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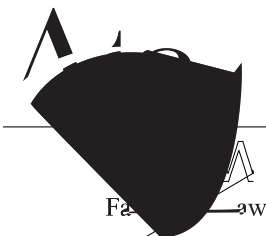
CONTENTS

93 Explaining the U.S. Income Tax Compliance Continuum
Brian Erard and Chih-Chin Ho

110 The Interrelation of Scheme and Purpose Under Part IVA
Maurice J Cashmere

134 The Influence of Education on Tax Avoidance and Tax Evasion
Jeyapalan Kasipillai, Norhani Aripin and Noor Afza Amran

147 **Scheme New Zealand or An Example of The Operation of Div 165**
Justice Graham Hill



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Scheme New Zealand or An Example of The Operation of Div 165[+]

Justice Graham Hill[*]

Abstract
There is no decided case in Australia yet regarding the application of general anti-avoidance rules to a transaction with respect to GST. However, this has been considered to some extent in a recent case in New Zealand, *TRA No 001/02 v Commissioner of Inland Revenue*. This paper considers the decision made by the New Zealand Taxation Review Authority on that case as a vehicle for speculating on the outcome under the general anti-avoidance rules contained in the Australian GST Act, had a scheme equivalent to the New Zealand scheme been implemented in Australia.

INTRODUCTION

It took 13 years from the introduction of Part IVA into the *Income Tax Assessment Act 1936* until it first engaged the attention of the High Court in *Commissioner of Taxation v Peabody*[1]. It may well take around that time for Division 165 of the *A New Tax System (Goods & Services Tax) Act 1999* ("the GST Act") to receive detailed consideration in the High Court. Perhaps that is to be unduly pessimistic given recent murmurings in the newspapers suggesting the possible application of Division 165 to "joint venture" schemes.

Because there are, as yet, no cases in Australia which have considered Division 165 it is useful to consider the facts of a recent New Zealand case *TRA No 001/02 v Commissioner of Inland Revenue* ("the deferred payment scheme") decided by the New Zealand Taxation Review Authority. This, then, provides a vehicle for speculating on the outcome under Division 165, had the scheme been implemented in Australia (and worked). It also enables us to assess the difficulties (if any) which the transplantation of Part IVA into the GST Act (albeit with some modif(possibbeit w(30.19P00520)T

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The paper will not set out the legislative scheme of Division 165. That will be assumed. There will, however, be a need to set out some of the provisions of s 76 of the *Goods & Services Tax Act 1985* ("the NZ Act").

THE FACTS

The basic outline of the facts of the deferred payment scheme is quite simple. The taxpayer T contracted to purchase some 114 sections of land in a subdivision from a similar number of companies ("the A group of companies") by separate agreements. The agreements were conditional upon each of the A group of companies completing a purchase agreement it had entered into with W Developments Limited the owner of the land.

The total consideration payable under the contracts exceeded $80 million (NZ). Each had a deferred settlement date ranging from 10 to 12 years. Each provided for payment of $10 on signing, as part payment of an agreed deposit of $30,000. Each provided that the vendor would build a house on the land agreed to be sold. The consideration in each contract reflected the expected market value of the land on completion after a house had been built upon it.

A typical example of a contract is given at par [13] of the Tribunal's reasons. The purchase price was $810,000 (NZ). Settlement was to take place on 26 August 2016. Settlement contemplated a second mortgage being granted back from the vendor in the sum of $240,000 (NZ) with a term of 3 years from settlement with the balance of $520,000 being payable in cash on completion. There is a mathematical problem with the figures in the judgment. With a purchase price of $810,000 and after allowing the deposit of $30,000 and the mortgage back of $520,000 there is an amount of $20,000 not accounted for. However nothing turns on this.

The secret of the scheme for GST purposes lay with the mismatch in GST attribution that was brought about because the taxpayer was registered to pay GST on an invoice (ie non cash basis), whereas each relevant vendor was registered to pay GST on a cash basis. On these facts (but for simplicity sake I have assumed the Australian GST rate of 10%) the taxpayer under the NZ Act would be entitled to an input tax credit of $73,636 at the time the contract was entered into. (The New Zealand figure was approximately $NZ 90,000). The vendor, on the other hand would only be liable to pay an output tax of $2,727 at the time the $30,000 deposit was paid with the balance payable on completion in 2016. Commercially the promoter of the scheme was the real winner. A had contracted to purchase the property the subject of the example for $70,000. The deposit of $30,000 (after GST) paid by T allowed A to pay a fair percentage of the purchase price to W Developments and T had some $NZ 60,000 left over which would assist in financing the balance.

In respect of 104 of the properties sold, an input tax credit of nearly (NZ) $9,000,000 was claimed.

As is often the case with income tax schemes, and one might assume GST schemes will be the same, things went wrong for the promoters of the scheme. The Commissioner was not inclined to grant the refund sought. That refund was intended, among other things, to fund the actual cash deposit. Since the deposit was not paid (which would also have funded the purchase of the properties by the A Group of

Companies), W Developments Ltd rescinded those contacts and then commenced to sell off the land which the taxpayer had contracted to buy from the various companies in the A Group of companies. Other relevant facts will be mentioned in the course of

did. Here the taxpayer wished to argue that the Act did operate to bring about a

> taxpayers. That served to prevent the application of the Act by denying on the one hand the Crown the revenue which the Act was designed to exact, and on the other, requiring the crown to disgorge public monies for private use.

Perhaps the most difficult of these conclusions is paragraph (d) with the premise implied in that paragraph that the exploitation of the attribution mismatch defeated the intention of the NZ Act or a provision of it. Certainly it is a consequence of the two methods of accounting that a mismatch could arise. Nothing in the transaction was

intended to deny the Crown revenue as such. The purpose was to ensure that there would be a time delay in payment brought about by the combination of the mismatch and the period of time which would elapse between contract and completion. Clearly the transaction was designed to ensure an

It is far from clear what that qualification means despite an elliptical reference to *Inland Revenue Commissioners v Brebner*[4] in Peabody which presumably was

the benefit "got" from the scheme is one "attributable to the making, by any entity, of a choice or election" expressly provided for by the GST law.

Section 29-40 of the GST Act permits a taxpayer to "choose to account on a cash basis" so long as certain tenets are observed, for example, the annual turnover does not exceed the cash accounting turnover threshold in s 29 – 40 (3) of $1(AUS) million. That, of course, is why it would be essential in Australia (it was also essential in New Zealand) for each contract to be a single venture of one parcel of land with a consideration under the threshold. Otherwise accounting on a cash basis would invoke the exercise of discretion by the Commissioner. It could not be expected that that discretion would be favourably exercised.

Clearly there is a choice under s 29-40(1) of the GST Act. That choice on one view of the matter, ensures that there is a deferral of output tax by the vendor to the taxpayer. It does not in any way accelerate the obtaining of an input tax credit by the taxpayer.

Accepting for the moment that the relevant GST benefit is the deferral of the output tax by each company in the A Group of companies, such that each such company become the relevant taxpayer, the next question would be whether that benefit, is one that is "attributable" to a choice and thus excluded from the definition of GST benefit.

The word "attributable" is not defined in the legislation. The relevant dictionary (not the "Dictionary" in Div 195-1) meaning of "attributable" as a verb is, according to the Macquarie Dictionary (3rd ed) "*to consider as belonging; regard as owing, as an effect to a cause*".

Mr Pagone QC in an article "The Divine Comedy: Consolidations and Part IVA of the *Income Tax Assessment Act 1936* (Cth)[6] suggests that attributable:

> calls for "some sufficient relationship to exist between the tax benefit and the choice. The degree of sufficiency may still be an area for debate and exploration but it is unlikely that the requirement that the tax benefit be attributable to the choice will be satisfied merely by satisfying the "but for" test.

With respect, I agree.

The provision of s 177C(2) of the *Income Tax Assessment Act 1936* was obviously designed to aid in resolving the problem which all general anti-avoidance provisions pose of reconciling it with the more specific provisions of the taxing statue designed to confer concessions or advantages upon taxpayers. The ordinary rule would be that specific provisions prevail over general provisions. That is the true rationale of the income tax cases decided under s 260 of the *Income Tax Assessment* Act 1936, the predecessor to Part IVA, for example, the cases which developed the so-called "choice doctrine" such as *W P Keighery Pty Ltd v Federal Commissioner of Taxation*[7] or *Slutzkin v Federal Commissioner of Taxation*[8]. It must, however, in this context be noted that in the last of the High Court s 260 cases, *Federal Commissioner of Taxation*

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[6] Vol 32 Australian Business Law Review 35 (February 2004)
[7] (1957) 100 CLR 66
[8] (1977) 140 CLR 314

Further, it is an essential element of the scheme that the input tax credit to which the taxpayer is otherwise entitled funds the deposit which the taxpayer is obliged to pay and thus the amount which the various companies in the A group of companies are

THE REASONABLE CONCLUSION – PURPOSE OR EFFECT?

Division 165 requires the drawing of a conclusion. That conclusion may be either a conclusion about purpose or a conclusion about effect. Whichever alternative is to be adopted the conclusion must be one that it is reasonable to draw. That presumably means no more than that the conclusion has to be one based upon reason. Some of the cases under Part IVA have spoken of the conclusion being such that a reasonable man (or woman) would draw it. Perhaps nothing turns upon these two different formulations. In the discussion which fo

tax purpose but motivated by profit to himself or herself. The purpose of an adviser may be attributed to the taxpayer in an appropriate case.[15]

Thirdly, there is no necessary dichotomy be

The normal provision in the contract that the deposit was to be held as stakeholder was crossed out. This may have been thought necessary to ensure the time of supply was immediately upon the contract being entered into.

The need for 114 separate companies to make the purchases from W Developments Ltd had, despite protestations that the separate companies limited the commercial risks involved, no commercial basis. The separate companies could only be explained by the need for ensuring that each company kept below the threshold so as to permit it to account on a cash basis as a matter of right.

The land agent, although according to the contractual arrangements entitled to commission from W Developments Ltd immediately the contract was entered into with the A group companies, as a result of an understanding entered into informally, not to receive his commission until the GST refund was received. In fact he never received any.

Before the 114 contracts were entered into favourable rulings had been obtained from the Revenue in respect of three unrelated property transactions having a similar mismatch.

No doubt in favour of the taxpayer it would be argued that the taxpayer stood to make a profit from the arrangement. This is somewhat like the argument that, in the income tax context, was made in *Spotless.* There the taxpayer's after tax return was substantial and much better than the after tax return that would have been obtained had the taxpayer left the funds invested at interest with an Australian bank and thus suffered Australia tax upon it. However, the higher after tax return was only achieved because the TD0.0(2.6557 17.6)1.4(r lp, th)]TJ17.6011 0 11.9-7.8(and th6)1.4(601oand t)7.J thas5xo