Iddles v Commissioner of Taxation and Macpherson v Commissioner of Taxation: Implications for the Tax Planning Landscape in Viticulture

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Abstract

This article examines how to identify when a viticulture project may constitute a ‘tax avoidance scheme’ for the purposes of pt IVA which is the general anti-avoidance rule in the Income Tax Assessment Act (Cth) 1936. The article focuses on the decisions of Iddles v Commissioner of Taxation and Macpherson v Commissioner of Taxation where pt IVA was applied to disallow the taxpayer’s deductions for outgoings incurred in relation to participation in the viticulture schemes Austvin and Central Highlands. This paper considers the implications these decisions may have for the tax planning landscape in viticulture in respect of pt IVA. It is suggested that the decisions in Iddles and Macpherson, when analysed in conjunction with the other body of case law in relation to the application of pt IVA to mass-marketed schemes, provide taxpayers and practitioners with a reasonably coherent and consistent judicial framework for applying pt IVA in the context of a viticulture scheme.

Introduction

Historically, the viticulture industry has depended to some extent on the availability of a tax deduction for participation in a viticulture project to attract investment into the industry. However, in recent times the deductibility of outgoings for participation in viticulture projects that constitute managed investment schemes (‘MIS’) has been under increasing scrutiny from the government and the Australian Taxation Office (‘ATO’). For example, the ATO announced that it had reconsidered its position in relation to the deductibility of outgoings incurred to participate in MIS, resulting in the release of Taxation Ruling TR 2007/8. The ruling stated that contributions to MIS were of a capital nature and not deductible as taxpayers participating in MIS were not carrying on a business. The ruling and this altered stance of the ATO led to litigation on this issue, culminating in the Full Federal Court decision of Hance v Federal Commissioner of Taxation; Hannebery v Federal Commissioner of Taxation. In this case the Full Federal Court held that participants in an almond MIS were carrying on a business and entitled to a deduction for expenses incurred in relation to their participation. This ultimately led to TR 2007/8 being withdrawn. Whilst this decision may provide some comfort for potential participants in viticulture schemes, unfortunately this is not the end of the issue. Accordingly, even once a participant has successfully negotiated the general deductibility provisions in s 8-1 of the Income Tax Assessment Act 1997 (Cth) (‘ITAA 1997’), they must still then navigate the provisions of pt IVA. Part IVA is the general anti-avoidance rule in

1 Margaret McKercher and Cynthia Coleman, ‘The Australian Income Tax System: Has it Helped or Hindered Primary Producers Address the Issue of Environmental Sustainability?’ (2003) Journal of Australian Taxation 7 state: ‘The income tax system has directly encouraged investment in pastoral activities, irrigation and viticulture and has clearly been effective given the rate of growth in these industries.’


Australia’s *Income Tax Assessment Act 1936* (Cth) (‘ITAA 1936’).

In the cases of *Iddles v Commissioner of Taxation*[^4] and *Macpherson v Commissioner of Taxation*[^5] it was held that pt IVA applied to disallow deductions for outgoings incurred by the taxpayer in relation to their participation in the viticulture projects. These decisions, when read in conjunction with the body of case law clarifying the impact of pt IVA to mass-marketed schemes, should act as a caution to potential participants in the viticulture industry that even though deductibility under the general provisions may be established, the terms of a project should also be carefully scrutinised and tested against the provisions of pt IVA.

The focus of this article is not to give a comprehensive exposition of the law relating to pt IVA as this has been undertaken elsewhere in the literature.[^6] Rather, this article will identify and discuss several of the key issues for potential participants in the viticulture industry regarding the likely application of pt IVA. In this regard, the article will consider whether *Iddles* and *Macpherson*, when read in conjunction with the other mass-marketed scheme decisions, effectively assists participants to further clarify under which circumstances pt IVA may apply to a viticulture project. More broadly, it will consider the implications these decisions may have for the tax planning landscape in viticulture in respect of pt IVA. It is suggested in this article that an analysis of the decisions in *Iddles* and *Macpherson* can significantly assist potential participants in the viticulture industry by providing a number of industry-specific ‘warning signs’ in relation to ascertaining when pt IVA may apply to a viticulture arrangement.

The structure of this article is as follows. Firstly, the article will provide a brief overview of the operation of pt IVA. It will then provide an analysis of the decisions in *Iddles v Federal Commissioner of Taxation* and *Macpherson v Federal Commissioner of Taxation*. Lastly, the article will discuss the implications of these decisions for potential participants in viticulture projects.

### The Operation of Pt IVA

Part IVA is the general anti-avoidance rule in Australia’s income tax legislation contained in s 177A-177F of the *ITAA 1936*. The Commissioner can notionally annihilate and then reconstruct a scheme to which pt IVA applies, in order to determine the taxpayer’s liability. This may result in the taxpayer having to pay the tax that would have been payable had the scheme not been entered into or carried out (together with interest and penalties). Part IVA was enacted to prevent taxpayers engaging in ‘blatant, artificial or contrived’ tax avoidance activities.[^7] Tax avoidance refers to a situation where the taxpayer is complying with the black letter of the law but not the intention of the legislation in obtaining a tax deduction.[^8] However, pt IVA functions as a provision of last resort and it operates only where the amount is otherwise deductible under another provision of the *ITAA 1936* or *ITAA 1997* (for example, s 8-1 of the *ITAA 1997*). In this regard, Justice G T Pagone QC states that: ‘General anti-avoidance provisions occupy a very special role in tax laws because their role is to underpin the effectiveness of the primary operative provisions when those primary provisions fail to achieve their purpose.’[^9]

[^7]: Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981.
[^9]: Pagone above n 6, 770.
So whilst participants in a viticulture scheme may feel comfortable that their participation in a viticulture project is deductible under s 8-1 of the ITAA 1997 after the decision of *Hance*, it is still necessary to consider the operation of pt IVA.

Applying pt IVA involves the following steps. First it must be established that there is a ‘scheme’ pursuant to s 177A. A ‘scheme’ is defined very widely to encompass any ‘agreement, arrangement, understanding, promise or undertaking.’

The second step is to establish that there is a ‘tax benefit’ obtained as a result of the scheme that would not or might not reasonably have been obtained had the scheme not been entered into or carried out. Broadly a tax benefit can take the form of an amount not included in assessable income, a deduction, a capital loss or a foreign tax credit. It is most likely in relation to a viticulture scheme that the tax benefit would be a deduction for outgoings incurred in carrying on a viticulture business, which would not have been obtained had the scheme not been entered into or carried out.

The third and arguably most difficult element for a taxpayer to establish is whether a reasonable person would conclude that a person who entered into or carried out the whole or part of the scheme did so for the dominant purpose of obtaining a tax benefit for a relevant taxpayer. Dominant purpose is ascertained by reference to the eight factors set out in s 177D. The factors can be broadly grouped into three overlapping categories and includes the following.

Group 1 (which comprises factors 1, 2 and 3) is concerned with the implementation of the scheme. Factor 1 involves an assessment of the manner in which the scheme was entered into or carried out. Factor 2 looks at the form and substance of the scheme. Factor 3 considers the time at which the scheme was entered into and the length of the period during which the scheme was carried out.

Group 2 (factors 4, 5, 6 and 7) examines the fiscal effects of the scheme. Factor 4 looks at the result in relation to the operation of the ITAA 1936 and 1997 that, but for pt IVA, would be achieved by the scheme. Factor 5 examines any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme. Factor 6 considers any change in the financial position of any person who has, or has had, any connection with the relevant taxpayer, being a change that has, will or may reasonably be expected to result, from the scheme. Factor 7 studies any other consequence for the relevant taxpayer, or for any person referred to above, of the scheme having been entered into or carried out.

Group 3 comprises factor 8 and concerns the nature of any connections between participants in the project. The test in s 177D is objective and after a ‘global consideration’ of the factors in s 177D requires the decision-maker to form a conclusion on the balance of probabilities regarding the dominant purpose. The Full Federal Court stated in *Calder v Federal Commissioner of Taxation*: ‘It is important … to bear in mind that the ultimate judgement as to purpose under s 177D is holistic, albeit it required that regard be paid to each of

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10 The High Court in *Commissioner of Taxation v Hart* (2004) 217 CLR 216 stated in relation to a scheme: ‘This 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 … the taking of but one step. The very breadth of the definition of “scheme” is consistent with the objective nature of the inquiries that are to be made under Part IVA.’

11 *Tax benefit* is defined in s 177C of the *Income Tax Assessment Act 1936.*
the eight factors listed in s 177D(b). Indeed it can be expressed as a global or overall judgement provided that it is apparent that those factors have been considered.’14

Given the test in s 177D is objective, a consistent line of case law has established that the subjective purpose of a participant is irrelevant. In Hart v Commissioner of Taxation, Gummow and Hayne JJ stated (in relation to s 177D): ‘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.’15

Furthermore, a scheme can be entered into for more than one purpose which can make it difficult to ascertain the dominant purpose of the arrangement.16 In Commissioner of Taxation v Spotless Services Limited, the High Court stated: ‘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.’17

Iddles and Macpherson were both cases involving mass-marketed schemes in the context of the viticulture industry. Therefore, in a discussion regarding the elements of pt IVA, a short analysis of some of the key principles emerging from these cases in relation to the findings involving dominant purpose is necessary. As noted by Justice Hill in the decision of Sleight ‘… decisions on Part IVA will, inevitably, turn upon the particular facts of the case’.18 However, arguably the mass-marketed scheme decisions in relation to pt IVA do establish various consistent and coherent principles that can be applied when ascertaining the dominant purpose under s 177D in relation to these types of mass-marketed arrangements. Furthermore, the decisions in Iddles and Macpherson do not represent a significant departure from the general principles advanced by this body of case law but rather act as a confirmation or clarification of these decisions in the context of the viticulture industry.

Mass-marketed schemes commonly exhibited the following types of characteristics. They were often schemes that were promoted or aggressively marketed to a large public audience.19 The projects were often based on a public offer document, such as a prospectus, that emphasised the tax benefits of the arrangement and that was supported by a legal opinion.20 Mass-marketed schemes spanned a broad range of activities including tea-tree oil, cattle breeding, motivational speaking franchises, Indian Sandalwood plantations and viticulture. Most of the schemes had similar structuring features including round robin financing, limited or non-recourse loans and participant obligations limited to any profits derived from the project.21 Furthermore, in many cases the participants would appoint managers to undertake the activities of the business on their behalf. Some of the mass-marketed scheme decisions included, for example, Howland-Rose v Federal Commissioner of Taxation,22 Vincent,23 Sleight24 and Puzey.25 In relation to all the mass-marketed scheme decisions that were delivered by the Courts, the Commissioner was only completely unsuccessful in Cooke and Jamieson v Federal Commissioner of Taxation.26

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17 Ibid.
20 Ibid.
21 Ibid.
26 [2002] FCA 1315. Cooke and Jamieson was however regarded as an anomaly by many commentators.
In most of the mass-marketed scheme decisions the pivotal issue in applying pt IVA was ascertaining the dominant purpose of the participants. Some of the common factors that were identified as influencing a finding that the dominant purpose was to obtain a tax benefit in these cases included:

- Where there was no clear commercial basis or benefit for entering into the project or scheme when it was considered without the tax benefit;
- Even if the project or scheme failed to deliver the returns projected in the scheme documentation, the participants would remain cash positive because of the large tax deductions obtained;
- An inflated price was paid to acquire certain interests in the project compared to the market value of such acquisitions (eg seedlings or plots of land);
- Promotional documentation pointing towards a tax benefit; and
- Overall a passive role was played by the participants in the overall management of the project, oftentimes with the participation being limited to the initial signing of the project documentation.

The final step in pt IVA is that pursuant to s 177F the Commissioner must exercise his discretion to determine that the tax benefit will be cancelled. Again this discretionary element of pt IVA can be problematic for a taxpayer to predict.

An analysis of the decisions *Iddles v Federal Commissioner of Taxation* and *Macpherson v Federal Commissioner of Taxation*

*Iddles v Federal Commissioner of Taxation* is a Federal Court decision that was on appeal from the Administrative Appeals Tribunal (‘AAT’) and *Macpherson v Federal Commissioner of Taxation* is an AAT decision. Both decisions involve the application of pt IVA of the *ITAA 1936* to the deductions claimed by the taxpayers in relation to their participation in viticulture projects.

**Structure of the Projects**

Whilst there were some subtle differences in the structures and agreements used for the viticulture projects in *Iddles* and *Macpherson*, essentially the way in which the projects were structured was the same.

*Iddles* involved a viticulture project called Austvin. Growers were allocated a vine plot (0.2 of a hectare) for 15 years pursuant to the project deed. The vine plot was then managed for the growers on their behalf in return for the payment of a licence and management fee pursuant to a licence and management agreement. The wine purchaser bought the grapes from the growers pursuant to a grape sales agreement. There was an option to utilise a limited recourse loan to finance participation in the project and pay the licence and management fees. The grower’s liability to repay the loan amount was limited to the payment of certain primary amounts and the rest of the repayments were to be from the proceeds of the sales of the grapes. If this loan was utilised it essentially enabled growers in the first year to outlay cash of $2204 to obtain a commensurate tax deduction of $17 204.

Mr Iddles purchased two vine plots and claimed a corresponding tax deduction for his participation in the Austvin Project. Through entry into the project agreements, Mr Iddles appointed a manager to attend to the daily management of the running of the vineyard and utilised the loan agreement. The Commissioner
applied pt IVA to Mr Iddle’s participation in the Austvin Project and issued amended assessments increasing his income to $17,20427 in 1997, $12,76528 in 1998 and $605829 in 1999. Mr Iddles appealed against the disallowance of his deductions. The matter was heard before the AAT and then subsequently on appeal by the Federal Court. At first instance two issues were heard: firstly, whether the disputed expenses were allowable deductions pursuant to s 51(1) of the ITAA 1936 and s 8-1 of the ITAA 1997; and secondly, if the amounts were deductible whether they were susceptible to cancellation pursuant to pt IVA. However on appeal to the Federal Court, only the application of pt IVA was argued. This article will only focus on those parts of the decision pertaining to pt IVA. At first instance in the AAT, Member Barton ruled that pt IVA applied to Mr Iddles’ participation in the project. This finding was upheld by Justice Besanko of the Federal Court.

Likewise, Macpherson involved a viticulture project called Central Highlands Wine Grape Project. Each participant was allocated a farm consisting of 300 vines. Similar to Iddles, the farm was managed on behalf of the farmer by a project manager. To participate in the project, a farmer had to pay an initial amount for their root stock and then farm and management fees. To finance their participation in the project, participants were offered the opportunity to borrow 100% of the first three years’ farm and management fees from the lender. However farmers had to pay the first and second years’ interest in advance and pay additional amounts to reduce the principal of the loan agreement as per the agreements. Due to the non-recourse nature of the loan all additional payments for interest, principal, management and farm fees were payable out of farm proceeds and there was no additional personal liability attaching to the farmer. Ms Macpherson claimed deductions for her participation in the 1997 and 1998 years of income in the Central Highlands Project. The Commissioner disallowed her deductions pursuant to pt IVA and issued amended assessments of $46,100 for the 1997 income year and $17,000 for the 1998 income year. Ms Macpherson appealed to the AAT. Member Fice of the AAT ruled in favour of the Commissioner.

**Scheme and Tax Benefit**

In both cases there was little controversy regarding the finding that there was both a scheme and a tax benefit. The scheme in Iddles was defined to include the making and implementation of the prospectus, the licence and management agreement, the loan agreement, the grape sale agreement and the project deed by which the project was established. Similarly, in Macpherson the scheme was the making and implementation of the prospectus, completion of the application form and the principal agreement.

In both Iddles and Macpherson the tax benefit was the deductions claimed in relation to the taxpayer’s participation in the relevant viticulture projects.

**Dominant Purpose**

The substantive issue in both Iddles and Macpherson was whether the dominant purpose in entering into the scheme was to obtain a tax benefit. In both cases it was emphasised, consistent with the findings in previous cases, that there was no inconsistency between a finding that the subjective purpose of a person was to pursue a commercial gain and an overall finding that the dominant purpose of entering into the scheme (pursuant to pt IVA) was to obtain a tax benefit.30 Both Mr Iddles and Ms Macpherson gave evidence that in entering into

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27 The $17,204 consisted of $1,000 in licence fees, $15,000 in management fees and prepaid interest of $1,204.
28 The $12,765 consisted of $1,000 in licence fees, $10,000 in management fees and $1,765 in prepaid interest.
29 The $6058 consisted of $1,000 in licence fees, $2,872 in management fees and $2,186 in prepaid interest.
30 Federal Commissioner of Taxation v Spotless Services Ltd (1996) 186 CLR 404. In Spotless the High Court found: “A particular course of action may be … 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 … [there was a] “dominant purpose” of enabling the taxpayer to obtain a tax benefit.”
the scheme they were looking to diversify their investments and obtain a future income stream.

Mr Iddles was the Executive Vice-President of the Toyota Motor Corporation of Australia and he gave evidence that he was nearing retirement and was actively looking to diversify his investments. He stated that he believed viticulture was a growth industry and that the Austvin project represented a long term investment in an innovative new vineyard. He admitted that the availability of a tax deduction was a factor in his decision to participate in Austvin but was not decisive.

Similarly, Ms Macpherson said that she was interested in looking at tax effective investments which would guarantee her ‘strong taxable returns in the future’. Ms Macpherson said she was impressed by the Central Highlands Project as a ‘viable business with a sound and certain future income stream’. She obtained a prospectus, familiarised herself with the business and satisfied herself that the income projections in the prospectus were achievable. She relied on the advice of an independent expert provided in the prospectus. She said she was also influenced by the tax opinion in the prospectus affirming the deductibility of outgoings incurred by participants entering into the project. The Court noted that she relied on this opinion despite the fact it was given by a director of the managing company who was also an accountant from a reputable accounting firm.

In relation to ascertaining dominant purpose by reference to each of the factors listed in s 177D the Court in Iddles and the AAT in Macpherson made the following observations.

Factor 1: The manner in which the scheme was entered into or carried out

In Iddles, the Federal Court upheld the AAT’s finding that the round robin arrangement and the limited recourse loan both pointed to the dominant purpose being to obtain a tax benefit. The Federal Court agreed with Member Barton’s findings that this conclusion was not ‘diminished’ by the fact that Mr Iddles:

was a man of means ... he did not claim the relevant tax refunds at the earliest opportunity, that he participated in the project at the minimum level, that the promotional material did not over-emphasise the tax benefits, that the round robin arrangements were legally effective and that the limited recourse loan was a commercially sensible option for the applicant in his circumstances.

In Macpherson the AAT focused on statements in the prospectus and supplementary prospectus and the advice by Ms Macpherson’s financial adviser that the investment was a tax effective investment that would utilise money the taxpayer would ‘ordinarily pay in tax.’ Ms Macpherson had engaged a financial adviser to assist in managing her tax position, particularly with regard to the superannuation surcharge levy. The AAT noted that Ms Macpherson was advised to enter into two other tax effective projects so that her taxable income would be reduced to eliminate the two highest tax brackets and her need to pay the 15% superannuation surcharge. The AAT noted that: ‘Outlay for the project will be more than be [sic] covered by the tax savings you will enjoy and that, in fact, the tax savings, will be significantly greater than the commitment required to the projects.’

It was also noted that Ms Macpherson was very passive in her overall involvement in the project. Other than signing a cheque and authority in favour of her financial planner and her payment of the amounts due under the

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32 Ibid.
relevant project agreements the AAT noted ‘nothing further was required of Ms Macpherson.’36 Overall, the AAT agreed with the Commissioner that the large upfront fees had no commercial function and their only function was to ‘gear up’ the available deductions.37

Additionally the ATO noted that according to the project agreements the lender was required to advance the loan funds on behalf of the grower to the manager and landowner, but in fact no advance was made. Furthermore, the AAT observed that the participants in the project were all related and entered into a round robin arrangement involving book entries. It was held that the fact that Ms Macpherson was unaware that the funds were not advanced was irrelevant.38 In conclusion the AAT felt the project involved a ‘complex structure with no commercial purpose.’39

**Factor 2: The form and substance of the scheme**

In *Macpherson* it was noted that whilst the project agreements obliged each farmer to manage their farm in accordance with good farming practice, in substance the farmers were not allocated a specific location where their allocated vines would be growing. Therefore, it was impossible for the farmers to meet this obligation. It was noted that the farmers were essentially passive investors in the scheme.40

Likewise, in *Iddles* the AAT noted that the ‘vine plots’ were allocated some time after the contracts were concluded. Furthermore, the arrangements by which Mr Iddles carried on a business of growing wine grapes, including the limited recourse loan, meant that essentially the arrangement was a ‘passive investment which, but for the tax benefits, would ordinarily have been cast in a different legal form.’41 This divergence between form and substance led the AAT at first instance to conclude the dominant purpose was to obtain a tax benefit.

**Factor 3: Time at which the scheme was entered into or carried out**

In *Iddles*, the findings as to factor 3 were mixed. The fact that the expenses were incurred towards the end of the year pointed towards a tax purpose. Conversely, observations on the length of the scheme pointed towards a predominantly commercial purpose.

In *Macpherson* the AAT noted that the taxpayer entered into the scheme in May 1997 but did not pay the amounts due until 30 June 1997 indicating that the dominant purpose of entering into the scheme was to obtain a tax benefit.

**Factor 4: The result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme**

It was noted in both *Iddles* and *Macpherson* that the taxpayers obtained deductions that far exceeded their cash outlays, pointing towards the dominant purpose of obtaining a tax benefit.

In *Iddles*, attention was drawn to a letter in the prospectus from the Chairman of the Management Company highlighting that the project was structured to enable growers to participate by outlaying only $2204 whilst obtaining a much larger tax deduction of $17204.

**Factor 5: Any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme**

In *Iddles* the AAT noted that the viticulture project was commercially viable and had been successful to the date of the hearing. Member Barton remarked that he had no reason to doubt that the project would proceed to be successful. However he noted that according to the

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36 Ibid.
37 Ibid 2057.
38 Ibid 2064.
39 Ibid.
40 Ibid 2065.
projections in the prospectus the participant was not due to receive any substantial returns until 10 years after the project was entered into. It was suggested that this pointed to a dominant purpose of obtaining a tax benefit.

It was noted in *Macpherson* that other than the cash payment of $28,600 the taxpayer was not required to contribute any other money. Like in *Iddles*, regardless of whether the project generated any income, her deductions would ensure that she recovered her cash contributions. The AAT also commented that whilst there was a limited income from the project the taxpayer did not receive any of this due to the fees being taken from the income.

The AAT felt it was significant that the taxpayer entered into two other tax-effective projects to reduce her income to a level below the threshold for the super surcharge. Overall it was held that these factors pointed to a dominant purpose of obtaining a tax benefit.

**Factors 6, 7 and 8**

These factors were found to be neutral in *Iddles* and *Macpherson* in relation to ascertaining dominant purpose.

**Implications of *Iddles* and *Macpherson* for the Taxation Landscape in the Viticulture Industry**

It is submitted that the decisions in *Iddles* and *Macpherson* provide a consistent and reasonably coherent judicial framework to assist in applying pt IVA at least in the context of a viticulture project. In particular these decisions highlight some ‘warning signs’ of elements of a viticulture scheme that may result in a finding that the dominant purpose is to obtain a tax benefit. It is important to note however, that no *one* of the individual factors listed below will be determinative in finding that the dominant purpose of the scheme was to obtain a tax benefit. However, viewed together, each of the factors below may contribute to an overall finding that pt IVA will apply.

The first point for participants in a viticulture project to note is that their subjective purpose is irrelevant for ascertaining dominant purpose under pt IVA. Therefore, whilst evidence as to their individual pursuit of a commercial gain may be helpful in terms of s 8-1, *Macpherson* and *Iddles* (consistent with previous authorities) are authority for the proposition that a participant’s subjective purpose is irrelevant in looking at the objective test in pt IVA for ascertaining the dominant purpose. The fact that a grower’s subjective purpose is commercial will not preclude a finding that the dominant purpose of their entry into the scheme was to obtain a tax benefit.

In assessing whether it is likely pt IVA will apply, potential participants must also carefully consider the overall structure of the project. Any of the following features in a viticulture project may contribute to a finding that the dominant purpose was to obtain a tax benefit:

- A large discrepancy between the cash outlay and the tax deduction;
- Round robin financing structures;
- Utilisation of non-recourse loans;
- Several of the parties involved in the scheme are related and not acting at arm’s length;
- A long delay before the participant receives any income from the vines; and
- An unnecessarily complex structure with little commercial explanation.

Furthermore, where the participant’s involvement is essentially one of a passive investor and involves little more than the payment of money that will be recouped from their tax return, this will significantly contribute to a finding that pt IVA may apply.
Participants should also ensure that what it is said will be done, pursuant to the prospectus or project agreements, is actually done. For example, if each grower or farmer is to obtain a vine plot, they should ensure that a discrete vine plot is actually allocated to each participant before the project commences.

In relation to the discretionary element of pt IVA it can be difficult for a taxpayer to ascertain when the Commissioner will exercise his discretion to apply pt IVA. In this regard it is important for taxpayers to remain vigilant in checking ‘Taxpayer Alerts’ to ascertain whether any particular type of arrangement or scheme is on the Commissioner’s radar and therefore more susceptible to cancellation by pt IVA. Furthermore, where a number of the factors listed above are present there is a reasonable chance that pt IVA will apply to the arrangement.

Conclusion
Part IVA seeks to combat ‘tax avoidance’. However, tax avoidance in itself can be a very difficult concept to define given that there are always new structures emerging to exploit deficiencies in the legislation. Essentially the concept of avoidance is dependent on the ingenuity of taxpayers and their advisers. Given the difficulty of legislating to stop such a mobile and dynamic target, it is submitted that pt IVA must be necessarily flexible and consequently it is worded in a broad and principles-based manner. However as a matter of practice, it can be difficult to ascertain in exactly what circumstances pt IVA will apply.

Macpherson and Iddles provide two industry-specific examples of when pt IVA may apply in the context of a tax-effective viticulture scheme. These cases provide a useful indicator of some of the hallmarks a viticulture project may exhibit which make it more likely to constitute a tax avoidance scheme pursuant to pt IVA. Notably however, the application of pt IVA is case-specific and the elements of a project must be viewed as a whole rather than in isolation. Unfortunately, even with the guidance of Iddles and Macpherson and the case law on the application of pt IVA to the other mass-marketed schemes, significant uncertainties still remain in determining whether pt IVA will apply to a viticulture project. For example, it can be difficult to determine dominant purpose pursuant to s 177D as it is not clear how much weight should be placed on each of the factors in determining whether the overall dominant purpose will be to obtain a tax benefit and what the ‘dominant’ purpose will be when there are two purposes for entering into a project. Furthermore, it is not always clear in what circumstances the Commissioner would choose to exercise his discretion to apply pt IVA (pursuant to s 177F) in respect of viticulture projects and what factors will be taken into account in exercising this discretion. Overall, however, the message from Macpherson and Iddles, when read in conjunction with the other body of case law on pt IVA, appears to be that when a participant is looking at a viticulture project, in ascertaining whether pt IVA may apply it should make rational commercial sense, and the tax tail should not wag the commercial dog.

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42 A taxpayer alert is a warning provided by the ATO that a particular tax planning issue or structure is under ‘risk assessment’ and is of concern.

43 Justice Murphy in FCT v Hancock (1961) 8 AITR 328 at 333 states: ‘The resources of ingenious minds to avoid revenue laws has always proved inexhaustible and for that reason it is neither possible nor safe to say in advance what must be found …’

36