The Tax Institute

Private Business Tax Retreat

Part IVA – A cause for concern

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1. Overview

The general anti-avoidance rules, found in Part IVA of the Income Tax Assessment Act 1936 (**ITAA 36**) are an integral part of our tax system. Part IVA was originally meant to protect the Australian tax system from blatant, artificial or contrived arrangements, according to the introductory Explanatory Memorandum. However, over the years, the application of Part IVA has expanded to areas that were once considered to be acceptable tax planning and the recent decisions in *C of T v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (***Guardian***) and *Minerva Financial Group Pty Ltd v FCT* [2022] FCA 1092 (***Minerva***) have given many practitioners and taxpayers reason for concern about the types of schemes Part IVA will apply to. The line as to what's acceptable and what's not, has moved in favour of the Commissioner.

There are also changes being introduced for promoter penalties which can apply to the promotion of schemes to which Part IVA applies. The changes are targeted at large professional services firms and a number of them have raised concerns. Despite the changes and the potential expanded impact, it is likely that the application of the promoter penalty legislation will continue to be only used by the ATO in a very small number of cases for those promoting schemes that are more likely to fall into the blatant, artificial and contrived category.

This paper considers Part IVA from the perspective of arrangements entered into by private groups. It does not cover dividend stripping, or Part IVA measures applying to multinational groups.

The topics covered by the paper are:

- Impact of inserting s177CB into Part IVA;
- Recent Part IVA cases;
- How the alternative postulate can have adverse implications for taxpayers;
- Managing Part IVA audits and risks; and
- Impact of promoter penalty changes.

Finally, I acknowledge and thank Damien Bourke, Partner Hamilton Locke for his contribution to this paper, through his paper, "*Discussing the intersection of Part IVA with 100A*", which he presented to the Diocletian Club (Brisbane) on 31 May 2023.

2. Impact of inserting s177CB into Part IVA

Part IVA allows the Commissioner of Taxation to deny a tax benefit obtained by a taxpayer for a year of income where:

- there is a 'scheme';
- a taxpayer has obtained a 'tax benefit' in connection with that scheme;
- having regard to the eight matters to be considered, a reasonable person would conclude that a person who entered into or carried out the scheme did so for the sole or dominant purpose of obtaining a tax benefit in connection with the scheme; and
- the Commissioner makes a determination to cancel the tax benefit.

The issue which the insertion of s177CB ITAA 36 sought to rectify was in relation to how the courts work out whether there is a 'tax benefit'. S177CB applies to schemes that were entered into on or after 16 November 2012.

2.1 What is a 'tax benefit'?

S177C ITAA 36 defines 'Tax benefits' and ss177C(1)(a) and (b) provides that a tax benefit for the purposes of Part IVA includes:

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

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

Other types of tax benefits are set out in s177C in similar terms and include:

- a capital loss;
- a loss carry back tax offset;
- a foreign income tax offset;
- an innovation tax offset;
- an exploration credit;
- not being liable to withholding tax; and
- an R&D tax offset.

The definition of tax benefit makes it necessary to consider what the taxpayer might reasonably be expected to have done had the scheme not been entered into. This requires a comparison between:

- the consequences of the actual scheme to which Part IVA applies; and
- the consequences of what would have occurred had the scheme not been carried out – referred to as the 'alternative postulate' or 'counterfactual'.

2.2 Why was Part IVA amended to insert s177CB ITAA 1936?

Following several cases that went against the Commissioner, including *RCI Pty Ltd v FCT* [2011] FCAFC 104[1] (***RCI***), Part IVA was amended by inserting s177CB. The Federal Court decisions that went against the Commissioner found for the taxpayer principally on the question of whether there was a tax benefit within s177C. Taxpayers successfully argued that in the absence of the scheme, it would not be reasonable to expect that they would have entered into a different transaction that attracted adverse taxation consequences and therefore Part IVA did not apply. The alternative postulate or counterfactual was that the taxpayer would 'do nothing'.

The facts of *RCI* are set out in the ATO's decision impact statement[2] and are as follows:

> As part of an international corporate reorganisation codenamed Project Chelsea (also called Project Scully initially), the James Hardie Group transferred its operating companies into a new more tax effective structure headed by James Hardie NV.
>
> Project Chelsea had been planned since early 1997. A key step in the Project from its inception had been a revaluation of assets and the subsequent payment of a dividend.
>
> In October 1998, as part of the Project, the taxpayer ("RCI"), a wholly owned subsidiary of James Hardie Industries Ltd ("JHIL"), transferred its wholly owned US subsidiary, James Hardie (Holdings) Inc ("JHH") to a new group company, RCI Malta Holdings Ltd ("RCI Malta"). This transfer triggered a CGT event for RCI in the 1999 income year. RCI was, and is, an Australian resident company. JHH, incorporated in the US state of Nevada, was the holding company of the US sub-group, which was engaged in a business of manufacturing and sale in the US.
>
> In March 1998, about seven months prior to the disposal of JHH, the following events took place:
>
> (a) JHH revalued its shareholding in its immediate wholly owned US subsidiary, James Hardie (USA), through which JHH held the US sub-group, resulting in identification of a US$318 million surplus;
>
> (b) JHH paid an exempt s23AJ dividend of US$318 million (A$478,555,305) to RCI out of the revaluation amount; and
>
> (c) To satisfy its liability to RCI to pay the dividend, JHH paid US$20 million in cash to RCI and, in exchange for JHIL crediting US$298 million to RCI's intercompany account with

[1] Other cases that went against the Commissioner were *FC of T v Futuris Corporation Ltd* (2012) 205 FCR 274 and *FC of T v Axa Asia Pacific Holdings Ltd* (2010) 189 FCR 204.
[2] *Commission of Taxation v RCI Pty Ltd* Decision impact statement: https://www.ato.gov.au/law/view/document?docid=LIT/ICD/S34of2011/00001

> JHIL, issued a promissory note to JHIL for US$307,415,972. The promissory note was the first of three intra-group notes issued as part of Project Chelsea.
>
> Then in August 1998, RCI injected US$50.2 million additional equity into JHH by way of a share subscription.
>
> In October 1998, RCI sold its shares in JHH to RCI Malta.
>
> The exempt dividend had the effect of reducing the market value of RCI's shareholding in JHH. RCI included a capital gain of A$45,971,764 from the disposal of JHH in its 1999 income tax return.
>
> As a result of an audit, the Commissioner issued an amended assessment for the 1999 year, pursuant to a Part IVA determination, on the basis that RCI had obtained a tax benefit being the non-inclusion of an amount of capital gain of A$478,237,746 in its assessable income.

The Full Federal Court concluded that, if the scheme had not been entered into or carried out, the relevant parties would have either abandoned the proposal, indefinitely deferred it, altered it so that it did not involve the transfer by RCI of its shares in JHH to RCI Malta or pursued one or more alternatives. The conclusion was reached on the basis that it could not reasonably be expected that RCI would have transferred its shares in JHH to RCI Malta at a tax cost of $172 million.[3]

In summary the case was authority for the proposition that if the taxpayer can prove that they would not have entered into the scheme for the reason that too much tax would have been payable if the scheme had not been entered into or carried out, then they could avoid the operation of Part IVA. That is, where the alternative postulate would have given rise to too much tax, then this would be a reason why the alternative postulate was not a "reasonable" prediction as to what would have occurred.

The insertion of s177CB was to ensure that line of argument advanced by taxpayers will no longer be successful. It applies in relation to schemes that were entered into on or after 16 November 2012.

2.3 What does s177CB ITAA 36 require?

S177CB provides 'The bases for identifying tax benefits' and includes the following:

> (2) A decision that a tax effect would have occurred if the scheme had not been entered into or carried out must be based on a postulate that comprises only the events or circumstances that actually happened or existed (other than those that form part of the scheme).
>
> (3) A decision that a tax effect might reasonably be expected to have occurred if the scheme had not been entered into or carried out must be based on a postulate that is a reasonable alternative to entering into or carrying out the scheme.
>
> (4) In determining for the purposes of subsection (3) whether a postulate is such a reasonable alternative:
>
> (a) have particular regard to:

[3] *RCI Pty Ltd v FCT* [2011] FCAFC 104 at [150]

(i) the substance of the scheme; and

(ii) any result or consequence for the taxpayer that is or would be achieved by the scheme (other than a result in relation to the operation of this Act); but

(b) disregard any result in relation to the operation of this Act that would be achieved by the postulate for any person (whether or not a party to the scheme).

S177CB provides there are two bases or 'limbs' under which a tax benefit can be established:

- the 'would have' limb; and
- the 'might reasonably be expected to have limb'.

2.3.1 S177CB(2) – the 'would have' limb.

The first limb requires a comparison of the tax consequences of the scheme with the tax consequences that 'would have' resulted if the scheme had not occurred. This is referred to in the Explanatory Memorandum (EM) as the "annihilation approach".[4] When postulating what would have occurred in the absence of the scheme, the scheme must be assumed not to have happened, that is, it must be "annihilated". However, the alternative postulate must now include all the events and circumstances that actually happened (other than those that form part of the scheme).

This limb is designed to catch the allowable deduction schemes and deal with the problem the Commissioner have had with the Full Federal Court's decision in *FCT v Trail Bros Steel & Plastics Pty Ltd* [2010] FCAFC 94. In that case, it was found that if the taxpayer had not entered into the scheme that gave rise to the tax deduction, it would have done other transactions that also gave rise to a tax deduction. The tax benefit under s177C which was liable to be cancelled, therefore, was found to be the difference between the two deductions. After this amendment, the tax deduction liable to be cancelled would be the amount generated under the scheme.

2.3.2 S177CB(3) – the 'might reasonably be expected to have' limb

The second limb requires a comparison of the tax consequences of the scheme with the tax consequences of an alternative transaction – the 'alternative postulate'. This is referred to in the EM as the "reconstruction approach"[5]. The reconstruction approach is a way to identify a tax benefit in relation to a scheme that also achieves substantive non-tax results and consequences.

S177CB(3) states the alternative postulate must be a '***reasonable***' alternative. However, s177CB(4)(b) states that when working out the '***reasonable***' alternative that a highly relevant consideration (being the potential tax consequences) must be ignored.

Arguably, s177CB(3) requires the Commissioner to undertake an exercise not actually directed to finding a reasonable alternative to the scheme but to identifying an alternative transaction, which might or might not be reasonable, but which is labelled a "reasonable alternative". Whether a postulate is a reasonable alternative to a scheme must be worked out pursuant to s177CB(4) having

[4] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, paragraph 1.78
[5] Ibid paragraph 1.89

regard to the substance of the scheme and its results and consequences for the taxpayer and disregarding any actual or potential tax results and consequences. The paper considers how this approach applies in practice as illustrated in the *Guardian* case at [3.2] below.

The Government also replaced s177D, but the 8 factors in s177D remain. It is considered that those amendments have made no difference to the interpretation of Part IVA.[6]

[6] See for example, David Marks, "Part IVA – How's your postulate?" Tax Institute 29th National Convention, 28 March 2014, page 12.

3. Recent Part IVA cases

Two recent decisions of the Federal Court have shone a light on the way the courts are developing the law around Part IVA. There is a tendency developing recently to examine the facts and determine whether the taxpayer has successfully planned to avoid paying the full amount of tax, which then appears to shape the legal position.

In this section we consider two recent cases concerning Part IVA.

3.1 Minerva Financial Group Pty Ltd v FCT [2022] FCA 1092 (Minerva)

3.1.1 Facts

Minerva involved a group of financial services businesses (called the Liberty Group) undertaking a restructure in preparation for an initial public offering (**IPO**) of stapled securities. The IPO did not go ahead but the restructure did.

Of some significance (in that restructure) was the decision to establish all future securitisation trusts under a holding trust (Minerva Holding Trust (**MHT**)), rather than under the main operating company (Liberty Financial Pty Ltd (**LF**)), as had been done in the past.

Prior to the restructure LF (an Australian company) was entitled to income from the securitisation of trusts that were established, where it was the holder of the 'Residual income unit' (**RIU**) and 'Residual capital unit' (**RCU**) in the securitisation trusts.

Following the restructure:

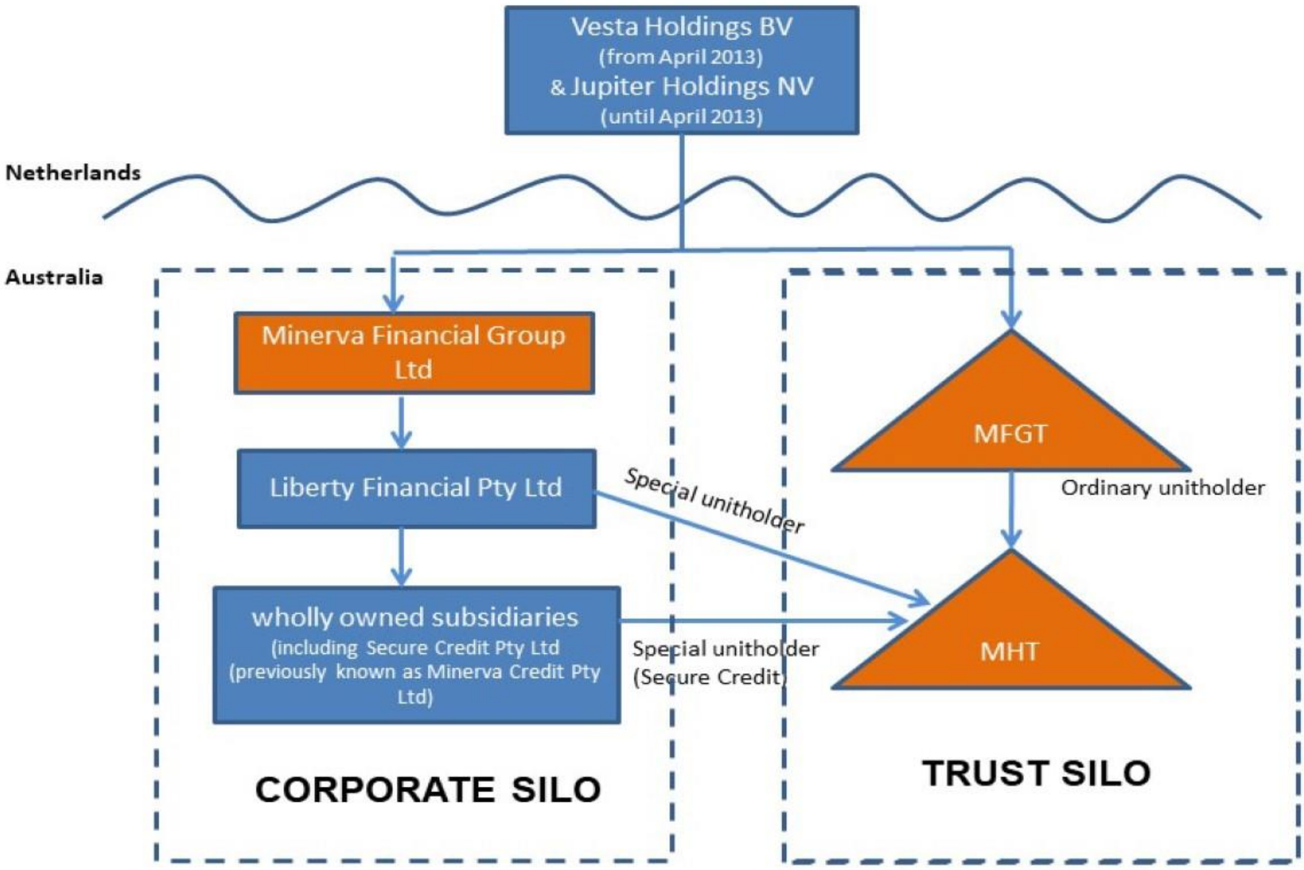
- each RIU was held by MHT;
- LF was a special unitholder and another wholly owned subsidiary Secure Credit Pty Ltd (**SC**) was also a special unitholder;
- another trust, Minerva Finance Group Trust (**MFGT**) was an ordinary unitholder of MHT.

In 2007 and 2008 Jupiter Holdings BV (**Jupiter**) (incorporated in the Netherlands) was a beneficiary (of MHT) until April 2013; thereafter Vesta Holding NV (**Vesta**) was appointed.

Once the IPO was abandoned the structure left in place had the effect of removing income that would have been derived by the Australian corporates (LF and its parent company, SC, on which 30% tax would have been paid) to the newly established trust MHT (and its ordinary unitholder, MFGT). That income would now flow through the trusts to the companies incorporated in the Netherlands - on which 10% withholding tax was payable.

The final structure was set out in the judgement of the case.[7]

[7] Minerva Financial Group Pty Ltd v Commissioner of Taxation [2022] FCA 1092 (*Minerva*) at [7].



Other relevant points:

- the trust deed of MHT allowed the trustee at its sole discretion to distribute net income to the special unitholders (LF/SC) and in so far as any amount was not distributed it was directed to the ordinary unitholder (MFGT);
- in 2009, 2011 and 2012 no distributions were made to the special unitholders;
- in 2013 and 2014 the trustee distributed 2% of its distributable income to the special unitholders;
- in 2015 only 1% was distributed to the special unitholders; and
- the distributions which eventually made their way to the Dutch companies were not paid in cash, but rather were paid by way of offsets (against intra group loans or the issue of units).

3.1.2 The decision

The 3 schemes in question were considered, the first being found to not have any part IVA characteristics. Part IVA was found to apply to the remaining 2 schemes identified, both of which featured:

- the identified steps involved giving Jupiter and Vesta the entitlement to all of the MHT distributions;
- the trustee of MHT choosing not to exercise its discretion to make any (or any substantial) distribution in respect of the distributable income of MHT to special unitholders of MHT (including LF); and
- the trustee of MHT, as the residual income unit holder in the securitisation trusts, lending monies to LF interest free.

In the case of the first scheme the Court accepted the taxpayer's expert evidence and found that there were compelling reasons for the use of the 'stapled structure'.

In the case of all the schemes it was suggested that there was fiscal mischief in the distributions to the offshore unitholders (the non-resident companies) being satisfied by accounting offsets rather than the physical payment of cash. The Court's response to this argument was:

> The Commissioner contended that the schemes were all, in part, constituted by MHT lending funds obtained to LF "via interest free unwritten loans" and the MHT and MFGT unpaid present entitlements "not being satisfied by the payment of cash" to MFGT and Jupiter/Vesta respectively.
>
> The Commissioner did not explain what turned on the descriptions of the loans in those terms. There is nothing unorthodox about recording loans in general ledgers. …
>
> So they are "written" or relevantly recorded and evidenced, in that sense. Likewise, there is nothing unorthodox about loans being repaid by one company within a group to another by way of set-off, not cash. And the fact that intercompany loans were interest free is also hardly unusual.[8]

The Applicant had difficulty with the s177D ITAA 36 factors being, "the manner in which the scheme was entered into and carried out" and "the time at which the scheme was entered into". The Court found on both tests that this pointed towards Part IVA as:

> The applicant was unable to provide any cogent reason, other than the tax benefit, why the decision was taken in each of the relevant years to direct no more than 2% of MHT's net income to the special unitholders. The applicant submitted that neither LF nor Secure Credit had an "entitlement" to the income from the RIUs and that the power of the trustee of MHT to distribute income to the special unitholders was discretionary. So much, unsurprisingly, was accepted by the Commissioner. But neither factor goes to the relevant question of dominant purpose, objectively viewed.
>
> In those circumstances, I agree with the Commissioner's submission that, viewed objectively, the exercise of the choice in each of the relevant years (the manner in which the second part of the second scheme was carried out) was driven by the tax benefit of directing income away from LF.[9]

In relation to the tax consequences that resulted from the restructure, the Court concluded that these were neutral in terms of determining the dominant purpose. The fact that a transaction has certain tax consequences does not imply it was entered into for the dominant purpose of obtaining

[8] *Minerva* [385] – [386]
[9] *Minerva* [564] – [565]

them, relying on what was said by Justice Edmonds in *Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd* (2011).[10]

However, having rejected the Commissioner's case in relation to the decision to split the group into the corporate silo and trust silo, the Court then addressed the Commissioner's more specific case that the dominant purpose of the failure to exercise the discretionary distribution power to transfer income from the trust silo to the corporate silo was to not pay the additional 20% tax.

The Court held that the failure to exercise the discretionary distribution power was a scheme because the broad statutory definition of 'scheme' includes any 'course of action or course of conduct', which in turn includes the failure to do things. Having accepted there was a scheme, the Court found that it had been entered into or carried out for the dominant purpose of obtaining the tax benefit of lower rates of income tax because the taxpayer *'was unable to provide any cogent reason, other than the tax benefit, why the decision was taken in each of the relevant years to direct no more than 2% of MHT's net income to the special unitholders'.*

3.1.3 What is the impact of the decision?

The concern is whether the Commissioner might potentially seek to apply Part IVA to private groups where distributions are made in a tax effective way. For example, a distribution is made to a beneficiary with a lower tax rate, rather than distributing to a beneficiary that has a higher tax rate. That is, will the Commissioner in the future seek to apply Part IVA to standard family trust distribution decisions?

In practice the ATO is unlikely to apply Part IVA to family trust distributions unless one or more additional factors apply such as

- the entitlements are not paid to the beneficiary, but used by someone else (eg s100A schemes);
- larger private groups are involved, rather than a small family business and the amounts distributed are in excess of $1M;
- there is a restructure or change in the structure that facilitated the arrangement, and as a result less tax is paid by the beneficiaries;
- non-resident beneficiaries are introduced for no other reason than tax purposes.

It should be noted that there is nothing to prevent the ATO from applying Part IVA to trust distributions. For example consider the simple situation of setting up a corporate beneficiary and making distributions to that beneficiary? Part IVA could technically apply, if the reason the corporate beneficiary was introduced was to pay less tax.

S170CB was not considered in this case.

[10] *Minerva* [540].

3.2 Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3 (Guardian)

The Full Federal Court's judgment in *Guardian* is of significant precedential value. It is also the first case in which s177CB has been considered.

The Full Federal Cout decision concerned the amounts of net income of the Australian Investment Trust (**AIT**) appointed to AIT Corporate Services Pty Ltd (**AITCS**) in the income years ended 30 June 2012 and 30 June 2013. Note that the Commissioner had also issued assessments in relation to the 2014 year, but the Commissioner did not appeal the Federal Court's single judge decision of Logan J in respect of the 2014 year.

The Commissioner assessed the present entitlement of AITCS to the net income of the AIT in the 2013 year as an entitlement that arose from a reimbursement agreement or by reason of an act, transaction or circumstance in connection with, or as a result of, a reimbursement agreement under s100A of the ITAA 36. The Commissioner was not successful in applying s100A in the 2013 year, because the Full Court held that there was no reimbursement agreement.

However, the Commissioner also assessed Mr Springer (the ultimate owner of the group) under the general tax anti-avoidance provisions in Part IVA, in respect of each of the years. The Commissioner was partly successful (on appeal) as Part IVA was found to apply in the 2013 year (but not the 2012 year). The discussion below will focus on the Part IVA component of the decision.

3.2.1 Facts

Mr Springer was the ultimate owner and controller of a group of businesses he referred to as the 'Springer Group'. Mr Springer was an arborist by trade, but his business ventures extended beyond forestry to property development and property investment.

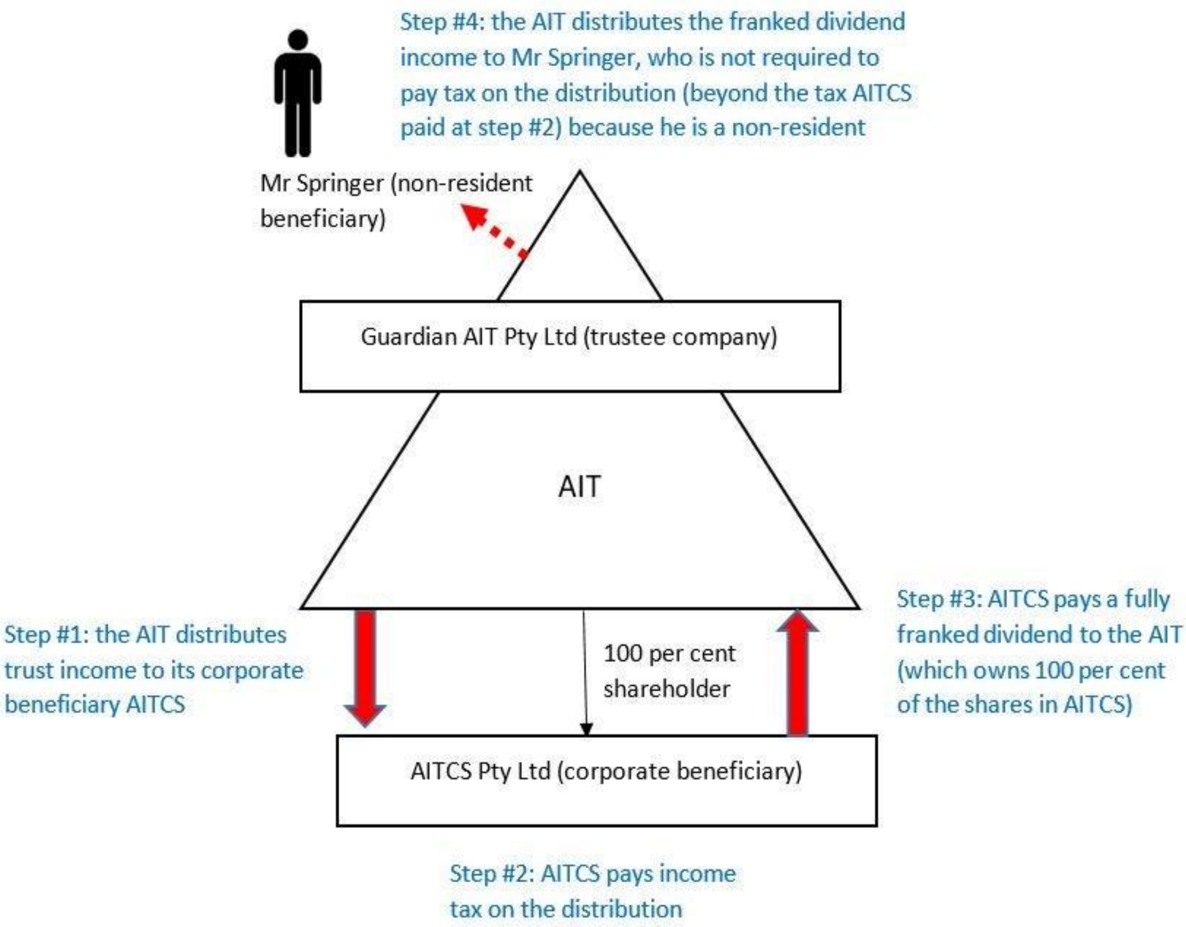
It was relevant to the proceedings that the Springer Group was being wound up because Mr Springer was transitioning to retirement and wished to "simplify his life". It was also relevant to the proceedings that Mr Springer had moved to Vanuatu and had ceased to be an Australian resident from 2008.

The important facts are as follows:

- The Australian Investment Trust (**AIT**) was a discretionary trust;
- Guardian AIT Pty Ltd (**Guardian**) is the trustee company;
- On 27 June 2012, without the assistance of his tax advisers Mr Springer caused AITCS Pty Ltd (**AITCS**) to be incorporated with Guardian holding 100% of the shares in AITCS. Mr Springer also appointed AITCS as a new beneficiary of the AIT. This was a new 'clean skin' corporate beneficiary bucket company;
- AIT distributed approximately $8.2M in the year ended 30 June 2012, including an amount of approximately $2.6M to AITCS, thereby creating an unpaid present entitlement (UPE) of $2.6M owing from AIT, referred to as '2012 UPE';
- On 17 April 2013, AITCS drew on the 2012 UPE to pay its tax, leaving a 2012 UPE of approximately $1.8M;

- It had initially been agreed that the 2012 UPE would be put on a Division 7A agreement, however subsequently it was decided that AITCS would pay a fully franked dividend in the year ended 30 June 2013 to AIT and that dividend would be offset against the 2012 UPE. AIT then distributed the franked dividend to Mr Springer; and
- The same transactions were undertaken in later years, however the Commissioner, in the appeal to the Full Federal Court only appealed the 2012 and 2013 years.

These steps are broadly set out in the diagram below.



3.2.2 Decision – Part IVA

The Commissioner argued the steps undertaken (broadly outlined in the above diagram) were undertaken with the dominant purpose of obtaining a tax benefit, namely the absence of “top up tax” on the distribution at step #4 to Mr Springer, which was not subject to any additional tax as it was non-assessable non-exempt income. Therefore, it was the Commissioner’s position that Part IVA should apply to cancel Mr Springer’s tax benefit.

The Full Court confirmed:-

- The legislation requires a comparison between the relevant scheme and an alternative postulate.[11]
- The alternative postulate compared to the scheme is required to be a reasonable prediction of what might have occurred (more than a possibility).[12]
- The onus on the Taxpayer to prove that the assessment is excessive requires more than proving that the Commissioner's alternative postulate is unreasonable. The onus also requires that the evidence should show what might have been reasonably expected to occur if the scheme had not been entered into.[13]

The Full Court held that there was a tax benefit arising from the identified schemes because Mr Springer had not discharged the onus of proving that, in the absence of the schemes, he would reasonably have been expected to have undertaken an alternative course of action that would not have resulted in him being made presently entitled to the income of the Trust in the 2012 and 2013 income years.

The Full Court found that a dominant purpose existed in relation to the scheme for the 2013 year, but not in relation to the 2012 year.

3.2.3 Analysis of the decision

The judgment appears to state that the Taxpayer must provide a more likely and reasonable alternative postulate showing no tax benefit in order to succeed in showing that the Commissioner's Part IVA amended assessment is excessive.

The Full Court[14] referred to the decision of *Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd*[15] in which it was stated:

> It is the taxpayer who bears the onus to establish that there is no tax benefit in connection with a scheme…..
>
> How the taxpayer does that is a matter for it. It may, for example as Sackville J said in *Lenzo* 167 FCR 255, lead evidence that the taxpayer would have undertaken a particular activity, or adopted a particular course, in lieu of the scheme. It is also conceivable that a taxpayer may not lead positive evidence of an alternative postulate because, for example, the result of any objective enquiry of the alternative postulate is inevitable. In the end, the Court will decide what would have been done, or might reasonably be expected to have been done, in lieu of the scheme having regard to all of the evidence that is fed. If a taxpayer has given evidence of what he or she would have done but for entering the scheme, that evidence will be relevant and useful to the extent to which it reveals facts or matters that bear upon the objective determination of the alternative postulate.

Despite Logan J having determined in the first Federal Court decision[16] that the Commissioner's postulated distribution to Mr Springer (then a non-resident) would '*never, ever, have occurred'* - on

[11] *Guardian* [155]
[12] *Guardian* [155]
[13] *Guardian* [156]
[14] *Guardian* [155]
[15] [2010] FCAFC 94 at [35] – [36].
[16] *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner or Taxation* [2021] FCA 1619

the basis of evidence given by Mr Fischer (Mr Springer's accountant), the Full Court found that is what would have occurred.

Logan J had concluded that absent a demonstrable need by Mr Springer for the money, a competent tax advisor would not recommend Mr Springer incur a tax impost. That was not a conclusion to which the Full Court subscribed (although they did find that there was no subjective intention of avoidance - objectively viewed that was the dominant purpose).

The Full Court held that the amendment to Part IVA in s177CB(4) applied from the 2013 income year, so that in order for an alternative postulate to be considered reasonable it must achieve the same outcome as the Scheme but no regard is to be given to the tax cost of the alternative.

The Commissioner did not argue that s177CB applied until the Full Court hearing. In the first Federal Court decision, before Logan J, the Commissioner had conceded that s177CB had no application to the 2013 year presumably because the Commissioner considered that the scheme commenced before 16 November 2012. The taxpayer objected to the Commissioner running the argument for the first time in the Full Court. However, the Full Court applied s177CB without any discussion of the natural justice implications of considering a point raised for the first time on appeal - one which was expressly disavowed at first instance.

From there the Full Court reasoned that as a result of s177CB,

> …..it was not open to the primary judge to have regard to the higher Australian income tax cost that would have applied had the income been distributed directly to Mr Springer in determining what might reasonably be expected to have happened had the 2013 related scheme not been entered into or carried out.[17]

The Full Court held that evidence as to what a tax advisor would have recommended as an alternative is not relevant.

[17] *Guardian* [174]

4. How the alternative postulate can have adverse implications for taxpayers

As discussed above, for there to be a tax benefit, in relation to a scheme, it is often necessary to compare what actually occurred (the scheme) to what "*might reasonably be expected*" to have happened – the reconstruction approach.

This requires an alternative postulate to be identified. As discussed previously, s177CB(4)(b) now specifies that potential tax liabilities are not to be taken into account in assessing the likelihood or reasonableness of any alternative postulate.

The question is whether the alternative postulate must still nevertheless be a 'reasonable alternative', even though it does not take into account the tax cost.

In *Commissioner of Taxation (Cth) v Peabody* (1994) 181 CLR 359 (***Peabody***) at 385, the High Court said:

> A reasonable expectation requires more than a possibility. It involves a prediction as to events which would have taken place if the relevant scheme had not been entered into or carried out and the prediction must be sufficiently reliable for it to be regarded as reasonable: *IRC v Brebner* [1967] 2 AC 18 at 27.

Prior to the introduction of s177CB, the Commissioner had argued in both *RCI* and *FC of T v Axa Asia Pacific Holdings Ltd* (2010) 189 FCR 204 (***AXA***) that the counterfactual or alternative postulate does not have to be the most reasonable or probable counterfactual – it just has to be one of a number of reasonable counterfactuals.

This was rejected by the courts in *RCI* and *AXA*, the basis being that if the Commissioner's alternative postulate or counterfactual is not the most likely prediction then it is not sufficient to be a reasonable expectation.

The onus of proof is on the taxpayer to prove what the taxpayer would have done in lieu of entering into the scheme.

The following table summarises the scheme and the alternative postulates put forward in *Guardian*.

Scheme	Taxpayer's alternative postulate	Commissioner's alternative postulate agreed to by the Full Federal Court
Trust distributes income to new bucket company which is taxed at 30%	Trust distributes income to new bucket company which is taxed at 30%	Trust distributes all the income that it would have otherwise paid to the bucket company to the individual taxpayer (Mr Springer), who would be taxed at the marginal rates for non-

		resident taxpayers - no franking credits.
Trust pays to the bucket company sufficient cash to pay the tax, but the balance of the distribution remains as an unpaid present entitlement (**UPE**) owing to the company.	Either (a) Trust would have paid the distribution to the bucket company or (b) the distribution would have been retained in the Trust (less the tax) as a UPE and a compliant Division 7A loan would have been entered into with the Company.	
Bucket company pays franked dividend to Trust.		
The franked dividend is offset against the UPE, so that effectively the UPE is extinguished.		
Trust makes distribution of franked dividend to taxpayer who is a non-resident and no further tax is paid.		

Even though there was evidence in the case that no competent adviser would ever recommend that distributions be paid to the individual taxpayer and incur tax at the top marginal rates, the Full Federal Court nevertheless decided that (in the 2013 year) it was a reasonable alternative postulate that all the income distributed to the bucket company would otherwise be distributed to the individual and be subject to tax at the marginal tax rates applicable to non-residents – no franking credits.

The reasoning was as follows:

- There was no evidence that a Division 7A loan agreement would have been used – even though there was an existing Division 7A loan agreement in place as a safety-net, but that loan agreement did not specifically cover the amounts in question.
- The commercial substance of the Trust retaining the funds, and no dividend being paid and no distribution to the taxpayer was not in line with the commercial reality of what occurred.

- The alternative postulate of having a Division 7A loan agreement had been rejected by the taxpayer when the taxpayer had suggested that a dividend be paid; the taxpayer did not want a Div 7A loan agreement.[18]

- The taxpayer had given evidence that he did not want money to be placed into a company bank account that he did not control – so the Full Court found on this evidence that a distribution to the bucket company would never have been paid out.

The finding by the Full Court that the taxpayer had rejected the Division 7A loan agreement seems to be based on the following email, although this email could be interpreted as the taxpayer considering the Division 7A loan agreement as an option….

> I am not comfortable transferring that much money into an account that I have no control over. I therefore would like to enter into a 10 [sic] loan agreement with AIT and [AITCS]. The other option which I would do is to transfer to [sic] money directly to myself as 100% shareholder of [AITCS]. The books could show the funds going directly to [AITCS] and from [AITCS] to me via a dividend payment. Would this comply with ATO requirements. I could then pay the 10% non resident tax on any interest generated.[19]

This case shows the difficulties that the taxpayer now faces. An alternative postulate was accepted by the Full Court that was not the most reasonable. Unfortunately, the taxpayer had had enough and was unwilling to progress the case any further. The taxpayer had access to test case funding for the Full Federal Court appeal, but that funding was not available to test the matter in the High Court.

Consider the following simple example in the context of a scheme which consists of a taxpayer disposing of an asset to pay off Division 7A loans. The Division 7A loans owed by the taxpayer amount to $1M. The following alternative is postulated by the Commissioner:

- Rather than the taxpayer disposing of an asset for $1M to repay Division 7A loans the company might have declared a $1M fully franked dividend to its individual shareholder (taxpayer).

- Assume $200,000 of top-up tax is payable as a consequence of the dividend being declared.

The argument that the company would never have paid a fully franked dividend because it would have resulted in a significant amount of top-up tax payable is now not available.

Based on the Commissioner's view, it would be the case that:

- The substance of the 'scheme' (by which the taxpayer has received a 'tax benefit') is the sourcing of the funds through the disposal of another asset of $1M which is in turn used to pay off the Division 7A loans - s177CB(4)(a)(i).

- The result or consequences for the taxpayer is that the Division 7A loans are wholly repaid by the asset proceeds - s177CB(4)(a)(ii).

- The franking credit gross-up and offset are ignored as is any tax paid by the taxpayer at his marginal tax rate - s177CB(4)(b). This is because one must disregard any result in relation to the operation of the Act that would be achieved by the postulate for any person (in this case the taxpayer).

[18] *Guardian* [164]
[19] *Guardian* [52]

- It follows that for the purposes of s177CB(4)(b), the taxpayer receives $1M and not the overall net amount of $800,000 (after tax is paid). As such, there is no Division 7A shortfall amount, and the substance/effect of the scheme is comparable to the alternative postulate.

Prior to 2013 the taxpayer would say that such an outcome would be an unlikely prediction. The declaration of the dividend would not have been a reasonable alternative for the payment of the Division 7A loans, given the $200,000 additional tax impost.

Now, it would be impermissible to rely upon the tax consequences of the alternative postulate to argue that it is unreasonable.

Instead, it could be argued that the financial consequence of declaring the dividend and meeting the tax outcome (in this example $200,000) is a relevant consideration because it would result in the taxpayer borrowing further funds from the company with the result that the substance/ effect of the alternative postulate is not comparable to the scheme.

In other words, is there scope to argue that the borrowing relates to the non-tax objectives of the "scheme" (the repayment of the division 7A loan in full) and not the tax consequence of the alternative postulate?

The argument can no longer be that the company would never have paid a fully franked dividend because it would have resulted in a significant amount of top-up tax payable. Instead, the argument is that the company would never have paid a fully franked dividend because the taxpayer would need to find an additional $200,000 with which to fund the repayment of the Division 7A loans.

The EM[20] places considerable importance on the comparability of the alternative postulate with the "substance of the scheme". The following passages from the EM underline this point:

> 1.98 The amendments make it clear that in determining whether a postulate is a reasonable alternative to the entering into or carrying out of the scheme, particular regard must be had to the 'substance of the scheme' and to 'any result or consequence for the taxpayer that would be achieved by the scheme' (tax results aside). [Schedule 1, item 5, paragraph 177CB(4)(a)]…
>
> 1.100 Particular regard must be given to the specified matters: they are *not intended to be an exhaustive list* of the matters to which regard may be had….
>
> 1.103 An examination of the substance of a scheme [Schedule 1, item 5, subparagraph 177CB(4)(a)(i)] requires a consideration of its commercial and economic substance as distinct from its legal form or shape….
>
> 1.106 In order for a postulate to constitute a reasonable alternative to the entering into and carrying out of the scheme, the substance of the postulate *should correspond* to the substance of the scheme…..
>
> 1.110 It would be expected that a postulate that is a reasonable alternative to the entering into and carrying out of a scheme would achieve for the taxpayer non-tax results and consequences that are *comparable* to those achieved by the scheme itself.

Based on these passages from the EM, the results and consequences are not the same. In other words, the non-tax results between the scheme and the alternative postulate are not comparable. This is because the result under the scheme is that the Division 7A loans are wholly repaid, whereas

[20] Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013.

the alternative postulate requires an additional borrowing of $200,000 which was not part of the scheme. Therefore, it could be argued that the Commissioner's alternative postulate is not reasonable because the non-tax results are not comparable.

The fact that the taxpayer did not have to borrow under the scheme should be another (non-tax) matter to which regard can be had for the purposes of s177CB(4) because the matters in that subsection are non-exhaustive.

5. Dealing with Part IVA in practice

For Part IVA to apply, the Commissioner must make a Part IVA determination to cancel a tax benefit. In other words, Part IVA cannot apply without administrative intervention.

5.1 ATO Part IVA audits

Before Part IVA will be considered by the ATO, there must be a position formed that the general taxation provisions do not apply, or there is a risk they will not apply. The ATO will not usually seek to use Part IVA if they are confident that another tax provision could apply. Therefore, if in an audit, the ATO advises that they may seek to apply Part IVA, when they have been arguing that another provision applies (for example Div 7A) then that is a signal that the ATO has some concerns that the primary provision will not apply to tax the identified tax benefit.

The ATO will generally need to raise Part IVA as an issue in the review or audit. The ATO is unlikely to rely on Part IVA at the objection stage or in litigation, if the ATO has not gathered the relevant evidence at audit. Even though I have seen objection decisions where the ATO will include a one-line statement with words to the effect that they reserve the right to apply Part IVA, the reality is that the ATO needs to gather evidence and undertake a process to apply Part IVA and this is done during an audit – not at the objection stage.

If in the late stage of an audit, the ATO decides to consider Part IVA, and then asks for an extension of the period of review to give them more time in which to finalise the audit, the taxpayer by giving the extension is giving the ATO time to gather evidence and prepare their Part IVA position. Even though taxpayers do not like the idea of an assessment being issued on which they will likely be required to pay tax, it is worthwhile considering whether agreeing to an extension of the period of review will be the best decision in the long run.

The ATO does not normally consider Part IVA in the reviews or audits conducted in the 'Individual and Intermediaries' and 'Small Business' client engagement group business lines. The reasons for this include:

- the times in which staff in those business lines have to do an audit are very short (months not years) and these time frames are too short to prepare a Part IVA case;
- the staff conducting reviews in those business lines do not usually have the skill set to prepare Part IVA cases; and
- the money involved does not warrant the time and resources required to prepare a Part IVA case.

This is why the ATO is unlikely to apply Part IVA to trust distributions made by small businesses, even though those distributions decisions may be driven by tax considerations.

The business line that has the most Part IVA cases is the 'Private Wealth' business line. These are groups with the following characteristics:

- private companies and their associated subsidiaries with an annual turnover greater than $10 million; or

- resident individuals who, together with their business associates, control net wealth over $5 million.

If Part IVA is an issue in an audit, that will usually extend the audit for an additional 12 months if not longer. The audit may involve:

- formal interviews to gather verbal evidence about what occurred, including the subjective intention of the parties in an arrangement and this can include the advisers;
- engagement of external Barristers to assist with the gathering of evidence; and
- extensive requests for information and documentation.

The evidence of the individuals in an arrangement is very important even though the 'dominant purpose' for Part IVA is based on an objective view of the facts, not the subjective view of the participants. As in all tax matters the most critically important aspect are the facts – and how they are presented.

The audit team must follow the practice statement PSLA 2005/24 which provides them with instructions on how to deal with a Part IVA matter, and this will involve the following steps:

- engagement with technical experts in the business line to consider whether the audit team has support to raise Part IVA;
- obtaining approval to engage Tax Counsel Network (**TCN**), who must agree that Part IVA could apply and sign off on the position paper before it issues;
- booking into the GAAR panel after position papers have issued;
- preparing submissions and presenting to the GAAR panel (this process involves TCN);
- following the recommendation of the GAAR panel; and
- providing submissions, papers and relevant information to Deputy Chief Tax Counsel to make a determination.

The Part IVA audit is a very time-consuming and resource intensive process for both the ATO and the taxpayer. It is worthwhile considering whether to make of an offer to settle early in the process and/or to engage legal counsel during the audit – especially if formal interviews are being conducted.

Another consideration is whether it is worthwhile attending the GAAR panel. The taxpayer and/or their advisers have the option of attending the GAAR panel and/or providing a submission. Some advisers think this is a waste of time – but there have been instances where the GAAR panel has decided that Part IVA does not apply due to the oral and written submissions made by a taxpayer and his advisers, who attended the panel.

5.2 Part IVA & tax advice

It is often the case in disputes involving Part IVA that the ATO will lift the accountants' concession and request that written tax advice provided by an accountant to a taxpayer regarding the tax implications of various alternative ways of carrying out a transaction be provided to the ATO. This written advice may be evidence for the ATO to establish a Part IVA case, especially if the advice has only considered the tax impacts of various alternatives.

The only way such tax advice is protected is if it is provided by a solicitor and legal professional privilege applies.

When advising on any proposed transactions, where there is a potential tax benefit, it is necessary to carefully consider whether there are commercial and economic reasons for undertaking the transaction in the particular way that is being proposed. Transactions that are structured in a particular way to access tax advantages are likely to be a Part IVA risk.

The risk of Part IVA applying is heightened for the larger private group – especially if there is a likelihood of an ATO review due to the taxpayer's size.

Recent experience indicates to me that advisers are under-estimating the risk of Part IVA applying to transactions and restructures. If Part IVA is found subsequently to apply and the client has not been advised of the risk – then this can give rise to a claim for professional negligence.

It is possible to request a private ruling from the ATO on the application of Part IVA. However, the ATO has a history of declining to provide private rulings on Part IVA on the basis that the Commissioner is entitled to decline to make a private ruling where the correctness of the ruling would depend on the assumptions about future events or other matters. The ATO's right to refuse to issue a private ruling on Part IVA was upheld in the Full Federal Court decision in *FCT v Hacon Pty Ltd* [2017] FCAFC 18.

Even if the ATO did decide to rule, it is likely that such a ruling will take a long time, over 6 months and substantial information would need to be provided.

Finally, it is important to keep abreast of the taxpayer alerts and other information that the ATO issues. This gives an indication of the types of arrangements that the ATO may be seeking to apply Part IVA to. When a taxpayer alert is issued, normally there is a number of cases which the ATO currently has under audit. Further, the ATO will have a compliance strategy to address the risks associated with an arrangement in a taxpayer alert and this may involve a strategy to identify a pool of cases to audit. An example of a recent taxpayer alert is TA 2023/*1 Interposition of a holding company to access company profits tax-free*.

6. Promoter Penalties

In my previous life I was an Assistant Commissioner in the ATO in an area called "Aggressive Tax Planning". Part of my role was dealing with the technical issues that arose in dealing with schemes and promoter penalties. I was involved in the Federal Court proceedings in the matter of *Commissioner of Taxation of the Commonwealth of Australia v Barossa Vines Ltd* [2014] FCA 528, which was the second promoter penalty case, the quantum of penalties being resolved through mediation.

It is not easy for the ATO to establish a case for promoter penalties. It is a resource intensive process. In relation to the promotion of a scheme, the process will involve audits to establish there is a tax exploitation scheme. Then, there is the promoter investigation which will include gathering evidence about the promotion and marketing of the scheme and consideration. After all that work is completed the ATO then needs to instigate Federal Court litigation. The process usually takes years.

Therefore, the application of those rules is only considered in cases where the ATO sees behavior that is at the most aggressive end of the spectrum. In short it is a measure only directed at a very small minority of the tax adviser population.

There are proposed amendments as part of the Government's package of reforms in response to the PwC tax leaks. The Government announced these changes on 6 August 2023. The Exposure Draft legislation and Explanatory Memorandum was open to public consultation until 4 October 2023. On 16 November 2023, the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 was introduced to parliament. The draft legislation has been referred to the Senate Economics Legislation Committee, with a report being due on 18 April 2024.

The draft legislation provides for a commencement date on the later of 1 July 2024 or the first of 1 January, 1 April, 1 July or 1 October after Royal Assent.

6.1 Summary of existing Promoter Penalties provisions

The promoter penalty rules were introduced in 2006, to deter tax practitioners from promoting tax avoidance and evasion schemes. Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (**TAA 53**) contains the relevant legislation.

6.1.1 When do the provisions apply?

The laws apply to two types of prohibited conduct:-

- An entity must not engage in conduct that results in that or another entity being a **promoter** of a tax exploitation scheme.
- An entity must not engage in conduct that results in a scheme that has **been promoted on the basis of conformity** with a product ruling being implemented in a way materially different from that being described in the product ruling.

Section 290-60 ITAA 53 sets out the definition of a promoter. For an entity to be considered a promoter:

- it must market or encourage the growth, or interest in a tax exploitation scheme;
- it (or an associate) directly or indirectly receives consideration in respect of the said marketing or encouraging; and
- it is reasonable to conclude, having regard to all relevant matters, that the entity had a substantial role in respect of said marketing or encouragement.

There are two exceptions to being classified as promoter - where the entity merely provides advice on a scheme and where an employee distributes information or material prepared by another entity.

6.1.2 ATO Guidance

The ATO has published PS LA 2021/1 encompassing the application of the promoter rules. The practice statement sets out indicators of potential promoter behavior:

- advisers who have encouraged one or more taxpayers to seek a tax or superannuation benefit to which they are not entitled;
- advertisements or marketing for tax or superannuation schemes that seem 'too good to be true';
- tax agents, consultants or other advisers (whether registered or unregistered) offering tax savings in return for a large fee or a percentage of the tax saved;
- tax agents, consultants or other advisers marketing a scheme that was developed by others;
- multiple clients of the same adviser engaging in similar arrangements that are unnecessarily complex or seem designed primarily to get a tax or superannuation benefit;
- schemes where the ATO has applied the anti-avoidance provisions (for example, in Part IVA) which were marketed by an adviser;
- tax agents, consultants or other advisers (whether registered or unregistered) offering or encouraging illegal early access to superannuation despite release criteria not being satisfied.

6.1.3 What is a "Tax exploitation scheme"?

Pursuant to s290-65 TAA 53 the meaning of a tax exploration scheme is separated between whether the scheme is implemented or not. If the scheme is implemented, the question is whether it is reasonable to conclude that the sole or dominate purpose of entering or carrying out the scheme was to obtain a benefit. If the scheme is not implemented, the question is whether it is reasonable to conclude that IF the entity had entered into or carried out the scheme, it would have been done so as the sole or dominate purpose of obtaining a benefit for that entity or another.

You will note that a tax exploitation scheme is generally one to which Part IVA would apply.

6.2 The proposed changes

The reforms are currently in the form of draft legislation, namely Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023.

The objective of the amendments is set out in the draft EM:

> The amendments seek to boost the effectiveness of the operation of the promoter penalty provisions **without inhibiting the capacity of entities to provide independent and objective tax advice, including advice regarding tax planning**. The amendments improve the ability of the Commissioner to target promoters of tax exploitation schemes and schemes being misrepresented as having ATO endorsement, and the ability to seek the application of civil penalties.
>
> The promotion of these schemes puts taxpayers who enter such schemes at risk of shortfall tax, penalties and interest. The amendments ensure the incentives for tax practitioners and other promoters to make unauthorised disclosures of confidential information, where that information is used to promote these schemes, are diminished.[21] (emphasis added)

The Commissioner must apply to the Federal Court to impose a civil penalty or to obtain an injunction – that requirement will not change. The EM has changed since the Exposure Draft EM to note that the amendments are not intending to impact the capacity of advisers to provide advice on tax planning. Concerns were raised in the consultation process that the amendments could apply to the provision of advice about a scheme.

6.2.1 Increasing the time

Under current law, the Commissioner cannot make an application to the Federal Court regarding the promoter's involvement after four (4) years since the promoter last engaged in the conduct. The reforms will increase this period to six years.

According to the draft EM, the Commissioner often becomes aware of the promotion after the 4-year period has elapsed. This is because the tax audits uncover the promotion, and they normally occur after the 4-year period. Consideration should also be given to the complexity of taxation exploitation matters which necessitates gathering evidence that takes significant time.[22]

It is also noted that there is an exception to these time limits that was pre-existing – that is where the scheme involves evasion. It is likely that most schemes to which the promotor penalties apply would involve evasion, so this time extension is unlikely to make much difference in practice.

6.2.2 Unimplemented schemes not conforming to tax rulings

The draft legislation now also extends the promoter penalty provisions to schemes that have not been implemented yet – in respect of schemes that are promoted on the basis of conforming with a tax ruling (see further below) but are materially different from that described in the tax ruling. Noting that the legislation has always applied to unimplemented tax exploitation schemes but had not previously applied to unimplemented schemes not conforming to tax rulings.

[21] Draft Explanatory Memorandum, Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 at [1.4] - [1.5]
[22] Ibid [1.7] – [1.8]

This change is new and was not included in Exposure Draft Legislation.

6.2.3 Penalties

The proposed changes seek to also increase the penalties. Currently, the penalties have not been updated since 2006. The new penalties are as follows:-

- 5,000 penalty units for individuals (unchanged) [$1.565M based on current penalty rate] or 50,000 penalty units [$15.65M] for a body corporate or Significant Global Entity (**SGE**) as opposed to 25,000 penalty units.
- 3 times the benefit received or receivable instead of 2 times the consideration received or receivable. (Noting the change from “consideration received” to “benefit received”.)
- Introducing, for a body corporate or SGE, 10% of the aggregated turnover of the most recent tax return before the entity engaged in conduct that contravened the promoter penalty laws. This is capped at 2.5 million penalty units [$782.5M based on current penalty rate].

It is noted in the Draft EM that:

> Extending the penalty provisions to SGEs is intended to include large partnerships and trusts and is consistent with the tax integrity and reporting measures imposed on SGEs. This ensures that large multidisciplinary firms are accountable regardless of their entity structure.[23]
>
> ……..
>
> To give effect to these changes in relation to SGEs that are partnerships, any contravention of the civil penalty provisions by a partnership is taken to be a contravention by each of the partners. All partners in the partnership will be jointly and severally liable for a contravention by any partner acting in their capacity as a partner in the partnership.[24]

BDO took issue with this in the consultation process – but it appears that their concerns did not result in any changes to the draft legislation. Their submission states:

> In relation to the extension of actionable conduct to all partners in a partnership that is an SGE and all trustees of a trust that is an SGE, BDO is concerned that this seems to be overkill to provide no defence at all for not knowing and not being involved. The proposed provisions impose quasi-criminal consequences on persons merely by association. We consider that this is not consistent with the general understanding of the rule of law. It is also unnecessary, as pecuniary liability for actions of the partnership or trust will be effectively imposed on all partners or trustees in any event.[25]

Ernst & Young in their submission on the proposed changes state that the potential penalty is far greater than that set out in the Corporations Act 2001, noting the intention was to make the civil penalty regimes align. They note that term ‘aggregated turnover’ includes the annual turnover of the

[23] Ibid [1.33]
[24] Ibid [1.35]
[25] BDO submission, dated 4 October 2023 and published at: https://consult.treasury.gov.au/pwc-response/ppl-reforms/view/1

entity plus the annual turnover of any entities that are connected to or affiliated with it, calculated on a world-wide basis![26] Again, this feedback did not result in any changes to the draft legislation.

6.2.4 Broadening the definition of "promoter"

As noted above, the definition of "promoter" currently prescribes that there be consideration received. The new changes proposed to be implemented removes this requirement, alternatively adding that a "benefit' be received. Moreover, a benefit need not be quantifiable. [27]

Ernest Young has commented on this change with a degree of trepidation.

> it may be that there is no practical limit on the amount of penalty that can be imposed if the suggestion in the draft EM that 'benefit' should encompass benefits from a promoter increasing their client base as well as any "less obvious" benefit or an intangible or "disguised" benefit.[28]

Ernest Young believes the more suitable change would be to expand the definition of "consideration" rather than creating exponential uncertainty.

Ernst Young's concerns have not resulted in any changes to the draft legislation, however, the EM now includes examples of in-house advice and in-house promotion and is as follows[29]:-

> Example 1.2 - In-house advice
>
> A tax practitioner is employed to provide in-house advice to a company. The tax practitioner provides advice in relation to a scheme which the company has asked them about and which purports to be consistent with an ATO ruling. The advice notes that the tax structure could be beneficial for the company, but also notes that the assertion that the scheme is consistent with the ATO ruling should be tested before the scheme is adopted.
>
> In these circumstances, the practitioner is not promoting or encouraging the growth of the scheme and would not be considered a 'promoter' for the purposes of the promoter penalty laws.
>
> Example 1.3 – In-house promotion
>
> An in-house adviser develops and promotes a tax exploitation scheme to entities within its corporate group by actively encouraging participation in a scheme of which the related entities were not previously aware. The adviser does not charge the related entities professional fees for providing this advice, but receives a bonus based on the tax saving the group has achieved. Because the benefit element of the promotor penalty provisions is satisfied, in these circumstances the in-house adviser could be considered a 'promoter' for the purposes of the promoter penalty laws.

6.2.5 Expansion of ATO Rulings.

In relation to the civil penalty that broadly applies to promoters who promote schemes which incorrectly purport to conform with a product ruling (s290-50(2) TAA 53), the proposed changes

[26] Ernst & Young submission, dated 4 October 2023 and published at : https://consult.treasury.gov.au/pwc-response/ppl-reforms/view/5
[27] Draft Explanatory Memorandum, Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 at [1.13] - [1.14].
[28] Ernst & Young submission, dated 4 October 2023 and published at : https://consult.treasury.gov.au/pwc-response/ppl-reforms/view/5
[29] Draft Explanatory Memorandum, Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 at [1.43]

replace “product ruling” expanding the scope by substituting “public ruling, private ruling or oral ruling”.

BDO discusses this in their submission on the proposed changes and forms the opinion that an advisor may accidentally refer to an edited version of a private ruling and be subject to promoter penalty provisions![30]

6.2.6 Expanding the definition of ‘Tax Exploitation Scheme’

The draft legislation extends the definition of tax exploitation scheme to ensure that it includes schemes that are subject to the Multinational Anti-Avoidance Law (**MAAL**) or the Diverted profits tax (**DPT**) provisions particularly s177DA and s177J ITAA 36. Similarly, to current law, the definition can apply whether the scheme has been implemented or not.

The fundamental difference between the changes is they swap the dominate purpose test for the principal purpose test that is found in the MAAL and DPT provisions.

[30] BDO submission, dated 4 October 2023 and published at: https://consult.treasury.gov.au/pwc-response/ppl-reforms/view/1