PS LA 2000/10 (Withdrawn) - Application of Part IVA

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This practice statement was withdrawn on 13 December 2005 and replaced by PS LA 2005/24 - Application of General Anti-Avoidance Rules

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ATO Practice Statement Law Administration

PS LA 2000/10

This practice statement was withdrawn on 13 December 2005 and replaced by 2005/24 - Application of General Anti-Avoidance Rules.

FOI status: may be released

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

SUBJECT: **Application of Part IVA**

PURPOSE: **This Law Administration Practice Statement provides instruction and practical guidance to staff on the application of Part IVA to tax benefits obtained in connection with a scheme. Staff proposing to take action under section 177F or to rule on the application of Part IVA in a private binding ruling should follow this Law Administration Practice Statement.**

The main body of the Law Administration Practice Statement does not cover deemed tax benefits under section 177E (stripping of company profits), 177CA (withholding tax avoidance), 177EA (creation of franking debit or cancellation of franking credits) or 177H.

It also does not cover general anti-avoidance rules in the *Fringe Benefits Tax Assessment Act 1986*, the *A New Tax System (Goods and Services Tax) Act 1999* or any other laws administered by the Commissioner. It may however be useful as a background reference for officers exercising powers in respect of those provisions. Matters arising under those provisions, together with Part IVA matters, should be referred to the Part IVA Panel in accordance with the processes outlined in Attachments 3 and 4.

THIS LAW ADMINISTRATION PRACTICE STATEMENT ONLY APPLIES TO SCHEMES ENTERED INTO OR CARRIED OUT PRIOR TO 1PM, AUSTRALIAN EASTERN SUMMER TIME, 11 NOVEMBER 1999, because of the Government's decision to implement integrity measures, as recommended in the Review of Business Taxation "A New Tax System Redesigned", Chapter 6, from that time.

This Law Administration Practice Statement will be subject to review from time to time in light of judicial consideration of Part IVA. Issues currently before the Courts are noted below. This Law Administration Statement will also be reviewed in light of legislative amendment of Part IVA.

HOW TO USE THIS LAW ADMINISTRATION PRACTICE STATEMENT

1. This Law Administration Practice Statement is designed to assist ATO officers who are contemplating the possible application of Part IVA to an arrangement.

2. The Law Administration Practice Statement follows the broad outline of the Part, covering scheme, tax benefit, purpose, determinations and assessments, compensating adjustments, time limits and penalties.

3. The Law Administration Practice Statement provides administrative guidance on applying these elements of the Part, and also includes further explanations or interpretations drawn from cited case law.

4. The Law Administration Practice Statement is not divided into Statement and Explanation. Propositions contained in the Law Administration Practice Statement are, where necessary, explained, clarified by example, supported by case law authority, or discussed.

5. The Law Administration Practice Statement has five attachments:

   - Attachment 1 provides guidance on the proper execution of Part IVA determinations.

   - Attachment 2 contains a 'Framework for decision-making'. This table provides essential and structured guidance on the steps involved in making a Part IVA determination.

   - Attachment 3 replaces withdrawn Law Administration Practice Statement PS LA 1998/9. It describes the process for the proper escalation of Part IVA cases and the function of the Part IVA Panel.

   - Attachment 4 is written for officers preparing papers for presentation to the Part IVA Panel. It also contains guidance on the presentation of Part IVA Panel submissions at Panel meetings.

   - Attachment 5 contains the relevant provisions of Part IVA, excluding sections 177CA, 177E and 177EA.

6. Officers are directed to Case Decision Summaries on Part IVA as a reference on how Part IVA has been applied in particular cases.

7. This Law Administration Practice Statement replaces PS LA 1998/9.

BACKGROUND

8. Part IVA of the *Income Tax Assessment Act 1936* is a general anti-avoidance provision. It replaced former section 260 of the *Income Tax Assessment Act 1936* and should be construed and applied according to its terms, not under the influence of 'muffled echoes of old arguments' concerning other legislation, such as section 260: *FC of T v. Spotless Services Ltd* (1996) 186 CLR 404 at 414; 141 ALR 92 at 96; 96 ATC 5201 at 5205; 34 ATR 183 at 186.

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

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

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

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

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

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

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

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

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

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

16. On 11 November 1999 the Treasurer announced the second stage of the Government's response to the recommendations of the *Ralph Review of Business Taxation* - see Treasurer's Press Release No. 074. One of the key measures involves strengthening the general anti-avoidance provisions. This measure became effective immediately at 1pm, Australian Eastern Summer Time, 11 November 1999. This Law Administration Practice Statement does not apply to schemes entered into after that time. Officers need to be aware of the impact of these changes on schemes entered into or carried out after that time.

STATEMENT

Scheme - section 177A

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

Relevant case law

FC of T v. Spotless Services Limited (1995) 62 FCR 244 at 279; 133 ALR 165 at 196; 95 ATC 4775 at 4805; 32 ATR 309 at 338 *per* Cooper J:

> 'In my view, the definition in s. 177A requires that the parties to the scheme, insofar as they are known, must be identified and the terms or content of any agreement, arrangement, understanding, promise or undertaking and the steps or stages of any course of action or proposal, insofar as they are relevant, be identified. It is not sufficient to identify a scheme by reference to a hoped for fiscal outcome. Section 177A requires that the scheme has an existence based in fact and reality and is not something based on the Commissioner's view of the facts or their legal effect.'

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

Example

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

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

20. Where the Commissioner seeks to rely on an alternative scheme after nominating a scheme, the taxpayer should be informed as soon as practicable of the alternative scheme and the taxpayer should be given adequate time to respond.

Relevant case law

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

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

21. Whatever steps or circumstances the Commissioner relies on in defining the scheme must be capable, by themselves, of constituting a scheme for the purposes of Part IVA.

Relevant case law

FC of T v. Peabody (1994) 181 CLR 359 at 383; 123 ALR 451 at 460; 94 ATC 4663 at 4670; 28 ATR 344 at 352.

> 'But Pt IVA does not provide that a scheme includes part of a scheme and it is possible, despite the very wide definition of a scheme, to conceive of a set of circumstances which constitutes only part of a scheme and not a scheme

in itself. This will occur where the circumstances are incapable of standing on their own without being "robbed of all practical meaning".'

22. Officers should be aware that section 177D, which identifies schemes to which Part IVA applies, allows purpose or dominant purpose to be tested against a person who entered into or carried out the scheme *or any part of the scheme*. This is important where the scheme is complex and involves a number of parties and connected transactions. This does not, however, affect the identification of a 'scheme' under subsection 177A(1).

Relevant case law

FC of T v. Peabody (1994) 181 CLR 359 at 384; 123 ALR 451 at 460; 94 ATC 4663 at 4670; 28 ATR 344 at 352.

> 'The fact that the relevant purpose under s.177D may be the purpose or dominant purpose under s. 177A(5) of a person who carries out only part of the scheme is insufficient to enable part of a scheme to be regarded as a scheme on its own.'

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

Relevant case law

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

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

FC of T v. Consolidated Press Holdings (No 1) (1999) 99 ATC 4945 at 4967-4968; 42 ATR 575 at 597-598; 91 FCR 524 at 547-548 [currently on appeal to the High Court of Australia]:

> '[T]he actions identified by the Commissioner and accepted by His Honour as constituting a scheme did fall within the definition in s177A(1)(b). They can be described in the precise way his Honour described them "… the acquisition by ACP of redeemable preference shares in MLG and the acquisition by MLG of redeemable preference shares in CPIL(UK)". They can also be described compendiously as the interposition of MLG between ACP and CPIL(UK). They can be regarded as a module or component of the larger set of transactions. That does not prevent them from being treated as a scheme. They are in a sense self explanatory. The identification of their purpose which may have to

> be undertaken in the context of surrounding transactions is not a condition of their characterisation as a scheme. The identification of a scheme within the meaning of s177A is antecedent to its characterisation as a scheme to which Part IVA applies as defined in s177D. It would be an error to suppose that identification of purpose is necessary in determining whether there is in existence a scheme under s177A.'

Tax benefit - section 177C

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

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

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

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

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

25. Subsection 177C(1) allows two ways of determining whether a tax benefit has been obtained in connection with a scheme. The first is that the relevant tax benefit would not have been obtained if the scheme had not been entered into or carried out. The second is that the relevant tax benefit might reasonably be expected not to have been obtained if the scheme had not been entered into or carried out. If it is possible to say that a tax benefit would have been obtained, it is not necessary to refer to the reasonable expectation test.

Reasonable expectation test

26. A reasonable expectation requires more than a possibility.

    Relevant case law

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

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

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

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

28. Given that the *FC of T v. Consolidated Press Holdings (No 1)* (1999) 99 ATC 4945, 42 ATR 575; 91 FCR 524 decision is on appeal to the High Court, further clarification of the meaning of 'reasonable expectation' may be provided. In the meantime, where in a particular case the meaning of 'reasonable expectation' is in issue, the issue should be referred to the Tax Counsel Network in accordance with the escalation process set out in Attachment 3.

29. It is possible for different results to be reached as to reasonable expectation. In that event, the Commissioner may rely on both or all the reasonable expectations to support a determination made under subsection 177F(1) in respect of that tax benefit.

30. In applying the reasonable expectation test, it may be useful to consider the following. This list includes examples only and is not intended to be exhaustive.

- commercial norms, e.g., standard industry behaviour;
- social norms, e.g., family obligations;
- behaviour of relevant parties before/after the scheme, compared with the period of operation of the scheme.

31. It may be difficult for the ATO officer to obtain evidence to support the reconstructed version of events. In applying the reasonable expectation test in situations where there is a lack of information, reasonable inferences may be drawn, and reasonable assumptions may be made. However, care needs to be taken in applying the reasonable expectation test to a scheme involving a trust. It may not be reasonable to expect that a particular beneficiary of a trust would, but for the scheme, have received a trust distribution (see paragraph 63 below and also *FC of T v. Peabody* (1994) 181 CLR 359; 123 ALR 451; 94 ATC 4663; 28 ATR 344).

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

Purpose – section 177D

33. The test in paragraph 177D(b) is the core of Part IVA and is frequently referred to as the 'statutory predication test'.

34. The statutory predication test is applied by carefully weighing the matters contained in paragraph 177D(b) having regard to all the relevant evidence.

35. The section requires the Commissioner to have regard to each of the matters in paragraph 177D(b). However, not all of the matters will be equally relevant in every case.

36. Section 177D refers to 'the purpose' of the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme. The person need not be the taxpayer. Subsection 177A(5) clarifies that the particular purpose referred to in the Part includes the dominant purpose if the scheme was entered into or carried out for 2 or more purposes.

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

Relevant case law

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

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

38. It is possible for Part IVA to apply, notwithstanding that the dominant purpose of obtaining the tax benefit was consistent with the pursuit of commercial gain.

Relevant case law

FC of T v. Spotless Services Ltd (1996) 186 CLR 404 at 415; 141 ALR 92 at 97; 96 ATC 5201 at 5206; 34 ATR 183 at 187.

> 'A person may enter into or carry out a scheme, within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.'

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

Relevant case law

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

> '[T]he conclusion reached, having regard to the matters in par (b) as to the dominant purpose of a person or one of the persons who entered into or carried out the scheme or any part thereof, is the conclusion of a reasonable person.'

40. The consideration of purpose or dominant purpose under paragraph 177D(b) requires an objective conclusion to be drawn.

Relevant case law

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

> 'The eight categories set out in par (b) of s 177D as matters to which regard is to be had "are posited as objective facts"', citing *FC of T v. Peabody* (1994) 181 CLR 359 at 382.

41. The requirement that the conclusion drawn under paragraph 177D(b) be objective does not mean that the intention of the person or their advisers can never be relevant, although it is not itself a matter to which paragraph 177D requires regard

to be had. It is clear subjective purpose is not one of the eight matters in paragraph 177D(b) however evidence of subjective purpose in some cases may be relevant to one or more of the matters in paragraph 177D(b). The Full Federal Court is expected to deal with the role of evidence of subjective purpose in appeals in respect of *Eastern Nitrogen Ltd v. FC of T* (1999) 99 ATC 5163; 43 ATR 112 and *Metal Manufacturers Ltd v. FC of T* (1999) 99 ATC 5229; 43 ATR 375. In the meantime, where in a particular case the issue arises, it should be referred to the Tax Counsel Network in accordance with the escalation process set out in Attachment 3.

Relevant case law

Peabody v. FC of T (1993) 40 FCR 531 at 542; 112 ALR 247 at 257; 93 ATC 4104 at 4113; 25 ATR 32 at 41.
The following relevant decisions are currently the subject of appeals:
Eastern Nitrogen Ltd v. FC of T (1999) 99 ATC 5163; 43 ATR 112;
FC of T v. Consolidated Press Holdings (No 1) (1999) 99 ATC 4945; 42 ATR 575; 91 FCR 524.

42. The Full Federal Court in *FC of T v. Consolidated Press Holdings (No 1)* (1999) 99 ATC 4945 at 4971; 42 ATR 575 at 601; 91 FCR 524 at 552 stated in relation to section 177D:

> 'The section requires the decision-maker, be it the Commissioner or the Court, to have regard to each of these matters. It does not require that they be unbundled from a global consideration of purpose and slavishly ticked off. The relevant dominant purpose may be so apparent on the evidence taken as a whole that consideration of the statutory factors can be collapsed into a global assessment of purpose.'

43. The Full Federal Court also stated at ATC 4973, ATR 603 and FCR 554 that:

> 'The Commissioner submitted that in these circumstances the purpose or purposes of Arthur Young in recommending the scheme are to be attributed to those who entered into and carried it out on the basis of their advice. His Honour's reference to those who advised the group at Arthur Young is to be read in that light. There would be few such arrangements which do not involve the obtaining of prior professional advice and the objective purposes associated with the implementation of that advice can properly be attributed to those who implement it. In the circumstances the relevant purpose has been found, albeit by reference to the purpose of the advisers to the Group.'

44. Given that the *FC of T v. Consolidated Press Holdings (No 1)* (1999) 99 ATC 4945; 42 ATR 575; 91 FCR 524 decision is on appeal to the High Court, further clarification of the concept of "global dominant purpose" and of the role of adviser's purpose may be provided. In the meantime, where in a particular case these issues arise, they should be referred to the Tax Counsel Network in accordance with the escalation process set out in Attachment 3.

45. The presence of any of the following features whether alone or in combination in an arrangement is relevant to the matters in paragraph 177D(b) and would be likely to lead a reasonable person to consider carefully the possible application of Part IVA.

This list is not meant to be exhaustive or exclusive and is provided only by way of guidance.

- transactions between related or unrelated parties which are not at arm's length;
- transactions which do not occur at market rates/value;
- transactions the purpose of which is to transfer to the taxpayer a tax benefit of which he or she is not, under the Act, the intended recipient;
- transactions involving the interposition of an entity to access a tax benefit of which the taxpayer is not, under the Act, the intended recipient;
- the artificial creation of deductions or losses;
- arrangements involving a circularity of funds or no real money;
- use of non-recourse or limited recourse loans which limit the parties' risk or actual detriment in relation to debts/investments;
- arrangements where the taxpayer is not subject to significant risks when the tax benefit is taken into account because of the existence, for example, of a "put" option;
- arrangements conducted contrary to normal commercial explicability;
- financial arrangements made on unusual terms, e.g., interest rates above or below market rates, security for loans of little value in comparison to the principal amount, repayment of loan substantially deferred until the end of a lengthy repayment period;
- arrangements where the transaction or series of transactions produce no economic gain or loss, for example, where the whole scheme is self cancelling; and
- arrangements which lack economic substance and are not rationally related to any useful non-tax purpose, for example, inter-group or related party dealings that merely produce a tax result.

46. The eight categories of matter referred to in paragraph 177D(b) have been considered in some detail in the following cases - *W.D. & H.O. Wills (Australia) Pty Ltd v. FC of T* (1996) 65 FCR 298; 96 ATC 4223; 32 ATR 168; *CC(NSW) Pty Ltd (In Liq.) v. FC of T* (1997) 97 ATC 4123; 34 ATR 604; *Re Clough Engineering Ltd and Deputy Commissioner of Taxation* (1997) 97 ATC 2023; 35 ATR 1164 and *FC of T v. Consolidated Press Holdings (No 1)* (1999) 99 ATC 4945; 42 ATR 575; 91 FCR 524 . The analysis of the facts against the eight categories of matter in each of these cases is very instructive in understanding how these matters need to be properly considered against a set of facts.

Determinations and Assessments - section 177F

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

48. Officers should be aware that regard must be had to the individual circumstances of each case in applying Part IVA.

49. The discretion must be exercised bona fide and in good faith.

50. In all cases a determination should be evidenced in writing and provided to the taxpayer concerned: subsections 177F(2B) and (2C). The format suggested in Attachment 1 should be used unless an alternative form is needed and approved in accordance with the escalation procedure in Attachment 3.

51. Where a determination is made, subsection 177F(1) directs the Commissioner to take such action as he considers necessary to give effect to that determination.

52. Determinations should be given effect to as directed by the Chief Tax Counsel in a Minute dated 22 August 1997. Where issues arise, the escalation process in Attachment 3 should be followed. The relevant part of the Minute is extracted below (paragraphs 53-58).

"Single scheme, alternative bases

53. If a taxpayer can be assessed on alternative bases in respect of a single scheme to which Part IVA would apply in a particular year, the correct approach would be to make a single determination under subsection 177F(1). The highest "tax benefit" should be used in the determination, unless there are special circumstances (eg. the highest tax benefit would result in juridical double taxation). If an amount is to be included in assessable income, then for purposes of subsection 177F(2), the determination should state the provisions of the Act, for all the alternative bases, under which the amount is deemed to be included in assessable income.

Multiple schemes, multiple tax benefits and alternative bases

54. If a taxpayer can be assessed to two or more "tax benefits" under Part IVA from more than one scheme in a particular year, it will be necessary to issue determinations in respect of each scheme. However, only a consolidated assessment would be issued, based on the aggregate of the highest "tax benefit" for each of the schemes (subject to any special circumstances).

Single Scheme, multiple tax benefits (but not alternative bases

55. If a taxpayer can be assessed to two or more separate "tax benefits" under Part IVA from the one scheme in a particular year (eg. omission of income and excessive deductions claimed), it will only be necessary to issue one determination for the scheme and a consolidated assessment based on the aggregate of the "tax benefits".

Give effect to a determination

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

57. If an assessment has been issued prior to making the determination but the "tax benefit" was not included, it would be necessary to issue an amended assessment under section 170 of the Act to give effect to the determination.

58. If prior to making the determination under section 177F, the "tax benefit" was included in an assessment under sections of the Act other than Part IVA (eg. section 25(1) or Part IIIA), it would not be necessary to issue an amended assessment. As a matter of practice, we should issue and serve on the taxpayer a copy of the determination."

59. The normal and preferred method of giving effect to a determination is by an amended assessment. Officers should be cognisant of the Full Federal Court decisions in *FC of T v. Jackson* (1990) 27 FCR 1; 96 ALR 586; 90 ATC 4990; 21 ATR 1012 and *FC of T v. Stokes* (1996) 34 ATR 478; 141 ALR 653; 97 ATC 4001, which emphasise the limits on the Commissioner's ability to give effect to a Part IVA determination otherwise than by an assessment or amended assessment.

60. The normal and preferred method of giving effect to a determination made as part of determining an objection decision is also by an amended assessment. However, in this situation, subsection 169A(3) of the *Income Tax Assessment Act 1936* will operate to deem the determination to have been made when the assessment was made. The effect of subsection 169A(3) is that the determination may be given effect to by a prior amended assessment (if one exists) imposing the same tax liability as results from the Part IVA determination.

Relevant case law

Kordan Pty Limited v Commissioner of Taxation [2000] FCA 1807 para 32.

61. The Commissioner has power to assess more than one taxpayer in respect of the same income. The Commissioner also has power to make subsection 177F(1) determinations, and to issue assessments to give effect to the determinations, to more than one taxpayer in respect of the same tax benefit. However, although it is possible for multiple concurrent assessments in respect of the same amounts to co-exist, the Act does not authorise double taxation, and tax must only ultimately be collected from the taxpayer truly liable.

Relevant case law

DC of T v. Richard Walter Pty Ltd (1995) 183 CLR 168; 127 ALR 21; 95 ATC 4067; 29 ATR 644.

62. Where a determination is proposed to be made in situations other than described herein, officers should follow the escalation process outlined in Attachment 3.

63. Where the scheme involves trust income under Division 6, care should be taken to ensure that the Part IVA determination issues in respect of the appropriate taxpayer

(e.g., trustee or beneficiary). Officers in any doubt as to the proper taxpayer should escalate the issue in accordance with Attachment 3.

64. Care should be taken when making a Part IVA determination involving a partnership. A partnership is not a taxpayer for Part IVA purposes. Officers in any doubt as to the proper taxpayer should escalate the issue in accordance with Attachment 3.

Compensating Adjustments - subsection 177F(3)

65. Where the Commissioner has made a determination under subsection 177F(1) or (2A), he may, if it is fair and reasonable, make another determination under subsection 177F(3) adjusting the taxation situation of any taxpayer. A subsection 177F(3) determination is known as a 'compensating adjustment'.

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

Example

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

67. Where the Commissioner determines that a deduction shall not be allowable to the taxpayer in relation to a year of income, it is fair and reasonable, in some circumstances, to allow an alternative amount as a deduction.

Example

The Commissioner determines that deductions relating to a sale and leaseback arrangement are not allowable to the taxpayer in relation to a year of income. If it would be reasonable to expect that, but for the scheme, the taxpayer would have entered into a loan, it may be fair and reasonable to determine that an amount reflecting the interest that would, but for the scheme, have been paid, be allowable as a deduction in that year of income.

68. Any action to make or give effect to compensating adjustments (e.g., amendment of assessments) should not be undertaken while the application of Part IVA is subject to objection or review.

Time limits - section 177G

69. Subsection 177G(1) allows the Commissioner to amend an assessment at any time before the expiration of 6 years after the date on which tax became due and payable

under the assessment if the amendment is for the purposes of giving effect to a determination made under subsection 177F(1).

70. Where the Commissioner has not previously assessed a taxpayer in respect of a particular year of income, the Commissioner can make a determination under subsection 177F(1) at any time and give effect to it by issuing an original assessment to the taxpayer for that year of income.

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

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

Penalties

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

74. For income years prior to 2000-2001, the following applies in relation to penalties. Where the Commissioner has taken a determination made under subsection 177F(1) into account in making an assessment or amended assessment, the taxpayer is liable under section 226 to pay, by way of penalty, additional tax equal to 50% of the difference between the tax properly payable and the tax that would have been payable had the determination not been made. However, in cases where it is reasonably arguable that Part IVA did not apply, this penalty is reduced to 25%: section 226L.

75. For income years prior to 1992-93, the penalty is double the amount of tax avoided: see old section 226(2A).

76. The Commissioner has a discretion to remit all or part of the additional tax or administrative penalty. For years prior to the 1992-93 years, the Commissioner's power to remit is found in subsection 226(3). For years after 1992-93 and prior to 22 December 1999, the Commissioner's discretion to remit the whole or part of the additional tax is found in subsection 227(3). After 22 December 1999, the Commissioner's discretion to remit all or part of the penalty is found in section 298-20 of Schedule 1 of the *Taxation Administration Act 1953.*

EXTRA READING

77. The following articles may be of interest in relation to Part IVA:

- Carmody, Michael, "Part IVA: Where to Draw the Line" (plus attachment), Journal of the Taxation Institute of Australia, March 1997, pp.176-186;

- D'Ascenzo, Michael, "Part IVA: Post Spotless", Journal of Australian Taxation, Jul/Aug 1998, pp. 3-13;

- D'Ascenzo, Michael, "Part IVA: Commentary on Key Issues", Taxation in Australia (Red Edition), Volume 4 No 3, February 1996, pp. 129-137;

- D'Ascenzo, Michael, "Ownership: The Bellinz Saga", Tax Specialist, Vol 2 No 2, October 1998, pp. 65-72.

78. Officers should familiarise themselves with relevant Case Decision Summaries on Part IVA.

ATTACHMENTS

Attachment 1: Proper Execution of Part IVA Determinations
Attachment 2: Framework for decision-making
Attachment 3: Escalation of Part IVA issues
Attachment 4: Part IVA Panel Submissions Guidelines
Attachment 5: Relevant provisions of Part IVA

subject references:	anti avoidance measures; anti avoidance penalties; avoidance & evasion; escalation processes; general anti avoidance provisions; tax avoidance; tax benefits under tax avoidance schemes; tax planning; tax planning, avoidance & evasion
legislative references:	ITAA 1936 166 ITAA 1936 169A(3) ITAA 1936 170 ITAA 1936 177A ITAA 1936 177B ITAA 1936 177C ITAA 1936 177D ITAA 1936 177F ITAA 1936 177G ITAA 1936 226 ITAA 1936 226L ITAA 1936 227(3) ITR 1936 172(2) TAA 1953 284-150 TAA 1953 284-160 TAA 1953 298-20
related taxation rulings:	IT 2051: Leveraged Lease Transactions IT 2121: Income Tax: Family companies and trusts in relation to income from personal exertion. IT 2169: Income Tax: Equity Leasing Transactions IT 2220: Income Tax: Leveraged Transactions IT 2317: Income Tax: Deductibility of prepaid rent IT 2330: Income Tax: Income Splitting IT 2344: Income Tax: Trust schemes with non-resident beneficiaries: assessing guidelines: Determination of objections: Settlement guidelines IT 2373: Income Tax: Alienation of Income IT 2444: Income Tax: Self-assessment of income tax returns: amendment of assessments: remission of interest on underpayments of income tax IT 2456: Income Tax: Tax avoidance schemes: tax benefit IT 2460: Income Tax: Disability insurance: deductibility of premiums IT 2462: Income Tax: Trust stripping – income from family trust distributed to a trust owned accountant. Distributed amount returned to the family trust in the form of an interest free loan repayable on demand. IT 2466: Income Tax: Trust distributions of group interest to non-resident beneficiaries: determination of objections IT 2494: Income Tax: Cars and other fringe benefits supplied to employee/partners of administration entities IT 2496: Income Tax: Deductibility of the cost of lease receivables IT 2500: Taxation Ruling System: Policy governing issue of income tax rulings: status of rulings: advance opinions IT 2501: Income Tax: Assignment of partnership interest

IT 2503: Income Tax: Incorporation of medical and other professional practices
IT 2504: Income Tax: Deductibility of interest on borrowed funds – life assurance policies.
IT 2512: Income Tax: Financing Unit Trusts
IT 2513: Income Tax: Margin Lending
IT 2519: Income Tax: Ownership of plant or fixtures purchased under hire-purchase agreements as part of a financing arrangement,
IT 2538: Income Tax: Factoring of debts
IT 2547: Income Tax: Part IVA determinations made after an appeal against the Commissioner's decision on an objection is referred to the Federal Court
IT 2569: Income Tax: Extensions of time to pay under section 206
IT 2627: Income Tax: Application of Part IVA to dividend stripping arrangements
IT 2631: Income Tax: Lease incentives
IT 2635: Income Tax: Syndicated research and development arrangements
IT 2639: Income Tax: Personal services income
IT 2643: Income Tax: Sale of shares in companies in liquidation, receivership
IT 2670: Income Tax: Meaning of "Trading stock in hand"
TR92/11: Income Tax: Application of the Div 13 transfer pricing provisions to loan arrangements and credit balances
TR93/6: Income Tax and fringe benefits tax: loan account offset arrangement
TR94/14: Income Tax: Application of Div.13 of Part III – some basic concepts underlying the operation of Div 13 and some circumstances in which s.136AD will be applied
TR94/30: Income Tax: Capital gains tax implications of varying rights attaching to shares
TR95/30 Income Tax: Sale and Leaseback
TR96/2 Income Tax: Taxation implications of arrangements known as financial insurance and financial reinsurance.
TR96/24: Income Tax: Capital gains: guidelines to determine whether an amount described in a sale of business agreement as consideration for goodwill is properly characterised as a lease premium
TR98/22 Income Tax: The taxation consequences for taxpayers entering into certain linked or split loan facilities.

related tax determinations: TD 92/160; TD 92/164; TD 93/89; TD 93/188; TD 93/132; TD 93/187; TD 95/4; TD 95/37; TD 99/12

related case decision CDS10154; CDS10276; CDS10283; CDS10304; CDS10313; CDS10321; CDS10322; CDS10323; CDS10324; CDS10325; CDS 10326; CDS10327; CDS10328; CDS10329; CDS10330; CDS10331; CDS10332; CDS10333; CDS10334

case references:

- CC (NSW) Pty Ltd (In Liq.) v. FC of T (1997) 97 ATC 4123; 34 ATR 604

- DCT v. Richard Walter Pty Ltd (1995) 183 CLR 168; 127 ALR 21; 95 ATC 4067; 29 ATR 644
- Dunn v. Shapowloff (1978) 2 NSWLR 235
- Eastern Nitrogen Ltd v. FC of T (1999) 99 ATC 5163; 43 ATR 112
- FC of T v. Consolidated Press Holdings (No 1) (1999) 99 ATC 4945; 42 ATR 575; 91 FCR 524
- FC of T v. Jackson (1990) 27 FCR 1; 96 ALR 586; 90 ATC 4990; 21 ATR 1012
- FC of T v. Peabody (1994) 181 CLR 359; 123 ALR 451; 94 ATC 4663; 28 ATR 344
- FC of T v. Spotless Services Ltd (1996) 186 CLR 404; 141 ALR 92; 96 ATC 5201; 34 ATR 183
- FC of T v. Spotless Services Limited (1995) 62 FCR 244; 133 ALR 165; 95 ATC 4775; 32 ATR 309
- FC of T v. Stokes (1996) 34 ATR 478; 141 ALR 653; 97 ATC 4001
- Fletcher & Ors v. FC of T (No1) (1988) 19 FCR 442; 19 ATR 1765; 88 ATC 4834
- Fletcher & Ors v. FC of T (No2) (1990) 94 ALR 167; 23 FCR 134; 21 ATR 425; 90 ATC 4559
- Gulland,Watson & Pincus v. FC of T (1985) 160 CLR 55; 85 ATC 4765; 62 ALR 545; 17 ATR 1
- Jacques v. FC of T (1924) 34 CLR 328
- Kordan Pty Limited v Commissioner of Taxation [2000] FCA 1807
- Metal Manufacturers Ltd v. FC of T (1999) 99 ATC 5229; 43 ATR 375
- Newton v. FC of T (1958) 98 CLR 1
- Peabody v. FC of T (1993) 40 FCR 531; 112 ALR 247; 93 ATC 4104; 25 ATR 32
- Peate v. FC of T (1964) 111 CLR 443
- Re Clough Engineering Ltd and Deputy Commissioner of Taxation (1997) 35 ATR 1164; 97 ATC 2023
- Richardson v. FC of T (1932) 48 CLR 192
- W.D. & H.O. Wills (Australia) Pty Ltd v. FC of T (1996) 65 FCR 298; 96 ATC 4223; 32 ATR 168

file references: 99/10125-3; T2000/009216; T2000/020862

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Other Business Lines consulted	**INB; LB&I; OCTC; SB; SPR; GST**

Attachment 1: Proper Execution Of Part IVA Determinations

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

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

Delegates

3. A delegate (all SES are delegates) exercises the power in his or her own right. Generally they cannot be directed as to how to decide an issue. A delegate must have an instrument of delegation. The delegate signs in their own name.

4. For example, if Michael Bersten exercises his delegation himself:

> I, Michael Bersten, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation by instrument of delegation signed and dated on *XXX* determine….
>
> Signed
>
> *Michael Bersten*
> Michael Bersten
> Deputy Chief Tax Counsel

Authorised officers

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

6. Authorised officers must sign in the name of the delegate. That means that the authorised officer writes the name of the delegate in his or her own handwriting, or applies the delegate's stamp. He or she *may* then, subject to business line additional requirements, indicate their own name as having exercised the power. If the authorised officer adds their own name, he or she should use either "per" or "p.p" (meaning *pro procurationem* - by proxy).

7. For example, if Antonietta Balik, an authorised officer, exercises the power on Michael Bersten's behalf:

   I, Michael Bersten, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation by instrument of delegation signed and dated on *XXX* determine….

   Signed

   Michael Bersten p.p Antonietta Balik
   Michael Bersten
   Deputy Chief Tax Counsel

8. Officers should be aware of additional business line requirements for the proper execution of documents. Officers in the Large Business & International (LB&I) Business Line are directed in addition to a National Office Minute issued by Jim Killaly, Deputy Commissioner, LB&I, on 3 April 2000 (contact officer Mark Darmody, x 61367), which provides instructions for signing documents under authority including correspondence in LB&I. Officers in LB&I who sign as authorised officers are required to indicate their name and that they have exercised the power as an authorised officer.

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

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

10. The effect of this regulation is that the initial burden of proof is placed on the person challenging the validity of a document to adduce evidence that the document was issued without authority.

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

I, Michael Bersten, Deputy Chief Tax Counsel, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation by instrument of delegation signed and dated on 26 October 1999 determine under paragraph 177F(1)(a) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $3,567, 900, being a tax benefit that is referable to an amount that has not been included in the assessable income of XYZ Pty Ltd, TFN 99 999 999 (the taxpayer) for the year of income ended 30 June 2000, shall be included in the assessable income of the taxpayer of that year of income.

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

Dated the 9th day of June 2000 .

Michael Bersten (handwritten or stamped)
Michael Bersten
Deputy Chief Tax Counsel

This is a sample Part IVA determination, made by a delegate (Michael Bersten), to include income. Highlighted fields must be updated. Note that the Commissioner may determine under subsection 177F(2) of the Act the provision by virtue of which the amount is to be included in assessable income. It may be necessary to check the date of the most recent delegation (contact Jane Holden, OCTC National Office, x 61347).

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

I, Michael Bersten, Deputy Chief Tax Counsel, in the exercise of the powers and functions delegated to me by the Commissioner of Taxation by instrument of delegation signed and dated on 26 October 1999 determine under paragraph 177F(1)(b) of the *Income Tax Assessment Act 1936* (the Act) that the amount of $55,894.00, being a tax benefit that is referable to a deduction being allowable to XYZ Pty Ltd, TFN 99 999 999 (the taxpayer) for the year of income ended 30 June 2000, shall not be allowable to the taxpayer in relation to that year of income.

Dated the 9th day of June 2000.

Michael Bersten (handwritten or stamped) p.p Antonietta Balik
Michael Bersten
Deputy Chief Tax Counsel

This is a sample Part IVA determination, made by an authorised officer (Antonietta Balik) on behalf of a delegate (Michael Bersten), to deny a deduction. Highlighted fields must be updated. Note that a deduction or *a part of a deduction* can be determined to be not allowable (see para 177F(1)(b)); the determination must state whether 'a deduction' or 'a part of a deduction' is determined to be not allowable. It may be necessary to check the date of the most recent delegation (contact Jane Holden, OCTC National Office, x 61347).

Attachment 2: Framework For Decision-Making

The following framework is designed to ensure that all relevant issues and necessary questions are fully considered before a decision to apply Part IVA is properly made. It is a simplified guide to the requirements of the law as set out in the Law Administration Practice Statement and should be read in that light. It is also to be applied against the background of applicable ATO Business Line and corporate policies.

1. Who makes the decision?

The ATO Business Line Officer alone?	⇒ No. You need to check within the Line and in this Law Administration Practice Statement who else should be involved.
An ATO Officer who is either authorised or has a delegation?	⇒ It is necessary to confirm that the officer making the Part IVA decision is duly authorised or has the Commissioner's delegation. ⇒ Persons who are authorised officers are required to sign the determination in the name of the delegate and not in their own name. It is important to follow the applicable format for determinations in Attachment 1. ⇒ The Tax Counsel Network needs to be involved in accordance with Attachment 3.
Is it necessary to refer this matter to the Part IVA Panel before a decision is made?	⇒ This issue is determined in accordance with Attachment 3. If it is a significant or novel matter that has not previously been considered it must be referred to the Part IVA Panel. To be exempt from a requirement to refer a matter to the Panel a clearance is required from the Deputy Chief Tax Counsel, National Office.

2. Preparation for making the decision

How are the facts to be taken into account?	⇒ Ensure that all the steps of the particular scheme or schemes are clearly identified and understood. ⇒ Obtain all the relevant factual material, including documents. ⇒ Examine the legal and commercial effect of the factual material. ⇒ Consider the individual circumstances of the case.

How are the surrounding circumstances to be taken into account?	⇒	Consider all the facts in light of the eight matters in paragraph 177D(b) that led to the party or parties entering into the relevant scheme or schemes.
Are there alternative arguments for the ATO position?	⇒	Consider the possible application of the general provisions of the Act.
Has the view of the taxpayer been sought and considered?	⇒ ⇒	Consider whether the taxpayer's view is consistent with the documents and other factual material available to the ATO. Consider the possible application of Part IVA on the taxpayer's view of the facts.
Have the legal issues been fully researched and considered?	⇒ ⇒	In accordance with PS LA 2000/7, seek the views of TCN/ITD/Business Line/Centres of Expertise. Consider obtaining advice on the legal issues from external advisers (such as counsel or the Australian Government Solicitor).
Is the matter within the time limits in s. 177G?	⇒ ⇒	Which is the relevant year of income in issue? Is there any fraud or evasion in the relevant year of income?

3. What is the decision-making process?

Step One:	⇒ ⇒ ⇒ ⇒	Is there a scheme? Is there an alternative scheme? Are there more than two schemes? What are the steps of the scheme or schemes?
Step Two:	⇒ ⇒ ⇒ ⇒	Is there a tax benefit? Is there an alternative tax benefit? Are there two or more tax benefits? What is the greatest amount that can be included or excluded as a tax benefit?
Step Three:	⇒ ⇒ ⇒	Who is the taxpayer? Is there an alternative taxpayer? Are there two or more taxpayers?
Step Four:	⇒	Having regard to all the steps of the scheme and all the surrounding circumstances considered against the eight matters referred to in paragraph 177D(b), would it be objectively concluded that the person or one of

		the persons who entered into or carried out the scheme or any part of the scheme did so for the purpose or the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme or of enabling the relevant taxpayer and another taxpayer or other taxpayers each to obtain a tax benefit in connection with the scheme (whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers)?
Step Five:	⇒ ⇒ ⇒ ⇒	If the requirements of the Part are satisfied, should the discretion to make a Part IVA determination be exercised? If yes, a determination must be made and evidenced in writing. The reasons for the determination should be documented separately. Is it necessary to make an alternative determination? Is it necessary to make more than two determinations?
Step Six:	⇒ ⇒ ⇒	Consider how to give effect to the determination. The normal and preferred method of giving effect to a determination is to use an amended assessment. In limited cases, s. 169A(3) may be relied on to give effect to a determination made as part of the decision on objection. Consider whether it is necessary to issue an alternative assessment (or assessments) or amended assessments (or assessments)?
Step Seven:	⇒	Are there circumstances that warrant making any compensating adjustment or adjustments?

4. Who needs to be told about the decision?

The Tax Counsel Network?	⇒	The Tax Counsel Network in your region dealing with you on this matter must be aware of and take part in the decision.
The taxpayer and/or the taxpayer's tax agent or tax adviser?	⇒ ⇒	The determination should be evidenced in writing and provided to the taxpayer concerned. The person directly dealing with the ATO on this

		matter should be informed of the decision.
Anyone else?	⇒	If the Australian Government Solicitor is involved, the AGS officer should be made aware of this decision.

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

In the ATO records?	⇒ ⇒	The information can be retained electronically. It must be available generally for the information of other ATO officers subject to any secrecy provisions.
In the personal tax file of the taxpayer or taxpayers?	⇒	All the documents should be properly filed in a locatable ATO file.
A Case Decision Summary?	⇒	After the ATO position in relation to Part IVA has been settled, a Case Decision Summary should be prepared by the Business Line in conjunction with TCN.
In any other way?	⇒	If appropriate, the relevant information should be provided to the Part IVA Panel and records from the discussion of the Part IVA Panel retained.

Attachment 3: Escalation of Part IVA issues

1. The proper application and development of general anti-avoidance provisions is an issue of importance to the ATO.

2. Where officers seek to apply the general anti-avoidance provisions they must, before proceeding, refer the matter to the Tax Counsel Network (TCN) using their Business Line's escalation process.

3. A member of the TCN will provide interim advice, and arrange for that advice and relevant papers to be provided to the Deputy Chief Tax Counsel, National Office who will, in consultation with the Chief Tax Counsel and Deputy Chief Tax Counsel (using the Part IVA Panel as appropriate), monitor and confirm the application of the general anti-avoidance provisions. Where a specific issue is the subject of litigation (e.g., on appeal in another case), the issue must be referred to the Deputy Chief Tax Counsel, National Office, to ensure consistency in the ATO approach.

4. It is not necessary for a matter to be referred to the Part IVA Panel where a materially identical matter has been previously considered by the Panel. In such cases, a clearance from the Deputy Chief Tax Counsel, National Office, is required to exempt the matter from the requirement to proceed to the Part IVA Panel for consideration.

5. After the ATO position in relation to Part IVA has been settled, a Case Decision Summary should be prepared. It is the responsibility of the business line bringing the case to the Part IVA Panel to prepare a draft Case Decision Summary to be finalised in conjunction with the Tax Counsel Network.

Charter of the Part IVA Panel

6. The Part IVA Panel (which includes community representatives) has been established to advise the ATO on general anti-avoidance issues. The Panel looks at cases usually just before the application of the general anti-avoidance provisions is formalised (e.g., a Part IVA determination is made), so that taxpayers will know their case has been fully considered before that step was taken. However, important and/or sensitive cases may come to the panel at an earlier stage.

7. TCN, in conjunction with the Part IVA Panel secretariat, is responsible for ensuring proper documentation of the consideration by the Panel of the application of Part IVA to particular cases.

8. The Panel considers the use and development of the general anti-avoidance provisions as a whole, rather than being necessarily "driven" by individual cases. It is the responsibility of the officer making the determination to take proper account of the individual facts in each case.

9. The Part IVA Panel has been established to ensure that the Commissioner's power to make determinations under Part IVA is exercised responsibly and after full consideration.

10. The charter of the Panel is therefore to ensure that, in cases which come before it, proper consideration has been given to the primary tax liability questions so that Part IVA is only used as a measure of last resort and is only used where it is clearly

appropriate. In doing this, the Panel looks at the use and development of the general anti-avoidance provisions as a whole.

11. The Panel also helps to settle, maintain and develop the ATO position on Part IVA, monitors consistency and helps identify trends. It serves the purpose of providing guidance to the ATO on general questions surrounding Part IVA such as on practice and procedure and on applying Part IVA to emerging risks.

12. The Panel provides a forum in which avoidance issues can be workshopped. This is encouraged where risks of a significant type have come to the attention of Business Lines.

13. It should be borne in mind that the Panel is not in a position to evaluate the evidence that supports a proposal to exercise Part IVA. Rather the Panel relies upon assurances from tax counsel and senior officers in the Business Lines that any proposal to make a determination under Part IVA can be supported on the basis of legally admissible evidence available to the Commissioner.

Attachment 4: Part IVA Panel Submissions Guidelines

What is the objective of submissions?

1. These guidelines are to help you to prepare and present to the Part IVA Panel.
2. The job of the Part IVA Panel is to coordinate ATO responses to key tax technical issues. Their job is not to revisit your calls on the bread and butter details. To do their job they need to see the wood for the trees.
3. Files coming to the Panel are typically difficult and involve overwhelming detail. Your submission will be effective if it helps the Panel cut through this. It must outline the problem clearly. It must put a finger on the main mischief, the essential idea driving the scheme, the main "trick". It must set out the basics clearly right up at the front end.

What does the Panel expect?

4. Normally, documents should give a stand alone overview of the issue(s) and the key drivers in not more than five pages excluding diagrams and attachments. Your statement of the key facts, main issues and basic law in this executive summary must be robust and focused. Information which is not central to your argument or supportive in nature should be relegated to attachments or lower paragraphs. Flow charts are often helpful. You may need to lead the Panel through a chronology of events with a more detailed set of facts and flow charts in the main report. You must sign off the summary on a firm conclusion. To achieve this you will normally need to start from scratch and not just rehash a document written for another purpose.

Keep it focused

5. Keep all your documents short and well digested. Your job is to help decision makers cut through to the core problem. Start with the problem. Tie everything back to the problem and the legal elements of Part IVA. Select facts and issues which are relevant, and only those relevant, to solving the problem. Constantly ask: What are the key drivers? Do I need all this detail? Is my reader getting my key message? Have I explained the basics before getting bogged down in detail? Is there any contentious issue the Panel needs to be aware of (eg. evidentiary, legal, time limits, administrative problem)?
6. Good structure and well chosen headings will make your document clear. But do not let headings and structures distract you from the essence of your document, which is the pithy statement that cuts through to the essence of the problem.

Communicate clearly

7. Write in plain English. Use short, punchy sentences. But do not sacrifice an appropriate depth to a fixation with plain language. This is your call. Not all technical concepts can be understood in a casual read by an intelligent lay person. Avoid technical jargon. Choose your abbreviations carefully. Where possible, use normal language. In particular:
    - Choose your abbreviations with careful thought about the recognition factor eg. ATO Finance not ATOFL; Carmody Holdings not CHPL;
    - Where special terms or abbreviations are unavoidable, define them;
    - Use dot-points, numbers and headings where they assist clarity;
    - include edited copies of key legislation in an appendix (not notorious provisions like Part IVA, s8-1 etc); underline crucial passages.

Structuring your submission

8. Complete the standard cover sheet for each submission (Appendix 1).

9. Outline the core issue and test in relevant legislation and/or authorities.

10. Include an executive summary as discussed above.

11. In your main document, describe what is driving the scheme. Examples of key drivers are: exploiting mismatching of deductions and derivations, tax benefit transfers, double dipping on benefits, interpolation of business vehicle to get round legislation, recharacterisation of transactions, concessions/rebates/credits, profit shifting, creating a Clayton's acquisition/disposal etc.

12. In describing the drivers, you would normally cover, as appropriate:

    - Law including ATO practice and rulings and case law;
    - Chronology of events (where necessary to get a real feel for the transaction); this may be linked to flow charts;
    - What are the arguments (or potential arguments) for the taxpayer?;
    - Put full emphasis on the operation of specific provisions of the Act;
    - Commercial reality of the arrangements; what aspects achieve genuine commercial outcomes and what parts only tax saving?;
    - What taxpayer should be assessed? What are the problems in targeting a particular member of a corporate group?;
    - Revenue impact – qualitative and quantitative assessment; where available, include information for assessing risk and the broad implications of the issue;
    - Political sensitivities and wider policy implications.

Give a clear answer

13. Finish with a clear conclusion and recommendation. Even if you make the wrong call, a document with a focus and a clear answer is of far more practical help to the Panel than a document that hedges and does not take a position.

14. This process is about solving problems effectively. Organisations can solve tough problems effectively only when their people communicate strong views and, paradoxically, have the confidence to be wrong. Your submission will be judged, not by whether it was right or wrong, but by its contribution to a clear understanding of the problem. Remember, it was Dixon CJ's "wrong" decisions in a series of celebrated dissents which created the foundation for modern Australian tax law.

Attachments

15. Only include attachments which are absolutely essential. Normally audit reports and primary documents would not be attached. Opinions from counsel or taxpayer views on Part IVA are helpful for the Panel.

Include draft Part IVA determinations

16. Including draft Part IVA determinations will ensure that you tie your analysis back to the provisions of Part IVA, and will ensure that your analysis yields the proper identification of scheme, tax benefit and taxpayer.

Presentation at Panel meetings

17. Presenters should comprise a member of the Tax Counsel Network together with an officer or officers fully acquainted with the evidence (e.g., the auditor). Presenters

should assume the Panel has read the papers. Nonetheless presenters should be in a position to provide a short oral summary including diagrams. The Panel can be expected to engage in extensive questioning, not only as to Part IVA but also as to primary provisions and tax administration issues.

Appendix 1

18. Appendix 1 is a standard cover sheet for Part IVA Panel submissions.

Appendix 2

19. Appendix 2 contains a sample Part IVA Panel submission.

SUBMISSION TO PART IVA PANEL

[TITLE]

A brief description of the problem (in no more that 30 words.)

SUBMITTED BY

Name:

Segment:

Location:

Phone Number:

Date:

Please complete the following if relevant:

##Significant Issue Number

##Registered on CRS Yes / No

SUBMISSION TO THE PART IVA PANEL

FILM SCHEME – DIV 373 (CAPITAL ALLOWANCE FOR INTELLECTUAL PROPERTY) – PRODUCT RULING APPLICATION

The taxpayer has proposed an arrangement under which the capital allowance for the capital cost of copyright will be fully deductible in the first year. The deduction is normally spread over 25 years. The arrangement utilises balancing adjustment rules which bring forward the outstanding deduction to the year of sale. Despite the copyright being sold, the taxpayer continues to derive income from the copyright and for up to 15 years.

SUBMITTED BY

Name: .....
Segment: ..... **OCTC TAX COUNSEL NETWORK**
Location: ..... **SYDNEY**
Tel:.....

Date: .....

Signum No: .....

DESCRIPTION OF THE ARRANGEMENT

1. ***Common fund*** – The Participants acquire units in a common fund for a minimum $250 and contribute a minimum $25,000 to the fund for the purchase of copyright in selected foreign films. A Manager (the Promoter) is appointed over the fund which acts as agent for the Participants.

2. ***Copyright acquired*** – The Manager acquires the Australian copyright in the selected foreign films on behalf of the Participants.

3. ***Distribution agent*** – The Manager appoints a Distribution Agent to effect the distribution of the films on behalf of the Participants for a 15 year period. The agreement is for the provision of services by the distribution agent in return for the payment of fees. The agreement does not effect a grant of any form of property or rights in the films. Services are provided as agent for the participants.

4. ***Copyright sold*** – Following the appointment of the Distribution Agent, the copyright is sold. It is sold subject to the Participants' right to income from the distribution of the films for a 15 year period. The copyright will be sold on an arm's length basis for a market value. Their market value is estimated to be around 3% of the purchase price. It is likely that the copyright purchaser will be the vendor or an entity associated with the vendor.

5. ***Distributors*** – The Distribution Agent secures Distributors for the film library. Income is derived by the Participants in consequence of the distribution of the films.

6. ***Expenses*** – Participants incur the following expenses:
   - *Management fees* – Initial management fees payable to the Manager set at 12.5% of the Participant's investment. Administration fees are also payable. There are also ongoing management and administration fees.
   - *Distribution fees* – Initial distribution fees payable to the distribution agent and distributors set at 12.5% of the Participant's investment and print and advertising costs. There are also ongoing distribution fees.

ADMINISTRATIVE CONTEXT

The arrangement is being considered by this office in the context of a Product Ruling application. Doubts exist regarding the tax technical aspects of the arrangement and the application of the substantive provisions involved. Consideration is also being given to the application of Pt IVA to the arrangement.

RELEVANT TAX LAW

Of central importance to the arrangement and this submission is the application of Div 373 (Intellectual Property) to the arrangement. The key features of these provisions as relevant to the arrangement are as follows:

Basic deduction

- ***Capital allowance*** – The law provides a deduction for expenditure on an item of intellectual property (s 373-10(1)). This includes capital expenditure incurred in buying the item (s 373-30 Case 3). Intellectual property includes copyright (s 373-15(1)).

- ***Income producing use*** – The item or the work to which it relates must have been used for the purpose of producing assessable income (s 373-10(1)).
- ***25 year write-off*** – The deduction is available over the effective life of the item (s 373-20). For copyright, this is set at 25 years or an earlier time when the copyright ceases (s 373 35 Item 4).
- ***Partial realisation adjustment*** – If there is a partial realisation of the item, the expenditure that remains eligible for this deduction is reduced and any excess is assessable (s 373-50). Partial realisation includes part disposals and interests granted by way of licence (s 373-45 Items 1 and 5). In these cases, the reduction represents the amount received for the part disposal of grant of the licence. However, this addback excludes amounts that are ordinary income.
- ***Disposal*** – This particular deduction is not available if a balancing adjustment event has happened (s 373-10(2)). This includes the disposal of the item, except by partial realisation (s 376-60(2) Item 1).

Balancing adjustment

- ***Balance assessable or deductible*** – In the case of a disposal, the difference between the sale price (less sale expenses) and the expenditure that remained eligible for deduction is assessable (where the sale price is greater) or deductible (where the remaining eligible expenditure is greater) in the current year (s 373-65). Sales price excludes amounts that are ordinary income.

Other matters

The Applicant's arrangement also involves other issues that are not significant for the purpose of this submission. These relate to the ordinary deduction provisions and the character of income received under the arrangement.

ANTICIPATED TECHNICAL OUTCOME

As relevant to this submission, the Applicant anticipates that the arrangement produces the following technical consequences:

- ***Full write-off in first year*** – Participants will be entitled to a deduction for the purchase price of the film copyright acquired during an income year (less the nominal sale proceeds) because the copyright is sold in that same year.

TECHNICAL ISSUES

The following technical issues arise in relation the application of the substantive provisions and the Participants' entitlement to a deduction for the capital cost of the copyright.

- ***Disposal*** – The arrangement may not involve the "disposal" of the item in the first year as anticipated by the Applicant. The retention of substantial rights in connection with the copyright may not amount to a disposal for these provisions (see s 373-60(2)).
- ***Income producing use*** – The arrangement may not involve the "use" the item or the work for the purpose of producing assessable income (see s 373-60(1)(b)). At the time of the assumed disposal, no relevant use may have been made of the copyright. At that time, no dealing has taken place with respect to the copyright. The only agreement has been that for the provision of distribution agency services.

- ***Partial realisation*** – Following the assumed disposal, distribution agreements are entered into that may amount to a "partial realisation" of the copyright. This may affect the application of the provisions.
- ***General law*** – There are conceptual issues regarding the operation of the agency agreement following the alleged disposal of the copyright. This may affect the general efficacy of the arrangement.

Other matter
There are also some concerns relating to the commerciality of the return, the multiple role of copyright vendors (and their associates) as probable copyright purchasers, and issues regarding the effect of the Managed Investments provisions of the *Corporations Law*.

Applicant's response
The Applicant has responded to all concerns and issues raised. The Applicant has strongly defended their position and has raised arguments that are not without merit. Consideration is currently being given to these arguments. Correspondence in this regard is attached.

POLICY AND ADMINISTRATIVE CONSIDERATIONS
In determining the correct interpretation to be given to the provisions, and their proper application to the proposed arrangement, consideration may be had to the following policy and administrative matters.

- ***Disposal*** – The relevant notion attributed to the term "disposal" must involve the absolute parting with all rights and benefits whatsoever associated with the item. The retention of the rights under this proposed arrangements results in a position where there has not been such a disposal. The retention of sufficient rights to support an ongoing right to revenue from the films and to support the operation of the Distribution Agency Agreement should be taken to be a situation in which there has been no disposal.
- ***Period of ownership and use*** – In general, capital write-offs are claimed over the period of income producing use. Balancing adjustments are made in the year of disposal. In substance, the adjustment is intended to be made when income producing use ceases. This can be difficult to establish and the legislation opts for the more objectively ascertainable time of disposal. The legislation does not intended to allow a balancing charge where the item continues to be used as in this arrangement.
- ***Australian film concession*** – In general, the allowance is available over the life of the item. A special concession exists for Australian films for which the deduction is available over 2 years. It would be inconsistent with this concession for an arrangement with respect to foreign films to achieve a deduction in the first year.
- ***Start of income producing use*** – Entitlement to the deduction requires that the item has been used for the purposes of producing assessable income. Ruling IT 2658, states:

> "3. We accept that the decision in *Case W19, AAT Case 4882* is correct. To satisfy the words in subsection 124L(1) 'has used the unit of industrial property ... for the purpose of producing assessable income', it is not necessary to establish a direct nexus between the use of the unit of industrial property and identifiable assessable income (or even a right to assessable income) attributable to that use. Eligibility to claim deductions under Division 10B begins once the unit of industrial property exists and

> it is put to use with the ultimate object of producing assessable income. …
>
> "5. Use of a unit of industrial property by an agent, for and on behalf of its owner, is sufficient for Division 10B to apply to the owner and enable a deduction to be allowed. …
>
> "9. Whether a unit of industrial property has been used is a question of fact that depends on the circumstances of each case. If a unit has not been put to any use, Division 10B does not apply to its owner and no deduction is allowable."

- ***Start of income producing use*** – The capital allowance for the cost of establishing horticultural plants allows a deduction commencing when the plant is first used for the purpose of producing assessable income: see s 387-165. According to the Explanatory Memorandum and a number of Product Rulings, this does not happen until the start of the first commercial growing season. It does not happen when the plants are acquired or planted. The underlying principle applied to the present situation suggests that the copyright has not been relevantly used as at the time of disposal. Accordingly, this condition for entitlement to the allowance has not been satisfied.
- ***Stripping value*** – The arrangement is somewhat akin to a dividend strip. Value is removed from the property prior to its disposal at a substantial loss. This loss is the basis of the deduction. The value extracted is returned as income with the benefit of significant deferral over a 15 year period.
- ***Matching*** – The arrangements reflects a mismatch between the legal event of disposal (relied on in the legislation) and the economic circumstances. Commercially, the copyright continues to be used and profited from.

APPLICATION OF PART IVA

Underlying the stance that Pt IVA should be sought to be applied to the arrangement is the view that the arrangement (if effective) gives rise to a deduction in the first year that should be available over 15 years.

- ***Scheme*** – For present purposes, the scheme is as described in this submission. In essence it involves the purchase and sale of copyright, the distribution agency agreement and distribution agreements, with particular regard to the sequence and timing of those transactions.
- ***Tax benefit*** – The tax benefit is the amount of the capital allowance claimed in the first year of the arrangement. The amount of the capital allowance is the Participant's contribution (set at a minimum of $25,000). A small deduction would otherwise be allowable based on claiming the capital allowance over 25 years, ie at 4% per year (being $1000 on a minimum subscription). This may either reduce the amount of the tax benefit or be dealt with as a compensating adjustment.
- ***Dominant purpose*** – The sequence and timing of the various transactions indicate an arrangement designed to attract a full deduction for the capital allowance in the first year. It is not an arrangement that is ordinarily encountered and is not one envisaged to attract the capital allowance. Ordinarily copyright would be held while it is being put to profitable use. In this regard, it is not crucial that the arrangement was commercially motivated and commercially explicable as suggested by the Applicant. Having regard to the applicable factors in s 177D:

- The manner in which the scheme is carried out suggests careful attention and planning attempting to secure technical compliance with the substantive provisions that would give the outcome sought: para (b)(i).
- The form of the arrangement involves a sale of copyright while in substance the significant economic aspects of ownership of copyright are retained: para (b)(ii).
- The scheme is carried out over 15 years, income is capable of being earned over that time while the deduction is claimed in the first year rather than being spread over that period: para (b)(iii) &(iv).
- The Participants crystallise a substantial loss on sale of copyright and secure rights over an uncertain income stream. The loss arguably does not represent the real financial position of the Participants as the loss flows from the expiring, wasting or amortising nature of copyright over the life of the copyright (either statutory life or commercial life). In the first year, the entire loss does not exist but for the removal of value from the property created by the arrangement itself: para (v).

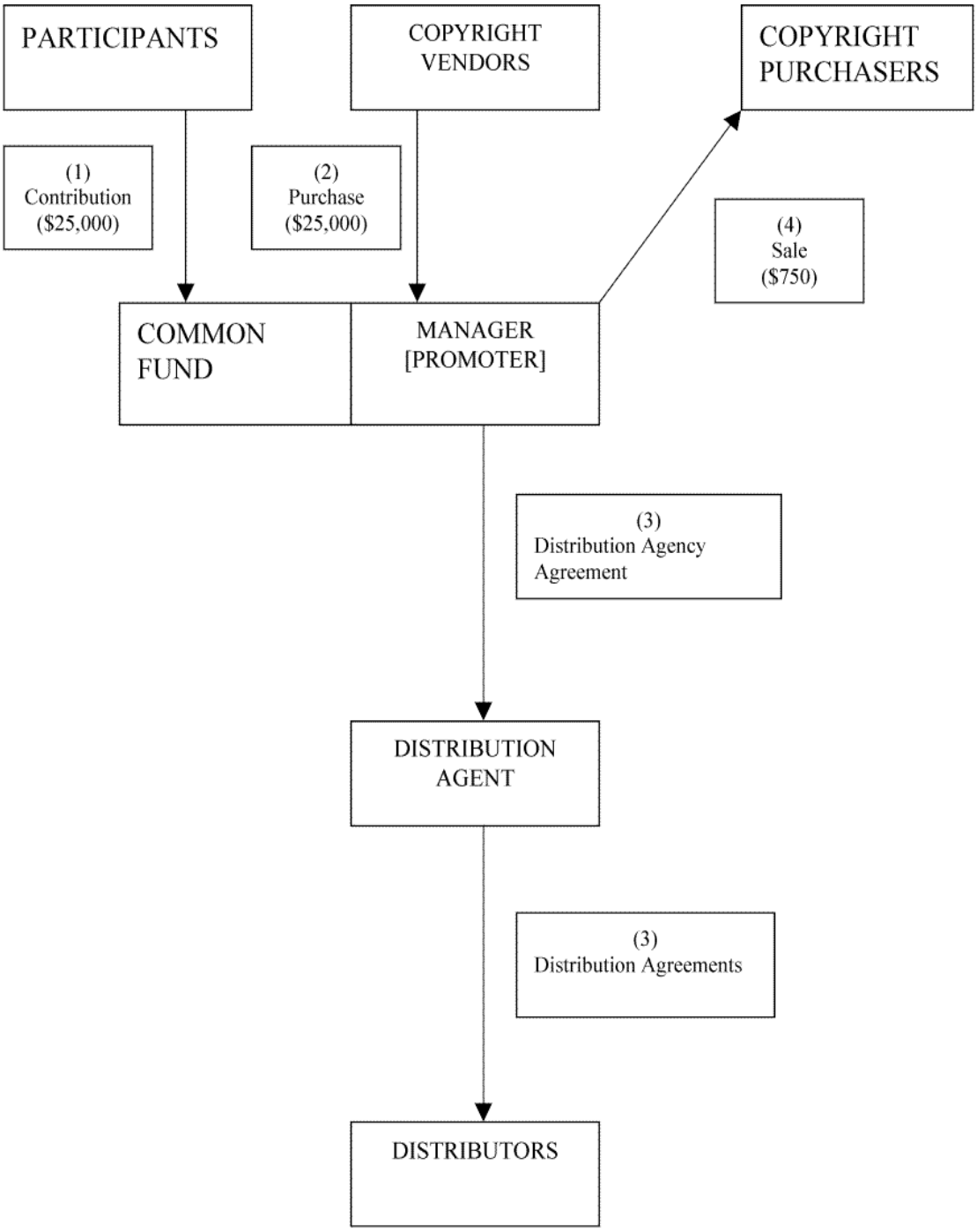
Applicant's position

The Applicant has provided detailed reasons why Pt IVA should not be applied. These reasons are attached. The essence of the Applicant's position is as follows:

- ***Commercial*** – The arrangement is not tax driven and is inherently commercial (and at least as commercially realistic as other product ruling approved arrangements).
- ***Returns*** – The after-tax return is only slightly higher than the pre-tax return.
- ***Copyright sale*** – After the Distribution Agency Agreement is entered into, there is no commercial imperative to retain the copyright. Its sale is commercially realistic because it has minimal residual value and is of no further economic use.
- ***Mismatch*** – To retain the copyright would produce a serious mismatch of income (derived over a few years) and deductions (spread over 25 years).
- ***Otherwise deductible*** – Under alternative arrangements, ordinary revenue deductions would in any event have been available under s 8-1.
- ***One-step*** – The sale of copyright cannot be isolated from the overall scheme in applying Pt IVA.

ATTACHMENTS

1. Application for Product Ruling dated 10 September 1999 and selected attachments to the application.
2. Additional material provided by the Applicant dated 1 October 1999.
3. Letter from the ATO to the Applicant requesting further information (dated 5 November 1999).
4. Letter from Applicant to the ATO dated 1 December 1999 responding to the letter of 5 November 1999 providing further information as requested.
5. Letter from Applicant dated 25 January 2000 providing detailed responses to issues and concerns raised with Applicant in previous correspondence and during a meeting held on 11 January 2000.
6. Revised draft product ruling provided by Applicant on 27 January 2000.


PARTICIPANTS
COPYRIGHT VENDORS
COPYRIGHT PURCHASERS
(1) Contribution ($25,000)
(2) Purchase ($25,000)
(4) Sale ($750)
COMMON FUND
MANAGER [PROMOTER]
(3) Distribution Agency Agreement
DISTRIBUTION AGENT
(3) Distribution Agreements
DISTRIBUTORS

Attachment 5: Relevant provisions of Part IVA of the *Income Tax Assessment Act 1936* (excluding section 177CA, section 177E and section 177EA)

177A Interpretation

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

capital loss has the same meaning as in Part IIIA.

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

scheme means:

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

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

taxpayer includes a taxpayer in the capacity of a trustee.

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

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

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

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

177B Operation of Part

(1) Subject to subsection (2), nothing in the provisions of this Act other than this Part or in the *International Tax Agreements Act 1953* or in the *Petroleum (Timor Gap Zone of Cooperation) Act 1990* shall be taken to limit the operation of this Part.

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

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

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

177C Tax benefits

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

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

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

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

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

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

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

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

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

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

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

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

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of an agreement, choice,

declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option (expressly provided for by this Act other than section 160ZP or 160ZZO or the *Income Tax Assessment Act 1997*) by any person, except one under Subdivision 126-B or 170-B of the *Income Tax Assessment Act 1997*; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

177D Schemes to which Part applies

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

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

(b) having regard to:

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

(ii) the form and substance of the scheme;

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

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

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

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

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

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

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

177F Cancellation of tax benefits etc.

(1) Where a tax benefit has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies, the Commissioner may:

(a) in the case of a tax benefit that is referable to an amount not being included in the assessable income of the taxpayer of a year of income—determine that the whole or a part of that amount shall be included in the assessable income of the taxpayer of that year of income; or

(b) in the case of a tax benefit that is referable to a deduction or a part of a deduction being allowable to the taxpayer in relation to a year of income—determine that the whole or a part of the deduction or of the part of the deduction, as the case may be, shall not be allowable to the taxpayer in relation to that year of income; or

(c) in the case of a tax benefit that is referable to a capital loss or a part of a capital loss being incurred by the taxpayer during a year of income—determine that the whole or a part of the capital loss or of the part of the capital loss, as the case may be, was not incurred by the taxpayer during that year of income;

(d) in the case of a tax benefit that is referable to a foreign tax credit, or a part of a foreign tax credit, being allowable to the taxpayer—determine that the whole or a part of the foreign tax credit, or the part of the foreign tax credit, as the case may be, is not to be allowable to the taxpayer;

and, where the Commissioner makes such a determination, he shall take such action as he considers necessary to give effect to that determination.

(2) Where the Commissioner determines under paragraph (1)(a) that an amount is to be included in the assessable income of a taxpayer of a year of income, that amount shall be deemed to be included in that assessable income by virtue of such provision of this Act as the Commissioner determines.

(2A) Where a tax benefit that is covered by section 177CA has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies:

(a) the Commissioner may determine that the taxpayer is subject to withholding tax under section 128B on the whole or a part of that amount; and

(b) if the Commissioner makes such a determination, he or she must take such action as he or she considers necessary to give effect to that determination.

(2B) A determination under paragraph (1)(c) or subsection (2A) must be in writing.

(2C) Notice of the determination must be given to the taxpayer and, in the case of a determination under subsection (2A), to the person who paid the amount.

(2D) More than one determination may be included in the same notice.

(2E) A failure to comply with subsection (2C) does not affect the validity of a determination.

(2F) If the Commissioner makes a determination under subsection (2A), the amount that the Commissioner determines is taken to be subject to withholding tax is taken to have been subject to withholding tax at all times by virtue of such provision of section 128B as the Commissioner determines.

(2G) If the taxpayer is dissatisfied with a determination under paragraph (1)(c) or subsection (2A), the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

(3) Where the Commissioner has made a determination under subsection (1) or (2A) in respect of a taxpayer in relation to a scheme to which this Part applies, the Commissioner may, in relation to any taxpayer (in this subsection referred to as the ***relevant taxpayer***):

(a) if, in the opinion of the Commissioner:

(i) there has been included, or would but for this subsection be included, in the assessable income of the relevant taxpayer of a year of income an amount that would not have been included or would not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income if the scheme had not been entered into or carried out; and

(ii) it is fair and reasonable that that amount or a part of that amount should not be included in the assessable income of the relevant taxpayer of that year of income;

determine that that amount or that part of that amount, as the case may be, should not have been included or shall not be included, as the case may be, in the assessable income of the relevant taxpayer of that year of income; or

(b) if, in the opinion of the Commissioner:

(i) an amount would have been allowed or would be allowable to the relevant taxpayer as a deduction in relation to a year of income if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, but for this subsection, be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; and

(ii) it is fair and reasonable that that amount or a part of that amount should be allowable as a deduction to the relevant taxpayer in relation to that year of income;

determine that that amount or that part, as the case may be, should have been allowed or shall be allowable, as the case may be, as a deduction to the relevant taxpayer in relation to that year of income; or

(c) if, in the opinion of the Commissioner:

(i) a capital loss would have been incurred by the relevant taxpayer during a year of income if the scheme had not been entered into or carried out, being a capital loss that was not incurred or would not, but for this subsection, be incurred, as the case may be, by the relevant taxpayer during that year of income; and

(ii) it is fair and reasonable that the capital loss or a part of that capital loss should be incurred by the relevant taxpayer during that year of income;

determine that the capital loss or the part, as the case may be, should be incurred by the relevant taxpayer during that year of income; or

(d) if, in the opinion of the Commissioner:

(i) an amount would have been allowed, or would be allowable, to the relevant taxpayer as a foreign tax credit if the scheme had not been entered into or carried out, being an amount that was not allowed or would not, apart from this subsection, be allowable, as the case may be, as a foreign tax credit to the relevant taxpayer; and

(ii) it is fair and reasonable that the amount, or a part of the amount, should be allowable as a foreign tax credit to the relevant taxpayer;

determine that that amount or that part, as the case may be, should have been allowed or is allowable, as the case may be, as a foreign tax credit to the relevant taxpayer;

and the Commissioner shall take such action as he considers necessary to give effect to any such determination.

(4) Where the Commissioner makes a determination under subsection (3) by virtue of which an amount is allowed as a deduction to a taxpayer in relation to a year of income, that amount shall be deemed to be so allowed as a deduction by virtue of such provision of this Act as the Commissioner determines.

(5) Where, at any time, a taxpayer considers that the Commissioner ought to make a determination under subsection (3) in relation to the taxpayer in relation to a year of income, the taxpayer may post to or lodge with the Commissioner a request in writing for the making by the Commissioner of a determination under that subsection.

(6) The Commissioner shall consider the request and serve on the taxpayer, by post or otherwise, a written notice of his decision on the request.

(7) If the taxpayer is dissatisfied with the Commissioner's decision on the request, the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

177G Amendment of assessments

(1) Nothing in section 170 prevents the amendment of an assessment at any time before the expiration of 6 years after the date on which tax became due and payable under the assessment if the amendment is for the purposes of giving effect to subsection 177F (1).

(2) Nothing in section 170 prevents the amendment of an assessment at any time if the amendment is for the purpose of giving effect to subsection 177F(3).

177H Amendment of foreign tax credit determinations

(1) Section 160AK does not prevent the amendment of a foreign tax credit determination at any time before the end of 6 years after the original determination date if the amendment is for the purposes of giving effect to subsection 177F(1).

(2) Section 160AK does not prevent the amendment of a foreign tax credit determination at any time if the amendment is for the purpose of giving effect to subsection 177F(3).

(3) For the purposes of this section, a ***foreign tax credit determination*** is a determination under Division 19 of Part III.

(4) For the purposes of this section, the ***original determination date*** for a foreign tax credit determination has the same meaning as in section 160AK.