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

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Practice Statement Law Administration

PS LA 2005/24

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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

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

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

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

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HOW TO USE THIS LAW ADMINISTRATION PRACTICE STATEMENT

1. This practice statement is designed to assist Tax officers who are contemplating the application of Part IVA or other GAARs to an arrangement, including in a private ruling, Public Ruling (including a Product Ruling or a Class Ruling) or other document setting out the ATO view.
2. All references to legislation within this practice statement are to the *Income Tax Assessment Act 1936* (ITAA 1936) unless otherwise specified.
3. The first part of this practice statement contains the rules about referring GAAR matters to the Tax Counsel Network (TCN) and the GAAR Panel. The role and procedures of the Panel are contained in paragraphs 18 to 41.
4. The second part of this practice statement on the GAAR provisions (commencing at paragraph 42) discusses the operation of key aspects of Part IVA and other GAARs, covering scheme, tax benefit or GST benefit, purpose, determinations or declarations, assessments, compensating adjustments, time limits and penalties.
5. The guidance on the operation of
   - Part IVA is contained in paragraphs 42 to 184.
   - section 67 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) is contained in paragraphs 185 to 191.

- Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) is contained in paragraphs 192 to 241.
- the general anti-avoidance rule for the Luxury Car Tax is contained in paragraph 242.
- the general anti-avoidance rule for the Wine Equalisation Tax is contained in paragraph 243.

6. Further resources for Tax officers on the application of Part IVA can be found in the links at the end of this document.

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

Proper application of GAARs

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

Private ruling applications and Part IVA

9. If a taxpayer applies for a private ruling in respect of an arrangement but has not requested a ruling on whether Part IVA applies to the arrangement, Tax officers must consider whether Part IVA may apply to the arrangement based on the information provided in connection with the ruling application. This must be done whether or not the taxpayer has advised in their ruling application that Part IVA need not be considered by the Commissioner.

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

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

    then the Tax officer should consider whether the private ruling should include an appropriate message or warning about the potential application of Part IVA.

11. If the Tax officer proposes to request additional information from the taxpayer to determine whether Part IVA may apply to the arrangement or an associated arrangement, then the Tax officer should disclose to the taxpayer that Part IVA may be in contemplation. Where Part IVA is in contemplation, the Tax officer should consider referring the matter to TCN, as per paragraphs 14 to 17.

12. If there is no reason to think on the basis of the information provided in connection with the ruling application that Part IVA may apply, then any ruling that is given does not need to refer to Part IVA.

13. Further guidance for Tax officers can be found in the link at the end of this document.

Referral to the Tax Counsel Network

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

15. Where a request for a Class Ruling includes the application of a GAAR the matter must be referred to the TCN, including where it is proposed that the GAAR would not apply. However, a decision that a GAAR would not apply in response to an application for a private ruling or a Product Ruling does not always require referral to the TCN. Similarly, a decision not to apply a GAAR in the context of an audit does not always require referral to the TCN. The business line will make a judgment about whether such matters need to be referred to the TCN depending on whether the application of the GAAR could be seriously contemplated. Further guidance for Tax officers on escalating matters to TCN can be found in the link at the end of this document.

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

17. A decision on review or objection or in the course of litigation to reverse a decision to apply a GAAR must not be made without first referring the question to a DCTC or the Chief Tax Counsel (CTC).

THE GENERAL ANTI-AVOIDANCE RULES PANEL

18. In acknowledgment of the serious nature of the GAARs, as outlined in paragraph 8, the Commissioner has established the GAAR Panel (the Panel) to advise on the application of GAARs to particular arrangements.

19. Unless indicated otherwise below, matters for which a decision-maker is proposing to apply a GAAR must be referred to the Panel before a final decision is made. In the usual case a matter will be referred to the Panel after the TCN officer, to whom it has been referred under the rules in paragraphs 14 to 17 above, has fully considered the matter.

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

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

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

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

Role of the Panel

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

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

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

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

When matters are referred to the Panel

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

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

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

Attendance by taxpayers at Panel meetings

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

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

33. An invitation given to a taxpayer to attend a Panel meeting and address the Panel is not extended on the basis that it will provide a platform for a hearing as part of a quasi-judicial process of review. This is not the function of the Panel, nor in any event does it have power to undertake a review process; it is there merely to provide advice to decision-makers so as to assist in the making of objective decisions by decision-makers and to ensure consistency in the approach to various issues that arise in the application of the GAARs. Of course, the decision-maker is always available to receive and address any submissions that a taxpayer may wish to put to the decision-maker at any time.

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

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

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

Written submission by taxpayer to Panel

37. In extending an invitation to a taxpayer, the Chair will request the taxpayer to provide a written submission (unless the taxpayer chooses to rely upon a written submission already made to the Tax Office). If in relying upon an earlier submission the taxpayer wishes to add to or correct some part of an earlier submission, the taxpayer may do so. Written submissions should be concise. The appropriate timeframe for a written submission to the Panel will depend on the circumstances of each case. As a general guide, a taxpayer can expect to be given around 28 days notice of a Panel meeting and will be asked to make any written submission no later than 14 days before that meeting.

Oral submissions by a taxpayer to Panel

38. Ordinarily, the Panel will have had an opportunity to review the papers before the meeting and may wish to question or hear an oral submission by Tax officers, or discuss the matter, before hearing from the taxpayer. This will occur in the absence of the taxpayer. The taxpayer will then be given an opportunity to address the Panel. The Chair will set the time for this address as appropriate in each case, but it is expected that in most cases it would be no more than one hour. This oral submission should seek to emphasise or elaborate upon the key points of the taxpayer's written submission. While the Panel is not open for questioning or debate about the application of the GAAR, Panel members may ask questions and discuss issues with the taxpayer to ensure the Panel has a clear understanding of the taxpayer's submission. Other Tax officers (that is, in addition to Panel members and the decision-maker) will usually be present during the meeting but they will not (nor will the decision-maker) be available for questioning. However, the taxpayer will be offered the option of making its submissions in the absence of such other Tax officers, if the taxpayer prefers.

39. Taxpayers attending a Panel meeting should address or be prepared to respond to questions relating particularly to the tax benefit and the objective factors in subsection 177D(2) of Part IVA or equivalent provisions in other GAARs.

Recording GAAR decisions

40. If a determination cancelling a tax benefit or declaration negating a GST benefit is made, the reasons for making the determination or declaration should be documented separately. Refer to Appendix 1 for further guidance on executing GAAR determinations.

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

THE GAAR PROVISIONS

PART IVA – INCOME TAX

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

Background to Part IVA

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

44. Part IVA gives the Commissioner the power 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 power is found in subsection 177F(1).

45. Before the Commissioner can exercise the power 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.

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

47. The word 'may' in subsection 177F(1) refers to the exercise of a power which arises when it is found that there is a tax benefit obtained in connection with a scheme to which section 177D applies. There is no over-arching or final discretion independent of the exercise of this power: *Cumins v. Federal Commissioner of Taxation* (2007) 66 ATR 57; 2007 ATC 4303; [2007] FCAFC 21 at [41]. That case demonstrates that, if the objective criteria for the application of Part IVA are present, the Commissioner's decision to go ahead and cancel the tax benefit under section 177F is not open to challenge on the basis that the Commissioner ought not to have exercised that power because, for example, he has in doing so failed to take into account some further matter that is said to be relevant. See also the remarks of Hill J (Carr and Hely JJ agreeing) in *Federal Commissioner of Taxation v. Sleight* (2004) 136 FCR 211; 2004 ATC 4477; (2004) 55 ATR 555; [2004] FCAFC 94 at [103] to [110] and [114].

48. The same view is taken of the power to negate a GST benefit under Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999*.

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

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

51. Part IVA is not limited by provisions in the ITAA 1936 or *Income Tax Assessment Act 1997* (ITAA 1997) or by the *International Tax Agreements Act 1953* or the *Petroleum (Timor Sea Treaty) Act 2003*: subsection 177B(1).

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

53. Part IVA was significantly amended in 2013.[1] The amendments apply to schemes entered into, or commenced to be carried out, on or after 16 November 2012. For discussion on the 'alternative postulate' under these amendments, please refer to paragraphs 78 to 95. Unless specified otherwise, the concepts in this document apply equally to the legislation as it stood before and after these amendments.

Part IVA must be construed as a whole

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

Relevant case law

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

Scheme – section 177A

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

Relevant case law

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

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

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

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

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

Example

[1] *Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*, Sch 1.

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

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

Relevant case law

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

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

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

Relevant case law

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

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

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

Relevant case law

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

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

Relevant case law

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

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

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

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

See also *Federal Commissioner of Taxation v. Hart* [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 at [55], [68] and [69] per Gummow and Hayne JJ, and at [89] per Callinan J and the discussion commencing at paragraph 62 below concerning deciding whether a tax benefit has been obtained in connection with a scheme.

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

Relevant case law

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

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

Tax benefit – sections 177C and 177CB

62. The breadth of what may constitute a scheme reflects the objective nature of the inquiry to be made under Part IVA. The scheme ultimately matters only in the context of whether there is a tax benefit obtained by the taxpayer in connection with the scheme for which the conclusion in subsection 177D(2) can be reached.

Relevant case law

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

63. 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 six kinds of tax benefit, relating broadly to:

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

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

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

(iv) a loss carry back offset being allowable to the taxpayer in relation to a year of income;

(v) a foreign income tax offset being allowable to the taxpayer;

(vi) an amount of withholding tax not being incurred by the taxpayer in a year of income.

64. For schemes entered into on or after 16 November 2012, tax benefit must be determined with reference to section 177CB: refer paragraphs 83 to 88.

Calculating the tax benefit

65. The reference in paragraph 177C(1)(a) to 'an amount not being included in the assessable income of the taxpayer' is a reference to an amount not being included that would be or might reasonably be expected to be included in the taxpayer's assessable income by reference to the relevant alternative postulate: refer to paragraphs 77, 89, 97 to 101, and 155. The fact that an amount was included in the assessable income of the taxpayer under the scheme by virtue of a different provision or circumstance does not affect the amount of a tax benefit, nor the provision by virtue of which it is to be included. Paragraph 177C(1)(a) focuses on what has been left out of assessable income by the scheme – not on what has been included: refer to Taxation Ruling IT 2456.

66. There is some uncertainty regarding the phrase 'a deduction being allowable to the taxpayer' in paragraph 177C(1)(b). In *FCT v Lenzo* [2008] FCAFC 50; (2008) 167 FCR 255, the Full Federal Court held that a taxpayer can demonstrate that it has not obtained a tax benefit if the alternative postulate would have resulted in a deduction of the same kind as that under the scheme.

67. A differently constituted Full Federal Court did not follow *Lenzo* in *Federal Commissioner of Taxation v. Trail Bros Steel & Plastics Pty Ltd* (2009) 75 ATR 916; 2009 ATC 20-141. In this case, the court held that the relevant enquiry is simply as to the difference in amount between the effect of the scheme and the alternative postulate, regardless of whether any deduction that would have been allowable without the scheme would have been of the same kind as the deduction under the scheme.

68. The enactment of subsection 177CB(2) means that this issue will now be academic in many deduction cases: refer paragraphs 83 to 95. See also, the discussion on compensating adjustments at paragraphs 174 to 176.

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

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

(i) the tax benefit is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person expressly provided for under the ITAA 1936 or the ITAA 1997 (other than an agreement or election specifically dealt with by subsection 177C(2A): refer to paragraph 72); and

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

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

Meaning of 'attributable to'

71. The first condition in subsection 177C(2), for the exclusion to apply, uses the phrase 'attributable to'. This phrase means that there must be a direct relationship between the obtaining of the tax benefit and the making of the relevant 'declaration … election … or choice'. Where the obtaining of the tax benefit is attributable to 'a sequence of integrated and inter-dependent steps making up the scheme', only one of which involves the making of the declaration, etcetera, in question, it cannot be said that the first condition is satisfied.

Relevant case law

Walters v. Federal Commissioner of Taxation (2007) 162 FCR 421; 67 ATR 156; 2007 ATC 4973; [2007] FCA 1270, per Greenwood J at [83] to [85].

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

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

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

Meaning of 'the scheme consisted solely of the making of the agreement or election'

73. The limitation to the subsection 177C(2A) exclusion in subparagraph (a)(ii) requires the relevant scheme to consist *solely* of the making of the agreement or election, and will not be satisfied where this scheme is found to consist of other steps.

Relevant case law

British American Tobacco Australia Services Ltd v. Federal Commissioner of Taxation (2010) 189 FCR 151; 2010 ATC 20-222; [2010] FCAFC 130 per Dowsett, Jessup & Gordon JJ at [32] to [38].

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

Alternative postulate

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

76. This is not to suggest that the enquiry concerning dominant purpose is necessarily always the same as that to do with whether a tax benefit under section 177C has been obtained. The former may involve a consideration of the 'particular way' the transaction in question was structured or of the 'particular features' of the transaction giving rise to the tax benefit, and a comparison of how the scheme achieves particular commercial objectives with alternative ways of achieving those same objectives.

Relevant case law

Federal Commissioner of Taxation v. Hart [2004] HCA 26; (2004) 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712, per Gleeson CJ and McHugh J at [6], [12], and [16]-[18]; and per Gummow and Hayne JJ at [65]-[68]; *Noza Holdings Pty Ltd v. Federal Commissioner of Taxation* [2011] FCA 46; 2011 ATC 20-241 per Gordon J at [296].

77. The eight factors that must be considered in applying the purpose test in former paragraph 177D(b) (now subsection 177D(2)) are considered against the background of the counterfactual(s): refer to paragraph 130.

Alternative postulate under post-2013 amendment law

78. Part IVA was significantly amended in 2013.[1] The amendments apply to schemes entered into, or commenced to be carried out, on or after 16 November 2012. The focus of the amendments is mostly on the concept of tax benefit. A summary of the effect of these amendments is found in the Explanatory Memorandum to the amending Bill. In particular, the Explanatory Memorandum states that the amendments are intended[2]:

- to put it beyond doubt that the 'would have' and 'might reasonably be expected to have' limbs of each of the subsection 177C(1) paragraphs represent alternative bases upon which the existence of a tax benefit can be demonstrated;
- to ensure that, when obtaining a tax benefit depends on the 'would have' limb of one of the paragraphs in subsection 177C(1), that conclusion must be based solely on a postulate that comprises all of the events or circumstances that actually happened or existed other than those forming part of the scheme;
- to ensure that, when obtaining a tax benefit depends on the 'might reasonably be expected to have' limb of one of the paragraphs in subsection 177C(1), that conclusion must be based on a postulate that is a reasonable alternative to the scheme, having particular regard to the substance of the scheme and its effect for the taxpayer, but disregarding any potential tax costs; and
- to require the application of Part IVA to start with a consideration of whether a person participated in the scheme for the sole or dominant purpose of securing for the taxpayer a particular tax benefit in connection with the scheme; and so emphasising the dominant purpose test in section 177D as the 'fulcrum' or 'pivot' around which Part IVA operates.

79. It is not possible at present to make many authoritative statements about the correct interpretation of the Part as amended. The other statements about interpretation in this practice statement are mostly grounded in the case law on Part IVA as it was prior to amendment in 2013. There is no case law on the amendments at the time of publication of this revised Statement. The ATO has very little practical experience so far in applying the amendments in real cases. We have received very few enquiries from practitioners about actual transactions (whether carried out or merely proposed).

80. In 2013 a 'workshop' was held between the ATO and some interested practitioners under the auspices of the National Tax Liaison Group. Practitioners provided some practical examples which raised questions under Part IVA, and the ATO sought to offer indicative views about the examples, having first had the benefit of discussing them with the group. Despite the intended purpose of the workshop, few if any of the examples supplied raised questions about the effect of the amendments. Their resolution depended chiefly on an analysis of dominant purpose under section 177D in much the same way as they would have under the previous version of Part IVA. The outcomes of the workshop have, nonetheless, been published.[3]

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[1] *Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*, Sch 1.
[2] Explanatory Memorandum to the Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, at paragraph 1.71.
[3] NTLG consultative workshop on Part IVA amendments minutes

81. In these circumstances, the only sure source of 'guidance' is the text of the provisions themselves and the extrinsic materials that accompanied the introduction of the amendments, in so far as the latter are a legitimate aid to the task of interpretation. It would not be helpful simply to repeat the text of those documents here. The following discussion assumes knowledge of what is said about the amendments in the Explanatory Memorandum for the Bill that became the amending Act.

82. Some external commentary on the amendments has been published since their enactment.[4] This commentary has raised some questions that are perhaps not clearly answered by the legislation or the extrinsic materials. The following sets out some of the questions that emerge from that material together with an indication of how the ATO would likely apply the law and what submissions we would likely make if any of these issues ever arise in litigation.

Is all of the case law on the concept of tax benefit still authoritative following the amendments?

83. No. New section 177CB so significantly alters the conceptual framework of the tax benefit test that cases such as *Federal Commissioner of Taxation v. RCI Pty Ltd* (2011) 2011 ATC 20-075; (2011) 84 ATR 785; [2011] FCAFC 105 and *Federal Commissioner of Taxation v. Futuris Corporation Ltd* (2012) 205 FCR 274; 2012 ATC 20-306; [2012] FCAFC 32, can no longer be wholly regarded as representing the law, so far as the tax benefit concept is concerned, and should be treated with extreme caution.[5] That this was Parliament's intention in enacting the amendments is clear from the legislative history and the extrinsic materials.[6] In particular, the explanatory memorandum highlights that section 177C is not intended to be a test of prediction, but rather to require the identification of reasonable alternatives to schemes that are 'informed by the commercial results to which the schemes were directed'.[7] That is, 'whether or not there were other ways (for example, more convenient, or commercial, or frugal ways) in which the taxpayer might reasonably have achieved the substance and effect (tax implications aside) that it achieved from, or in connection with, the scheme'.[8]

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[4] See for example: Mark Brabazon, 'The Hatter's watch: Tax benefit in Part IVA' (2014) 43 *AT Rev* 150; Brendan Sullivan, 'The new Pt IVA – interpretation and litigation issues' (2014)18 *The Tax Specialist* 1; Tim Kyle, 'Practical application of the New Part IVA' (Paper presented at the Corporate Tax Masterclass, Sydney, 11 September 2014); Greg Travers, *The Tax Adviser's Guide to Part IVA: A Practical Guide to the Application of the General Anti-avoidance Rule* (2014); Stuart Dall, *Part IVA amendments: Be just, and fear not* (2013) KPMG Australia http://www.kpmg.com/au/en/issuesandinsights/articlespublications/tax-insights/pages/part-iva-amendments-be-just-and-fear-not-14-august-2013.aspx at 19 June 2015.

[5] The pre-amendment case law remains authoritative for schemes entered into before 16 November 2012.

[6] See for example Explanatory Memorandum to the Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraphs 1.5-1.5, 1.31-1.32, 1.61-1.63, 1.69,and 1.72.

[7] Explanatory Memorandum to the Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 1.97.

[8] Explanatory Memorandum to the Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 1.51.

Does section 177CB merely provide a further limit on the concept of tax benefit, while leaving the operation of section 177C, as previously understood, intact?

84. No. The amending Act left the text of section 177C largely intact but inserted a new section 177CB that substantially affects its operation. It could therefore be suggested that the previous law on section 177C still holds and the sole effect of new section 177CB is to provide a further restriction, or condition, on what can be a tax benefit.

85. This reading of the provisions might just be literally open. But it is also open to read subsections 177CB(2) and (3) as replacing (rather than adding to) the 'prediction' approach which the previous case law established as the correct approach to the interpretation of section 177C. In so far as the text is ambiguous on this point, recourse to the extrinsic materials is permitted. These make it clear that the 'replacement' approach is correct. Having regard to the evident purpose and history of the amendments, it would be odd to suggest that Parliament only intended to *restrict* the previous operation of Part IVA by these amendments.

Does the amended tax benefit test require a two-step process by which one first finds a 'postulate' under section 177CB, then feeds that postulate into the expression set out in section 177C?

86. No. The concepts in section 177CB elucidate, and to the extent of any inconsistency replace, the test that the ordinary meaning of the expression 'would or might reasonably be expected' in subsection 177C(1) would otherwise require. For the 'would' limb, this much is plain on the face of the legislation. The 'reasonably expected' limb should be interpreted correspondingly. Having identified a postulate that meets the requirements of subsections 177CB(3) and (4), a tax benefit can be immediately calculated. There is no requirement to conduct a further enquiry by attempting somehow to shoehorn this postulate back into a separate test of reasonable expectation, as that expression had been interpreted in the previous cases. The concept of reasonable expectation is now to be understood in light of subsections 177CB(3) and (4), rather than in addition to those provisions.

87. This approach is consistent with paragraph 1.88 of the Explanatory Memorandum.

88. It is not clear how the opposite approach could be made to work without defeating the evident purpose of section 177CB.

Are the 'would' limb and the 'might reasonably be expected limb' true alternatives?

89. Yes. This stems from the ordinary meaning of the word 'or' in subsection 177C(1). In this respect, the law has not changed, although the content of the two limbs has of course been significantly affected by the insertion of section 177CB. It is open to the Commissioner to formulate his case under either or both approaches.

Can there be more than one reasonable postulate that satisfies subsections 177CB(3) and (4) in a given case?

90. The text of the legislation appears to leave this possibility open: note the use of the indefinite article in subsection 177CB(3). Whether or not the answer to this question will matter in many practical situations is not known at this stage.

Do the amendments require taxpayers to pay the highest possible amount of tax they could have incurred, had a scheme not been entered into or carried out?

91. No. Section 177CB says nothing to this effect.

92. In theory, the following scenario might arise. A scheme results in a certain commercial objective being met without incurring any tax liability. Absent the scheme, the same non-tax objective might have been met in two different ways: one resulting in a $100 tax liability and the other in a $200 tax liability. Assume that neither alternative would itself have attracted Part IVA, had it been carried out. Under the pre-amendment law, the question would be, as a matter of reasonable prediction, which of those two alternatives (if either of them) is it most reasonable to predict would have happened absent the scheme? The taxpayer would be entitled to suggest that the lower tax liability for the first alternative is a reason to expect that course would have been taken rather than the second. Other things being equal, a court may well have agreed with this.

93. Under the new law, the identification of a reasonable alternative to the scheme must be done disregarding these hypothetical tax effects. As between the two possible alternatives, it is not permissible to give weight to their relative tax costs.

94. In this somewhat theoretical scenario, section 177CB does not require the higher or the lower of the two hypothetical tax liabilities necessarily to be chosen. If the two truly were equally 'reasonable' by the lights of section 177CB, the law does not say which to choose. On the other hand, it behoves the Commissioner to administer Part IVA (and indeed the whole of the tax law) with common sense and reasonableness. Besides, the Commissioner's case under section 177D might well be more attractive to a court in practice if the lower of the two is the correct reference point. For the enquiry as to purpose under section 177D requires consideration of what other possibilities existed, and the tax effects of the scheme are still relevant to that enquiry: paragraph 177D(2)(d).

95. In any event, the Commissioner may choose to cancel only part of a tax benefit in appropriate cases. And, in the final analysis, the compensating adjustment mechanism in subsection 177F(3) remains available to ameliorate any unfair or unreasonable result: refer paragraphs 174 to 176.

Alternative postulate under pre-2013 amendment law

96. Paragraphs 97 to 107 apply only to Part IVA in the form in which it stood before the amendments made in 2013. (See above at paragraph 53). It consists of the relevant passages from the original version of this Practice Statement, as now updated to reflect developments in the case law on the original version of Part IVA, that occurred between 2005 and the time of the amendments.

What might reasonably be expected

97. A reasonable expectation requires more than a possibility.

Relevant case law

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

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

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

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

99. The following propositions concerning section 177C (in its pre-2013 form) have been stated by the Full Federal Court per Edmonds J (Bennett and Middleton JJ agreeing):

Relevant case law

Federal Commissioner of Taxation v. Ashwick (Qld) No. 127 Pty Ltd & ors [2011] FCAFC 49; 2011 ATC 20-255 at [153]:

> The following general propositions can be stated as to the analysis required to establish the relevant counterfactual:
>
> *Objective prediction*
>
> (1) The focus of s 177C is the identification of an activity – the prediction of events that would have or might reasonably be expected to have taken place in the absence of the scheme: *Trail Bros*[9] at [47]; *AXA Asia Pacific Holdings*[10] at [131].
>
> (2) In the case of a deduction, s 177C(1)(b) provides that it is an objective inquiry as to what would have been allowed or might reasonably be expected to have been allowed as a deduction had the scheme not been entered into or carried out:
> *Epov v Federal Commissioner of Taxation* 2007 ATC 4092; (2007) 65 ATR 399 at [62]; *Peabody* at 385-386; *Trail Bros* at [24]. It is an objective fact whether a taxpayer obtained a tax benefit in relation to a scheme to which Pt IVA applies: *Peabody* at 382; *Hart* at [37]; *Trail Bros* at [23]; *AXA Asia Pacific Holdings* at [126].

[9] *Federal Commissioner of Taxation v. Trail Bros Steel & Plastics Pty Ltd* (2010) 186 FCR 410
[10] *Federal Commissioner of Taxation v. AXA Asia Pacific Holdings Ltd* (2010) 189 FCR 204

(3) When predicting the events which would or might have taken place, that question is assessed on the assumption that the scheme had not been entered into or carried out: *Federal Commissioner of Taxation v Lenzo* 2008 ATC 20-014 167 FCR 255 at [121]. Section 177C requires the entirety of the scheme to be ignored: *Trail Bros* at [28]; see also *Peabody*, cf. *Lenzo* at [121] and [136].

(4) But that is not the entire question posed by s 177C. The rest of the question involves the objective enquiry of predicting the particular activity or the events that would or might reasonably be expected to have taken place in the absence of the scheme. The identification of the activity or events does not necessarily preclude any element of the scheme: *AXA Asia Pacific Holdings* at [131]-[133]. Of course, it cannot be the same complete set of events giving rise to the scheme: *Trail Bros* at [28]-[29].

(5) The integers relevant to the objective enquiry are not limited, and will be different in each case: *Trail Bros* at [30].

(6) A fact is not disqualified from consideration merely by reason of it having been an element of the scheme which was in place. To the contrary, what the taxpayer in fact did in the commercial circumstances which existed is likely to shed much light on what they would have done in the absence of the scheme, and in some cases to, as a matter of prediction, elements of that counterfactual: *AXA Asia Pacific Holdings* at [132].

Relevance of evidence from taxpayer

(7) How the taxpayer establishes that there is no tax benefit is a matter for it: *Trail Bros* at [36].

(8) It is conceivable that a taxpayer may not lead positive evidence of an alternative postulate because, for example, the result of any objective enquiry of the alternative postulate is inevitable: *AXA Asia Pacific Holdings* at [139]. *Futuris Corporation Limited v Federal Commissioner of Taxation* 2010 ATC 20-206 provides an example of a case where the taxpayer did not lead any direct evidence but established the alternative postulate through expert evidence.

(9) It is relevant to have regard to the evidence of the taxpayer as to the steps it says it would have undertaken or would have been likely to undertake in the absence of the scheme: *Federal Commissioner of Taxation v Spotless Services Limited* 96 ATC 5201; (1996) 186 CLR 404 at 423-424.

(10) The taxpayer may lead evidence that it would have undertaken a particular activity, or adopted a particular course in lieu of the scheme. If a taxpayer has given evidence of what he or she would have done but for entering the scheme, the evidence will be relevant and useful to the extent to which it reveals facts or matters that bear upon the objective determination of the alternative postulate: *Trail Bros* at [36]; *AXA Asia Pacific Holdings* at [139]; *Federal Commissioner of Taxation v Mochkin* 2003 ATC 4272; (2003) 127 FCR 185 at 209-210.

(11) The taxpayer can give evidence as to what it would have done in the absence of the scheme, provided foundation facts are given to support what would otherwise be a bald speculative statement: *McCutcheon v Federal Commissioner of Taxation* (2008) 168 FCR 149 at 163-164; *AXA Asia Pacific Holdings* at [140].

The actual rejection of some alternatives is relevant

(12) The taxpayer's actual rejection of an alternative at the relevant time will be important evidence in determining what would have been expected to have occurred: *Spotless Services* at 422; 424; *Federal Commissioner of Taxation v Spotless Services Limited* 95 ATC 4775; (1995) 62 FCR 244 at 284-285. In *Spotless Services*, the [Full Federal] Court considered that the taxpayer's actual rejection of one alternative to the scheme to be relevant to its conclusion that only one alternative remained open to the taxpayer.

Deduction does not need to be of the 'same kind'

(13) In a deduction case, if it can be predicted that, if the relevant scheme had not been entered into or carried out, the taxpayer would have done something which would give rise to a deduction being allowable to it of an equivalent amount, and the prediction is sufficiently reliable as to be regarded as reasonable, there will be no tax benefit: *CPH Property*[11] at 32 and 40 (see Corrigenda to 139 FCR); (1998) 98 ATC 4983 at 4998 per Hill J. See also *Essenbourne*[12] at [45] per Kiefel J.

(14) The allowable deduction identified in the alternative postulate does not need to be of the 'same kind' as that claimed as a deduction under the scheme: *Trail Bros* at [44], [52], [65], despite a suggestion to the contrary in earlier authorities (for example, *Lenzo* at first instance (per French J) and Full Court); *Trail Bros* at [52], [65]. The comparison does not assume, let alone require, that if the scheme had not been effected, the taxpayer would have ordered its affairs in a way that engaged the same provisions of the Act (or engaged the same provisions in the same way) as were said to be applicable to the events and transactions comprising the scheme: *Trail Bros* at [48], [65].

(15) That does not mean that the taxpayer is at large in pointing to some alternative allowable deduction, having no relevance to the impugned scheme: it is the alternative postulate that provides the limitation: *Trail Bros* at [65].

Quantitative analysis

(16) If it is determined that the relevant activity would give rise to tax deductions, then the tax benefit is any differential between the amount claimed and the deductions arising from the counterfactual: *Trail Bros* at [54] and [67].

100. Propositions 14 and 16 require a comment. While the weight of authority provided by the judgments in *Trail Bros*, *AXA* and *Ashwick* is noted, it is not yet clear that the view in *Lenzo* is certainly to be rejected (see paragraphs 66 to 68).

[11] *CPH Property Pty Ltd v. Federal Commissioner of Taxation* (1998) 88 FCR 21; 98 ATC 4983; (1998) 40 ATR 151

[12] *Essenbourne Pty Ltd v. Federal Commissioner of Taxation* 2002 ATC 5201; (2002) 51 ATR 629

101. It is possible for different conclusions to be reached as to what might reasonably be expected to have happened if the particular scheme had not been entered into or carried out. In that event, the Commissioner may rely on both or all the reasonable expectations in the alternative, and therefore on more than one counterfactual, to support a determination made under subsection 177F(1). See paragraph 159 in relation to making determinations where there are alternative counterfactuals.

Significance of implementation costs

102. The identification of what, as a hypothetical alternative, might reasonably be expected to have happened if the scheme did not occur can be affected by the cost of implementing that alternative. For example, the size of the 'tax cost' of carrying out a possible alternative scheme may show the relevant persons would not, or could not reasonably be expected to, have carried out that scheme.[13] This may be especially so where there is evidence pointing to a range of other alternatives that might have been adopted, in which this cost would not have arisen.

Relevant case law

Federal Commissioner of Taxation v. RCI Pty Ltd (2011) 2011 ATC 20-075; (2011) 84 ATR 785; [2011] FCAFC 105 at [141] to [150]

Discharging the onus – pre 2013

103. It is not correct that the taxpayer can only succeed by establishing that the Commissioner's counterfactual is unreasonable. It is for the court to determine objectively, on all of the relevant evidence, 'including inferences open on the evidence, as well as the apparent logic of events', what alternative would, or might reasonably be expected to, have occurred if the scheme had not been entered into or carried out.

104. The taxpayer might discharge its onus by leading evidence that it would have carried out a particular activity, or adopted a particular course, or not carried out a particular activity, or adopted a particular course, as the case may be. Such evidence is to be tested against the objective facts surrounding the relevant transaction.

Relevant case law

Federal Commissioner of Taxation v. RCI Pty Ltd (2011) 2011 ATC 20-075; (2011) 84 ATR 785; [2011] FCAFC 105 at [130]; [134]:

> … Generally, such evidence is unlikely to be sufficient to discharge the onus unless it is supported by objective indicia to be gleaned from the context and matrix of underlying or 'foundation facts', as they have been called: see *McCutcheon v FCT* (2008) 168 FCR 149 at 163-164 [37]-[39]; 69 ATR 607 at 621-622 [37]-[39]; 2008 ATC 20-009 at 8112-8113 [37]-[39] per Greenwood J, as well as the logic of the taxpayer's counterfactual having regard to the commercial or financial aspirations and limitations of the parties to the scheme; without such support, such evidence is likely to be regarded as no more than purely speculative.

[13] For post amendment schemes, refer to paragraphs 91 to 95.

105. The fact that the taxpayer leads no direct evidence on what would, or might reasonably be expected, to have happened, if the scheme did not, will not automatically lead to the taxpayer failing to discharge the onus.

Relevant case law

Federal Commissioner of Taxation v. RCI Pty Ltd (2011) 2011 ATC 20-075; (2011) 84 ATR 785; [2011] FCAFC 105 at [135]-[136]; *Federal Commissioner of Taxation v. Futuris Corporation Ltd* (2012) 205 FCR 274; 2012 ATC 20-306; [2012] FCAFC 32

Discharging the onus – post 2013

106. Although there is no authority on the point yet, we expect that how the taxpayer discharges the onus for a post-2013 scheme would be regarded as a matter for the taxpayer in a similar way as under the pre-amendment law. So, the taxpayer's argument may include inferences that are open on the evidence, as well as commercial logic. However, under the amended test in section 177CB it is no longer a matter of the taxpayer simply establishing the most likely prediction of what would have occurred absent the scheme, especially if that prediction poorly reflects the substance of the scheme and the relevant non-tax consequences for the taxpayer and other entities. Rather, the enquiry under the amended legislation is as to what reasonable alternatives to the scheme can be put forward, and subsection 177CB(4) directs one to have particular regard to certain matters, and to disregard others, in reaching this conclusion.

107. Also, if the taxpayer can show that there is no reasonable alternative to the scheme that would result in a less favourable tax outcome, this would tend to be consistent with an absence of the tax purpose required by s177D in any event.

Identifying reasonable alternatives

108. The following paragraphs are relevant to both the pre-2013 and post-2013 versions of Part IVA.

109. In applying the reasonable expectation test to identify the counterfactual(s), it may be useful to consider the following[14]:

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

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

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

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

Relevant case law

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

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

112. It may be difficult for a Tax officer to obtain evidence to support the counterfactual, that is, the reconstructed version of events. In applying the reasonable expectation test in situations where there is a lack of information, reasonable inferences may be drawn, and reasonable assumptions may be made. For example, care needs to be taken in applying the reasonable expectation test to a scheme involving a trust. Officers may need to consider whether it was reasonable to expect that a particular beneficiary of a trust would, but for the scheme, have received a trust distribution (see paragraphs 162 and 163 and also *Federal Commissioner of Taxation v. Peabody* (1994) 181 CLR 359; 123 ALR 451; 94 ATC 4663; 28 ATR 344).

113. Where the relevant taxpayer is a non-resident, the question of source must also be considered in determining whether there is a tax benefit.

Consolidated Groups

114. If a scheme involves a company joining a consolidated group, the fact that the scheme has resulted in the company becoming a subsidiary member of that group is no bar to finding that the company has obtained a tax benefit consisting of the non-inclusion of an amount in the company's assessable income, despite the single entity rule in section 701-1 of the ITAA 1997. The Commissioner may issue a section 177F determination to that company and may give effect to the determination by issuing an assessment (or an amended assessment) to that company, even though it is in fact a subsidiary member of a consolidated group. The Commissioner may not however assess the head company in these circumstances.

Relevant case law

Channel Pastoral Holdings Pty Ltd v. Commissioner of Taxation [2015] FCAFC 57; (2015) 2015 ATC 20-503

115. On the other hand, if a scheme involves a company joining a consolidated group, and without the scheme the head company of the group would not have been entitled to a certain deduction from its assessable income, then it is the head company that has obtained the tax benefit. The Commissioner may issue a section 177F determination to the head company and assess it accordingly. (This situation has not yet been considered by a court but, by contrast with the omission of income situation, there seems to be no reason to doubt that the law would apply in this way.)

The counterfactual must not be a scheme to which Part IVA applies

116. The counterfactual must not itself be a scheme entered into or carried out with the sole or dominant purpose of obtaining a tax benefit. Although the cases supporting this proposition were decided by reference to the pre-amendment version of Part IVA, there is no reason to think the proposition would not apply equally under the amended version.

Relevant case law

Federal Commissioner of Taxation v. Trail Bros Steel & Plastics Pty Ltd (2009) 75 ATR 916; 2009 ATC 20-141; [2009] FCA 1210 at [52]; *Futuris Corporation Limited v. Federal Commissioner of Taxation* (2010) 2010 ATC 20-206; [2010] FCA 935 at [113]

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

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

118. The objective test in subsection 177D(2) is the core of Part IVA and has been described by the High Court as the 'pivot' or 'fulcrum' on which Part IVA turns. It is frequently referred to as the 'statutory predication test'.

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

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

Relevant case law

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

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

121. It is possible for Part IVA to apply notwithstanding that the dominant purpose of obtaining the tax benefit was consistent with the pursuit of commercial gain. The key issue under Part IVA is whether the particular scheme, or any part of it, was entered into or carried out by any person for the relevant purpose having regard to the objective factors in subsection 177D(2).

Relevant case law

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

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

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

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

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

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

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

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

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

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

Relevant case law

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

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

123. The consideration of purpose or dominant purpose under subsection 177D(2) requires an objective conclusion to be drawn. The conclusion required by section 177D is not about a person's actual, that is, subjective, dominant purpose or motive. Section 177D requires an objective conclusion as to purpose to be reached having regard to objective facts. The actual subjective purpose of any relevant person is not a matter to which regard may be had in drawing the conclusion under section 177D. In other words, a conclusion about a relevant person's purpose for section 177D is the conclusion of a reasonable person based on all the facts and evidence that are relevant to considering the eight factors for the scheme (see paragraphs 117 and 125 to 150). Tax officers must therefore focus on these facts and not on what a relevant person actually intended or what the taxpayer's motivations were for entering into the scheme.

Relevant case law

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

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

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

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

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

124. It may be relevant in determining what objectively was the purpose of any person entering into or carrying out the scheme, or any part of the scheme, to have regard to the purposes of the advisers or other agents of any of those persons. This, of course, will be appropriate only where a person acts on professional advice and what was done on professional advice is relevant to considering the eight matters required to be considered in applying the purpose test in subsection 177D(2) – refer to paragraphs 125 to 150.

Relevant case law

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

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

125. The section requires the Commissioner to have regard to each of the eight matters in subsection 177D(2) in reaching an objective conclusion about purpose. However, not all of the matters will be equally relevant in every case.

Relevant case law

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

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

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

126. The eight matters in subsection 177D(2) are to be each individually taken into account for the scheme having regard to all the relevant evidence, and then weighed together, in arriving at the conclusion as to dominant purpose.

Relevant case law

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

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

127. The eight matters listed in subsection 177D(2) enable consideration of the context in which the particular scheme occurs.

Relevant case law

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

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

128. Provided the eight matters identified in subsection 177D(2) are each taken into account, it is possible to arrive at the conclusion as to purpose by making a global assessment of purpose.

Relevant Case Law

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

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

129. The eight factors in subsection 177D(2) consist of three overlapping sets. The first set is about how the scheme was implemented: how its results were obtained. It comprises the first three factors in paragraphs (a), (b) and (c) of subsection 177D(2) and deals with manner, form and substance, and timing. The second set comprises the next four factors in paragraphs (d), (e), (f) and (g) of subsection 177D(2) and deals with the effects of the scheme: the tax results, financial changes, and other consequences of the scheme. The third set is the eighth factor in paragraph (h) of subsection 177D(2) which deals with the nature of any connection between the taxpayer and other parties.

Considering the eight factors against the background of the counterfactual

130. There is authority to suggest that consideration of the eight factors involves comparison of the scheme with the 'alternative hypothesis', that is, the counterfactual: refer to paragraphs 75 to 116.[15]

Relevant case law

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

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

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

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

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

[15] See also Explanatory Memorandum to the Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraphs 1.24-1.26.

131. However, the most recent judicial statement touching on the role of alternative postulates in considering the purpose test is that of Pagone J in *Orica Limited v Commissioner of Taxation* [2015] FCA 1399; 2015 ATC 20-547 at [20]:

> The conclusion contemplated by s 177D calls for an evaluative judgment. It is to that extent similar to the evaluative judgment contemplated by the predication test in *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1, 8-9. The evaluative judgment to be made under s 177D about dominant purpose is one to be made by application of the words of s 177D and, specifically, by having regard to the matters to which the section compels, and confines, attention. It is by a consideration of those matters that the conclusion is to be made about whether obtaining the tax benefit was the 'ruling, prevailing, or most influential purpose': *Spotless Services* at 416; see also at 423. The dominant purpose of obtaining a tax benefit may be revealed, as was decided in *Spotless Services*, by 'the particular means adopted by the taxpayers to obtain the maximum return on the money invested after payment of all applicable costs, including tax': *Spotless Services* at 423. It may also be revealed by consideration 'of what other possibilities existed' by reference to the eight matters in s 177D(b): *Hart* at 243 [66]; see also *British American Tobacco Australia Services Ltd v Federal Commissioner of Taxation* (2010) 189 FCR 151, 163, [53]. In *Hart* the dominant purpose of obtaining a tax benefit could be seen by comparing what was done to borrow funds with how else funds could be borrowed, and, therefore, as in *Spotless Services*, the dominant purpose was revealed by consideration of the eight factors in s 177D(b) in the particular means adopted by the taxpayer. It is not relevant to consider, therefore, whether Orica might have done something else, such as to borrow funds from an external source. In any event, if it be relevant, the evidence is that Orica rejected such an option and there is insufficient evidence to conclude that Orica's directors would have funded OUSSI from external sources. The inquiry called for by s 177D is, rather, what was the dominant purpose of entering into the transactions that Orica did choose. It is an inquiry that must be undertaken by having regard to the eight matters in s 177D(b) and, as a conclusion about purpose to be drawn from those matters, will require an evaluation of inference and degree.

The first three factors – how the scheme was implemented

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

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

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

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

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

> As Hill J rightly pointed out, the form and substance of the scheme (s 177D(b)(ii)) also point to the purpose of a relevant person obtaining a tax advantage. What was one advance, to be repaid by 300 instalments, was treated as if it were 2 separate loans. The only persons obtaining any advantage from the treatment were the … [taxpayers]. And the only advantages which they obtained depended upon the taxation treatment resulting from the application of payments and accumulation of interest for which the scheme (however identified) provided.

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

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

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

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

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

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

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

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

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

The next four factors - the effect of the scheme

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

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

145. The fifth, sixth and seventh factors focus on the non-tax effects of the scheme, not only for the relevant taxpayer, but also for all connected parties. These factors look to the practical financial, legal, economic and any other outcomes achieved by the scheme for the taxpayer and connected parties. For example, the change in the position of a taxpayer may mean little if there is an inverse change in the position of another person as a result of the scheme, and that other person is an associate or alter ego of the taxpayer such as a spouse or a wholly-owned company. It may also be relevant to observe that an allowable deduction is, or is not, matched by a corresponding amount of assessable income among the other parties who are affected by the scheme. These factors will often require consideration in conjunction with the second factor.

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

147. The absence of any practical change in the overall financial, legal or economic position of a taxpayer and connected parties that are affected by the scheme is likely to add weight to the dominance of the tax purpose when all the subsection 177D(2) factors are weighed together. For example, in *Pridecraft Pty Ltd v. Commissioner of Taxation* [2004] FCAFC 339; 213 ALR 450; 2005 ATC 4001; 58 ATR 210, the 'round robin' of funds was relevant in considering the fifth factor for the employee bonus scheme. Sackville J (with whom Sundberg J and Ryan J agreed) said at [91]:

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

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

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

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

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

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

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

Part IVA Warning Signs

151. The presence of any of the following features whether alone or in combination in an arrangement may suggest that Part IVA applies to the arrangement. These features represent warning signs that the arrangement may be 'tax driven' and lead to a conclusion that the arrangement was entered into for the dominant purpose of enabling a taxpayer to obtain a tax benefit. The list of features is not meant to be exhaustive or exclusive and is provided only by way of guidance to officers who must consider and apply the provisions of Part IVA. The purpose in subsection 177D(2) can only be objectively ascertained by reference to the eight factors. Where any of the following features are present officers must consider the possible application of Part IVA in undertaking audits or issuing rulings to taxpayers:

- the arrangement (or any part of the arrangement) is out of step with ordinary family dealings or the sort of arrangements ordinarily used to achieve the relevant commercial objective;
- the arrangement seems more complex than is necessary to achieve the relevant family or commercial objective, or includes a step or a series of steps that appear to serve no real purpose other than to gain a tax advantage, for example:
  - transactions which interpose an entity to access a tax benefit;
  - intra-group or related party dealings that merely produce a tax result;
  - arrangements involving a circularity of funds or no real money;
- the tax result of the arrangement appears at odds with its commercial or economic result, for example:
  - a tax loss is claimed for what was a profitable commercial venture or transaction;
- the arrangement results in little or no risk in circumstances where significant risks would normally be expected, for example:
  - 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's risk is significantly limited because of the existence, for example, of a 'put' option;
- the parties to the arrangement are operating on non-commercial terms or in a non-arm's length manner, for example:
  - financial arrangements made on unusual terms, such as interest rates above or below market rates, insufficient security, or deferment of repayment of the loan until the end of a lengthy repayment period;
  - transactions which do not occur at market rates/value;
- there is a gap between the substance of what is being achieved under the arrangement (or any part of it) and the legal form it takes, for example:
  - arrangements where a series of transactions taken together produce no economic gain or loss, such as where the whole scheme is self-cancelling.

Determinations and Assessments – section 177F

152. Subsection 177F(1) gives the Commissioner a power to make a determination cancelling a tax benefit that has been obtained, or would but for section 177F be obtained, in connection with a scheme to which Part IVA applies. The power 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.

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

154. In all cases a determination should be evidenced in writing and provided to the taxpayer concerned.

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

156. Where a determination is made, subsection 177F(1) directs the Commissioner to take such action as he considers necessary to give effect to that determination: refer to paragraphs 164 to 168. Tax officers should take particular care in determining the correct taxpayer against whom a determination and assessment should be made.

Making one or more determinations in particular scenarios

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

- a 'single scheme' is intended to include both wider and narrower 'alternative' schemes in connection with which the same tax benefit is obtained; and
- 'multiple schemes' is to be read as a reference to different schemes in connection with which different tax benefits are obtained.

This use of the term 'single scheme' is appropriate because a conclusion as to dominant purpose under subsection 177D(2) is made in the broader context of the relevant scheme in any event. In those cases where the same tax benefit arises in connection with both wider and narrower alternative schemes, the application of Part IVA should be unaffected by whether a wider or narrower scheme is examined: see paragraphs 59 to 60 and 127.

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

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

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

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

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

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

Single scheme and tax benefit – different taxpayers

161. The Commissioner has power to make subsection 177F(1) determinations, and to issue assessments to give effect to the determinations, to more than one taxpayer in respect of the same tax benefit. This can occur where the Commissioner forms the view that each determination and consequent assessment could be correct, based on what is known by the Commissioner at the time. This situation commonly arises in relation to a scheme involving a trust where the trustee or any one or more of its beneficiaries may be ultimately taxable on a tax benefit obtained in connection with the scheme. However, although it is possible for multiple concurrent assessments in respect of the same amounts to co-exist, the Act does not authorise double taxation of the same income, and tax must only be collected from the taxpayer ultimately held to be liable.

Relevant case law

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

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

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

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

Single scheme, incorrect counterfactuals – different taxpayer

162. In some cases courts have found that the taxpayer who obtained a tax benefit is not the taxpayer to which the relevant section 177F determination(s) apply. Officers should be alert to this possibility and consider the need to make determinations and raise corresponding assessments for not only the taxpayer considered most likely to have obtained a tax benefit, but for different taxpayers under different alternative postulates. Again, care should be exercised in such cases to see that double taxation does not occur.

    Relevant case law

    Futuris Corporation Limited v. Federal Commissioner of Taxation 2010 ATC 20-206; [2010] FCA 935 at [112]; *Federal Commissioner of Taxation v. AXA Asia Pacific Holdings Ltd* 2010 ATC 20-224; [2010] FCAFC 134[16]

163. If the tax benefit was taken into account in calculating the 'net income of the trust estate' under section 95, the standard approach is to make Part IVA determinations cancelling the relevant tax benefits in respect of both the trustee and the beneficiaries since the objective facts will usually support a conclusion that both the trustee and the beneficiaries obtained a tax benefit in connection with the scheme. However, there is nothing to prevent the Commissioner in appropriate cases from simply cancelling the tax benefit obtained by the trustee and then relying upon Division 6 of Part III to assess the recalculated net income of the trust to the relevant beneficiaries under section 97, or to assess some or all of the recalculated amount to the trustee under section 99A. A similar approach is taken to making Part IVA determinations in relation to partnerships: refer to paragraphs 170 to 172.

Give effect to a determination

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

[16] These cases were decided under Part IVA as it was in force before the amendments of 2013, and might have been decided differently under the amended Part IVA. However, the general point made here remains valid.

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

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

Relevant case law

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

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

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

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

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

Relevant case law

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

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

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

Schemes involving trusts

169. Where the scheme involves the 'net income of a trust estate' under Division 6 of Part III of the ITAA 1936, care should be taken to ensure that an assessment or amended assessment that gives effect to the Part IVA determination(s) issues in respect of all the appropriate taxpayers (for example, trustee and beneficiary). In this respect, refer to paragraphs 162 and 163 of this practice statement which deal with making Part IVA determinations in respect of different taxpayers for the same tax benefit in connection with the same scheme.

Schemes involving partnerships

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

171. If a tax benefit obtained in connection with a scheme to which Part IVA applies had the effect of reducing the 'net income' of the partnership or increasing the 'partnership loss' that is calculated for the purposes of Division 5 of Part III of the ITAA 1936, then Part IVA determinations cancelling the relevant tax benefits should be made in respect of both the partnership and each individual partner. A determination cancelling each relevant kind of tax benefit obtained by the partnership should be provided to either the managing partner or another senior partner. A determination cancelling the omission of assessable income by each partner which corresponds with the reduction of their share of net income under section 92 obtained by them in connection with the scheme should be provided to each partner.

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

Other situations not specifically dealt with

173. Where a determination is proposed to be made in situations other than described in paragraphs 157 to 172, officers should follow the referral procedure referred to at paragraph 14 of this practice statement.

Compensating adjustments – subsection 177F(3)

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

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

Example

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

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

Relevant case law

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

Time limits for amending assessments – section 177G

177. Section 177G was amended in relation to assessments for the 2004-05 year of income and later years. It now provides only that nothing in section 170 prevents the amendment of an assessment at any time if the purpose of the amendment is to give effect to a compensating adjustment under subsection 177F(3). Amendments to give effect to determinations made under subsection 177F(1) for these years are therefore covered by the general power of amendment in section 170. Item 4 in subsection 170(1) limits the time for this to within 4 years from the day on which the relevant notice of assessment is given. For income years before the 2004–05 income year, the 6 year limit in former subsection 177G(1) applies. However, in respect of these years the Federal Court decision in *Vincent v. Commissioner of Taxation* [2002] FCAFC 291; 2002 ATC 4742; 51 ATR 18 at [88] to [94] means that the six year period for amending assessments under Part IVA cannot be relied upon where the claimed tax benefit is unavailable under the general provisions of the income tax law. In such cases, Part IVA has no application because there was no tax benefit within the meaning of section 177C.

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

Penalties

179. Where Part IVA applies to cancel a tax benefit, the taxpayer is liable to pay an administrative penalty of 50% of the scheme shortfall amount, or 25% of the scheme shortfall amount if it is reasonably arguable that Part IVA does not apply: sections 284-145, 284-155 and 284-160 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). The scheme shortfall amount is the reduction in tax that the taxpayer would have got from the scheme if Part IVA did not apply: section 284-150 of Schedule 1 to the TAA 1953.

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

Relevant case law

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

181. The imposition of an administrative penalty under section 284-145 of Schedule 1 to the TAA 1953 may raise issues where a general anti-avoidance provision is relied on in the alternative (see for example., *Federal Commissioner of Taxation v. Star City Pty Ltd (No.2)* [2009] FCAFC 122; (2009) 74 ATR 447; 2009 ATC 20-129). See Practice Statement PS LA 2008/18 *Interaction between Subdivisions 284-B and 284-C of Schedule 1 to the Taxation Administration Act 1953* for guidance in such cases (as well as to the Decision Impact Statement on *Star City (No.2)*).

182. Paragraph 284-145(1)(b) of Schedule 1 to the TAA requires that it be 'reasonable to conclude' that an entity entering into or carrying out the scheme 'did so with the sole or dominant purpose of that entity or another entity getting a scheme benefit from the scheme', where 'scheme benefit' is defined in subsection 284-150(1). The nature of the 'purpose' spoken of in paragraph 284-150(1)(b) has been discussed in *Lawrence v. Federal Commissioner of Taxation* [2008] FCA 1497; (2008) 70 ATR 376; 2008 ATC 20-052 per Jessup J (not needing to decide the point), and *Federal Commissioner of Taxation v. Star City Pty Ltd (No.2)* [2009] FCAFC 122; (2009) 74 ATR 447; 2009 ATC 20-129 per Dowsett J at [74].

183. In the Decision Impact Statement for *Lawrence* the Commissioner says that the views of Dowsett J in *Star City (No.2)* are those which will be followed. In the latter case Dowsett J said at [74] that the language of paragraph 284-145(1)(b) of Schedule 1 to the TAA 'is not apposite to require an actual decision as to purpose. It rather addresses the availability of an inference'. In the same paragraph his Honour said that he was inclined to the view that paragraph 284-145(1)(b) posed the question 'whether a reasonable person could conclude that the relevant entity had the identified purpose'.

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

SECTION 67 OF THE FBTAA – FBT

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

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

187. An objective review of the transaction and the surrounding circumstances should be undertaken in determining a person's sole or dominant purpose in carrying out the arrangement or part of the arrangement. Section 67 of the FBTAA differs from subsection 177D(2) in Part IVA in that it does not explicitly list the factors that should be taken into account in determining a person's sole or dominant purpose.

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

    (i) a benefit is provided to a person;

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

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

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

190. After the tax benefit has been cancelled, adjustments may be appropriate to restore the situation to what it would have been if the arrangement had not been carried out. Under subsection 67(4) of the FBTAA an employer may make a written request to the Commissioner to make a determination under paragraph 67(1)(d) of the FBTAA. The process in paragraph 67(1)(d) and in subsection 67(4) is similar to the compensating adjustment process in Part IVA (refer to paragraphs 174 to 176).

191. The approach outlined in this practice statement (refer to paragraphs 75 to 150) to the counterfactual and the sole or dominant purpose test in Part IVA is relevant (except that amendments corresponding to the 2013 amendments of Part IVA have not been made to section 67) and should be taken into account by Tax officers who are considering the application of section 67 of the FBTAA.

DIVISION 165 OF THE GST ACT – GST

192. Division 165 of the GST Act is a general anti-avoidance provision. It is modelled on Part IVA (except that amendments corresponding to the 2013 amendments of Part IVA have not been made to Division 165).

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

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

(i) the existence of a 'scheme';

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

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

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

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

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

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

Scheme – subsection 165-10(2)

199. For Division 165 of the GST Act to operate, the identified scheme must fall within the definition of 'scheme' in subsection 165-10(2) of the GST Act. The definition in this subsection is virtually identical to the one in the comparable Part IVA provisions (subsections 177A(1) and 177A(3)). Accordingly, paragraphs 55 to 61, in relation to the definition of a scheme in Part IVA, apply equally to the definition of a scheme in Division 165 of the GST Act.

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

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

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

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

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

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

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

Counterfactual

202. Consideration of the GST consequences, but for the operation of Division 165 of the GST Act, of an alternative hypothesis or postulate – what would have happened or might reasonably be expected to have happened if the scheme (or part of the scheme) had not been carried out – is required. For guidance, refer to paragraph 75 and following paragraphs above regarding counterfactuals in the Part IVA context.

No economic alternative

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

Timing benefits

204. Subsection 165-10(1) of the GST Act is not directed only at liabilities (permanent differences) but is additionally directed at timing benefits. The benefit in paragraph 165-10(1)(c) of the GST Act concerns the deferral of attribution of a liability to GST or an increasing adjustment, and the benefit in paragraph 165-10(1)(d) of the GST Act concerns the acceleration of attribution of entitlement to an input tax credit or decreasing adjustment: refer to paragraph 201.

Net amounts

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

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

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

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

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

208. Paragraph 165-5(1)(b) of the GST Act essentially constitutes an exclusion from the definition of GST benefit. It provides that Division 165 of the GST Act will only operate if the GST benefit that has otherwise arisen is not attributable to the making of a choice, election, application or agreement expressly provided for by the GST law. This requires a consideration of how the entity obtained the GST benefit. In *Federal Commissioner of Taxation v. Unit Trend Services Pty Ltd* [2013] HCA 16 the High Court said at [60]:

> The identified GST benefit is not attributable to the making of a choice by the entity or some other entity if: (a) the GST Act or another relevant law does not operate to confer the identified GST benefit by reference to that choice: or (b) the choice made in fact as part of the scheme would have been made in any event without the scheme.

209. An exception to the exclusion in paragraph 165-5(1)(b) now exists in subsection 165-5(3). Although not applicable to the proceedings in *Unit Trend* the High Court indicated by way of obiter that the subsection would only be called into play where it had first been found that the relevant GST was attributable to an eligible statutory choice. The Court said at [67]:

> The insertion of s 165-5(3) in Div 165 cannot be regarded as an acknowledgement by the Parliament that, without it, Div 165 would not have encompassed a situation such as that of present concern. Section 165-5(3) ensures the application of Div 165 to the case where the scheme was entered into for the purpose of generating the statutory choice relied upon by the avoider. Section 165-5(1)(b) may apply without the need to invoke s 165-5(3) where the statutory choice arises as a step in a scheme. There may be cases where the avoider has not manipulated circumstances to confect the occasion for the making of the statutory choice, but nevertheless the GST benefit can be seen as not attributable to that choice. …

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

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

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

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

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

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

Dominant purpose test

212. The dominant purpose test in Part IVA, found in section 177D (see also subsection 177A(5)), is essentially mirrored in the test in subparagraph 165-5(1)(c)(i) of the GST Act. Accordingly, the propositions contained in paragraphs 117 to 150 are equally applicable to the dominant purpose test in Division 165 of the GST Act.

213. However, the application of the dominant purpose test in Division 165 of the GST Act requires consideration of the twelve matters in subsection 165-15(1). Subsection 177D(2) only requires consideration of eight factors. This difference in the matters to be considered in determining purpose (and effect) is addressed separately below.

Principal effect test

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

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

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

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

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

The 12 matters to be considered in determining purpose or effect

219. The propositions contained in paragraphs 117 to 129 concern the correct approach to the consideration and weighing up of the eight factors in subsection 177D(2) in determining purpose. Where context permits, and with due allowance being made for the absence of the principal effect test in Part IVA, these propositions will generally be equally applicable to a consideration and weighing up of the twelve matters in subsection 165-15(1) of the GST Act in determining purpose or effect.

220. As indicated above, subsection 177D(2) in Part IVA requires regard to be had to eight factors in considering whether it can be concluded that a relevant person has the requisite purpose, whereas subsection 165-15(1) in Division 165 of the GST Act requires regard to be had to twelve matters.

221. The matters in paragraphs (a), (b), (f), (g), (h), (i) and (j) of subsection 165-15(1) of the GST Act correspond to the factors in paragraphs (a), (b), (d), (e), (f), (g) and (h) of subsection 177D(2). Paragraph 165-15(1)(b) of the GST Act also refers to the form and substance of a scheme but, in addition to paragraph 177D(2)(b), elaborates on the meaning of the 'form and substance' of a scheme by indicating that this includes 'the legal rights and obligations involved in the scheme' and 'the economic and commercial substance of the scheme'.

222. The matters in paragraphs (d) and (e) of subsection 165-15(1) of the GST Act together correspond to the factor in paragraph (c) of subsection 177D(2). That is, the timing and period of a scheme are combined into one factor in Part IVA whereas the timing and period of a scheme are separate matters in Division 165 of the GST Act.

223. Accordingly, paragraphs (c), (k) and (l) of subsection 165-15(1) of the GST Act are the only matters in subsection 165-15(1) for which there are no equivalents in subsection 177D(2) of Part IVA.

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

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

226. The propositions contained in paragraphs 130 to 150 explain the nature and meaning of the eight factors in subsection 177D(2). These propositions will be equally applicable to a consideration of the nature and meaning of the equivalent matters in subsection 165-15(1) of the GST Act.

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

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

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

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

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

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

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

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

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

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

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

Declaration formerly self-executing

233. The word 'determination' is used in section 177F in Part IVA for the decision to cancel a tax benefit. Apart from terminology, another difference between Part IVA and Division 165 of the GST Act was that under subsection 177F(1), to give effect to a determination, the Commissioner must issue an assessment or amended assessment in the usual case. For tax periods commencing before 1 July 2012, no such requirement existed in Division 165 of the GST Act as a declaration was self-executing: section 165-50 of the GST Act provides that a declaration under section 165-40 of the GST Act has effect according to its terms for the purposes of Division 33 and Division 35 of the GST Act, despite the provisions of the GST Act outside those Divisions and Division 165.

234. Accordingly, the comments concerning the issue of assessments and amended assessments to give effect to Part IVA determinations, in paragraphs 164 to 168, are inapplicable in relation to tax periods commencing before 1 July 2012. Nevertheless, it is the Tax Office's practice, in the absence of extraordinary circumstances, to issue assessments. This is consistent with the Tax Office's usual practice of issuing assessments at the conclusion of GST audits where a shortfall is found to exist, even though for GST purposes the liability for GST exists independently of and without the need for an assessment.

Post 30 June 2012 tax periods

235. For tax periods commencing on or after 1 July 2012 an assessment is deemed to be made when an activity statement or relevant document is lodged or received. These changes also included changes to Division 165. Subsection 165-40(1) of the GST Act now provides that the Commissioner may negate a GST benefit by making a declaration stating the net amount payable for a particular tax period, or the GST payable on an importation to be a higher amount. New subsection 165-40(2) provides that the Commissioner must take such action as is considered necessary to give effect to the declaration. This means in the usual case, that when a declaration is made in relation to a tax period commencing on or after 1 July 2012, that an amended assessment will be issued to give effect to it.

Declaration may cover several tax periods and importations

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

Compensatory adjustments – section 165-45

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

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

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

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

238. The comments in relation to the comparable provision in Part IVA, subsection 177F(3), in paragraphs 174 to 176, are equally applicable. There are now no substantive differences between section 165-45 of the GST Act and subsection 177F(3).[17]

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

239. In the absence of fraud or evasion, the effective time limit for the Commissioner to make a declaration under section 165-40 of the GST Act for tax periods commencing before 1 July 2012, was within 4 years after the time GST became payable by an entity. A declaration may be able to be made outside that period if the Commissioner has required payment of the relevant net amount of GST by giving a notice to the avoider within the period, but generally officers should make declarations within the 4 year period: section 105-50 in Schedule 1 to the TAA. However, any declaration made after 4 years because there has been fraud or evasion must be approved by a DCTC or the CTC.

Time limits – section 155-5 of Schedule 1 to the TAA

240. Where a declaration is made under subsection 165-45(3) of the GST Act, for a tax period commencing on or after 1 July 2012, to give a compensating adjustment, no time limit applies to give effect to that declaration.

Penalties

241. The same penalty regime applies to both Division 165 of the GST Act and Part IVA. Accordingly, paragraphs 179 to 184 are equally applicable.

LUXURY CAR TAX

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

WINE EQUALISATION TAX

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

[17] For tax periods commencing before 1 July 2012, declarations under Division 165 were self executing.

MORE INFORMATION

244. For more information, see:

- Considering Part IVA in Private Rulings (internal link only)
- Considering the General Anti-Avoidance Rules (GAAR) and referral to the GAAR Panel (internal link only)
- How to engage TCN (internal link only)
- Law Companion Guide LCG 2015/2: *Section 177DA of the Income Tax Assessment Act 1936: Schemes that limit a taxable presence in Australia*

Legislative references	ANTS(GST)A 1999 Div 33 ANTS(GST)A 1999 33-3 ANTS(GST)A 1999 Div 35 ANTS(GST)A 1999 35-5 ANTS(GST)A 1999 Div 165 ANTS(GST)A 1999 165-5(1)(a) ANTS(GST)A 1999 165-5(1)(b) ANTS(GST)A 1999 165-5(1)(c) ANTS(GST)A 1999 165-5(1)(c)(i) ANTS(GST)A 1999 165-5(1)(c)(ii) ANTS(GST)A 1999 165-5(1)(d) ANTS(GST)A 1999 165-5(2) ANTS(GST)A 1999 165-5(3) ANTS(GST)A 1999 165-10(1) ANTS(GST)A 1999 165-10(1)(c) ANTS(GST)A 1999 165-10(1)(d) ANTS(GST)A 1999 165-10(2) ANTS(GST)A 1999 165-10(3) ANTS(GST)A 1999 165-15 ANTS(GST)A 1999 165-15(1) ANTS(GST)A 1999 165-15(1)(a) ANTS(GST)A 1999 165-15(1)(b) ANTS(GST)A 1999 165-15(1)(c) ANTS(GST)A 1999 165-15(1)(d) ANTS(GST)A 1999 165-15(1)(e) ANTS(GST)A 1999 165-15(1)(f) ANTS(GST)A 1999 165-15(1)(g) ANTS(GST)A 1999 165-15(1)(h) ANTS(GST)A 1999 165-15(1)(i) ANTS(GST)A 1999 165-15(1)(j) ANTS(GST)A 1999 165-15(1)(k) ANTS(GST)A 1999 165-15(1)(l) ANTS(GST)A 1999 165-15(2) ANTS(GST)A 1999 165-40 ANTS(GST)A 1999 165-40(1) ANTS(GST)A 1999 165-40(2) ANTS(GST)A 1999 165-45 ANTS(GST)A 1999 165-45(3) ANTS(GST)A 1999 165-50 ANTS(GST)A 1999 165-60 ANTS(LCT)Act 1999 ANTS(LCT)Act 1999 13-5 ANTS(LCT)Act 1999 13-30 ANTS(WET)Act 1999 ANTS(WET)Act 1999 21-5 ANTS(WET)Act 1999 23-10 FBTAA 1986 67 FBTAA 1986 67(1) FBTAA 1986 67(1)(c) FBTAA 1986 67(1)(d) FBTAA 1986 67(2) FBTAA 1986 67(4) FBTAA 1986 136(1)

	ITAA 1936 Pt III Div 5 ITAA 1936 92 ITAA 1936 Pt III Div 6 ITAA 1936 95 ITAA 1936 97 ITAA 1936 99A ITAA 1936 166 ITAA 1936 169A ITAA 1936 169A(3) ITAA 1936 170 ITAA 1936 170(1) ITAA 1936 170(2)(a) ITAA 1936 173 ITAA 1936 177(1) ITAA 1936 Pt IVA ITAA 1936 177A ITAA 1936 177A(1) ITAA 1936 177A(1)(a) ITAA 1936 177A(1)(b) ITAA 1936 177A(3) ITAA 1936 177A(5) ITAA 1936 177B ITAA 1936 177B(1) ITAA 1936 177B(3) ITAA 1936 177B(4) ITAA 1936 177C ITAA 1936 177C(1) ITAA 1936 177C(1)(a) ITAA 1936 177C(1)(b) ITAA 1936 177C(2) ITAA 1936 177C(2)(a)(i) ITAA 1936 177C(2)(b)(i) ITAA 1936 177C(2)(c)(i) ITAA 1936 177C(2)(d)(i) ITAA 1936 177C(2A) ITAA 1936 177C(2A)(a)(i) ITAA 1936 177C(2A)(b)(i) ITAA 1936 177C(3) ITAA 1936 177CB ITAA 1936 177CB(2) ITAA 1936 177CB(3) ITAA 1936 177CB(4) ITAA 1936 177D ITAA 1936 177D(2) ITAA 1936 177D(2)(a) ITAA 1936 177D(2)(b) ITAA 1936 177D(2)(c) ITAA 1936 177D(2)(d) ITAA 1936 177D(2)(e) ITAA 1936 177D(2)(f) ITAA 1936 177D(2)(g) ITAA 1936 177D(2)(h) ITAA 1936 177E ITAA 1936 177EA ITAA 1936 177EA(5)

	ITAA 1936 177EB ITAA 1936 177EB(5) ITAA 1936 177F ITAA 1936 177F(1) ITAA 1936 177F(1)(a) ITAA 1936 177F(2) ITAA 1936 177F(2A) ITAA 1936 177F(3) ITAA 1936 177G ITAA 1936 177G(1) ITAA 1936 177H ITAA 1936 260 ITAA 1997 6-5 ITAA 1997 Subdiv 126-B ITAA 1997 Subdiv 170-B ITAA 1997 701-1 TAA 1953 Sch 1 105-5 TAA 1953 Sch 1 105-50 TAA 1953 Sch 1 155-5 TAA 1953 Sch 1 284-15 TAA 1953 Sch 1 284-145 TAA 1953 Sch 1 284-145(1)(b) TAA 1953 Sch 1 284-150 TAA 1953 Sch 1 284-150(1) TAA 1953 Sch 1 284-150(1)(b) TAA 1953 Sch 1 284-155 TAA 1953 Sch 1 284-155-5 TAA 1953 Sch 1 284-160 TAA 1953 Sch 1 298-20 Customs Act 1901 International Tax Agreements Act 1953 Petroleum (Timor Sea Treaty) Act 2003 Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013
Related public rulings	IT 2456
Related practice statements	PS LA 1998/1; PS LA 2001/8; PS LA 2000/10; PS LA 2008/18; PS LA 2012/1
Case references	Australia & New Zealand Banking Group Ltd v. Federal Commissioner of Taxation [2003] FCA 1410; 137 FCR 1; 203 ALR 644; 2003 ATC 5041; 54 ATR 449 British American Tobacco Australia Services Ltd v. Federal Commissioner of Taxation (2010) 189 FCR 151; 2010 ATC 20-222; [2010] FCAFC 130 CC (NSW) Pty Ltd (In Liq.) v. Federal Commissioner of Taxation (1997) 97 ATC 4123; 34 ATR 604 Channel Pastoral Holdings Pty Ltd v. Commissioner of Taxation [2015] FCAFC 57; (2015) 2015 ATC 20-503 Commissioner of Taxation v. Mochkin [2003] FCAFC 15; 127 FCR 185; 2003 ATC 4272; 52 ATR 198 Corporate Initiatives Pty Ltd v. Commissioner of Taxation [2005] FCAFC 62; 142 FCR 279; 219 ALR 339; 2005 ATC 4392; 59 ATR 351 CPH Property Pty Ltd v. Federal Commissioner of Taxation (1998) 88 FCR 21; 98 ATC 4983; (1998) 40 ATR 151 Cumins v. Federal Commissioner of Taxation (2007) 66 ATR 57; 2007 ATC 4303; [2007] FCAFC 21

	Dan v. Federal Commissioner of Taxation (No. 2) [2000] FCA 752; 2000 ATC 4350; 44 ATR 338 Darrell Lea Chocolate Shops Pty Ltd v. Federal Commissioner of Taxation (1996) 72 FCR 175; 141 ALR 713; 97 ATC 4040; 34 ATR 491 Deputy Commissioner of Taxation v. Richard Walter Pty Ltd (1995) 183 CLR 168; 127 ALR 21; 95 ATC 4067; 29 ATR 644 Epov v. Federal Commissioner of Taxation 2007 ATC 4092; (2007) 65 ATR 399 Essenbourne Pty Ltd v. Federal Commissioner of Taxation 2002 ATC 5201; (2002) 51 ATR 629 Federal Commissioner of Taxation v. Ashwick (Qld) No. 127 Pty Ltd & ors [2011] FCAFC 49; 2011 ATC 20-255 Federal Commissioner of Taxation v. AXA Asia Pacific Holdings Ltd 2010 ATC 20-224; [2010] FCAFC 134 Federal Commissioner of Taxation v. Consolidated Press Holdings (No. 1) (1999) 91 FCR 524; 99 ATC 4945; 42 ATR 575 Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 Federal Commissioner of Taxation v. Futuris Corporation Ltd (2012) 205 FCR 274; 2012 ATC 20-306; [2012] FCAFC 32 Federal Commissioner of Taxation v. Hart [2004] HCA 26; 217 CLR 216; 206 ALR 207; 2004 ATC 4599; 55 ATR 712 Federal Commissioner of Taxation v. Jackson (1990) 27 FCR 1; 96 ALR 586; 90 ATC 4990; 21 ATR 1012 Federal Commissioner of Taxation v. Lenzo [2008] FCAFC 50 (2008); 167 FCR 255 Federal Commissioner of Taxation v. Peabody (1994) 181 CLR 359; 123 ALR 451; 94 ATC 4663; 28 ATR 344 Federal Commissioner of Taxation v. RCI Pty Ltd (2011) 2011 ATC 20-075; (2011) 84 ATR 785; [2011] FCAFC 105 Federal Commissioner of Taxation v. Sleight [2004] FCAFC 94; 136 FCR 211; 206 ALR 511; 2004 ATC 4477; 55 ATR 555 Federal Commissioner of Taxation v. Spotless Services Ltd (1996) 186 CLR 404; 141 ALR 92; 96 ATC 5201; 34 ATR 183 Federal Commissioner of Taxation v. Star City Pty Ltd (No.2) [2009] FCAFC 122; (2009) 74 ATR 447; 2009 ATC 20-129 Federal Commissioner of Taxation v. Stokes (1996) 72 FCR 160; 141 ALR 653; 97 ATC 4001, 34 ATR 478 Federal Commissioner of Taxation v. Trail Bros Steel & Plastics Pty Ltd (2010) 186 FCR 410; (2009) 75 ATR 916; 2009 ATC 20-141 Federal Commissioner of Taxation v. Unit Trend Services Pty Ltd [2013] HCA 16 Futuris Corporation Limited v. Federal Commissioner of Taxation (2010) 2010 ATC 20-206; [2010] FCA 935 Kordan Pty Limited v. Federal Commissioner of Taxation [2000] FCA 1807; 2000 ATC 4812; 46 ATR 191 Lawrence v. Federal Commissioner of Taxation [2008] FCA 1497; (2008) 70 ATR 376; 2008 ATC 20-052 McCutcheon v. Federal Commissioner of Taxation (2008) 168 FCR 149 at 163-164 Noza Holdings Pty Ltd v. Federal Commissioner of Taxation [2011] FCA 46; 2011 ATC 20-241 *Orica Limited v Commissioner of Taxation* [2015] FCA 1399; 2015 ATC 20-547.

	Pridecraft Pty Ltd v. Commissioner of Taxation [2004] FCAFC 339; 213 ALR 450; 2005 ATC 4001; 58 ATR 210 Puzey v. Commissioner of Taxation [2003] FCAFC 197; 131 FCR 244; 201 ALR 302; 2003 ATC 4782; 53 ATR 614 Richardson v. Federal Commissioner of Taxation (1932) 48 CLR 192; 2 ATD 19 Spassked Pty Limited v. Commissioner of Taxation [2003] FCAFC 282; 136 FCR 441; 203 ALR 515; 2003 ATC 5099; 54 ATR 546 Vincent v. Commissioner of Taxation [2002] FCAFC 291; 2002 ATC 4742; 51 ATR 18 Walters v. Federal Commissioner of Taxation (2007) 162 FCR 421; 67 ATR 156; 2007 ATC 4973; [2007] FCA 1270
Other references	Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1999 Explanatory Memorandum to the Taxation Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013
File references	1-6UYXLYA
Date issued	13 December 2005
Date of effect	13 December 2005

Attachment 1: Proper Execution of Part IVA Determinations

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

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

Delegates

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

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

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

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

Authorised officers

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

7. Authorised officers must sign in the name of the delegate; this means that the authorised officer writes the name of the delegate in his or her own handwriting, or applies the delegate's stamp. He or she *may* then, subject to business line additional requirements, add his or her own name. If the authorised officer adds his or her own name, he or she should use 'for', or 'per' or 'p.p' (meaning *pro procurationem* – by proxy).

8. For example, if John Citizen is an authorised officer who exercises on behalf of Mary Brown, Deputy Commissioner of Taxation, Large Business and

International, the power to make a determination, the determination would be executed as follows:

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

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

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

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

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

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

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

Appendix 1 to Attachment 1

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

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

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

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

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

Dated the 9th day of June 2005.

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

Mary Brown
Deputy Commissioner of Taxation, Large Business and International

> This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to include income. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that the Commissioner determines under subsection 177F(2) of the Act the provision by virtue of which the amount is to be included in assessable income: see paragraph 155 of this practice statement. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 2 to Attachment 1

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

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

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

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

Dated the 9th day of June 2005.

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

Mary Brown
Deputy Commissioner of Taxation, Large Business and International

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

Appendix 3 to Attachment 1

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

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

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

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

Dated the 9th day of June 2005.

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

Mary Brown
Deputy Commissioner of Taxation, Large Business and International

This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to include income for the purpose of calculating the 'net income' or 'partnership loss' of a partnership. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that the Commissioner determines under subsection 177F(2) of the Act the provision by virtue of which the amount is to be included in assessable income: see paragraph 155 of this practice statement. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 4 to Attachment 1

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

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

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

Dated the 9th day of June 2005.

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

Mary Brown
Deputy Commissioner of Taxation, Large Business and International

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

Appendix 5 to Attachment 1

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

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

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

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

Dated the 9th day of June 2005.

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

Mary Brown
Deputy Commissioner of Taxation, Large Business and International

This is a sample Part IVA determination, made by an authorised officer (John Citizen) on behalf of a delegate (Mary Brown), to include income under section 92 for a partner. Highlighted fields must be updated. In most cases the determination will be made on behalf of the Deputy Commissioner of the relevant business line. Note that the Commissioner determines under subsection 177F(2) of the Act the provision by virtue of which the amount is to be included in assessable income: see paragraph 155 of this practice statement. It may be necessary to check the latest delegations and authorisations. Refer to the Register of Delegations and Authorisations on the intranet.

Appendix 6 to Attachment 1

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

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

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

Dated the 9th day of June 2005.

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

Mary Brown
Deputy Commissioner of Taxation, Large Business and International

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

Attachment 2: ATO Paper released by the Commissioner if Taxation on 17 March 2005

TAX OFFICE COMMENTS ON THE OPERATION OF PART IVA

The recent decision in *Hart's* case[18] in our view, means business as usual. The judgments of the High Court in *Hart* represent no change in our understanding of Part IVA. What they decided was, we think, already settled law, settled since the decision in *Spotless*[19]; moreover, we think it was what Part IVA's designers intended. Yet we have heard and read concerns that the High Court went too far, or that we went too far, take your pick. There seem to be several strands to this concern: that it makes life too uncertain for taxpayers, that it gives the Tax Office too much power, and, above all, that Part IVA goes further than was intended—that it applies to more than the blatant artificial and contrived dealings that the then Treasurer said it would when he announced it in 1981.

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

The Development of Part IVA

There is a certain conundrum involved in designing a general anti-avoidance rule. The function of a general anti-avoidance rule is to limit the opportunities that might otherwise be available to taxpayers to reduce tax. That is all it does. But a general anti-avoidance provision will necessarily appear in the context of a statute many of whose other provisions exist to *offer* opportunities to reduce tax. This contradiction has to be reconciled. It cannot be reconciled by saying that the anti-avoidance applies if your main purpose in doing something is to reduce tax because there are provisions in the Act framed on the assumption that taxpayers will act to reduce tax.[20]

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

This conundrum bedevilled s. 260. Section 260 had the effect of making void as against the Commissioner any arrangement so far as it had the purpose or effect of avoiding tax, very broadly defined[21]. Consider the range of transactions that have the effect of changing the incidence of income tax. The formation of a company by, say, a grocer who had formerly traded on his own account, to carry on his grocery business, can have that effect. Any business re-organization or re-arrangement of

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[18] [2004] HCA 26; 2004 ATC 4599; 55 ATR 712.

[19] 96 ATC 5201; 34 ATR 183; (1996) 186 CLR 404.

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

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

one's affairs will most likely alter the incidence of income tax, as can, indeed, mere trading. As Knox CJ pointed at in *DFC of T v. Purcell*:

> 'The section, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer.'[22]

Lord Denning articulated an approach for determining whether an arrangement had a tax avoidance character to which section 260 and a rule like Part IVA should apply[23].

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

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

> 'Some writers on the subject suggest that tax avoidance involves conduct entered into for the sole or dominant purpose of obtaining a particular tax advantage. That description could be expected to cover the types of tax avoidance that, again using the language of social or political debate, are blatant, artificial or contrived, and which are indeed intended to be covered by this Bill. But it is also apt to describe other arrangements, including some family arrangements, which are beyond the appropriate scope of general anti-avoidance measures and ought, if need be, to be dealt with by specific measures. …
>
> The test for the application of the new provision is intended to have the effect that arrangements of a normal business or family kind, including those of a tax planning nature, will be beyond the scope of the Part IVA.
>
> In this respect, Part IVA may be seen as effectuating … a position akin to that which appears to emerge from the decision in… *Newton*. The essence of the views expressed in that case was that a tax avoidance situation covered by section 260 exists only if it can be predicated from looking at an arrangement that it was implemented *in that particular way* so as to avoid tax. [emphasis added]

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

[22] (1921) 29 CLR 464 at 466.
[23] *FC of T v Newton* (1958) 98 CLR 1 at p 8.

fall within the provision. A taxpayer would therefore not be free to take up opportunities to reduce tax that required artifice or contrivance to achieve.

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

The same cannot be said of contrivance and artifice. This, to generalise, is precisely what is not contemplated by those who design tax laws, and when they do contemplate it, they generally put something in the law to try to prevent it. Some people say that we should be used to it by now—surely some of the dodges ought to be obvious. However, the product of human ingenuity when it is wasted on tax avoidance is not as easy to predict as you might think, but anyway, this is not the point. The point is that there is a very big difference between what flows naturally from the Act, and what can be extracted from its provisions by contrivance and artifice. In the first case it may be said that the opportunity to reduce tax was *given* by Parliament through the design of the tax laws; the second, it can only be said that it was taken. What one wants is a rule that allows tax reduction opportunities to be given by policy-makers, but prevents them from being taken unilaterally by taxpayers where that was not intended.[24] That, in a nutshell, is what section 260 meant to achieve, and indeed, it is what Part IVA is meant to achieve.

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

THE SCOPE OF PART IVA

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

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

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

This question is posed on the basis of a comparison – 'the inquiry directed by Part IVA requires a comparison between the scheme in question and an alternative postulate. To draw a conclusion about purpose from the eight matters identified in s177D(b) will require consideration of what other possibilities existed.'[25]

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

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

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

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

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

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

First Set of Factors: Enquiring into How the Scheme Was Implemented

It is not coincidence that s.177D starts by looking at how the scheme achieves its effects before it looks at what the effects are. If one is asking, why this particular scheme, *how* is likely to be informative.

(1) The Manner of Implementation

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

This factor thus expresses the policy intent that transactions capable of explanation by reference to ordinary business and family dealing are not to be caught by the section. If the manner of the scheme does not bespeak tax avoidance, a taxpayer is a long way towards showing their purpose is not to obtain a tax benefit. However, it is a mistake to read manner narrowly—*Spotless* tells us not to—and it is a mistake to think a step in a scheme cannot contribute to a conclusion on manner. There is no statutory concept of 'step'. So if a scheme includes a round-robin of cheques in creation or discharge of liabilities, that goes to the manner in which the scheme is carried out: see *Sleight's* case[26].

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

For example, *Peabody*[27] had a share devaluation with no non-fiscal rationale; *Consolidated Press*[28] had a company which lacked another reason for being; and *Hart* had an election to split the loan.

(2) Questions of Form and Substance

As Callinan, J., says in *Hart*, s.177D(b) requires that substance rather than form be the focus[29]. Thus, the second factor directs an enquiry into whether there is a discrepancy between the form of the scheme and its substance, meaning its

[26] 2004 ATC 4477, at p 4510; 55 ATR 555 – particularly where the scheme has non-recourse features which may limit the funds available for any real investment.
[27] 94 ATC 4663; (1994) 181 CLR 359; 28 ATR 344.
[28] 2001 ATC 4343; (2001) 207 CLR 235; 47 ATR 229.
[29] 2004 ATC 4599 at p.4625; 55 ATR 712 at p 741-742.

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

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

It might be added, the manner of implementing a scheme whose form and substance correspond is likely to be straightforward, commercial, and uncontrived. However, a discrepancy between the business and practical effect of a scheme, on one hand, and its legal form on the other, may well indicate that the scheme has been implemented in a roundabout way and in a particular form, or with particular attributes, as the means of obtaining a tax benefit, given that the substance of the scheme is usually available by some more straightforward and commercial mode of dealing. That is to say, a transaction may be 'shaped' to be the means of obtaining a tax benefit.[30]

This factor enables one to take into account what may actually be achieved by a scheme, whether that is 'found within the four corners of an agreement' or not.[31]

(3) Timing Issues

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

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

However, in *Hart*, as Mr Justice Callinan points out[32], the timing of principal and interest repayments (formally in respect of the investment property) over a long period of time indicated something odd was going on, something to be explained by the purpose of obtaining a tax benefit.

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

The fourth to seventh factors, inclusive, are described shortly and aptly as the effects of the scheme. They cannot simply be compared and weighed to determine purpose, for to do so is to ignore the other factors. The bare fact that a taxpayer pays less tax, if one form of transaction rather than another is made does not by itself demonstrate that Part IVA applies.[33]

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[30] Refer to the well-known passage in *Spotless*, 96 ATC 5201 at p.5206; (1996) 186 CLR 404 at 416; 34 ATR 183 at p 188.
[31] Per Callinan, J., 2004 ATC 4599 at p. 4625; 55 ATR 712 at p 741.
[32] 2004 ATC 4626; 55 ATR 712.
[33] Per Gummow and Hayne JJ, 2004 ATC. 4599 at p. 4612; 55 ATR 712 at p 727.

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

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

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

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

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

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

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

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

but who act in concert for the purpose of obtaining a tax benefit, may exhibit that purpose by dealing in the *manner* of persons who are not at arm's length.[34]

This factor also requires attention to be paid to the existence of family relationships in a way that assists taxpayers. Many dealings whose manner would be decidedly odd between strangers may be entirely explicable between family members. A businessman who gives assets to strangers for less than they are worth would be the subject of enquiry. A gift to one's family stands on a different footing. *Purcell*, an old s.260 case[35], provides as an example. *Purcell* settled assets on trust for the benefit of his wife and children, retaining, however, wide, and at the time unusual, powers of management and control. Possibly his motivation was to reduce tax through income splitting. On the other hand, his subjective purpose might have been to benefit his wife and children because he was fond of them. Objectively one cannot infer the purpose of tax avoidance just from a gift of property to one's family. Of course it is a different matter if the family does not benefit in substance from the arrangement. That was a consideration in *Hollyock*, another s.260 case that well illustrates the sort of family dealing that would not pass Part IVA[36].

The Importance of Weighing the Eight Factors

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

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

The Role of 'an Alternative Postulate'

One of the important points that emerges from the High Court decision in *Hart* is that in working out whether Part IVA applies to a scheme, and in applying the s.177D factors, the scheme must be compared with the probable alternative.[37]

But the fact that there are different ways of doing a transaction or organizing your business affairs does not mean that Part IVA applies if you choose the one that produces less tax. This is where the s.177D factors operate. The choice of the most tax efficient structure might, as matter of subjective intention, have been chosen

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

[35] (1921) 29 CLR 464, esp. at p.473f.

[36] 71 ATC 4202; 2 ATR 601; (1970-1971) 125 CLR 647:

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

[37] 2004 ATC at p.4614, paragraph 66; 55 ATR 712 at p 730, paragraph 66.

solely for tax reasons. (Of course, it might not.) But it is a mistake to say well of course they chose this one for tax, so Part IVA applies.

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

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

Gummow and Hayne, JJ., drew attention to the finding by Hill, J., that 'the manner in which the scheme was formulated … is certainly explicable *only* by taxation consequences.'[38] (Their emphasis.) Of course, they wrote, manner is not determinative; all eight factors must be considered. But the other factors—they went through them—all pointed to the same conclusion or were neutral. None pointed against the conclusion, they said. But if it were not for the obvious contrivance involved in the terms of that loan, as it showed up under the headings of manner, form and substance, change in financial position and so on, there would only have been one factor which pointed to a tax purpose, that being under the heading of 'result under the Act', which would not have sufficed.

Defining a scheme Widely or Narrowly – Is it Important?

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

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

> 'The conclusions just described, as being indicated by the manner in which the scheme was entered into or carried out, are indicated by a consideration of how else the loan might have been arranged. They are not conclusions which depend on

[38] 2004 ATC 4599 at p.4612; 55 ATR 712 at p 728.

identifying the scheme in one of the ways put forward by the Commissioner rather than another.'[39]

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

> 'it is not for the appellant [that is, the Commissioner] to attempt to seize upon the and isolate one event, or a series of events, which standing alone may appear to have a complexion which it or they cannot truly bear when other, relevant, connected events are taken, as they should be, into account.' :[40]

If there were any doubt in that respect, it was settled by the previous decision of the High Court in *CPH*.[41] That decision clearly held that context is to be taken into account in explaining a scheme.

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

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

> 'A transaction may take such a form that there is a particular scheme in respect of which a conclusion of the kind described in s.177D is required, even though the particular scheme also advances a wider commercial objective.' [42]

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

> 'the conclusion that, viewed objectively, it was the obtaining of the tax benefit which directed the taxpayer in *taking steps which they would not otherwise have taken by entering into the scheme*.' [43]

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

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

[39] 2004 ATC 4599 at p.4614; 55 ATR at p 731.
[40] 2004 ATC 4599 at p.4625; 55 ATR 712 at p 742.
[41] (2001), 207 CLR 235 at pp.254, 264, paragraphs 52 and 96; 2001 ATC 4343 at pp.4354, 4360; 47 ATR 229 at pp 240, 247, paragraphs 52 and 96.
[42] 2004 ATC at p.4604; 55 ATR 712 at p 718.
[43] (1996) 186 CLR at pp. 416, 423; 96 ATC at pp. 5206, 5210; 34 ATR 183 at p 193.

account 2 *contrived by the particular form of the borrowing transaction.* [44] [emphasis added]

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

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

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

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

[44] 2004 ATC 4599 at p. 4605; 55 ATR 712 at p 719.