Illuminating Tax Avoidance

South Australian Tax Institute Convention 14-16 April 2011

G.T. Pagone*

Illuminating

The organisers of this conference must have a medieval sense of humour. Notice how the title given for my talk plays with the word "illuminating". Is the word used as an adjective (to describe either tax or avoidance, or perhaps the combination of both) or as an adverb (to describe the kind of tax avoidance upon which I have been asked to speak). The choice of topic is no small problem for a guest speaker who must select between potentially quite different subject matter that his or her audience might be expecting. Have you, for example, come to hear me talk about that kind of tax avoidance that might be called illuminating tax avoidance as distinct from other kinds of tax avoidance like, say, dull tax avoidance (a bit like a botanist might provide descriptions of different kinds of plants). The one expectation I hope nobody has is that I, or possibly anyone else, can shed "light upon" the provisions dealing with tax avoidance.

The Dark Ages

The medieval period, or the middle ages, is sometimes referred to as "the Dark Ages". The concept originated with the Italian scholar Petrarch as a pejorative description of the post Roman centuries as compared with the light

* Judge of the Supreme Court of Victoria; Professorial Fellow, Law School, University of Melbourne.

of classical antiquity. It expresses the idea of cultural and economic deterioration and disruption that is generally thought to have occurred in Europe following the decline of the Roman Empire. On this view the classical times can be taken to have been in 1958 when the Privy Council decided *Newton v Federal Commissioner of Taxation*[1] and enunciated the predication test.[2] Thereafter darkness fell upon the world of tax avoidance as the invading barbarian "choice principle" breached the walls of *Newton's* empire and eventually led to its collapse. A deep darkness then fell upon the tax avoidance jurisprudence: Part IVA was enacted,[3] schemes could not be part of schemes,[4] purposes of tax advisers could be attributed to others and alternative postulates[5] came to rule in the capital of the empire.

Darkness and obscurity

Provisions directed to prevent tax avoidance may always be difficult to interpret and apply predictably or with certainty. It may be both pointless and wrong to aim for an anti-avoidance provision which is certain and predictable. It may be wrong because the effectiveness of anti-avoidance rules may need uncertainty to be effective as a deterrent. It may be pointless because, perhaps, however much we try, it may just not be possible to enact certain and predictable anti-avoidance rules. The litigation history of Part IVA cases, and of its predecessor s 260, amply reveals uncertainty of application. The best illustration of the unpredictability in outcome may be seen by court

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1 (1958) 98 CLR 1.
2 Ibid 8-9 (Denning LJ).
3 *Income Tax Assessment Act 1936* (Cth) Part IVA.
4 *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359.
5 *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 (Gummow and Hayne JJ).

decisions where different judges at different levels in the judicial process from first instance to final appeals reached different decisions. At times judges sitting in the same court reached different decisions. This is evidence not of the Commissioner taking an extreme view or of the taxpayer taking an opposite extreme view, but of reasonable, impartial and independent decision makers genuinely having differences of opinion about the application of the anti-avoidance rules on the facts found after testing. It is the manifestation of some level of uncertainty and of unpredictability.

Part of the explanation for the unpredictability in application of the anti-avoidance provisions can be found in the mechanism upon which the application of the anti-avoidance provisions depends. Under s 260, in the predication test developed in *Newton v Federal Commissioner of Taxation*,[6] the application of the anti-avoidance rule depended upon a judgment about whether the transactions were implemented as they were so as to avoid tax. The test was easy to state but more difficult to apply. That test is essentially the one incorporated into Part IVA through s 177D. It too requires a conclusion to be drawn from a consideration of the objective circumstances by which a tax benefit is obtained. That is also true about the equivalent provision in relation to GST.

What makes the conclusion difficult to apply with certainty and predictability may possibly be put into three categories. One category is all of those factors that go to making a judgment by individual decision makers on individual

[6] (1958) 98 CLR 1.

cases. They are often unstated and imponderable. A second category concerns the competing policy considerations which are at play when making a judgment about whether something is to be explained by reason of tax avoidance. That, I think, was largely the reason for the development of the choice principle under s 260. The third category is those factors arising from the difficulty of interpreting the relevant provisions and the jurisprudence which has developed around them.

I will say little about the first category although I do not think tax advisers should ignore its significance. Individual decision making is affected by a wide range of complex conscious and unconscious factors.[7] We frequently make decisions intuitively and, indeed, it is often said that the true measure of the anti-avoidance provisions is whether a transaction passes the "smell test". Advisers should, and do, frequently consider the application of the anti-avoidance provisions by this basal "olfactory" factor. Impression plays an important part in the application of any provision which depends not upon science or mathematics but upon individual judgment.

I will also say little about the second category of matters although it too should not be ignored or thought unimportant. It is genuinely difficult in many circumstances to disentangle tax avoidance from non tax avoidance because of the competing policy considerations in active opposition in tax legislation in particular contexts. Tax avoidance provisions assume a harmony between tax benefits which may be obtained and those which may not but general tax

[7] GT Pagone, *Centipedes, Liars and Unconscious Bias* (2009) 83 ALJ 255.

avoidance rules give little guidance about how the tension between the two is to be reconciled.[8] Transactions do, and inevitably must, frequently take their shape because of the consequences of the way in which tax is imposed. Tax is not neutral as between people or transactions. The way in which tax applies expresses a variety of policy choices which have an impact (as they are known and intended to do) upon the behaviour of people and upon the form in which they enter into transactions. A simple useful illustration can be found in the way in which a taxpayer used to be treated differently if a simple acquisition of depreciable property was acquired through a simple loan or through a simple rental. The taxpayer could approach a financier for money to buy the depreciable property directly or to lease the property from the financier. The physical reality of either transaction was the same. The legal and fiscal analysis was not. In one situation the taxpayer was the owner of the goods with the rights of ownership in respect of them. In the other situation the financier was the owner of the goods with the rights of ownership in respect of them. The difference was important in law and in commerce.[9] The tax consequences were also different. A consequence of the tax consequences being different is that the shape of the transaction, and its economic integers for each of the parties, would necessarily be adjusted. The physical outcome for each transaction was the same and the commercial outcome (from the point of view of profit and loss) was largely likely to be the same although there might be some differences to take account of additional costs attributable to one form or another and the potential variation in risk

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8 For a recent consideration of these issues see *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23188.

9 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552.

profile to each of the parties by the choice of one form or the other. The point being that the ultimate form of the transaction, and the particular shape and integers within that form, were necessarily affected by the policy choices reflected in tax law.

Other examples of policy choices reflected in tax law affecting the application of the anti-avoidance provisions may be seen in the many instances of taxpayers taking advantage of some beneficial fiscal provision. The policy choices reflected in such provisions as those dealing with research and development, employee share schemes and film investments are but three illustrations. In each case there is a legislative policy granting a favourable treatment which may be expected to encourage taxpayers to bring their circumstances within the legislature's contemplation for the conferral of the fiscal advantage. Whether, and if so how, the anti-avoidance provisions should apply in such circumstances involves an application of the letter of the law (including the formation of intuitive synthetic judgments) in harmony within competing policy considerations where each is pulling in a different direction and with different strength.

It is, however, to the third category of factors that I wish to turn today. In 1981 s 260 was replaced with Part IVA. The provisions in Part IVA have been the model for other anti-avoidance provisions both in the context of the GST and in the context of very many other anti-avoidance measures both in federal and state legislation. The provisions were thought essentially to give expression to the test enunciated in *Newton* but that was done by a complex set of

provisions with different problems emerging as Commissioner and taxpayers battled for the meaning of the words to suit the circumstances of individual cases.

Illuminations

Illuminations are, of course, often associated with medieval times and with medieval manuscripts in particular. An illuminated manuscript is one in which the text is supplemented by illustrations or decorations to the letters and the margins. A number of illustrated manuscripts have survived the middle ages and many are thought to be beautiful works of art. Statutory definitions, some statutory provisions and judicial jurisprudence sometime illuminate, in that sense, the main text and principal provisions. The definition of "scheme" is an illumination of s 177D.

Scheme

It is a fundamental condition to the application of any of the anti-avoidance provisions that a fiscal advantage (to use a potentially neutral term) be obtained from or in connection with "a scheme". The role of the "scheme" in the context of the anti-avoidance provisions is important. The word "scheme" is not used in the anti-avoidance provisions in any pejorative way. The usual statutory definition for the word illustrates that the word itself is chosen as the vehicle to convey a wide set of circumstances without moral or pejorative connotation. There need be nothing wrongful about a scheme but it must be the reference point for the obtaining of the tax benefit in question. The word "scheme" as used in Part IVA, however, led (inevitably and understandably) to

debates about whether the provisions were properly being applied to something contemplated by the anti-avoidance provisions.

The first serious debate concerning the operation of Part IVA concerned the role of the scheme identified by the Commissioner. A fundamental issue in *Peabody*[10] was the role of the scheme identified by the Commissioner in the application of Part IVA. Counsel for the taxpayer argued:

> The power to make a determination is in s. 177F(1)(a). […] The tax benefit may not be the subject of a determination under s. 177F(1) unless it is obtained in connexion with "a scheme to which this Part applies", which is defined by s. 177D. Central to the operation of these provisions is the scheme in connexion with which the tax benefit the subject of the determination is obtained. It must be the scheme in connexion with which the tax benefit in s. 177F(1)(a) is obtained. Accordingly, *that scheme* must be the one in whose absence it is (s. 177C) reasonable to expect that the particular taxpayer would have derived the amount of income assessed. *That scheme* must be entered into with the purpose specified in s. 177D(b). For the purpose of considering an assessment, the Commissioner is entitled to examine and discard a variety of schemes to ascertain whether each exhibits the desired characteristics and in particular whether its absence would reveal a reasonable expectation of derivation by the taxpayer of an amount of assessable income. He may also consider the potential liability of a variety of taxpayers. Such a review comprises the performance by the Commissioner of his duties before making a determination and consequent assessment. Once he has

[10] *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359.

> made a determination and assessment, it is the Court's role to consider whether, in respect of the tax benefit *actually* cancelled, the statutory preconditions to the determination are satisfied and whether the Commissioner has had regard to all and only the relevant matters and reached his conclusion unaffected by any mistake of fact or law. That role is to be performed in respect of the tax benefit actually selected and not of alternatives which could have been but were not the subject of a determination.[11]

The High Court rejected the view that Part IVA depended upon the Commissioner's correct identification of a scheme. The Court, rather, upheld the contention that Part IVA presupposed the obtaining of a tax benefit in connection with a scheme as an objective fact.[12] The Court did not say that the identification of a scheme did not matter but that the operation of the provisions were not made to depend upon the Commissioner's correct identification of the scheme. The correct identification of the scheme is still central to the operation of Part IVA: the fact of erroneous identification by the Commissioner may be irrelevant but Part IVA must be applied by reference to a scheme,[13] and the scheme needs ultimately to be identified correctly for Part IVA and its safeguards to work. On that view the critical question for the application of Part IVA (namely that it would be concluded that a person entered into or carried out the scheme for the dominant purpose of enabling a taxpayer to obtain a tax benefit in connection with the scheme) necessarily required an analysis by reference to a scheme.

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11 Ibid 369 (emphasis in original).

12 Ibid 382 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

13 *Macquarie Finance Ltd v Federal Commissioner of Taxation* (2004) 210 ALR 508, [76] (Hill J).

Unfortunately for the subsequent jurisprudence which emerged, the High Court made some observations in addressing an argument put by the Commissioner that had the effect of diverting subsequent litigation. The Commissioner in *Peabody* had sought to argue that the relevant dominant purpose could be found in relation to only part of what might have been identified as the scheme. In the context of an argument that assumed that the only scheme to be considered was one which had as its dominant purpose a commercial nature, the Commissioner sought to argue that the provisions of Part IVA permitted the requisite conclusion to be drawn from part of such a scheme.

It was in answer to that argument that the High Court said that Part IVA could not apply to something as if it were a scheme where the circumstances were incapable of standing on their own without being robbed of all practical meaning.[14] This passage subsequently became the basis of arguments that circumstances identified by the Commissioner as schemes could not be within the contemplation of Part IVA if they were incapable of standing on their own without being robbed of all practical meaning. The Court's words were taken out of the context of the hypothesis of the Commissioner being forced to find the dominant purpose in something which was not itself a scheme, and it was sought to apply the words in support of an argument that the scheme identified by the Commissioner needed to be something which was otherwise capable of identification as a scheme in its own right.

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[14] *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359, 383–4 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

It was not for another ten years before the High Court would reconsider that observation and the way in which it had come to be (mis)understood. In the joint judgment of Gummow and Hayne JJ in *Federal Commissioner of Taxation v Hart*[15] their Honours explained the error in treating the earlier observations in *Peabody* as "a criterion which must be applied in deciding whether there is a scheme to which Part IVA applies".[16] Their Honours pointed out that what had been said in *Peabody* had been addressed to a particular argument on which the Commissioner had sought to rely and went on to say:

> Thirdly, and most importantly, there is no basis to be found in the words used in Pt IVA for the introduction of some criterion additional to those identified in the Act itself. 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 whatever is identified as the scheme, s 177D(b) 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 …[17]

The identification of a scheme has lost some of the significance it had in the earlier litigation because it seems no longer relevant to argue whether the scheme identified is a scheme in its own right or only part of something which by itself is not a scheme within the meaning of the statute. However, the importance of the correct identification of the scheme to the application of Part

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[15] (2004) 217 CLR 216.
[16] Ibid 237 [47].
[17] Ibid 238 (emphasis in original).

IVA should not be ignored. Part IVA only applies where a tax benefit has been obtained "in connection with the scheme".[18] That circumstance is only satisfied where it is the scheme which gives rise to, or produces, the tax benefit. Indeed, that is the role played by s 177C(1); namely, to ensure that Part IVA is limited in its application to those schemes which produce the tax benefits which the Commissioner purports to cancel. Section 177C(1) statutorily compels that there be a clear and discernable link between the tax benefit obtained and the scheme by which it is obtained. It may be that the link can be satisfied by reference to reasonable expectations but the need for the link is important both analytically and as a safeguard for taxpayers.

Tax Benefit

Section 177C may also be seen as an illumination in the sense used about illuminations in medieval manuscripts. It illuminates ss 177D and 177F (in particular). However the particular way in which s 177C is intended, and has been interpreted, to illuminate s 177D may have become problematic for the Commissioner and taxpayers alike. A new area of debate has emerged concerning the provisions dealing with tax benefit that create particular problems both for taxpayers and the Commissioner. The problem has emerged in relation to s 177C and it is not clear what impact the current jurisprudence may have to corresponding provisions in other tax Acts such as s 165-10(1) in the GST context.

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[18] *Income Tax Assessment Act 1936* (Cth) s 177D(a); *Macquarie Finance Ltd v Federal Commissioner of Taxation* (2004) 210 ALR 508, [76] (Hill J).

On one view s 177C does no more than require a precise and careful identification of the scheme said to produce the tax benefit. That view does not depend upon a strained reading of the section but can more readily be seen in the GST equivalent to Part IVA in s 165-10(1). It provides:

> (1) An entity gets a ***GST benefit*** from a *scheme if:
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> (a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme; or
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> (b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or
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> (c) all or part of an amount that is payable by the entity under this Act apart from this Division 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
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> (d) all or part of an amount that is payable to the entity under this Act apart from this Division 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.[19]

What the section does is to ensure that whatever is cancelled as the tax benefit is that which is directly produced by and from the scheme. The section operates as an analytical tool ensuring a clear logical link between tax benefit and scheme.

Section 165-10 deals with when an entity gets a GST benefit from a scheme. The heading does not describe the section as a definition. Both the heading, and the operative section, use the active verb "get". The heading poses a question; namely, when does an entity "get a GST benefit from a scheme?".

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[19] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 165-10(1).

The operative provision begins with identifying when "[a]n entity gets a GST benefit from a scheme". The use of the active verb is important in identifying what the section is directed to. It is directed, not to defining benefits which may come within the ambit of the provision, but rather, to identifying when it may be said that an entity has "got" one. This same form of thinking may readily enough be seen in s 177C by use of the word "obtaining" rather than "get". Lest there be any doubt, I am not suggesting in any way that the GST provision enacted after Part IVA is somehow intended to alter the meaning of Part IVA.[20]

What s 165-10(1) and s 177C were each designed to do was to ensure that the anti-avoidance provisions applied in a disciplined manner. The discipline was found by requiring a link between the tax benefit (to be cancelled) and the scheme (which produced it). The analytical link was, in the case of Part IVA, that the tax benefit was "obtained" in connection with the scheme, and in the case of GST, that the tax benefit was "got" from a scheme.

This reading of s 177C and s 165-10(1) does not require any delving into any alternative postulate as a precondition to the application of the respective anti-avoidance provisions. It is, with respect to those who hold a different view, unsurprising that such an enquiry was not called for by the section because the anti-avoidance provisions were supposed to operate on objective criteria and were not made to depend upon the fiscal awareness or subjective considerations of individual taxpayers. An anti-avoidance provision designed

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[20] *Beckwith v R* (1976) 135 CLR 569, 578-83 (Mason J); *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 256-8 (McHugh, Gummow, Hayne and Heydon JJ).

to apply objectively without reference to fiscal awareness or subjective considerations is inconsistent with an enquiry into what a taxpayer might otherwise have done if the particular tax benefit obtained was not obtained through what was done. It is a fortiori inconsistent with an enquiry into what might reasonably be expected by the taxpayer to have done if the taxpayer had not done the scheme actually undertaken through which the tax benefit was in fact obtained.

Recent litigation has adopted an interpretation of s 177C which is different from that which I have just described but has done so without expressly rejecting or considering that construction. The construction seems not to have been urged by the parties. The basis for the recent line of authority appears to be a sentence in the decision in *Federal Commissioner of Taxation v Hart*[21] in which Gummow and Hayne JJ considered s 177D and not s 177C. The relevant sentence is that emphasised in the following passage:

> In the present matters, the respondents would obtain a tax benefit if, in the terms of s 177C(1)(b), had the scheme not been entered into or carried out, the deductions "might reasonably be expected not to have been allowable". <u>When that 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.</u> To draw a conclusion about purpose from the eight matters identified in s 177D(b) will require consideration of what other possibilities existed. To say, as Hill J did, that "the manner in which the scheme

[21] (2004) 217 CLR 216.

> was formulated and thus entered into or carried out is certainly explicable only by the taxation consequences" assumes that there were other ways in which the borrowing of moneys for two purposes (one private and the other income producing) might have been effected. And it further assumes that those other ways of borrowing would have had less advantageous taxation consequences (my emphasis).[22]

It is important to read this passage carefully and, perhaps, to read it by reference to the actual submissions put by the Commissioner in that case. Even confining oneself only to the passage, however, it is clear that what their Honours were explaining was how s 177D applied not how s 177C applied. Their Honours were explaining that in determining whether to draw the conclusion required by s 177D it was necessary to consider what was done with how else it might have been done. The conclusion that a particular transaction was entered into for the dominant purpose of enabling the taxpayer to obtain the tax benefit necessarily requires some conception of something else by reference to which the conclusion is to be reached. Indeed (and on one view it is so obvious that it hardly needs to be stated), the conclusion in s 177D is required to be reached having regards only to the eight matters stipulated in s 177D(b) and not by reference to facts and circumstances not found within the eight factors in s 177D(b). Their Honours in the passage in *Hart* did not say that the conclusion required by s 177D required or permitted an enquiry into facts and circumstances other than those listed in the eight matters identified in s 177D(b). Rather, the passage

[22] Ibid [66].

explained that to draw a conclusion from those factors carried the implication that what was done could have been done differently. The conclusion about tax avoidance (if any) was to be found in considering what was done with how else the same thing could have been achieved. It is in that difference that the conclusion about tax avoidance is to be found.

Helpful though this dicta may be, it has given rise to other questions and other debates. One such debate is about how and where the "alternative postulate" is to be determined. In the passage quoted above, their Honours referred to a consideration of "what other possibilities existed". An inquiry into "what other possibilities existed" might seem to call for a factual inquiry based upon evidence.[23] Indeed, it might be thought that this factual inquiry (if a factual inquiry was what their Honours intended) was the same as that to be undertaken for the purposes of determining whether a tax benefit had been obtained under section 177C. On that view, presumably, the comparison for 177D purposes is between the scheme which produced the tax benefit and something which (somehow) would not. Section 177C contemplates a comparison between the tax effect of the scheme with what "would have" or "might reasonably be expected" to have occurred had the scheme not been entered into or carried out.

The issue has been made more complicated for the Commissioner and taxpayers in a series of cases involving *Federal Commissioner of Taxation v*

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23 *Epov v Commissioner of Taxation* [2007] FCA 34.

Lenzo,[24] *Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd,*[25] *RCI Pty Ltd v Federal Commissioner of Taxation,*[26] *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd*[27] and *Noza Holdings v Federal Commissioner of Taxation.*[28] The critical issue for present purposes in each of these cases is how the courts, encouraged by the parties, have interpreted s 177C. In each case the debate has been about whether the fiscal advantage in question was a fiscal advantage coming within s 177C. In each case the provision has been interpreted as requiring that the fiscal advantage obtained be measured as against what, in fact, would otherwise have happened or as against what, in fact, might reasonably otherwise have been expected to happen. In other words s 177C has been treated as a precondition to enliven the anti-avoidance provisions such that the anti-avoidance provisions will only be enlivened where, as a matter of fact and evidence, it is established that the fiscal advantage would otherwise have not been obtained in fact or might not otherwise reasonably be obtained in fact.

This reading of s 177C, and this potential reading of s 165-10(1), has had a necessarily dramatic shift in the way in which both the Commissioner and taxpayers analyse and argue about the application of the anti-avoidance provisions. It has brought about a search for alternative postulates reminiscent of the elusive Scarlet Pimpernel:

> We seek him here, we seek him there
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> Those Frenchies seek him everywhere

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[24] (2008) 167 FCR 255.
[25] (2010) 186 FCR 410.
[26] [2010] FCA 939.
[27] (2010) 189 FCR 204.
[28] [2011] ATC 20-241.

Is he in Heaven?

Is he in Hell? That dammed elusive Pimpernel![29]

Ironically this search for the counterfactual is potentially to the advantage of neither Commissioner nor taxpayer. If the alternative postulate, or the counterfactual, is to be found not in a consideration of what was done by reference to how the same thing could have been done, but rather by reference to what in fact might have been done or what in fact might reasonably expected to have been done, then both taxpayer and Commissioner are directed to undertake very complicated analysis by reference to facts and circumstances which did not occur.[30] It would, curiously, place in centre stage an artificially created hypothesis into something that never happened.[31]

The practical difficulty that such an enquiry occasions may be seen by the facts in *Noza Holdings Pty Ltd v Federal Commissioner of Taxation*[32] where Gordon J was called upon by the parties' submissions to analyse in detail whether the commercial objectives achieved by the actual means adopted by a taxpayer were able to be achieved by the counterfactuals relied upon by the

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29 GT Pagone, *Advising on Part IVA* (2007) Supreme Court of Victoria <http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/library/supreme+-+speech+-+where+are+we+with+part+iva+pagone+j+(pdf)> at 14 April 2011.

30 "Yesterday, upon the stair,
I met a man who wasn't there
He wasn't there again today
I wish, I wish he'd go away …"
Hughes Mearns, *Antigonish ("The Little Man Who Wasn't There").*

31 Some may recall the Monty Python sketch in which the words "nothing happened" assumed the power of mystery and drama when accompanied by strong dramatic music, mysterious looking figures and a prelude of suspense; see "The Day Nothing Happened" Monty Python at http://www.wepsite.de/The%20Day%20Nothing%20Happened.htm; "The Adventures of Ralph Mellinsh" in Monty Python *Free Record Given Away with the Monty Python Matching Tie and Handkerchief* (Audio LP Record or CD), 1975.

32 [2011] ATC 20-241.

Commissioner. Her Honour concluded in that case that they were not.[33] The conclusion was reached by reference, not to whether the transaction itself exhibited signs of tax avoidance but, rather, to whether what was put as an alternative transaction was commercially able to achieve the same commercial outcomes as the one actually adopted by the taxpayer. In *Federal Commissioner of Taxation v AXA Asia Pacific Holdings*[34] Edmonds and Gordon JJ remarked upon the risk of artificiality occasioned by such inquiries:

> The finding that it *might reasonably be expected* that the alternative postulate was a direct sale to MBF is a further example of the difficulties which now arise in litigation concerning Pt IVA where the focus is on the "scheme" and the "alternative postulate" identified by the parties. Of course, this is a direct result of the adversarial process. The problem is that it does run the risk of creating considerable artificiality often divorced from commercial reality.[35]

The taxpayer was successful in *AXA* and *Noza*, but advisers to taxpayers may not be able to take too much comfort by looking at the outcome. The outcome in both was achieved by complex, and to some extent (if not largely), artificial analysis about necessarily hypothetical circumstances which did not occur. More unsettling, perhaps, for taxpayers might be the role in future litigation which may be played by the legal burden of proof upon the taxpayer to disprove what might reasonably have been expected.

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33 [2011] ATC [20-241], 12,054.

34 (2010) 189 FCR 204.

35 (2010) 189 FCR 204, 243-4 [147].

Careful consideration must be given both by the Commissioner and by taxpayers about the consequence of the taxpayer having the burden of proof (including disproof) where one of the matters to be proved (or disproved) is that an alternative postulated might not "reasonably have been expected". What is necessarily contemplated as something which is only "reasonably to be expected" is that it neither happened nor that it would have happened. What may be considered as being a reasonable expectation must therefore exclude and be different from both what did happen and what did not happen but what would have happened. What may reasonably have been expected is a lower order hypothetical than what "would" have occurred in the context of something which did not happen in fact. The ability of the Commissioner to rely upon something which did not happen, would not have happened, but which nonetheless might reasonably be expected to happen is likely in the future to become a more significant Achilles heel for taxpayers because of the legal burden of proof which falls upon the taxpayer. Taxpayers may find decision makers relying more upon the taxpayer not having discharged the burden of proof or disproof rather than concluding affirmatively that something affirmatively comes within the anti-avoidance provisions. In that context the role played by intuitive decision making and the need to reconcile competing policy objectives which I mentioned at the start become particularly significant, critically important and frequently disturbingly unpredictable.

We are yet to see how all of these debates are likely to be played out specifically in the GST context. Section 165-10(1) uses different words to express the same idea as that found in s 177C. The different words might, on

one view, make it more difficult to apply in that context the current jurisprudence that has emerged around s 177C. However, the same concepts about an amount being, or which could reasonably be expected to be, different in the absence of a scheme, is also found in that provision and is equally capable of providing a platform for the same kind of analysis as has now emerged in relation to s 177C.

Advising

I have already dealt in part with the position of advisers to taxpayers. It is difficult for advisers to give confident advice predicting the application of Part IVA in most circumstances in which taxation considerations have an impact in the form or shape of a transaction. Advisers, however, can be confident that a subjective motivation of avoiding tax will not be sufficient to enliven the anti-avoidance provisions. A taxpayer who enters into a transaction to avoid tax will not by that circumstance alone come within the operation of the anti-avoidance provisions. Thus, for example, a distribution by a trustee of a discretionary trust to beneficiaries for the purpose of avoiding tax will not be caught by the anti-avoidance provisions provided that the resolution is legally and commercially effective upon its terms. That is because although the motivation may have been to avoid tax, the consequence of the resolution is an actual distribution of funds conferring economic benefit to the beneficiary.

A more debateable scenario might be where the taxpayer adopts a tax effective structure through which to undertake income earning activities. Income splitting between spouses is sometimes targeted as tax avoidance.

Many people in the community might think so also. I have always doubted that view but must concede that many do not share my doubt. In 2002 the then Commissioner of Taxation announced a series of tax cases designed to test the application of the anti-avoidance rules to, amongst other things, income splitting between spouses.[36]

The reason I doubt whether income splitting in its simple form can be regarded as tax avoidance is because of the commercial and economic consequences in typical cases where income splitting occurs and which are revealed upon a careful analysis. Assuming a husband and wife partnership, the splitting of income equally from the labour of the husband is legally, commercially and economically no different from the husband taking an arm's length silent partner or securing a guarantor for the business. The arm's length silent partner may play no active role in the derivation of partnership income beyond the legal liability flowing from the partnership relationship. Both spouses in the typical scenario are similarly exposed legally and commercially for the debts and liabilities incurred by the partner undertaking the income earning activities and services just as the arm's length "silent" partner. The spouse is in no different position from a genuine arm's length silent partner entitled to receive half the profits of a partnership in consideration for the assumption of the potential liability derived from business activity.

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[36] Michael Carmody, "Tensions in Tax Administration" (Speech delivered at the ICAA NAB Gala Luncheon, Melbourne, 14 March 2003) at <http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00122124.htm>.

In more complex transactions tax advisers feel some need to document counterfactuals and alternative postulates when undertaking a transaction which they fear might be impugned by the Commissioner under the tax avoidance provisions. I rather doubt the wisdom of doing so. It is conceivable that there may be some benefit in documenting that an alternative would not have been done if that be the fact, however, I doubt the wisdom of undertaking any analysis into hypotheticals not actively considered. Documentation of what could or might have been done, but which was not done, is artificial. It also assumes a confident prediction of what in the future will be considered to have been relevant in hindsight. It is likely that what is documented may cause more problems at a factual level for the taxpayer. It may engage unforeseen lines of enquiry and cross examination and may expose key people to unwanted criticism about their truthfulness and plausibility.

On the other hand the tax adviser may need to be vigilant to ensure that advice is given not only about the narrow application of the anti-avoidance provisions but about risks which a taxpayer may face beyond the narrow question of whether the anti-avoidance rules may apply. The occasion to advise upon the potential application of the anti-avoidance provisions may arise in the context of ordinary commercial or family dealings. Many apparently simple transactions may have tax consequences that the non-tax expert cannot avoid advising upon, no matter how great the aura of tax law as a specialised area "outside the competence of most lawyers".[37] The adviser

[37] GE Dal Pont *Lawyers' Professional Responsibility* (3rd ed, 2006) 124; see also

will sometimes be obliged to advise about the tax advantages available to a client. At other times the adviser may in doing so be at risk of professional misconduct, penal prosecution or administrative sanction.[38] Neither disavowal of expertise nor disclaimers will necessarily protect an adviser from risk.[39]

Registered tax agents may be liable under tax legislation for any negligence causing a taxpayer to be liable to pay a fine, penalty or general interest charge.[40] That is in addition to the duties otherwise imposed by the common law and by statute.[41] An issue in *Walker v Hungerfords*[42] was whether the liability of a taxpayer's accountants was reduced by the conduct of the taxpayer's clerk who had supplied erroneous calculations. The Court rejected the contention that the actions of the taxpayer's clerk reduced the liability of the accountant with King CJ saying:

> The information supplied by [the taxpayer's clerk] was supplied to the respondents who had undertaken responsibility for the

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references at footnote 16.

38 Michael McHugh, "Jeopardy of Lawyers and Accountants in Acting on Commercial Transactions" (1989) 5 *Australian Bar Review* 1; Allan Myers, "Tax Advice and Ethical Responsibility" (1990) 19 *Australian Tax Review* 80; D Graham Hill, "The Ethics of Tax Practice" in GS Cooper and RJ Vann (eds), *Decision Making in the Australian Tax System* (1985); RV Gyles, "Criminal Liability of Professional Advisors" (1989) 23 (7) *Taxation in Australia* 480; Ron Merkel, "The Lawyer as Client: Role of the Lawyer as a Professional Adviser" (1987) *Australian Business Lawyer* 11; Vincent Morfuni, "The Civil Liability of Tax Advisors" (2005) 34 *Australian Tax Review* 131; GS Cooper AM, "Promoter Penalties" (2006) 4(2) *eJournal of Tax Research* 117; Jenny Davies "Promoter Penalty Provisions – An Overview of the Provisions including an Analysis of the Key Areas of Risks and Responsibilities" (Conference Paper presented at the Taxation Institute of Australia, 22 May 2007).

39 Kathie Cooper and James Jackson, "The Impact of Section 74 of the *Trade Practices Act 1974* (Cth) on the Use of Disclaimers by Accountants and Other Professionals" (1991) 19 *Australian Business Law Review* 167.

40 *Tax Agent Services (Transitional and Consequential Amendments) Act 2009* (Cth) sch 2, pt 6, s 20; *Income Tax Assessment Act 1936* (Cth) s 251M.

41 *Stirling v Poulgrain* [1980] 2 NZLR 402; *Sacca v Adam and R Stuart Nominees Pty Ltd* (1983) 33 SASR 429; *Markham v Lunt* (1983) 15 ATR 136; *Walker v Hungerfords* (1987) 49 SASR 93; *EVBJ Pty Ltd v Greenwood* (1988) 20 ATR 134.

42 (1987) 49 SASR 93.

> preparation of correct tax returns. The very purpose of engaging tax advisers and accountants is to ensure that the returns are prepared upon a correct basis. Any calculation submitted by the taxpayer to his tax expert is necessarily submitted upon the basis that its conformity with tax law and correct tax and accounting practice will be verified by the expert. The taxpayer and his staff, in the absence of agreement to the contrary, do not, by furnishing such information, assume responsibility for its conformity to tax law and practice. If a taxpayer were to be considered to be lacking in reasonable care for his own interests for that reason, much of the advantage of engaging experts would be lost. The taxpayer, as it seems to me, cannot be expected to exercise skill or knowledge in relation to such matters. He is entitled to rely upon the tax expert whom he has engaged to check any calculations submitted by him to ensure their conformity to tax law and practice and in that way to ensure that the tax returns are correct. In my opinion the cross appeal fails.[43]

In *Hurlingham Estates Ltd v Wilde & Partners*[44] a solicitor was found to be negligent for failing to advise about the form in which a transaction might have been entered into to secure a favourable tax result, even though it was discovered during the course of the hearing that the particular conveyancing and commercial partner acting for the taxpayer had little knowledge of tax law and was found to be unqualified to give tax advice or to recognise the adverse tax consequences of the commercial transaction. The standard applied to the adviser in that case was the awareness expected by "any reasonably

[43] Ibid 96 (Jacobs and Millhouse JJ agreeing).
[44] (1996) 37 ATR 261.

competent solicitor practising in the field of conveyancing and commercial law".[45]

The scope of the adviser's duty will vary with the circumstances. An important, though not always conclusive, factor will be the terms of the retainer under which any advice is given,[46] and those terms may also include any reasonable or necessary term which is to be implied into the retainer. The adviser's duty will also be governed by obligations in tort, with the scope of the duties under contract and tort often overlapping. In *Tip Top Dry Cleaners Pty Ltd v Mackintosh*[47] Debelle J expressed the duty on the advising lawyer in terms of a duty "to give advice which Tip Top appeared to need regardless of whether or not it had been specifically requested".[48] In that case the relevant adviser had held himself out as an experienced adviser in revenue law and had been expressly retained to advise on whether the taxpayer could engage in a transaction. In those circumstances the adviser was found to have had a duty to advise on all relevant issues arising under tax law and the general law, and to give the taxpayer comprehensive advice which touched upon all relevant matters.[49]

In *Hawkins v Clayton*[50] Deane J emphasised the significance to the relationship between lawyer and client in the assumption by the lawyer of the

45 Ibid 267 (Lightman J).
46 *Walker v Hungerfords* (1987) 49 SASR 93, 96 (King CJ).
47 [1998] ATC 4346.
48 Ibid 4366 (Debelle J), citing *Carradine Properties Ltd v DJ Freeman & Co* (1982) 126 Sol J 157.
49 [1998] ATC 4346, 4366 (Debelle J).
50 (1988) 164 CLR 539.

responsibility for the performance of professional work and in the reliance of the client on the lawyer. His Honour said:

> The client relies upon the solicitor to apply his expert knowledge and skill in the performance of that work. In the ordinary case, the only kind of damage which is likely to result from the negligence of the solicitor in the performance of his professional work is pure economic loss. In that context, the elements of assumption of responsibility and of reliance combine with that of the foreseeability of a real risk of economic loss to give the ordinary relationship between a solicitor and his client the character of one of proximity with respect to foreseeable economic loss. …

The content of the duty of care in a particular case is governed by the relationship of proximity from which it springs. It may, in some special categories of case, extend to require the taking of positive steps to avoid physical damage or economic loss being sustained by the person or persons to whom the duty is owed.[51]

Much of this will apply equally to other professional relationships in which the client is reliant on the expertise and knowledge of the adviser.[52] The discharge of the duty will vary from case to case, and the sophistication of the client may be a factor relevant to its discharge,[53] but the nature of the relationship of client and adviser will often be such that the client may not

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51 Ibid 578-579 (Deane J) ; see also *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 608-609 (Gleeson CJ, Hayne and Heydon JJ).

52 Cf GE Dal Pont, *Lawyers Professional Responsibility* (3rd ed, 2006) 100 and *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782, [12].

53 *Hurlingham Estates Ltd v Wilde & Partners* (1996) 37 ATR 261, 267 (Lightman J), citing *Virgin Management Ltd v De Morgan Group* [1996] EGCS 16; *Leda Pty Ltd v Weerden* [2007] ATC 4708.

know the extent of the advice needed and the lawyer may need to consider what advice the client needs whether or not it had specifically been sought. The client in many instances will be vulnerable to the adviser's skill and knowledge, not only for the specific advice or service sought, but also to be told what else needs to be advised upon or to be provided.

An adviser's duty may not be discharged by advising on how the relevant taxing provisions apply or whether the anti-avoidance rules are applicable. In the context of their potential application, the adviser's duty may extend to some testing of the facts on which the application of the anti-avoidance provisions may depend or, and at times at least, some warnings about the dangers facing the client in proceeding on a course of conduct. The adviser's duty is also to communicate the advice in a form that the client can understand.[54] These duties may require the adviser to warn about any material risk inherent in a transaction[55] perhaps by reference to an evaluation by the adviser of the risks to which a client may attach significance.[56] In that regard, an adviser may find it useful to ask whether the client would attach significance to a particular risk if warned about it. In relation to tax advice, and to the application of the anti-avoidance provisions in particular, that may require advice about questions of law and interpretation, questions of fact and evidence, questions of reputation, questions about possible audit or other action which the Commissioner may take, and any other question which may fairly fall within the adviser's expertise and of potential significance to the client.

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[54] *EVBJ Pty Ltd v Greenwood* (1988) 20 ATR 134.

[55] See *Rogers v Whitaker* (1992) 175 CLR 479.

[56] Ibid 490; see also *F v R* (1983) 33 SASR 189, 192-193 (King CJ).

Newton

Sir Isaac Newton was, amongst many other things, a famous mathematician and physicist. He is also known for his work in optics through which we have come to learn much about light and colour. There is no suggestion that he was related in any way to the taxpayer in the Privy Council decision of the same name through which the Privy Council sought to shed light and colour upon the topic of tax avoidance. The Privy Council had made an attempt in *Newton v Federal Commissioner of Taxation*[57] to enunciate a test to determine when a transaction would fall within the ambit of an anti avoidance provision. The test required an objective observer to look at the transactions and to be able to predicate that they were implemented in that particular way so as to avoid tax. The test was put in these 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 so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealings, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares *cum* dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Div. 7 tax … Nor could anyone, on seeing a declaration of trust made by a

57 (1958) 98 CLR 1.

father in favour of his wife and daughter, predicate that it was done to avoid tax …[58]

The dicta served for many years as the basis upon which impermissible tax avoidance was to be recognised and the anti avoidance provisions to be applied. The Australian legislature appears clearly enough to have intended the enactment of Part IVA to have given legislative effect to the predication test which had been enunciated in *Newton v Commissioner of Taxation*.[59]
The predication test in *Newton* required a consideration of the particular contract, agreement or arrangement which had been identified as an avoidance transaction to determine whether its objectively ascertainable purpose was to avoid tax. The enquiry called for was not into the actual motive or purpose (whether subjective or objective) of the participants to the transaction. It could be assumed that tax avoidance was a motive which any taxpayer may have had without the anti avoidance provisions applying. What the provision was thought to strike at, therefore, was not an intention to avoid tax but, rather, at transactions about which nothing could be said of them except that tax avoidance was their purpose. In that distinction there might be the only sound and principled criterion by which anti avoidance provisions may sensibly, reliably and defensibly apply.

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58 (1958) 98 CLR 1, 8-9 (Lord Denning on behalf of the court).

59 GT Pagone, *Tax Avoidance in Australia* (2010) 27-8; Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 9553; Second Reading Speech, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 2684; See also *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 408; Michael D'Ascenzo, 'Part IVA and the Common Sense of a Reasonable Person' (Paper presented at the Queensland Taxation Institute Convention, 17 May 2002) <www.ato.gov.au/corporate/content.asp?doc=/content/22809.htm>.

Amongst the many sound reasons why the anti avoidance provisions should not apply upon proof of a person's actual decision to avoid tax is that sound tax policy should not make the anti avoidance rules depend upon, and to vary as between, identical transactions. A wholly artificial tax avoidance scheme should be struck down whether or not a taxpayer can be shown to have a tax avoidance purpose.[60] The converse is also sound tax policy: tax avoidance rules should not apply where a person takes advantage of a provision in the tax law designed to provide a tax benefit. A focus upon purely artificial steps and transactions should reliably enable taxpayers, revenue officials, and the courts to determine when to apply and when not to apply the anti avoidance rule.

The essence of the predication test was an enquiry into whether something was done which had no function or explanation other than taxation. The predication test as enunciated in *Newton* would not apply to conduct motivated by taxation (however entirely motivated by tax considerations that might be) where one looked at the transaction and found that the overt acts did more than the tax consequence produced. That kind of analysis explains the examples found in the passage in *Newton*. No one could sensibly say that the private company which had been turned into a non private company in *WP Keighery Pty Ltd v Federal Commissioner of Taxation*[61] was motivated by anything other than taxation. The beneficial tax consequences may be

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60 *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235, 264 [95] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); see also *Federal Commissioner of Taxation v Sleight* (2004) 136 FCR 211; *Vincent v Federal Commissioner of Taxation* (2002) 124 FCR 350.

61 (1957) 100 CLR 66.

why the reconstruction occurred, but the reconstruction did occur in fact and that brought with it other commercial and legal consequences apart from tax. That situation was given as an example in *Newton* of one where the anti avoidance provision would not operate for the reason that, whatever the motivation may have been, the conversion of a company from a private company to a non private company did effect more than tax.

Seen in this way an anti avoidance provision provides a most valuable adjunct to a taxing statute by ensuring that taxpayers do not embellish their transactions with curlicues that have no purpose beyond taxation. Such an approach to the interpretation of the anti avoidance rules also has the highly desirable consequence of confining its operation within predictable bounds. There might still be room for debate in particular cases about how the test is to be applied, but it would confine the debate to a principled one about analysing those elements of a transaction which produced the tax consequence to determine whether those elements had some function other than tax. The anti avoidance provisions could predictably apply where the non tax function was non-existent, immaterial or so overwhelmed by the tax purpose that the commerciality of the element is overshadowed.[62]

The same considerations that arose in *Newton* under the s 260 jurisprudence also arise in application of s 177D in Part IVA and in s 165-10. Whatever else these provisions do, their application depends upon a conclusion about the dominant purpose of a taxpayer entering into the transaction in the particular

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[62] *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 408.

way that it was entered into. The conclusion required is not about the actual purpose of anyone. The provisions could have been made to turn upon a finding that one or more persons connected with a scheme was actuated by a purpose of a taxpayer obtaining a tax benefit. Alternatively, the provisions could have included the actual purpose of such a person amongst the list of factors required to be considered. The provisions plainly do neither. Indeed, they expressly contemplate their application to a taxpayer where some person other than the taxpayer (namely one of the many who may have entered into or carried out the scheme) may be concluded to have the relevant purpose without any requirement to link that person's presumed purpose to an actual, or even imputed, state of knowledge of the taxpayer obtaining the benefit.

A reason for making s 177D (and presumably s 165-10) turn upon "the objective matters listed" in the section "was to avoid the consequence" of Part IVA depending on "the fiscal awareness of a taxpayer".[63] In *Federal Commissioner of Taxation v Hart*[64] the court made clear that an actual purpose of entering into or carrying out a transaction to secure a tax benefit would not trigger the operation of Part IVA.[65] Gummow and Hayne JJ said in a joint judgment:

> In these matters, it is, of course, true that the money was borrowed to finance and refinance the two properties. 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)

63 *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235, 264 [95] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

64 (2004) 217 CLR 216.

65 Ibid 222 [3], 227 [15] (Gleeson CJ and McHugh JJ), 243 [65] (Gummow and Hayne JJ).

> 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 enquiry into the subjective motives of the relevant taxpayers or others who entered into or carried out the scheme or any part of it.[66]

The conclusion called for by the required enquiry is not whether someone actually entered into or carried out the scheme to enable the taxpayer to obtain the tax benefit, but rather whether a conclusion of that kind would be reached having regard to the particular, specific but limited, matters required to be considered.

Gummow and Hayne JJ in their joint judgment expressed the general enquiry directed by Part IVA as requiring a comparison between the scheme in question and an alternative postulate.[67] To draw a conclusion about purpose from the eight matters will "require consideration of what other possibilities existed".[68] In particular it will require an enquiry into what was done to determine whether to conclude that the way it was done is to be attributed to the tax benefit secured by that means. An enquiry into whether obtaining a tax benefit for a taxpayer was the dominant purpose of someone participating in a scheme requires an evaluation of the significance of the tax benefit produced by the scheme to the scheme being entered into or carried out. Whether the tax benefit is the explanation to be imputed to the participants to

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66 Ibid 243 [65].
67 Ibid 243 [66].
68 Ibid 243 [66].

the scheme will depend on a precise identification of the scheme, of the tax benefit and of the connection between the scheme and the taxpayer obtaining the tax benefit.

In *Federal Commissioner of Taxation v Spotless Services Ltd*[69] the High Court considered that the requisite purpose was found in the particular means adopted by the taxpayer to obtain its commercial return.[70] In *Hart* Gummow and Hayne JJ found in the terms of the actual loans entered into matters that "were explicable *only* by the taxation consequences for" the taxpayer.[71] Their Honours did not undertake a factual enquiry about what alternative deal or arrangements might have been done, but about how else the commercial objective which was secured through the scheme would or might reasonably be expected to be achieved without the scheme. Their focus was on whether there was some element of the transaction which could only be explained by the tax benefits it secured. Seen in that way the test in s 177D matches the predication test enunciated by the Privy Council in *Newton* and accords with the mischief, as explained in the Explanatory Memorandum when Part IVA was enacted, of applying to tax avoidance arrangements capable of being described as "blatant, artificial or contrived" and not to transactions of a kind "of a normal business or family kind, *including those of a tax planning nature*" (emphasis added).[72] The test so understood accords with the argument put

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69 (1996) 186 CLR 404.

70 Ibid 423 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

71 *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216, 244 [68], emphasis as per quote.

72 Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 9553; see also PJ Lanigan, 'Interpretational Problems with Part IVA' (Material presented in Melbourne, 15 September 1981) Taxation Institute of Australia Library archive box 638, 13-14, esp at 13 quoting from statement by Second Commissioner

for the Commissioner in *Federal Commissioner of Taxation v Spotless Services Ltd*[73] that, for the conclusion required by s 177D, the enquiry "must necessarily be whether the scheme is so attended with elements of artificiality or contrivance primarily directed to the obtaining of the tax benefit that any commerciality of the scheme is overshadowed".[74] It accords with the personal view expressed by the Commissioner of Taxation that the factors chosen for consideration by s 177D were the more exact and positive test to achieve the same purpose as limiting the Part to schemes that are blatant, artificial and contrived.[75] It accords also with acceptance of the proposition that it is only to be expected that the adoption of one particular form over another may permissibly be influenced by revenue considerations.[76]

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in NE Challoner and RJ Richardson, *Tax Avoidance, Implications of 1981 General Provisions (Part IVA)* (CCH Australia Ltd, 1981).

73 (1996) 186 CLR 404.

74 Ibid 408.

75 Michael D'Ascenzo, 'Part IVA and the Common Sense of a Reasonable Person' (Paper presented at the Queensland Taxation Institute Convention, 17 May 2002) <www.ato.gov.au/corporate/content.asp?doc=/content/22809.htm>.

76 *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ); it is consistent with the view expressed by Edmonds J (Sundberg and Stone JJ agreeing) in *Federal Commissioner of Taxation v BHP Billiton Finance Ltd* (2010) 182 FCR 526, [70].