdings) Ltd. Its business was to act as financier and broker to members of the Bloggs group of companies. The other subsidiaries of Bloggs (Holdings) Ltd manufactured and sold grommets. Owing to adverse currency and interest rate movements, the company incurred huge losses. As the debts of the company were guaranteed by Bloggs (Holdings) Ltd and its subsidiaries, the group collapsed and its members, except the taxpayer, were liquidated. During the liquidation period, the taxpayer ceased to raise funds and either repaid or transferred its liabilities. By the end of the liquidation period, the company transacted no business and had neither assets nor liabilities. Immediately prior to the liquidation of Bloggs (Holdings) Ltd, the taxpayer was sold to Nerk (Holdings) Ltd. Nerk (Holdings) Ltd owns subsidiaries which manufacture and sell ferrules. After the change-over the taxpayer changed its name to Nerk (Finance) Ltd. Its business was to act as financier and broker to members of the Nerk group of companies.

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102. Nerk (Finance) Pty Ltd will fail the same business test. The taxpayer was not carrying on business immediately before the change-over. If it was carrying on business, that business was to provide financial services to the Bloggs group in connexion with the manufacture and sale of grommets, whereas after the change-over its business was to provide financial services to the Nerk group in connexion and sale of ferrules.

103. **Scenario 2.** The facts are as above except that instead of liquidating the other companies, the entire Bloggs group is sold to Nerk (Holdings). The group commences to manufacture ferrules, having acquired the businesses of Nerk group. The taxpayer resumes the provision of financial services to the same companies to which it formerly furnished such services. Ferrule manufacturing, however, has different capital needs from grommet manufacturing and the sales of the products are for dollars rather than yen, as had hitherto been the case. Cash flows are different, and the conditions and methods of raising and managing funds has changed. Its risk management operations also differ. It has different management and staff and is located in new premises. It changes its name to Nerk (Finance) Ltd.

104. If the taxpayer was carrying on business at the change-over, its business thereafter is nevertheless not the same business it carried on immediately before the change-over.

### Example 3

105. A company (Restaurant Pty Ltd) owned and operated a restaurant located in a Sydney suburb which served a distinctive style of Northern Japanese cuisine. The restaurant attracted heavy trade from Japanese businessmen, and was notably expensive. The name of the restaurant reflected the style of the cuisine and the name was a registered tradename of Restaurant Pty Ltd. The style of operation was suitable for franchise. The restaurant made losses and the company changed hands.

106. During the year of recoupment the taxpayer continues to own and operate the Japanese restaurant ('Original Japanese Restaurant'). During that year the taxpayer also purchases an Italian restaurant, situated some distance away, from an unrelated party. The restaurant attracts a random cross selection of locals; it is notably cheap.

107. In **Scenario 1**, Restaurant Pty Ltd never operates the Italian restaurant and converts the premises where the Italian restaurant is located into a restaurant serving Japanese food ('Second Japanese Restaurant'). During the year of recoupment the taxpayer commences to operate the Second Japanese Restaurant. The Second Japanese

Restaurant uses the same registered tradename as the Original Japanese Restaurant, with similarities in service, menu and decor.

108. The taxpayer will pass the same business test, and, if the Second Japanese Restaurant constitutes a distinct undertaking, the new business test, and the new transaction test will not arise for consideration.

109. In **Scenario 2**, the taxpayer commences to operate the Italian restaurant during the period of recoupment.

110. The taxpayer is likely to fail either the same business test or the new business test. The answer to the question of whether the same (overall) business is being carried on after the change-over as was carried on immediately before it, depends, in practical result, on the extent to which the business of the second restaurant resembles the business of the first restaurant. Opening an Italian restaurant would not ordinarily be regarded as an expansion of a Japanese restaurant business. Assuming that the second restaurant is, say, an equal part of the business it would be difficult to describe the business in the year of recoupment as the same but expanded business carried on before the change-over<sup>149</sup>.

111. In regard to the new business test, the answer to the question of whether a new business of a different kind has been commenced depends on the 'kind' of business operated before the change-over. The content of the word 'kind' derives from the nature of the business being carried on before the change-over. While the 'kind' of business carried on by a company with several restaurants of differing cuisines to various segments of the market might be that of operating restaurants, in this case, where only one type of restaurant was operated before the change-over, it is that of operating Japanese restaurants. Hence, the taxpayer commenced to carry on a business of a different kind in the year of recoupment.

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<sup>149</sup> see the discussion at 345f in *Rolls-Royce v. Bamford* (1976) 51 TC 319, and *George Humphries v. Cook* (1934) 19 TC 121



**Example 4**

112. Mad Cow Ltd operates a chain of hamburger stores. The stores have distinctive layouts, the product is distinctively branded, the staff have distinctive uniforms, and the chain is heavily advertised. Scrapie Ltd operates a rival chain of hamburger stores selling essentially the same product with minor differences. Its layout, product brand and uniforms are distinctive, and it is heavily advertised. Following a health scare and resulting heavy losses, Mad Cow is obliged to close all but a few of its stores: it is sold to Scrapie. After the change-over, Scrapie transfers its business to Mad Cow, while continuing to operate the remaining Mad Cow outlets. Except at the most senior levels the two businesses are run separately, and continue to be readily distinguishable. The original business of Mad Cow is now only a minor component of the overall business of Mad Cow.

113. While the business transferred from Scrapie would pass the new business test, the overall business of the taxpayer is not the same business carried on by the taxpayer immediately before the change-over and so the taxpayer will fail the same business test

**Example 5**

114. **Scenario 1.** The taxpayer, Dale-Avon Motors, is a retail seller of Holden and Mitsubishi motor vehicles, in Sydney. The vehicles are purchased through an associated wholesaler company from General Motors Holden and Mitsubishi, pursuant to Dealer Sales and Service Agreements. They are sold from one site in respect of which the taxpayer has a dealer licence under the *Motor Dealers Act 1974*. Dale-Avon has an excellent reputation, and advertises widely.

115. Owing to a recession, Dale-Avon incurs losses and changes hands. The company renegotiates and continues the Dealer and Service Agreements. The new owner does not acquire the original wholesaler, but uses an associated wholesaler company, which does not engage in any other business than to sell to Dale-Avon. Under its new owner, Dale-Avon, capitalising on its reputation, opens another outlet on Prince's Highway in Sydney under the same name, and continues to advertise widely. It obtains another dealer's licence in respect of that site, but sells the same cars under the same agreements. Site goodwill is comparatively trivial; both sites share in the same reputation goodwill, and many customers are attracted to the second site by reason of Dale-Avon's reputation.

116. The same business test is passed because the original (overall) business has merely expanded, and the new business and new transactions test will also be passed as no new business or transaction of a different kind has been commenced or entered into.

117. Dale-Avon continues in the organic growth of its business to acquire outlets under the same name and using the same goodwill in Sydney and selling the same cars, until it has ten sites. Over time there is gradual change in the brands sold, and new Dealer and Service Agreements are negotiated with other manufacturers, but at all times only ordinary passenger vehicles are sold.

118. The same business is still passed because the same business has merely continued to expand.

119. **Scenario 2.** Dale-Avon, which had previously sold most of its trade-ins to used car dealers (although occasionally selling a trade-in to retail customers itself), now opens a used car outlet. It begins to purchase used cars from other retail dealers and from the public. It sells them under the name 'Dale-Avon', and to some extent its existing reputation is exploited by the taxpayer. However, it begins to advertise the used car business separately and it acquires separate goodwill. Its market and suppliers are different from the market and suppliers for new cars. It then commences to sell Mack trucks at a separate site, and in respect of this undertaking its existing goodwill has no value. Used cars and the trucks initially constitute about 10% of the business each. Later, however, they grow greatly in size and Dale-Avon begins to reduce its involvement in the new car business, so that used cars and trucks constitute about 50% and 30% of the business respectively.

120. This scenario raises questions of degree. Initially, the taxpayer is likely to pass the same business test, but fail the new business test; and as the trucks and used cars come to predominate in its overall business it will also fail the same business test.

121. **Scenario 3.** The facts are as for Scenario 1, but in this scenario Dale-Avon has a poor reputation before the change-over. Immediately after the change-over, the new owner, Genauto, transfers to it an existing business of ten sites in Sydney all selling passenger cars under the name 'Genauto'. Existing Dealer Sales and Service Agreements with manufacturers and existing dealer licences are transferred from Genauto, and the cars are purchased from an existing wholesaler associated with Genauto from whom Genauto had previously bought its vehicles. Dale-Avon is permitted to exploit Genauto's goodwill by using 'Genauto' as its trade name. Dale-Avon's existing site continues to sell cars under that name, and through its existing licence and Dealer Sales and Service agreement. However, the transferred sites account for 80% of the business in the year of recoupment.

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122. Dale-Avon will fail the same business test: see *Rolls-Royce v. Bamford*<sup>150</sup>.

## Example 6

123. Iron Mine NL operates an open cut iron mine on a mining lease. Gold is discovered on another part of the lease. After frenzied speculation and turnover in its shares, the taxpayer, which has large section 79E losses, fails the continuity of ownership test in section 80A. After the change-over, the taxpayer commences to mine and sell gold. The taxpayer will fail the new business and new transactions tests. It may also fail the same business test depending on the effect on the overall business.

## Example 7

124. A resident company ('Mammon') carries on a gold mining operation in New South Wales, from which copper can also be produced. However, no copper is being produced because copper prices have been severely depressed since the opening of the mine; and, although the ore is of a high-grade as a percentage of copper to ore, the copper is not worth extracting at current market prices. It is generally expected that copper prices will recover, although when that will occur is a matter for speculation.

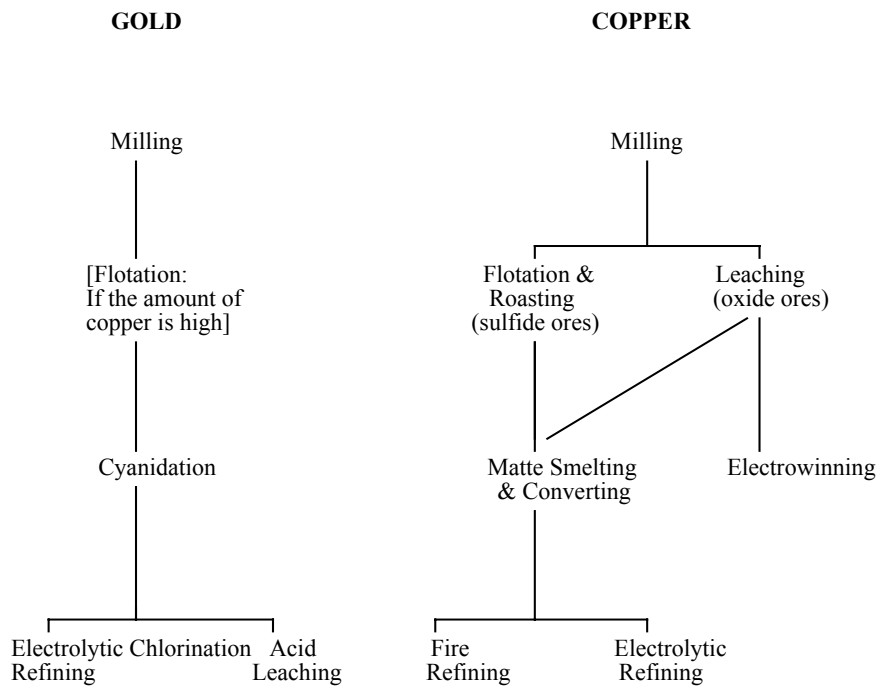
125. Mammon's business has involved mining ore, extracting gold from ore, and selling extracted gold to customers worldwide.

126. As the purpose of this example is to illustrate the practical significance of close examination of a taxpayer's operations in applying the same business, new business and new transactions tests, the processes of the gold/copper mining industry are detailed. Information regarding markets or means of selling gold/copper is not provided.

127. The following chart outlines the different processes for extraction of gold and copper. The two processes are entirely different except for the first step. Each step requires distinct plant and is impossible without it, and such plant often requires significant expenditure to install and operate it.

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<sup>150</sup> (1976) 51 TC 319



128. The association of gold and copper in a common ore body is not uncommon. Copper may be economically mined from ores containing 0.4%-0.8% copper. When found in association with gold, copper may be wasted, i.e., dissolved in the process of extraction (as in this

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example), although this rare<sup>151</sup>; or it may be recovered provided processes for doing this are installed. Developing a gold/copper deposit as a mine usually depends upon whether the primary metal, gold, is worthwhile mining, although the mining of a gold rich cap may be a prelude to the further development of the mine primarily to produce copper. If the relevant processes for recovering copper have not been installed, copper cannot be produced from a gold/copper deposit.

129. In this example, ore is mined from solid rock. Ores mined from solid rock must usually be finely ground and subjected to chemical treatment to extract the gold. After milling, initial separation takes place using vibrating tables or jigs. Then follows cyanidation. Cyanidation dissolves the gold, leaving the undesirable ingredients of the ore unaffected. The gold solution is then treated to prepare it for smelting. Upon smelting impurities (e.g., copper, iron and zinc) combine with flux and are eliminated as slag (solid waste). Thus, copper is not and cannot be recovered, for it is eliminated as waste. The operation is sometimes repeated to flux off more base metal. The amount of copper removed by this process is minimal. Most of it would already have been dissolved through cyanidation.

130. The gold may then be further refined by electrolytic refining and chlorination. Mammon uses those processes to obtain gold as pure as possible before sale. Following cyanidation, smelting takes place and the resulting gold and silver alloy is refined by electrolytic refining which produces gold of differing degrees of purity for sale for different uses.

131. Mammon incurs large losses and changes hands.

132. **Scenario 1.** In the loss year, the copper in the ore is dissolved by cyanidation and wasted; it is not separated and concentrated. The taxpayer does not possess plant to separate copper concentrate from gold, since copper recovery has not been economically worthwhile. The business is one which produces and can only produce gold for sale. After the change-over the price of copper rises sharply, and the new management decides to recover, concentrate and sell copper ore. To do this, it acquires a flotation plant and appropriately trained staff at a cost of around \$30-35M (using funds from its parent) and commences concentrating and selling copper concentrate.

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<sup>151</sup> Given that the economic production of pure copper metal suitable for fabrication and use is possible from ores with ores containing as little as 0.4% copper, it is unlikely that copper as a by-product would be wasted in most cases. Hence a flotation circuit would usually be undertaken in gold mining where copper is present, and most gold mines with recoverable grades of copper ore will sell copper concentrate as well as gold.

133. Flotation takes place between milling and cyanidation to extract copper which would otherwise be wasted in the cyanidation process; and involves treating the ground ore in water to produce a heavy froth which is scraped off and dried. The resulting product is a concentrate rich in copper. Gold remains in the solution and is transferred to cyanide processing and treated as outlined above, while the copper concentrate is transferred for the processes preparatory to sale.

134. In the recoupment year, the company acquires the plant and appropriately trained staff at a cost of around \$30 million and commences concentrating and selling copper concentrate. Mammon sells copper concentrate in accordance with usual practice in the industry.

135. If the taxpayer passes the same business test because its overall business is not altered so as not to be the same business (perhaps because of the comparative insignificance of the copper concentration undertaking), it will fail the new business and new transactions tests. Before the installation of the flotation circuit the taxpayer was not in the copper concentrate business. When the taxpayer installed the selective flotation process and began to produce and sell copper concentrate, it commenced to carry on a new business (in the sense of a distinct undertaking) different in kind from the business it previously carried on, which was the business of extracting and selling gold. Nor, in the absence of appropriate plant and staff to extract copper concentrate, could it have sold copper concentrate in the course of its business operations before the change-over. The sale of copper concentrate is therefore different in kind from transactions actually entered into in the course of business operations prior to the change-over, which were exclusively transactions concerned with extraction and sale of gold. This is so, notwithstanding that it is common in the industry for gold mining companies to concentrate copper and sell it.

136. **Scenario 2.** Mammon has plant to recover copper, viz, the flotation tank, in the loss year, and has been extracting copper concentrate in expectation of selling it when prices recover; but it has sold none, and the concentrate has been stockpiled pending a recovery in world prices. The copper concentrate is trading stock of the taxpayer and the taxpayer's assessable income for the loss year included the cost price of the closing stock of concentrate. There exist no formal agreements, arrangements or negotiations in relation to future sales of copper concentrate.

137. The taxpayer commences to sell copper concentrate in the recoupment year because of a significant increase in the world price for copper. The business of the taxpayer in this example is the same in the recoupment year as it was immediately before the takeover: it is the same business of mining and treating the gold/copper ore and

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selling the product of the treatment process. For the purposes of the new business test no new business was commenced after the change-over, for the business of mining, concentrating and selling copper minerals commenced with the mining and concentration of those minerals. For the purposes of the new transactions test, income was not derived from a transaction of a kind not previously entered into in the course of the taxpayer's business operations because the sale of copper ore is a transaction of the same kind as those entered into in the course of the company's business operations, the extraction and concentration of copper minerals. As copper concentrate was produced in a saleable state before the change-over, sale of copper concentrate could have occurred naturally in the course of the company's business operations before the change-over, and is not extraordinary judged by reference to those operations: it is, in fact, the intended outcome.

138. However, if the taxpayer went further, and began to refine the copper concentrate into pure copper, it would need to install further processes for roasting, smelting, and refining, with attendant plant and substantial capital costs: and this would be a business different in kind from a business of extracting copper concentrate, with transactions different in kind from those entered into before the change-over.

139. Examination of the different markets for gold, copper concentrate, and refined copper and the different processes for transporting, marketing and selling those products indicates that the commencement of copper concentration or copper refining, as in this example, will involve the taxpayer in carrying on new businesses or engaging in new transactions different in kind from the business or transactions in which it was engaged before the change-over.

## Example 8

140. **Scenario 1.** Portfolio Ltd owns shares which it holds for their yield, not as trading stock (profits on the disposal of shares are assessable income in accordance with the principles in *London Australia Investment Co Ltd v. FC of T*<sup>152</sup>). Occasionally, during bull runs on the stock market it has bought mining shares for speculative profit making by sale. Such transactions have been few, irregular, and separated by long periods. In October 1987, the last occasion on which it did this, the taxpayer made significant losses on revenue account. In 1994 it is sold to new owners, who continue the previous business of holding shares for their yield. There is no important change in the portfolio after the change-over. The taxpayer now buys

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<sup>152</sup> (1977) 138 CLR 106; 7 ATR 757; 77 ATC 4398

shares in Lasseter's Mine Ltd as a speculation without any intention to do this with any greater repetition or regularity than had hitherto prevailed.

141. The taxpayer will pass the same business test, the new business test (there being no new business) and the new transactions test: the transactions are not different in kind from those previously entered into in the course of the business operations before the change-over.

142. **Scenario 2.** Owing to the success of the speculation in Lasseter's Mines, it purchases shares in Solomon's Reef for profit making by sale, and now intends regularly transacting similar business. Solomon's Reef shares are sold for a profit.

143. The shares in Solomon's Reef were trading stock and the taxpayer has commenced a new business of trading in shares. As the enterprise is a comparatively insignificant part of the overall business at this stage, the taxpayer will pass the same (overall) business test and the new transactions test. However it will fail the new business test because a business of trading in mining shares is different in kind from its business of holding shares for their yield.

144. **Scenario 3.** Portfolio's new owner, Paris Australia, carries on a similar business of holding shares for their yield, not as trading stock. Some of those shares have appreciated enormously in value. Paris Australia would like to sell them, but this will result in Paris Australia deriving a large taxable income. It transfers them at cost, a fraction of their market value, to the taxpayer. After a time the taxpayer realises them at their true value.

145. The taxpayer will fail the new transactions test: a non arms-length transaction at grossly artificial prices is extraordinary when judged by reference to the ordinary course of its business before the change-over, and is of a different character to the transactions in which it had previously engaged.

### **Example 9**

146. A large retailer has bad debts not yet written off. It changes hands, and after the change-over the taxpayer engages in a transaction under which it lends money to an associated finance company. As part of the same transaction, the taxpayer then assigns its right to receive interest on the loan from the finance company to another company for a lump sum. It has never done anything like this before.

147. The taxpayer will fail the new transactions test. The transaction, being extraordinary judged by reference to the ordinary course of the taxpayer's business before the change-over, differs in kind from the transactions by which it derived income before the change-over. See



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*Myer Emporium v. FC of T*<sup>153</sup> for further discussion of such a transaction.

## Example 10

148. Jones is the controller of the Jones Family Trust. He and Underling, his accountant, are directors of Trustee Co Pty Ltd, the trustee. The trust is a discretionary trust and the objects of the trust are members of the Jones family. There is a power to add to trust objects. The subject of the trust is income producing property. Jones buys Loss Co Pty Ltd, a loss company, and has Underling and himself appointed as directors. Loss Co has never been the beneficiary of a trust previously. Loss Co is appointed as an object of the Jones Family Trust. Jones and Underling resolve as directors of Trustee Co to appoint income to Loss Co.

149. Loss Co has derived income from a transaction of a kind into which it had not entered before the change-over. It therefore fails the new transactions test.

## Example 11

150. On land it owns, Pasture Ltd exclusively grows clover for sale as fodder. From time to time it buys virgin land from the Crown, clears it and sows clover. It is usually a term of sale that the land be cleared and a crop sown within twelve months of purchase. A drought ensues and Pasture loses money; it has section 79E losses. Pasture is sold and fresh equity is subscribed so that Pasture can resume its expansion. Pasture buys more virgin land, but due to a shortage of clover seed it sows with wheat, and a crop of wheat is harvested and sold. Thereafter it sows only clover.

151. **Scenario 1.** Although Pasture has never sown and sold wheat before, it passes the new transaction test. The transaction in question is the sowing of a crop to comply with the terms of purchase of virgin land and the subsequent sale of the product. The transaction is one which could have been entered into in the course of business operations before the change-over and is not extraordinary judged by reference to the ordinary course of the company's business operations.

152. **Scenario 2.** Pasture, pleased at the price for which it sold the wheat, sows another crop purely for gain. (The crop is sold ultimately for milling into flour.) Pasture will now fail the test: the production of wheat for profit otherwise than as an incident of carrying on business of growing clover is extraordinary judged by reference to the course of

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<sup>153</sup> (1987) 163 CLR 199; 18 ATR 693; 87 ATC 4363

business before the change-over, and thus not a transaction of a kind into which it had previously entered. Pasture may also have commenced a new business of a different kind from that which it carried on before the change-over.

153. **Scenario 3.** Pasture grazed cattle on the land on which it grew clover before the change-over with a view to selling the cattle, but never sold any; after the change-over it sold cattle for the first time. The sale does not fail the new business test or the new transactions test because it was carrying on business as a cattle grazier (and the cattle were trading stock of that business); and the sale of cattle, a natural incident of carrying on such a business, is thus of the same kind as the transactions into which it entered in the course of carrying on that business.

### **Example 12**

154. **Scenario 1.** Tins Ltd is a grocery retailer. It has incurred losses and changed hands. Before the change-over, Tins had offered selected customers a cheque cashing facility for a fee. It advanced customers cash from its takings and later banked the cheques at its bank. It also accepted cheques in payment of the sale price of groceries in certain cases. After the change-over the new management installs cash registers with EFTPOS. A deal is struck with Bank Ltd by which customers of Bank and Tins may pay for groceries purchased from Tins at the point of sale by the electronic transfer of funds; moreover, customers may withdraw cash from their accounts with Bank, and Tins will furnish the cash. Bank subsequently credits Tins for this cash, and it also pays Tins a fee, based on turnover, for providing the service to its customers. Because Tins now has less cash in its registers the risk of robbery and embezzlement is reduced. Tins had not received income in the form of fees from EFTPOS before the change-over.

155. Tins will pass the new transactions test as it is engaging in an old type of transaction by new means. The relevant transaction is the sale of groceries and the receipt from the taxpayer of the sale price; the transfer of funds from the customer's bank account by electronic means to pay for the groceries is part and parcel of the sale of groceries. The provision of cash to the customer is not different in kind from the previous bank cashing facility, and may, moreover, be regarded as part of the sale of groceries. The EFTPOS fee income is not different in kind from the fees charged for cashing the cheques.

156. **Scenario 2.** Tins buys some its groceries from Europe. After the change-over the new management for the first time hedges the company's exposure to exchange rate movements on account of

purchases of trading stock. It does so through a derivative based on an index of a weighted basket of European currencies matching Tins aggregate exposure to movements in those currencies. On average the exchange rates fluctuate adversely to Tins which derives a profit under the derivative approximately equivalent to the losses it incurs on its debts in respect of stock: this profit is income.

157. Tins will pass the new transactions test because the transaction judged by reference to its context in the ordinary course of the taxpayer's business is merely a means of fixing the taxpayer's cost of stock, and is of the same character as existing operations in respect of the acquisition of stock.

158. **Scenario 3.** Tins treasury department begins to take a position on the movement of the Australian dollar in the hope of making a profit by speculation. It succeeds, and will therefore fail the new business test or the new transactions test because it had never previously carried on a business or engaged in transactions of this kind.

159. **Scenario 4.** Tins opens an office in Kiribati after the change-over and begins to sell groceries in Kiribati. Tins then begins to engage in profitable wholesale dealings in coconuts through its branch. Tins had not engaged in any wholesale trade whatever before the change-over, nor had it dealt in coconuts, nor had it operated in Kiribati nor elsewhere out of Australia. It has therefore commenced a business of a kind which it had not previously carried on. However, the income of the new business is exempt by reason of Article 7 of the Treaty with Kiribati for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion. Tins will not fail the new business test because the income it has derived is not assessable income.

### **Example 13**

160. Fastbus Ltd, a bus company, buys Slowbus Ltd, another bus company. Fastbus owns a hotel. Slowbus has losses from operating buses. Fastbus transfers the business of Fastbus to Slowbus. Slowbus has never operated hotels before. The income it derives from carrying on the business of hotelier will cause it to fail the new business test.

### **Example 14**

161. **Scenario 1.** Site Ltd is a specific purpose vehicle incorporated in Year 1 to acquire, subdivide and sell a particular large parcel of land for residential use. The subdivision requires the laying out of culverts, roads, sewerage and so on, but it does not involve the construction of housing. The land is trading stock. Site incurs interest

on borrowings to fund the acquisition during the year. Site also incurs section 79E losses in consequence of these interest charges. Interest is also incurred during the next year of income. In Year 2, Site grants an option over the land to Buyer Ltd, a land developer, for a small fee of \$20,000, but the beneficial owners contract to sell Site Ltd itself: this contract has no conditions which cannot be waived by the purchasers. (The beneficial owners of Site have elected to sell the shares in it to Buyer rather than the land itself as less stamp duty is payable in this way under the local law.) The contract of sale is specifically enforceable and beneficial ownership of the shares in Site thereupon changes. After the change-over but before the end of the year of income Site derives a very large fee by undertaking to develop another site for an associate of Buyer by constructing thereon an office building. The change-over is a disqualifying event for the purposes of the current year loss provisions.

162. Site has changed the character of its business from a land developer of broad acres to that of a land developer and construction company. As a specific purpose vehicle its business was to subdivide and sell one particular site only, and the undertaking of construction work on another site cannot be regarded as the expansion or continuation of the business carried on immediately before the change-over. Thus, it fails the same business test in section 80E and cannot deduct prior year losses; and it fails the equivalent test in section 50D, and cannot, moreover, deduct the notional loss of the loss period before the change-over from the notional taxable income of the subsequent continuous business period.

163. If it is carrying on the same business it nevertheless fails the new business test because the business of constructing buildings is not of a kind which it carried on prior to the change-over: a construction business is markedly different from a business of subdividing broadacres.

164. Moreover, the receipt of the large fee for undertaking to construct a building on the associated company's land is, judged by reference to the course of Site's business before the change-over, an extraordinary transaction, because it is not one which could naturally have been entered into in the course of carrying on a business of subdividing and selling on one's own account a particular broadacre parcel; and it is therefore different in kind from the transactions entered into before the change-over.

165. **Scenario 2.** The facts are as above, but shortly before the sale Site's directors resolve that the company's intention is to acquire further sites and develop them.

166. If nothing is done before change-over to carry into effect this decision the business carried on before the change-over will be as

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above and carrying into effect the decision thereafter will cause Site to fail the same business test. Site will also fail the new business and new transactions test as above.

167. If the decision is carried into effect before the change-over, the company will have commenced a new business before the change-over, and unless there was a purpose of enabling the company to take into account the carry forward losses or the current year losses Site will pass the anti-avoidance test.

168. **Scenario 3.** Site Ltd is incorporated specifically for the purpose of acquiring and developing one particular site by constructing thereon a building and selling it. The site is not trading stock. It incurs interest expenses and changes hands as above.

169. The mere development of the site after the change-over will not cause the taxpayer to fail the same business test. However, should the taxpayer purchase other sites with the same intention, a business of purchasing and developing a series of sites will have come into existence. (The land would have to be brought to account as trading stock.) This is a different business from the business of a specific purpose vehicle incorporated to acquire and develop one site only, and either the same business test will be failed or the new business test will be failed. If, after disposing of the developed land the taxpayer acquires another site with a view to developing it in a profit making scheme, i.e., without intending to commence a continuing business so that the land is not trading stock, there will have been a cessation of the first business and this will be a different business because it is a different profit making scheme: and thus the same business test will be failed.

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