

Aspects of Tax Avoidance: Trans-Tasman observations

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It may be worth remarking that tax avoidance has not always been thought to be a bad thing. It may not be fashionable to suggest that these days but dealing effectively with tax avoidance may require that we refrain from demonising something which many may believe not to be an evil, if not a positive duty. It may also be desirable to be unfashionable because it is genuinely difficult to know what is impermissible tax avoidance as distinct from the permissible taking into account of tax considerations, and also because people of good will with good intentions (including judges) do not all agree, or make mistakes in applying the anti avoidance provisions.

There was a time when courts interpreted tax laws rather more literally than appears to be the case today. The reason for such an approach was not that courts condoned tax avoidance, but because of the view that the legislature's purpose was to tax only what it had unambiguously stated to be taxable.¹ A purposive approach to the interpretation of tax legislation assumed that

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¹ *Scott v Cawsey* (1907) 5 CLR 132, 154-5 (Isaacs J); *Western Australian Trustee Executor and Agency Co Ltd v Commissioner of State Taxation (WA)* (1980) 147 CLR 119, 126 (Gibbs J); *Commissioner of Stamp Duties (NSW) v Simpson* (1917) 24 CLR 209, 215-6 (Barton J); *Tennant v Smith* [1892] AC 150, 154 (Lord Halsbury LC); *Lumsden v Inland Revenue Commissioners* [1914] AC 876, 896 (Viscount Haldene LC).

parliament sought only to tax literally according to the terms of the text in the backdrop of a fundamental view that the imposition of taxation was required the clearest of parliamentary approval. The view that taxation was a special field of legislation requiring specific and clear legislative approval has roots dating back at least to the Bill of Rights² and the events of the Glorious Revolution of 1688-9, if not to the Magna Carta. The need for legislative certainty in the imposition of taxation was part of the constitutional framework within which the executive was kept in check and the sovereignty of parliament was asserted and maintained. The courts traditionally did not venture beyond the application of the literal terms of a taxing statute because taxation in clear terms was the task for the sovereign legislature and was not to be extracted by the executive without the clearest of parliamentary authority. The court's role in the application of taxation laws was to ensure that the executive acted according to law and it was not for the courts to embark upon legislation in that field.

These broad considerations continue to play a part in informing the drafting, interpretation and application of laws to prevent tax avoidance. They continue to play a role in the application of the provisions by revenue authorities, the courts and, more fundamentally, by taxpayers. Taxpayers are called upon each day to make decisions with tax consequences. The decisions they make will be informed by a reasonable desire to pay no more tax than necessary. It is in that context that taxpayers need to form views about what conduct with tax consequences is legally permissible. A factor informing that

² WA Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976) 387.

view will be what the law has identified as impermissible, and therefore ineffective and costly, tax avoidance.

The purpose of anti avoidance provisions

The need today for anti avoidance provisions is something we in Australia and New Zealand assume without much question. Conceptually it may be objected that there is no room for general anti avoidance rules where the operative tax laws are interpreted and applied consistently with the purpose and intention of parliament. Indeed, in such an environment it may be objected that anti avoidance provisions are inherently (and unfairly) designed to extend the primary taxing provisions to situations they were not intended to reach but which (somehow) the legislature should be presumed to have intended. It is a legislative feature of the anti avoidance provisions both in Australia and in New Zealand that tax is imposed through the anti avoidance provisions where tax would not otherwise be payable. The anti avoidance provisions themselves impose tax and not merely operate to make the other provisions operate. The anti avoidance provisions of Part IVA in Australia only apply where the tax benefits the Commissioner cancels are otherwise lawfully available to the taxpayer.³ The same effect was achieved by its predecessor provision in s 260, and is achieved in double measure through ss BG and GA of the New Zealand *Income Tax Act 2007*. In each case, tax is imposed through,⁴ or by application of,⁵ the anti avoidance provisions where tax is not otherwise imposed. The fundamental criteria chosen for this

³ *Income Tax Assessment Act 1936* (Cth) (“the 1936 Act”) s 177F.

⁴ *Income Tax Assessment Act 1936* (Cth) s 177F; *Income Tax Act 2007* (NZ) ss BG 1(2) and GA 1(2).

⁵ *Income Tax Act 2007* (NZ) s BG 1(1).

imposition is the successful purpose of avoidance. It must seem very curious to most normal people that tax would be imposed when it is lawfully not payable according to the provisions said to have been avoided, and that the very criteria of imposition could somehow be the success of its avoidance.

The fact that an anti avoidance provision is the operative source for the imposition of tax gives rise to many issues including a concern that the basis of taxation is unclear, ill defined and potentially arbitrary and irrational. legislatures and courts have struggled to find secure foundations for the imposition of taxation where it has otherwise successfully been avoided legally. One approach has relied upon conventional principles of statutory interpretation. Here the approach is that the primary taxing provisions are interpreted to cover the events which would otherwise have successfully avoided the operation of the provisions. By this approach the work of taxation is done by the primary taxing provisions and not by the anti avoidance rule. Indeed, by this approach the anti avoidance rule is no more than a principle of statutory interpretation. This is said to justify what is now described as the *Ramsay* principle of interpretation in the United Kingdom and lies at the heart of the US economic substance tests.

The principle first articulated in *WT Ramsay Ltd v Inland Revenue Commissioners*⁶ was said by Lord Wilberforce to be within the function of the courts to apply strictly and correctly the legislation enacted by parliament. In that context, his Lordship said of the approach to construction adopted:

⁶ [1982] AC 300.

That does not introduce a new principle: it would be to apply to new and sophisticated legal devices the undoubted power and duty of the courts to determine their nature in law and to relate them to existing legislation. While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result either in loss of tax, to the prejudice of other taxpayers, or to Parliamentary congestion or (most likely) to both. To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process.⁷

The question in *Ramsay* was whether there had been a disposal of an asset giving rise to a loss under a taxing statute. The issue of construction was whether the particular transaction came within the intended terms of the statute where the disposal was effected by a series of steps, each of which the parties necessarily intended to be effective according to their terms, but the partial legal and economic effect of which had been intentionally negated by other transactions.

The principle adopted in that case was subsequently formulated by Lord Brightman in *Furniss (Inspector of Taxes) v Dawson*⁸ in these terms:

First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction

⁷ Ibid 326.

⁸ [1984] AC 474, citing the formulation per Lord Diplock in *Inland Revenue Commissioners v Burmah Oil Co Ltd* [1982] STC 30, 33.

may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax not “no business effect”. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.⁹

The importance, limitations and difficulties of the statutory construction at play as the foundation and extent of the principle enunciated has been commented upon in subsequent cases¹⁰ and by commentators.¹¹

A series of cases in the UK was said to have given rise to the view that the principle enunciated in *Ramsay* created new jurisprudence applicable to taxing statutes to the effect that transactions or elements in transactions

⁹ [1984] AC 474, 527.

¹⁰ See especially *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999-1000 (Lord Steyn), 1005 (Lord Cooke of Thorndon); *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311, 323 (Lord Hoffmann). See also: *Craven (Inspector of Taxes) v White* [1988] AC 398; *Baylis v Gregory* [1986] 1 WLR 624; *Inland Revenue Commissioners v Bowater Property Developments Ltd* [1985] STC 783; *Countess Fitzwilliam v Inland Revenue Commissioners* [1993] STC 502; *Whittles v Unitholdings Ltd (No 3)* [1996] STC 914.

¹¹ See Lord Robert Walker, ‘*Ramsay* 25 Years On: Some Reflections on Tax Avoidance’ (2004) 120 *Law Quarterly Review* 412; Professor J Freedman, ‘Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament’ (2007) 123 *Law Quarterly Review* 53; J Tiley, *Revenue Law* (Hart Publishing, 5th ed) ch 3; Natalie Lee (ed), *Revenue Law – Principles and Practice* (Tottel, 2008) ch 2; KM Gordon and XM Manzano (eds), *Tiley and Collison: UK Tax Guide 2008-9* (LexisNexis, 2008) ch 3.

which had no commercial purpose were to be disregarded.¹² In *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)*¹³ it was said that this conclusion from the cases was going too far¹⁴ and that it was necessary first to decide on a purposive construction what transaction will assume the statutory description and next to decide whether the transaction in question does so.¹⁵ Lord Nicholls explained that the approach taken in the earlier decisions depended on statutory interpretation, saying:

The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: “The paramount question always is

¹² *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 AC 684, 696 (Lord Nicholls of Birkenhead).

¹³ [2005] 1 AC 684.

¹⁴ *Ibid* 696 (Lord Nicholls of Birkenhead).

¹⁵ *Ibid* 696-7.

one of interpretation of the particular statutory provision and its application to the facts of the case.¹⁶

Some may see in this passage something of the parliamentary contemplation approach adopted by the New Zealand Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*¹⁷ with the difference, of course, that under the *Ramsay* principle the taxing provision is never an anti avoidance rule. In *Barclays* it was held that the taxpayer was entitled to the capital expenditure allowance under s 24(1) of the *Capital Allowances Act 1990* (UK) notwithstanding that some transactions may have had no commercial purpose apart from the tax benefit secured. In that case a company (BGE) had built a pipeline and incurred expenditure which it did not expect to absorb for some time. Transactions were entered into including a sale and leaseback which enabled another company to enjoy the capital expenditure allowance and to pass on a benefit to BGE.¹⁸

A similar approach may be found in the economic and business substance test as articulated in the United States. The concern expressed by the courts was to avoid an interpretation of the taxing statute that might otherwise permit an abuse of its provisions. In the United States decision of *Helvering v Gregory*¹⁹ Learned Hand J refused to apply a literal reading of a statute which he considered to be contrary to the statutory intention. His Honour said:

We agree with the Board and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its

¹⁶ Ibid 695-696; see also *Astall v HM Revenue and Customs* [2009] EWCA Civ 1010. (2009) 24 NZTC 23188, 23210.

¹⁷ Cf: *Bellinz v Federal Commissioner of Taxation* (1998) 84 FCR 154.

¹⁸ 69 F 2d 809 (2nd Cir, 1934), aff'd 293 US 465 (1935).

immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes ... Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition ... [T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.²⁰

Learned Hand J's decision was affirmed on appeal by the US Supreme Court, saying:

The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. *United States v Isham*, 17 Wall 496, 506; *Superior Oil Co v Mississippi*, 280 US 390, 395-6; *Jones v Helvering*, 63 App DC 204; 71 F 2d 214, 217. But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below in justification of a negative answer leaves little to be said ... Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by

²⁰ Ibid 810-11; see also Marvin A Chirelstein, 'Learned Hand's Contribution to the Law of Tax Avoidance' (1968) 77 *Yale Law Journal* 440.

what actually occurred, what do we find? Simply an operation having no business or corporate purpose – a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner ... *The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.*²¹ (emphasis added)

Gregory v Helvering rejected the taxpayer's claim on the basis that the literal linguistic compliance with the statute secured by the taxpayer was not within the intent of the statute as judged by reference to the economic substance of the transaction.²² In *Coltec Industries Inc v United States*²³ the court said of the economic substance doctrine that the law does not permit a "taxpayer to reap tax benefits from a transaction that lacks economic reality".²⁴ In *Bazley v Commissioner of Internal Revenue*²⁵ the US Supreme Court upheld a decision to deny the tax consequences to a reorganisation which did not accord with the purpose of the provision.

²¹ *Gregory v Helvering, Commissioner of Internal Revenue*, 293 US 465, 469-70 (1935); see also Joseph Bankman, 'The Economic Substance Doctrine' (2000) 74 *Southern California Law Review* 5.

²² See also *Commissioner of Internal Revenue v Court Holding Co*, 324 US 331 (1945).
²³ 454 F 3d 1340 (Fed Cir, 2006).

²⁴ *Ibid* 1355.

²⁵ 331 US 737 (1947).

Countering tax avoidance through statutory interpretation of the operative provisions is not without its critics and difficulties. The dissenting judge in *ACM Partnership v Commissioner of Internal Revenue*²⁶ criticised the approach as in essence “something akin to a ‘smell test’.”²⁷ The application of the principles themselves carry some element of uncertainty because of the need to evaluate the facts and to form a judgment about them. A purposive, or non-literal, construction to taxing statutes is also difficult to apply as the statute increases in specificity. In the same passage in *Helvering v Gregory* Learned Hand J observed that “[a]s the articulation of a statute increases, the room for interpretation must contract”.²⁸

There may be other criticisms and difficulties that could be added to an approach of leaving the battle against tax avoidance only to a purposive interpretation of the taxing provisions. One would be that the revenue authorities would lack the ability to “reconstruct” transactions to determine liability. In other words that purposive statutory interpretation would only be effective if the taxing provisions as interpreted managed to impose liability or deny fiscal advantages. It had been a criticism of provisions like Australia’s s 260 and New Zealand’s s 108 that they failed to impose tax in some cases where the provisions otherwise applied.²⁹ Another criticism of the approach, seldom stated, may be that it would remove some of the uncertainty in the application of tax laws. Uncertainty as a desirable objective may seem unpalatable to those of us who have been taught to believe that fundamental

²⁶ 157 F 3d 231 (3d Cir 1998).

²⁷ Ibid 265; cf David P Hariton, “Sorting Out the Tangle of Economic Substance” (1999) 52 *Tax Lawyer* 235.

²⁸ 69 F 2d 809, 810 (2nd Cir 1934), aff’d 293 US 465 (1935).

²⁹ *Mangin v Inland Revenue Commissioner* [1971] AC 739.

to the rule of law is that the law “should be clear, easily accessible, comprehensive, prospective rather than retrospective, and relatively stable”.³⁰

The reality, however, is that uncertainty plays a key part of social decision making,³¹ and its adoption through taxation by discretionary powers is in part a means of combating tax avoidance.³² In favour of the approach, however, would be the discipline (structural and intellectual) of requiring the basis of taxation to be found in the general provisions intended to create the impost.

Tax avoidance as the subject matter of taxation

Legislative attempts to enact a sufficiently reliable and predictable rule to combat tax avoidance have not had an entirely satisfactory outcome. The early provisions seem to be found in legislation dealing with land transactions and their adoption in other taxing statutes may have occurred without rigorous analysis about translatability, adaptability or appropriateness. They appear to have been adopted almost as if one anti avoidance provision will work well in any context. Tax avoidance provisions typically depend upon a conclusion that something is explained or actuated by a dominant purpose of avoidance. Where to look for such a purpose may vary markedly as between different

³⁰ Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006) 6 citing Joseph Raz, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review* 195, 198-202; A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885; 10th ed, 1959); Butterworths, *Halsbury’s Laws of Australia*, vol 4 (at 18 August 2009) 80 Civil and Political Rights, ‘1 Introduction’ [80-25].

³¹ Philip D Straffin, ‘The Prisoner’s Dilemma’ in Eric Rasmusen (ed), *Readings in Games and Information* (2001); John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behaviour* (2004).

³² PJ Lanigan, ‘Technical Problems Relating to the Objectives and Consequences of Taxation’, in Taxation Institute of Australia (ed), *Taxation Now and in the Future: Papers and Commentaries Presented at the First National Convention of the Taxation Institute of Australia* (1969) 27, 29, 32-3, 38; Ross Parsons, ‘Commentary’ in Taxation Institute of Australia (ed), *Taxation Now and in the Future: Papers and Commentaries Presented at the First National Convention of the Taxation Institute of Australia* (1969) 45, 47.

taxing regimes. A taxing regime based upon sale and purchase may require different analysis to one based upon an annual accounting of income and expenses. The dominant purpose of tax effective sale may be the sale, no matter how tax effective the sale may have been structured.

New Zealand has enjoyed a general anti avoidance provision as part of its tax legislation since 1878.³³ The predecessor of Part IVA in Australia was s 260 of the 1936 Act, which had antecedents dating at least to 1915 and probably 1895.³⁴ Section 260 was much shorter than Part IVA. It, similarly to the provision in New Zealand, provided that every contract, agreement or arrangement was absolutely void as against the Commissioner³⁵ in so far as it had or purported to have the purpose or effect of:

- (a) altering the incidents of any income tax;
- (b) relieving any person from liability to pay income tax or making any return;
- (c) defeating, evading or avoiding any duty or liability imposed on any person by the Act; or
- (d) preventing the operation of the Act in any respect.

The words of s 260, like its equivalent in New Zealand, were wide and simple and because of that they carried the risk of a greater ambit of application than

³³ *Land Tax Act 1878* (NZ).

³⁴ The provisions of s 260 in the 1936 legislation were substantially the same as those in s 53 of the 1915 Act. They, in turn, can be traced to similar provisions in the *Commonwealth Land Tax Assessment Act 1910* (Cth); *Income Tax Act 1895* (Vic); and the *Land and Income Tax Act 1895* (NSW).

³⁵ The words “as against the Commissioner” appeared for the first time in 1936. The earlier provisions affected private rights and could be relied on by individuals against others in affecting private rights where a contract, agreement or arrangement differed the incidence of tax: *De Romero v Read* (1932) 48 CLR 649. The Privy Council described this as an “unexpected effect” in *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1, 7 (Lord Denning on behalf of the court).

intended or desirable. That led to criticism of the section and to various attempts to give it a meaning that would give it a reasonable and predictable application. In 1921, Knox CJ in *Deputy Federal Commissioner of Taxation v Purcell*³⁶ said of the precursor to s 260 in s 53 of the 1916 Act:

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

For this reason, his Honour sought to construe the terms of the section to curb unintended excesses. His Honour said:

[B]ut, in my opinion, its provisions are intended to and do extend to cover cases in which the transaction in question, if recognised as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth *his* income. It does not extend to the case of a *bona fide* disposition by virtue of which the right to receive income arising from a source which theretofore belonged to the taxpayer is transferred to and vested in some other person. The section is intended to protect the revenue against any attempted evasions of the liability to income tax imposed by the Act ... and the *bona fide* gift or sale by a taxpayer of assets producing income is therefore in no sense an attempt to evade his liability to income tax.³⁷

The case before his Honour, and subsequently on appeal to the Full High Court, concerned the owner of certain income-producing property who had

³⁶ (1921) 29 CLR 464, 466.
³⁷ Ibid.

declared himself a trustee of the property for himself, his wife and his daughter equally. His Honour found that the declaration of trust created by the taxpayer was not affected by the anti avoidance provisions in s 53 of the 1916 Act. The members of the Full Court essentially agreed with the decision of the Chief Justice at first instance.

Criticism of the terms in which the anti avoidance provisions were expressed was sometimes strident. In *Federal Commissioner of Taxation v Newton*³⁸ Kitto J said:

Section 260 is a difficult provision, inherited from earlier legislation, and long overdue for reform by someone who will take the trouble to analyse his ideas and define his intentions with precision before putting pen to paper.

In the same case Fullagar J said:

[T]he 'purposes' or 'effects' which will attract its operation are stated very vaguely. If we interpret it very literally, it will seem to apply to cases which it is hardly conceivable that the legislature should have had in mind.³⁹

These doubts and uncertainties saw limitations emerge on s 260 that ultimately led to its replacement with Part IVA.⁴⁰ The New Zealand anti

³⁸ (1956) 96 CLR 577, 596.

³⁹ Ibid 646.

⁴⁰ See *WP Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66; *Mullens v Federal Commissioner of Taxation* (1976) 135 CLR 290; *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314; *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330; *Clarke v Federal Commissioner of Taxation* (1932) 48 CLR 56; *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548; *Rowdell Pty Ltd v Federal Commissioner of Taxation* (1963) 111 CLR 106; Razeen Sappideen, 'Judicial Legislation and the Rationalisation of Section 260 of the Income Tax Assessment Act 1936' (1977) 8 *Federal Law Review* 319.

avoidance provisions similarly came in for strident criticism from high authority. Lord Wilberforce in his dissenting judgment in *Mangin v Inland Revenue Commissioner*⁴¹ questioned the ability of the provision to confront the problems of modern tax avoidance. In *Commissioner of Inland Revenue v Gerard*⁴² McCarthy P described the provision as “notoriously difficult”,⁴³ echoing laments which had been expressed about the equivalent Australian provision.⁴⁴

Avoidance as a subject matter of taxation

The problem, however, might have been less with the terms of provisions like Australia’s s 260 or New Zealand’s s 108 than with how one could ever reconcile and apply the competing policy considerations that the anti avoidance provisions necessarily contained. A general anti avoidance provision must steer a tight course amongst various competing policy objectives. One of those objectives is that the anti avoidance rule should not apply to defeat tax incentives positively given in the taxing statute. It was this concern that led to the development of the “choice principle” that may have hastened the demise of s 260 in Australia.⁴⁵ More fundamentally, however, is the objective of ensuring that the anti avoidance provision strikes at avoidance and nothing more. General tax avoidance provisions, however, operate by imposing tax upon successful tax avoidance. The problem is how to

⁴¹ [1971] AC 739.

⁴² [1974] 2 NZLR 279.

⁴³ Ibid 280.

⁴⁴ Ibid 281-3; *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23188, 23206-7.

⁴⁵ GT Pagone, *Tax Avoidance in Australia* (2010) 30-5; Razeen Sappideen, ‘Judicial Legislation and the Rationalisation of Section 260 of the Income Tax Assessment Act 1936’ (1977) 8 *Federal Law Review* 319, 329-337; PJ Lanigan, “Trends in the Interpretation of the Taxation Laws” (Papers presented at the Taxation Convention, South Australian Division, Taxation Institute of Australia, 15-17 March 1974).

distinguish between permissible tax avoidance and impermissible tax avoidance.

The fundamental difficulty with general anti avoidance provisions is that it is not always easy to see whether something is genuinely avoidance. An obvious criteria for the application of anti avoidance provisions should be, one might naively think, that tax has been avoided. It follows that one should be able to look at a transaction and see that it was done or entered into so as to avoid something which would otherwise have been done or which is likely to have been done. That was the general thrust of our s 260 and appears still to be the thrust of the New Zealand s BG 1(1) in the *Income Tax Act 2007* through the definition of “tax avoidance arrangement” in s YA 1. However, it is not sufficient for the application of an anti avoidance rule to establish that a taxpayer would have done something with a greater tax cost if the taxpayer had not done what was actually done. Otherwise the anti avoidance rule would prevent taking up positive inducements found in the legislation and it would penalise a taxpayer’s motive even when the transaction adopted was not fiscally offensive.

The Privy Council had made an attempt in *Newton v Federal Commissioner of Taxation*⁴⁶ to enunciate a test to help determine when a transaction will 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 it was

⁴⁶ (1958) 98 CLR 1.

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 father in favour of his wife and daughter, predicate that it was done to avoid tax ...⁴⁷

A careful textual comparison of this statement and the statutory provision might suggest that little had been said by their Lordships to advance knowledge or meaningful understanding of how the provision should operate. Nonetheless, 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

⁴⁷ (1958) 98 CLR 1, 8-9 (Lord Denning on behalf of the court).

predication test which had been enunciated in *Newton v Commissioner of Taxation*.⁴⁸

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 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. The distinction is less subtle than it might sound, and in that distinction there might be the only sound and principled criterion by which anti avoidance provisions may sensibly, reliably and defensibly apply.

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 see the application of the anti avoidance rules to be made to depend upon, and to vary as between, identical transactions. A wholly artificial tax avoidance scheme should be struck down whether or not a

⁴⁸ 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>.

taxpayer can be shown to have a tax avoidance purpose.⁴⁹ The converse is also sound tax policy: tax avoidance rules should not apply where a person took advantage of a provision in the tax law designed to provide a tax benefit. These simple enough considerations might provide the basic outlines for how a tax avoidance provision must be applied. 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 essentially an inquiry into whether something was done which had no function or explanation other than taxation. That, upon a careful consideration, would exclude from the operation of the anti avoidance rule, many transactions which were motivated by tax but about which one could not say there was no explanation other than tax. A few examples may both explain the point and enliven debate about whether tax avoidance provisions should or should not apply in that way. A trustee's decision to make distributions in a discretionary trust along lines which maximise the tax benefits between the beneficiaries may be motivated wholly, and exclusively, by the tax considerations flowing from the distributions made, but still not be caught by the anti avoidance provisions for the very simple reason that although tax may have been the motivation for the resolution, nonetheless the resolution produced more than the tax consequences: the beneficiaries gain entitlements flowing from the resolutions which they would

⁴⁹ *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.

not otherwise have had. On such a basis 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 something more than the tax consequence produced. That kind of analysis explains the examples found in the famous 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*⁵⁰ was motivated by anything other than taxation. The beneficial tax consequences may be 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 simple reason that, whatever the motivation may have been, overtly 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 did 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

⁵⁰ (1957) 100 CLR 66.

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.⁵¹

The same considerations that arose in *Newton* under the s 260 jurisprudence also arise in application of s 177D in Part IVA in the 1936 Act. Whatever else Part IVA may do, its application depends upon a conclusion about the dominant purpose of a taxpayer entering into the transaction in the particular way that it was entered into. The conclusion required by s 177D is not about the actual purpose of anyone. Section 177D does not call for an inquiry into the actual purpose of anyone. The section could have turned 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 section could have included the actual purpose of such a person amongst the list of factors required to be considered. The section plainly does neither. Indeed, it expressly contemplates the application of Part IVA 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.

⁵¹ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 408.

A reason for making s 177D 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”.⁵² In *Federal Commissioner of Taxation v Hart*⁵³ 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.⁵⁴ 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) structured the loan in the way it was. They are not statements which provide an answer to the question posed by s 177D(b). That provision requires the drawing of a conclusion about purpose from the eight identified objective matters; it does not require, or even permit, any inquiry into the subjective motives of the relevant taxpayers or others who entered into or carried out the scheme or any part of it.⁵⁵

The conclusion called for by the inquiry required by s 177D 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

⁵² *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235, 264 [95] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

⁵³ (2004) 217 CLR 216.

⁵⁴ *Ibid* 222 [3], 227 [15] (Gleeson CJ and McHugh JJ), 243 [65] (Gummow and Hayne JJ).

⁵⁵ *Ibid* 243 [65].

would be reached having regard to the particular, specific but limited, matters which s 177D(b) requires to be considered.

Gummow and Hayne JJ in their joint judgment expressed the general inquiry directed by Part IVA as requiring a comparison between the scheme in question and an alternative postulate.⁵⁶ To draw a conclusion about purpose from the eight matters will “require consideration of what other possibilities existed”.⁵⁷ In particular it will require an inquiry 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 inquiry 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 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*⁵⁸ the High Court considered that the requisite purpose was found in the particular means adopted by the taxpayer to obtain its commercial return.⁵⁹ In *Hart* Gummow and Hayne JJ found in the terms of the actual loans entered into matters that

⁵⁶ Ibid 243 [66].

⁵⁷ Ibid 243 [66].

⁵⁸ (1996) 186 CLR 404.

⁵⁹ Ibid 423 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

“were explicable *only* by the taxation consequences for” the taxpayer.⁶⁰ Their Honours did not undertake a factual inquiry 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).⁶¹ The test so understood accords with the argument put for the Commissioner in *Federal Commissioner of Taxation v Spotless Services Ltd*⁶² that, for the conclusion required by s 177D, the inquiry “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”.⁶³ 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

⁶⁰ *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216, 244 [68], emphasis as per quote.

⁶¹ 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 in *NE Challoner and RJ Richardson, Tax Avoidance, Implications of 1981 General Provisions (Part IVA)* (CCH Australia Ltd, 1981).

⁶² (1996) 186 CLR 404.

⁶³ *Ibid* 408.

contrived.⁶⁴ 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.⁶⁵

Permissible structuring to secure tax advantages and permissible motivation to achieve a favourable tax outcome may be seen where what secures the tax benefit also secures other outcomes. In such cases what secures the tax benefit will not be explicable *only* by the taxation consequences for the taxpayers.⁶⁶ An example was given in the joint judgment of Gleeson CJ and McHugh J in *Hart* of a decision based on a desire to obtain a tax deduction to rent premises rather than to buy them.⁶⁷ Another example may be seen in the decision to sell and lease back plant and equipment.⁶⁸ In each case the elements of the transaction securing the tax benefit also secure more, or other, outcomes than only the tax benefit: a lease creates different proprietary interests than ownership with different commercial and legal consequences, irrespective of tax benefits. Similarly the disposal of an income-earning asset by gift may result in the non-derivation of assessable income by the donor but it also disposes of ownership by transfer to another. A distribution of income or corpus by a trustee of a discretionary trust may be calculated and wholly motivated by reference to fiscal advantages, but an effective distribution

⁶⁴ 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>.

⁶⁵ *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].

⁶⁶ See the emphasis in *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216, 244 [68], line 2 (Gummow and Hayne JJ).

⁶⁷ *Ibid* 227 [15].

⁶⁸ *Eastern Nitrogen Ltd v Federal Commissioner of Taxation* (2001) 108 FCR 27.

confers economic benefit on the object of the distribution in addition to any tax benefit secured.

The approach recently taken in New Zealand would seem, on one view, to have the anti avoidance provisions operate more broadly than may have been contemplated in *Newton*. In *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*⁶⁹ the New Zealand Supreme Court adopted a test requiring a consideration of the purpose contemplated by parliament when enacting the provision which a transaction is said to have avoided. In the joint judgment of Tipping, McGrath and Gault JJ their Honours said:

When, as here, a case involves reliance by the taxpayer on specific provisions, the first inquiry concerns the application of those provisions. The taxpayer must satisfy the Court that the use made of the specific provision is within its intended scope. If that is shown, a further question arises based on the taxpayer's use of the specific provision viewed in the light of the arrangement as a whole. If, when viewed in that light, it is apparent that the taxpayer has used the specific provision, and thereby altered the incidence of income tax, in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provision, the arrangement will be a tax avoidance arrangement.⁷⁰

Based upon my experience, I think it likely that this test will not prevent debate and litigation about the application of the New Zealand general anti avoidance

⁶⁹ (2009) 24 NZTC 23188.

⁷⁰ (2009) 24 NZTC 23188, 23211-2.

provisions. There is often fierce debate, at least in Australia, about what was or was not within the contemplation of parliament when enacting a specific provision. It is, therefore, likely that there will be much debate between revenue authorities and taxpayers about the contemplation of the New Zealand parliament when enacting a specific provision before debate about whether the general anti avoidance provision has been engaged. It is also probable that judges will have different views about whether something comes within the principle. The litigation in *Commissioner of Inland Revenue v Penny and Hooper*⁷¹ is an example of such differences. In the field of tax there may still be something to be said in favour of the need for precision in legislative drafting. That need may be stronger in the case of the anti avoidance rules. Courts may have differing views about the law which, once finally stated, is applicable to all. However, differing views about whether a particular transaction is an avoidance transaction is a different matter because it depends upon judgment and impressions. Whether or not something is caught by anti avoidance provisions should be predictable and not be dependent upon judgments about which reasonable jurists may, and frequently do, reasonably differ.

The enquiry called for in *Ben Nevis* is about the underlying policy through which the specific provision is reflected. It is too early to evaluate the direction of the jurisprudence which is still to come following *Ben Nevis*. Inevitably taxpayers and revenue authorities will have different views about what it means and how it is to be applied. On one view the “parliamentary

⁷¹ [2010] NZCA 231.

contemplation” test may confine the application of the general anti avoidance provisions in New Zealand to those situations where it may reliably be said that the application of the anti avoidance rule is to give effect to the policy underlying a specific provision. In that way, the need to link the impugned arrangement with something found to be within the contemplation of parliament in another provision may reveal in *Ben Nevis* the echoes of the abuse of statute jurisprudence developed in the United States and the enactment of the general anti avoidance rule in Canada. However, both taxpayers and the revenue authorities are likely to find different “angles” to the decision in *Ben Nevis*, and each is likely to rely, and to distinguish, the decision for their own ends. The majority judgment in *Ben Nevis* said that the inquiry into whether a tax avoidance arrangement exists is not confined. Their Honours said:

The general anti-avoidance provision does not confine the Court as to the matters which may be taken into account when considering whether a tax avoidance arrangement exists. Hence the Commissioner and the courts may address a number of relevant factors, the significance of which will depend on the particular facts. The manner in which the arrangement is carried out will often be an important consideration. So will the role of all relevant parties and any relationship they may have with the taxpayer. The economic and commercial effect of documents and transactions may also be significant. Other features that may be relevant include the duration of the arrangement and the nature and extent of the financial consequences that it will have for the taxpayer. As indicated, it will

often be the combination of various elements in the arrangement which is significant. A classic indicator of a use that is outside Parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way. It is not within Parliament's purpose for specific provisions to be used in that manner.

In considering these matters, the courts are not limited to purely legal considerations. They should also consider the use made of the specific provision in the light of the commercial reality and the economic effect of that use. The ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision in a manner that is consistent with Parliament's purpose. If that is so, the arrangement will not, by reason of that use, be a tax avoidance arrangement. If the use of the specific provision is beyond Parliamentary contemplation, its use in that way will result in the arrangement being a tax avoidance arrangement.⁷²

The breadth of this inquiry is directed to whether a tax avoidance arrangement exists not into an inquiry into what parliament contemplated. It may be accepted that parliament can be presumed to have contemplated that the benefit of its specific provisions would not be gained by an artificial or contrived way, but future litigation may need to take care to ensure that these passages are not applied as tautologies. Whether an avoidance arrangement

⁷² *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23188, [108]-[109] (Tipping, McGrath and Gault JJ).

exists cannot depend upon whether it is an avoidance arrangement (since that would be tautologous) but whether the arrangement can reliably be seen to have been outside what parliament contemplated. It is the latter to which attention is likely to be drawn in subsequent litigation. The “parliamentary contemplation” test may conceivably be relied upon by taxpayers to narrow the application of the anti avoidance rules by arguing, with some force, that what was in the contemplation of parliament when enacting the specific provision was, and stopped with, the ambit of its actual terms (purposively interpreted, of course!). The revenue might rely upon the “parliamentary contemplation” rule to focus upon broader fiscal policy effected by the language in the specific provision which in terms may not go as far as the revenue would like. No doubt, in an appropriate case, each will adopt the opposite stance to achieve different conclusions. The broader the assumed contemplation of parliament, the broader the reach of the anti avoidance rule; the narrower the assumed contemplation of Parliament, the narrower the reach of the anti avoidance rule.

An allied, but more fundamental jurisprudential concern about the approach taken in *Ben Nevis*, is that its application may result in the imposition of unlegislated taxation. It is implicit in the *Ben Nevis* approach to the anti avoidance provision that tax will not arise other than through the anti avoidance rule. In other words that the primary provisions, purposively construed and purposively applied, did not go as far as parliament is to be presumed to have contemplated. An ability to extend the reach of taxing provisions through the anti avoidance provisions, may encourage the

application of the anti avoidance provisions by the New Zealand revenue authorities significantly beyond the reach of the primary taxing provisions. The approach, and its application, may also result in the courts being criticised when enforcing the application of the provisions that they have engaged in judicial legislation; that is, that in giving legal effect to the Commissioner's assessments through the anti avoidance provisions, to something which parliament is presumed to have contemplated but failed to enact in the primary provisions (given a purposive interpretation) involves the courts in making law something that was not law.

In evaluating such concerns it is important to recall that the issue of the application of the anti avoidance rule only arises after the primary taxing provisions have been given a purposive interpretation. In other words the question posed in *Ben Nevis* of parliament's contemplation is a second purposive interpretation which calls to be considered only after the primary provisions were given a purposive interpretation but found not to apply. A practical consequence of the approach may be that the anti avoidance provision becomes a mechanism for filling the actual gaps in tax legislation rather than striking only at what is undoubtedly tax avoidance.

A mechanism which "fills in gaps" may be indistinguishable from a delegation of legislative powers. In the task, however it may be described, it will be difficult for a court (let alone the many taxpayers called upon to make decisions upon law as it is stated without the benefit of a court decision) to know with sufficient confidence how to go about determining what parliament

contemplated. The complex modelling and economic assumptions which form the basis of fiscal provisions will not be easy for a court to ascertain. In Australia fiscal benefits were introduced in one context upon an assumption that some of the benefits would be wasted.⁷³ The market which developed to use by trading those benefits was countered in Australia by specific legislative provisions.⁷⁴ In New Zealand they might have been met in the first instance by a departmental invocation of the *Ben Nevis* principle followed by courts having to decide whether the principle applied. The application of the principle may be particularly difficult where the legislative provisions in issue are detailed.⁷⁵

Detailed statutory scheme

The Australian legislature had sought to avoid some difficulties by the enactment of legislation with a detailed statutory scheme. Success is a matter for debate. Indeed, such evidence as there is would suggest that the enactment of Part IVA may have made some aspects of the application of a general anti avoidance rule more difficult. The adoption of a detailed anti avoidance rule in a statute made each word a potential battle ground between taxpayers and the revenue.

The first serious debate concerning the operation of Part IVA concerned the role of the scheme identified by the Commissioner. Central to the litigation

⁷³ GT Pagone, *Tax Avoidance in Australia* (2010) 112-4.

⁷⁴ *Ibid.*

⁷⁵ *Helvering v Gregory* 69 F 2d 809, 810 (2nd Cir 1934), *aff'd* 293 US 465 (1935).

was the meaning and effect of the three letter word “may” in s 177F. A fundamental issue in *Peabody*⁷⁶ 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 phrase "a tax benefit has been obtained ... in connection with a scheme" is defined in s. 177C(1). 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

⁷⁶ *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359.

his duties before making a determination and consequent assessment. Once he has 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.⁷⁷

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.⁷⁸ The court did not say that the identification of a scheme did not matter but only that the operation of the provisions were not made to depend upon the Commissioner's correct identification of the scheme.

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 (perhaps unfortunately) that the relevant dominant purpose could be found in relation to only part of what might have been identified as the scheme. The argument was put, of course,

⁷⁷ Ibid 369.

⁷⁸ Ibid 382 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

in the context of the jurisprudence before the court gave judgment in *Peabody* and was necessarily in anticipation of the court's reasoning and decision. It is recorded as having been put 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 rather than to enable a taxpayer to obtain a tax benefit. In that context the Commissioner had sought to argue that the provisions of Part IVA permitted the requisite conclusion to be drawn from part of a scheme. The argument (in other words) proceeded upon the hypothesis that the only place left for the Commissioner to point to a requisite dominant purpose was in part only of a scheme.

It was in answer to that argument that the 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.⁷⁹ That 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 a limitation to Part IVA that the scheme identified by the Commissioner needed to be something which was otherwise capable of identification as a scheme in its own right.

⁷⁹ Ibid 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. In the joint judgment of Gummow and Hayne JJ in *Federal Commissioner of Taxation v Hart*⁸⁰ 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”.⁸¹ 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 ...⁸²

It would seem now that the identification of a scheme has lost much of the significance it had in earlier litigation but the effect of *Peabody* was not without cost and uncertainty. The cost was not only in litigation (although there was

⁸⁰ (2004) 217 CLR 216.

⁸¹ Ibid 237.

⁸² Ibid 238 (emphasis in original).

some of that). It was also in advice which had to be given upon an erroneous understanding of what *Peabody* stood for and the many more hidden costs of actions and decisions upon a basis that had been thought arguable but later found to be wrong.

The importance of what is identified as the scheme to the application of Part IVA should not, however, be ignored. Part IVA only applies where a tax benefit has been obtained “in connection with [a] scheme”.⁸³ That requirement is only satisfied where it is the scheme which gives rise to, or produces, the tax benefit which the Commissioner has cancelled. Indeed, the role played by s 177C(1) is to ensure that Part IVA is limited in its application to those schemes which produce the tax benefits. 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.

Another area of debate emerged around the application of s 177C. That section is headed “Tax Benefits” and is unhelpfully treated as a definition of the tax benefits to which Part IVA may be applied. There appear to be at least two rather different ways of reading s 177C. One way is that it requires the precise identification of the things (for which read “scheme”) which give rise to the tax benefit. On that view satisfying s 177C does no more than require the precise and careful identification of the scheme as that which

⁸³ *Income Tax Assessment Act 1936* (Cth) s 177D(a); *Macquarie Finance Ltd v Federal Commissioner of Taxation* (2004) 57 ATR 115, [76] (Hill J).

produces the tax benefit. The purpose of the section by that construction is to provide intellectual rigour to ensure that any tax benefit cancelled by the Commissioner is a tax benefit which is analytically, and in fact, produced by the scheme. This reading of the section does not require a consideration of any counterfactual or alternative postulate. It simply asks that there be identified that which analytically and in fact the scheme either would or might reasonably be expected to produce.

A different construction has emerged in a series of cases which appear to require a different and more complex enquiry. That construction assumes that s 177C excludes from the operation of Part IVA any tax benefit which would have been obtained had the scheme not been entered into. The idea behind this construction may be that Part IVA should not apply where the tax benefit obtained by the taxpayer through the scheme would have been obtained had the scheme not been entered into or carried out. This view has been said to require a consideration of what the scheme produced and its comparison with an alternative postulate.

In *Lenzo v Federal Commissioner of Taxation*⁸⁴ the taxpayer relied on the latter view. The submission at first instance was that if Mr Lenzo had not invested in the plantation project on which the Commissioner had applied Part IVA he would have obtained a similar tax benefit by putting money into his self-managed superannuation fund.⁸⁵ The answer given to this at first instance by French J was that s 177C(1)(b) sought to identify whether “that deduction”,

⁸⁴ (2007) 68 ATR 381; *Federal Commissioner of Taxation v Lenzo* (2008) 167 FCR 255.
⁸⁵ (2007) 68 ATR 381, 407 [116] (French J).

namely the deduction referable to the identified scheme, would not be, or might not reasonably be, allowable if the scheme had not been entered into or carried out.⁸⁶ His Honour therefore considered the superannuation counterfactual which had been contended for by the taxpayer to be extraneous to the statutory alternatives contemplated by the section.⁸⁷ His Honour went on to say, however, that a relevant counterfactual was that the taxpayer might have invested in the plantation project using either an alternative source of funds or his own funds.⁸⁸ These counterfactuals were challenged on appeal on the basis that they amounted to an erroneous finding at first instance that Mr Lenzo would still have invested in the plantation scheme. The basis of that contention was that the task required by s 177C(1) was to be undertaken by comparing what the scheme produced with what else a taxpayer might have done in the absence of the scheme.

On appeal the Full Federal Court held that, in assessing the counterfactual, s 177C(1)(b) requires the entirety of the scheme identified for application by Part IVA to be ignored.⁸⁹ In reaching that conclusion no distinction was made between a scheme and its factual components but the counterfactuals used by the trial judge were criticised on the basis that they dispensed with part of the scheme but left the balance intact.⁹⁰ In *AXA Asia Pacific Holdings Ltd v*

⁸⁶ Ibid 407 [118].

⁸⁷ Ibid.

⁸⁸ Ibid 407 [119].

⁸⁹ *Federal Commissioner of Taxation v Lenzo* (2008) 167 FCR 255, 281 [136] (Sackville J), 263 [42] (Heerey J agreeing), 286 [159] (Siopis J agreeing).

⁹⁰ Ibid 280 [130] (Sackville J).

*Federal Commissioner of Taxation*⁹¹ Jessup J explained the decision of the Full Court in *Lenzo* by saying:

In my view, *Lenzo* is authority for the proposition that the starting point under s 177C(1)(a) is one which the whole scheme identified by the Commissioner must be assumed out of existence. The question then arises: what then might reasonably have been expected to have been included in the assessable income of the taxpayer? Here the court is engaged in a “prediction as to events which would have taken place” in the absence of the scheme: *Commissioner of Taxation v Peabody* (1994) 181 CLR 359, 385. The exercise thus postulated, in my view, is wholly one of fact-finding. A fact is not disqualified, *a priori* as it were, from consideration merely by reason of it having been an element of the scheme which was in place. To the contrary: what the taxpayer and his or her associates in fact did in the commercial circumstances which existed is likely to shed much light on what they would have done in the absence of the scheme, and in some cases to be, as a matter of prediction, elements of that counterfactual. Nothing in *Lenzo* requires me to hold otherwise. Indeed, the way Sackville J approached the task of prediction was entirely consistent with the counterfactual in any particular case involving elements of the presumptively discarded scheme, assuming always that the facts of the case indicated such an outcome.⁹²

⁹¹ [2009] FCA 1427.
⁹² *Ibid* [118].

The view adopted by Jessup J draws a distinction between the scheme and any facts which may constitute its elements. It is the former, but not the latter, which the authority of *Lenzo* was seen to require to be entirely “ignored”⁹³ or “assumed out of existence”.⁹⁴ Whether that is what had been intended by the Full Federal Court in *Lenzo* may be doubted in view of the observation that the difficulty with the counterfactuals adopted by French J at first instance was “that they apparently dispense with part of the scheme (as found by his Honour), yet leave the balance of the scheme intact”.⁹⁵

The approach to *Lenzo* adopted in *AXA* at first instance appears to have been endorsed in *Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd*⁹⁶ where the Court said:

When assessing the alternative postulate or predicting the events that would or might take place, that question is answered on the assumption that *the scheme* has not been entered into or carried out: *Lenzo* 167 FCR 255 at [121]. Put another way, s 177C does require the entirety of the scheme to be ignored: *Lenzo* 167 FCR 255 at [136]. But that is not the entire question posed by s 177C. The rest of the question involves the objective enquiry of predicting the events that would have, or might reasonably be expected to

⁹³ *Federal Commissioner of Taxation v Lenzo* (2008) 167 FCR 255, 281 [136] (Sackville J).

⁹⁴ *AXA Asia Pacific Holdings Ltd v Federal Commissioner of Taxation* [2009] FCA 1427, [118] (Jessup J).

⁹⁵ *Federal Commissioner of Taxation v Lenzo* (2008) 167 FCR 255, 280 [130] (Sackville J).

⁹⁶ (2010) 186 FCR 410.

have, taken place in the absence of the scheme. As Sackville J said in *Lenzo* 167 FCR 255 at [128]:

[I]n determining whether the particular deduction claimed by the taxpayer would or might reasonably have been allowable, the Court must consider, in the absence of the scheme, *what activity the taxpayer would have undertaken*. The taxpayer can satisfy the onus of showing that he or she has not obtained a tax benefit in connection with a scheme if:

- he or she would have undertaken or might reasonably be expected to have undertaken a particular activity in lieu of the scheme; and
(Emphasis added).

The *particular activity* or the events that would have, or might reasonably be expected to have, taken place in the absence of the scheme and which are identified as a result of the objective enquiry are not confined or defined by the scheme. Of course, it cannot be the same complete set of events giving rise to the scheme - that would be the scheme. But at the same time, the identification of the activity or the events does not necessarily preclude any element of *the scheme*. As the High Court has said, "scheme" is a word of wide import: *Peabody* 181 CLR at 383; *Hart* 217 CLR 216 at [87].

A scheme is usually comprised of a number of "steps" or "integers". It is conceivable that a scheme (comprising just some of the integers of a wider scheme to which Pt IVA applies) may be a scheme to which Pt IVA does not apply. If the narrower scheme is the particular activity or the events that would have or might reasonably be expected to have taken place in the absence of the scheme, then that is the alternative postulate. The difference between the deduction claimed in relation to the scheme and the allowable deduction from the narrower scheme is the tax benefit. Similarly, the alternative postulate may comprise some of the integers of the scheme to which Pt IVA applies and other integers which do not form part of that wider scheme. The express words of s 177C require a prediction about what would happen or might reasonably be expected to happen. It is necessarily a hypothetical analysis. But it is a hypothetical analysis directed at ascertaining what particular activity would have been (or might reasonably have been) undertaken if the scheme was not entered into. The "integers" that are relevant to that objective enquiry are not limited and "may not always permit the precise identification of ... all the integers of a particular 'scheme'": *Hart* 217 CLR 216 at [43]. The integers will be different for each case and the onus is on the taxpayer to identify those integers which establish the alternative postulate.

It is contrary to the express words of s 177C (including s 177C(2)), its context and its purpose to exclude particular integers from a

prediction about what would happen or might reasonably be expected to happen. Put another way, absent particular integers, the enquiry would not be an objective enquiry as required by s 177C but a prediction of what would happen or might happen having regard to only a subset of the integers available to a taxpayer. That is not the object of Pt IVA.⁹⁷

Accepting a distinction between the scheme as a whole and its integers, there is still likely to be litigation about how that may be done consistently with the actual decision in *Lenzo*.

The most recent consideration by the Full Court of these issues has been the appeal in *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd*⁹⁸ which is the subject of a pending application for special leave to appeal to the High Court. In that case their Honours⁹⁹ set out the relevant legal principles concerning the application of s 177C. Their Honours said:

Section 177C (read with the other provisions in Pt IVA) identifies that it is an "objective fact" whether a taxpayer obtained a tax benefit in relation to a scheme to which Pt IVA applies: *Commissioner of Taxation v Peabody* (1994) 181 CLR 359 at 382; *Hart* 217 CLR 216 at [37]; *Federal Commissioner of Taxation v Lenzo* (2008) 167 FCR 255 at [119] citing *Commissioner of Taxation v Mochkin* (2003) 127 FCR 185 at [26].

⁹⁷ Ibid 418-9 [28] – [31] (Dowsett and Gordon JJ).

⁹⁸ [2010] FCAFC 134.

⁹⁹ Edmonds and Gordon JJ with Dowsett J agreeing.

In the case of an amount being included in the assessable income of a taxpayer, s 177C(1)(a) provides that it is an objective inquiry as to what would have been included or might *reasonably* be expected to have been included in the assessable income had the "scheme" not been entered into or carried out: *Epov v Federal Commissioner of Taxation* (2007) 65 ATR 399 at [62] and *Peabody* 181 CLR 359 at 385-6.

The legislation requires a comparison between the relevant scheme and an alternative postulate, or counterfactual: *Hart* 217 CLR 216 at [66].

The alternative postulate requires a "prediction as to events which would have taken place *if the relevant scheme had not been entered into or carried out* and that prediction must be sufficiently reliable for it to be regarded as reasonable" (emphasis added). "A reasonable expectation requires more than a possibility": *Lenzo* 167 FCR 255 at [122] citing *Peabody* 181 CLR 359 at 385. The question posed by s 177C(1) is answered on the assumption that *the scheme* had not been entered into or carried out: *Lenzo* 167 FCR 255 at [121].¹⁰⁰

In answering the question posed by s 177C(1) their Honours reasoned that the exclusion of particular integers from a prediction is contrary to the express

¹⁰⁰ *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd* [2010] FCAFC 134, [126] – [129].

words of s 177C, its context and its purpose. In that regard their Honours said:

The express words of s 177C require a prediction about what would happen or might reasonably be expected to happen. It is necessarily a hypothetical analysis. But it is a hypothetical analysis directed at ascertaining what particular activity would have been (or might reasonably have been) undertaken if the scheme was not entered into. The "integers" comprising the scheme that are relevant to that objective enquiry are not limited and "may not always permit the precise identification of ... all the integers of a particular 'scheme'": *Hart* 217 CLR 216 at [43] and *Trail Bros* (2010) 186 FCR 410 at [30].

It is contrary to the express words of s 177C (including s 177C(2)), its context and its purpose to exclude particular integers from a prediction about what would happen or might reasonably be expected to happen. Put another way, absent particular integers, the enquiry would not be an objective enquiry as required by s 177C but a prediction of what would happen or might happen having regard to only a sub-set of the integers available to a taxpayer: see *Trail Bros* (2010) 186 FCR 410 at [31].¹⁰¹

It is interesting that the Full Court, like the trial Judge, sought to apply *Lenzo* in reaching its conclusion. The mere fact that the argument was put suggests the decision in *Lenzo* is being read differently by some and, at best, may

¹⁰¹ Ibid [132] – [133].

require clarification if not rejection. In any event we see dispute about whether what is set up as the alternative postulate in any given case is permitted by the legislation. The reason for that dispute is the fight over whether what the Commissioner has cancelled as a tax benefit is not a tax benefit for the purposes of Part IVA. It might ultimately be better for disputes about alternative postulate to be confined, as they were probably intended in *Hart*, as illuminating the conclusion about purpose rather than informing the content or identification of the tax benefit.

Justice Hill's lament

The enactment of Part IVA can hardly be said to have ushered in certainty and predictability in the application of the general anti avoidance provision in Australia. The difficulty in predicting the application of the anti avoidance provisions may be seen by tracking through the history of many of the reported cases. Unanimous decisions in one court have at times been followed by unanimous decisions the other way on appeal.¹⁰² The history of the litigation in *Hart v Commissioner of Taxation* also saw changes in judicial outcomes.¹⁰³ Significant differences in opinion cannot be explained as things of the past. In *Macquarie Finance Ltd v Commissioner of Taxation*¹⁰⁴ the judges considered the application of Part IVA after the High Court decision in *Hart* but the judges reached different conclusions: at first instance Hill J

¹⁰² See *Federal Commissioner of Taxation v Spotless Services Ltd* (1995) 62 FCR 244 (Full Federal Court) and *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 (Full High Court).

¹⁰³ *Hart v Commissioner of Taxation* (2002) 121 FCR 206 (Full Federal Court) and *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216 (Full High Court).

¹⁰⁴ (2005) 146 FCR 77.

applied Part IVA with reluctance; on appeal, Gyles J thought the case a clear one for its application, whilst French and Hely JJ did not.

Justice Hill's reluctant application of Part IVA in *Macquarie Finance Ltd v Commissioner of Taxation*¹⁰⁵ should not go unnoticed. Justice Hill, when at the Bar, was intimately involved in the drafting of Part IVA as junior to AM Gleeson QC, later the Chief Justice of Australia.¹⁰⁶ His view, as one of those involved in the drafting, that the application of Part IVA in *Macquarie Finance* was not likely to have been intended by parliament when Part IVA was enacted is something which should give us all pause and concern. The concern might be magnified by the fact that the two leading tax practitioners actively involved in drafting the legislation appear to have taken different views about what was meant.¹⁰⁷ This cannot be a good thing for tax law.

A problem for taxpayers is that tax is a cost. It is a personal cost and a cost of doing business and predictability of that cost is often an important ingredient in personal and business decision making. Tax uncertainty may be a net gain to the community but not for individual taxpayers. There may be a case in the field of tax avoidance for the anti avoidance provisions to be applied by a specialist body including those who do, or perhaps who have, played a significant part in business and commerce apart from those who have done so through their role in Treasury or working for the revenue authorities. In

¹⁰⁵ (2004) 57 ATR 115.

¹⁰⁶ Trevor Boucher, *Blatant, Artificial and Contrived: Tax Schemes of the 70s and 80s* (Australian Taxation Office, 2010).

¹⁰⁷ Gleeson CJ upheld the application of Part IVA in *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216.

*Commissioner of Inland Revenue v BNZ Investments Ltd*¹⁰⁸ the joint judgment of Richardson P, Keith and Tipping JJ remarked that what should be struck by the anti avoidance provisions “are artifices and other arrangements which have tax induced features outside the range of acceptable practice” (my emphasis).¹⁰⁹ If “acceptable practice” is a relevant factor in the application of general anti avoidance provisions, it is something which should perhaps be reflected and incorporated into the decision making through those typically making commercial and other comparable or relevant decisions. The primary role of the revenue officials is to raise revenue and, in the discharge of that role, they are less likely to err against the raising of revenue where there is some debate about what are “acceptable practices”.

The recent litigation both in Australian and in New Zealand concerning products put on the market by banks to raise funds¹¹⁰ can be added to the numerous earlier decisions involving structured financing which reveal some difficulties for business in taking into account fiscal consequences in how they structure their transactions. It is naive to think that fiscal consequences of a transaction will not be reflected in the way a transaction takes shape. Furthermore, it would be quite wrong to require that it should not do so. The shape of a transaction will frequently be driven by the tax considerations because they will force the parties to bargain their terms to take account of where the tax costs lie in different ways of achieving their commercial outcomes. In a system, for example, where the legal owner of plant and

¹⁰⁸ [2002] 1 NZLR 450.

¹⁰⁹ [2002] 1 NZLR 450, [40].

¹¹⁰ *Macquarie Finance Ltd v Commissioner of Taxation* (2005) 146 FCR 77; *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216; *Westpac Banking Corporation v Commissioner of Inland Revenue* (2009) 24 NZTC 23,834.

equipment gets a tax deduction for depreciable property, there is no necessary fiscal mischief in a financier taking into account the after tax benefit of an application of funds to “acquire” goods which are then made available to a customer on a lease. The customer will pay rent rather than interest and the financier may receive less in nominal terms through rent than it would as interest, but in part that is because its economic return will be reflected by the tax deduction it receives for depreciation that would otherwise have been obtained by the customer had the customer acquired the goods with monies borrowed as a loan. A financier may prefer to apply funds to a customer by lease rather than as a loan for any number of non tax reasons including the additional security provided by being legal owner of the goods.¹¹¹ The shaping of the transaction will inevitably be influenced by the taxation consequences that each transaction produces for each of the parties. The reason that tax becomes a feature embedded in the structure of a transaction is because the cost of tax changes the returns and costs to the parties. That inevitably (as it must and should) results in bargaining as each party seeks to gain its commercial return and realise its commercial costs in light of the costs and benefits imposed or created by the tax system. Revenue officials cannot easily treat structuring of that kind as normal business dealing without judicial determination.

Some of the more recent litigation involving financial products may owe a great deal to world wide financial regulatory requirements where domestic financiers have sought to compete for capital in the international money

¹¹¹ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552.

market with others, consistently with domestic regulatory requirements. Capital raising instruments to tap into the United States or European markets may explain the shape and content of some instruments offered by Australian and New Zealand companies which are subsequently scrutinised with some scepticism by their domestic revenue authorities and the courts. An approach to the application of the anti avoidance provisions in such situations could benefit by a healthy input from those well placed to understand business needs and practices.

An alternative solution to reduce uncertainty might be the creation of a specialist tribunal charged primarily with the development of consistent, clear and predictable rules concerning tax avoidance. Whether there should be a separate Australian tax court was an issue upon which Justice Kirby delivered a paper with the title “Hubirs Contained: Why a Separate Australian Tax Court Should be Rejected”.¹¹² “Hubirs” is not, I do not think, a word of affection. It is defined as “arrogant pride or presumption” and, in relation to Greek tragedy at any rate, as “excessive pride towards or defiance of the Gods, leading to nemesis”.¹¹³ I am not generally in favour of specialist courts and most of the arguments identified by his Honour against specialist courts are ones which I generally embrace. One can readily accept that the law should be developed by the general courts of law informed by the general application of the law and not by the potentially distorted prism which may

¹¹² The Hon Justice Michael Kirby AC CMG, ‘Hubris Contained: Why a Separate Tax Court Should be Rejected’ (Speech delivered at the Challis Taxation Discussion Group, Sydney, 3 August 2007) <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_3aug07.pdf>.

¹¹³ RE Allen (ed), *The Concise Oxford Dictionary* (8th ed, 1990) 574.

come from specialisation in a narrow field of practice. However, a specialist tax tribunal at first instance might usefully develop principles and practices informed by an understanding of fiscal consequences and may be a useful vehicle for acceptable practices when relevant to the application of anti avoidance rules. Consistency and uniformity may then be achieved with greater certainty and predictability, but always, of course, subject to the review on appeal by the courts of law charged with the task of declaring and applying the law. It seems to me that tax law and practice would gain much from decision makers bringing their expertise and experience of economic, accounting and business realities when deciding tax cases within the boundaries permitted by the law. The community would also have greater confidence in that level of decision making especially in relation to the application of discretionary considerations, including the uncertainties inherent in the anti avoidance provisions.

The first edition of the *Oxford Companion to Law* described taxation as the means by which “the ruling classes in organized communities have oppressed, fleeced, and expropriated some of their subjects”.¹¹⁴ St Ives (the patron Saint of Brittany, lawyers and abandoned children¹¹⁵) zealously assisted the Church to avoid the King’s taxes which he considered to be unjust.¹¹⁶ The former Chief Justice of the High Court of Australia mused that the Church’s official recognition of his eternal reward “gives us all something

¹¹⁴ David M Walker, *The Oxford Companion to Law* (1980) “Taxation”, 1208.

¹¹⁵ http://en.wikipedia.org/wiki/Ivo_of_Kermartin

¹¹⁶ Catholic Encyclopaedia at <http://www.newadvent.org/cathen/08256b.htm>

to think about”.¹¹⁷ I most respectfully agree.

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¹¹⁷ The Hon Murray Gleeson AC “Foreword”, in GT Pagone, *Tax Avoidance in Australia* (2010) vii.