Tax Events

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Restructuring for asset protection

Is it genuine?

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Asset protection and tax integrity provisions

Presented by Brian Richards

1. Introduction

For many small business owners, the issue of asset protection is a significant concern where private and business assets (or both) are of substantial value and arguably exposed to the risks of business activity. With regard to these asset risk concerns, it is common to consider different types of business structure and asset ownership strategies to negate the incidence of risk. The types of risk are generated by any of or all four of the following factors:

1. Business activities;

2. Relationship developments;

3. Growth; and

4. Tax.

Each of the above factors has a different level and type of risk to the ownership of assets. As to what is an acceptable risk to the client is subjective, but where the circumstances involve shielding the assets, the accompanying problem is whether there are any taxation consequences flowing from such a strategy. Merely stating that the reason for the restructure, transaction or asset ownership strategy is to facilitate protection of the business assets of itself does not avoid scrutiny of the taxation integrity measures.

The general strategies for arrangements that are purported to be undertaken for asset protection purposes include:

1. Moving private and/or business assets away from the risk factors; and

2. Redirecting the generation of income to negate asset accumulation associated with the aggregation of income.

Whether the objective is to preserve the ownership of assets or maximise the taxation efficiencies of the present and future business income, the typical strategies would/must further consider the various tax integrity measures that might be applicable:

1. Part IVA;

2. Division 7A; and

3. Trust integrity measure – section 100A.

To the extent that the asset protection measures will incorporate the need to restructure either the business or business assets, access to these various CGT concessions is also often a factor:

1. Division 152; and

2. Subdivision 328-G.

The taxation adviser must contemplate whether, in relation to the above taxation measures, undertaking the transaction to provide "asset protection" is both genuine and sufficiently robust to negate the tax integrity measures.

2. Part IVA ITAA 1936

2.1 Statute overview

To start a discussion about Part IVA it is necessary to first comprehend that if the Commissioner is to exercise the power in subsection 177F(1), the requirements of Part IVA must be satisfied. These requirements are that:

1. A "tax benefit", as identified in section 177C, was or would, but for subsection 177F(1), have been obtained;

2. The tax benefit was or would have been obtained in connection with a "scheme" as defined in section 177A; and

3. Having regard to section 177D, the scheme is one to which Part IVA applies based on an objective review of all the matters raised in section 177D.

Regard must be had to the individual circumstances of each case in making a determination under section 177F to cancel a tax benefit.

Suffice to suggest that the term "scheme" is exceptionally broadly interpreted. In **FCT v. Hart [2004] HCA 26 at [43] per Gummow and Hayne JJ**:

> The definition is very broad. It encompasses not only a series of steps which together can be said to constitute a 'scheme' or a 'plan' but also (by its reference to 'action' in the singular) the taking of but one step.

Importantly, the application of Part IVA is dependent on the determination of what constituted the dominant purpose for the scheme. In this regard, section 177D is the pertinent provision. This section identifies schemes to which Part IVA applies and allows the objectively determined purpose or dominant purpose to be tested against a person who entered into or carried out the scheme or any part of the scheme.

Hence, and as is stated in PS LA 2005/24, Part IVA will apply to a scheme if a person enters into or carries out only a part of the scheme for the dominant purpose of enabling the taxpayer to obtain a tax benefit in connection with the scheme. This is important where the scheme is complex and involves a number of parties and connected transactions. This does not, however, affect the identification of a "scheme" under subsection 177A(1). Whether a scheme is wider or narrower should not be relevant in determining if the test in section 177D is met with respect to the scheme, as long as the tax benefit in question is sufficiently connected with the scheme.

As to what is the dominant purpose of the scheme is the critical issue. As we understand, the test is based on an objective observation of the relevant facts and circumstances, and not necessarily what the taxpayer asserts.

As indicated from the above, the essential Part IVA element is to establish that there is a "tax benefit" connected with the scheme. To establish whether there is a tax benefit pursuant to section 177C there is a two-step process.

1. A taxpayer must have achieved at least one of the following beneficial outcomes from the scheme, inter alia:

    (a) An amount is not included in assessable income (s 177C(1)(a)); and/or

(b) A deduction is allowable (s 177C(1)(b)).

2. It must be established that the beneficial tax outcome would not have happened, or it is reasonable to expect that it would not have happened, if the scheme had not been entered into or carried out.

Since the amendments introduced to Part IVA, whether or not there is a tax benefit is now based on two limbs provided by section 177CB:

1. The "would have"; and

2. The "might reasonably be expected to have".

The above process brings to the fore the concept of the "alternative postulate", i.e. an alternative scenario or state of affairs. That is, the Commissioner can postulate a reasonable alternative to the arrangement entered into by the taxpayer, which is postulated without regard to the tax consequences.

Once there is a tax benefit, section 177F authorises the Commissioner to:

1. Cancel tax benefits (s 177F(1) to (2G)); and

2. Make compensatory adjustments to any taxpayer's assessment (s 177F(3) to (7).

Just to remind us all, the taxpayer bears the onus of proving any assessment is excessive!

The annihilation approach "…would have…"

This test is based on subsection 177CB(2) and requires an examination of the tax effect that "would have" occurred if the scheme had not been entered into or carried out.

The examination must be made solely on the basis of a postulate comprising all of the events or circumstances that actually happened or existed, other than those that form part of the scheme (section 177CB(2)). This is described in the explanatory memorandum (EM) as the "annihilation approach". When postulating what would have occurred in the absence of the scheme, the scheme must be assumed not to have happened, i.e. it must be "annihilated" or extinguished. The alternative postulate, however, must incorporate all the events or circumstances that actually happened or existed.

Reconstruction approach – "…might reasonably be expected…"

This test is based on section 177CB(3) and requires an analysis of the transaction based on a reasonable alternative postulate.

Whether a postulate is a reasonable alternative to a scheme must be worked out having particular regard to the substance of the scheme and its results and consequences for the taxpayer, and disregarding any potential tax results and consequences (subsection 177CB(4)).

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. In these cases, simply annihilating the scheme would be inconsistent with the non-tax results and consequences sought by the participants in the scheme.

Asset protection

As regards to whether "asset protection" is accepted as the dominant and legitimate purpose of a transaction, it is noted from cases that:

1. The risk to assets must be real;

2. Antecedent risk exposure is helpful to justify the taxpayer's concern; and

3. Evidence should be adduced to support the assertion.

The long-standing application of the provision espoused in Newton's case[1] by the Privy Council is well known and is worthy of recall. In that case, the Privy Council grappled with the principles by which to decide when a transaction was to come within the operation of the anti-avoidance provision. Their Lordships said at 8-9:

> 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 dealing, 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 … [my emphasis]

This test required a consideration of the particular transaction to determine whether the objectively ascertainable purpose of the transaction was to avoid taxation. No inquiry into the actual motive or purpose (whether subjective or objective) of the participants to the transaction was necessary. Rather, the test contemplated a dispassionate assessment of the objective purpose of the transaction itself. The essence of the application of this test was whether what was attacked was to be explained as having been implemented in that particular way so as to avoid tax. The focus of the inquiry was the transaction itself, and the inquiry was about the objectively ascertainable purpose of the transaction impugned.

A very simple case example that illustrates these points is highlighted by the facts and reasoning in **Re MacMahon & Commissioner of Taxation [2011] AATA 809:**

The facts of the case are ultimately unimportant for our discussion; however, the facts are:

> Prior to 30 October 2000 the applicant, Mr Gregory John MacMahon, was the holder of one half of the issued share capital in a company called Mactek Pty Ltd (Mactek). By an agreement in writing dated 30 October 2000 the applicant and his brother, Mr Peter James MacMahon (who held the other half), agreed to sell their shares in Mactek to Radiodetection Australia Pty Ltd (Radiodetection Australia) for a price in excess of $6m.
>
> In these proceedings the applicant contends that, despite disposing of his shareholding in Mactek in this way, there was no CGT event which was capable of triggering the capital gains tax provisions of the Income Tax Assessment Act 1997 (Cth) (the ITAA 1997) and requiring him to bring into account a capital gain on the sale of the shares. This, according to the applicant, is the result of a complex series of acts, transactions and events that took place on 26 October 2000. The respondent, the Commissioner of Taxation, contends that those acts, transactions and events were not efficacious to achieve the result contended for. In any event, says the Commissioner, if it had the result contended for, then the anti-avoidance provisions in Part IVA of the Income Tax Assessment Act 1936 (Cth) (the ITAA 1936) operate to overcome that result.

The taxpayer argued that the purpose of the restructure was asset protection. More specifically the taxpayer stated that:

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[1] Newton v FCT (1958) 98 CLR 2

…viewed from the standpoint of an impartial reasonable minded observer, objectively viewed, the arrangements to vest the equitable interest in the Mactek shares in the Hill End Unit Trust as a constructive trust had the following commercial purposes:

(a) It secured asset protection by removing ownership of the purchase moneys from the applicant personally and having those purchase moneys as an asset ultimately held through a family discretionary trust;

(b) It had the consequence that any attempt by Radiodetection to enforce their [sic] indemnities under clause 9.4 of the sale agreement against the applicant personally would not succeed;

(c) It avoided, as the arrangements in Halloran would demonstrate, the imposition of stamp duty on a written declaration of trust in the Mactek shares."

As will appear, I reject the submission; it finds no support whatsoever in the evidence. In my view, it is plain that the objectively ascertained purpose in entering into the arrangement was to obtain a tax benefit, namely, the avoidance of the incidence of capital gains tax on the sale of the Mactek shares. That is the inescapable conclusion to be drawn by reference to the eight factors in s 177D of the ITAA 1936. In considering those factors some repetition will be unavoidable.

The AAT concluded with regard to the proposition that the transaction was undertaken for the purpose of providing asset protection:

Asset protection?

48. I have already explained why I reject the applicant's evidence regarding "asset protection". His assertions are not, of course, relevant where the test is objective. But there must, at least, be an evidentiary foundation from which, either directly or by inference, an objective conclusion may be drawn. In the present case there is not even evidence from which one might infer a need to protect assets. Beyond the risible suggestion that his advisers were concerned that clause 4.4 would permit Radiodetection Australia to recover monies already paid, the applicant does not suggest why there was a need to protect his assets and, if such a need existed, why it apparently did not extend to other assets. There was no evidence, for example, of a concern about potential liability from any particular source, no evidence of the recognition of a risk from a particular source, or even a concern that a particular warranty might have been breached. The notion of asset protection is raised in an evidentiary vacuum.

49. The applicant submits that I should conclude that the commercial purpose of the arrangement was to secure asset protection. Yet no explanation was proffered as to how that was achieved by the mechanism adopted beyond a suggestion that the mechanism was "not obvious and not readily apparent" to Radiodetection Australia. Also left unexplained was the claim that any attempt by Radiodetection Australia to enforce its contractual indemnities "would not succeed".

50. Finally, I note that there was no evidence from the applicant that I regard as acceptable that put forward the avoidance of stamp duty as a consideration. The applicant made no reference to stamp duty in either of his witness statements. The only reference to stamp duty is in the notice of objection which is signed by the applicant but obviously prepared by others. The applicant did not seek to adopt the truth of the matters of fact contained in the notice and I see no reason why I should infer that the avoidance of stamp duty was a consideration for the applicant. And beyond that, as the Commissioner's submissions point out, there is no explanation why adopting this mechanism avoided stamp duty. There is then absent any

evidentiary basis for me to conclude, objectively, that the avoidance of stamp duty was a purpose for adopting the scheme.

51. I am then satisfied that even if, contrary to my earlier conclusion, the applicant's scheme had been effective, Part IVA operates to cancel the resulting tax benefit.

2.2 Part IVA: practical examples

Sale of asset

In the simplest of transaction, the at-risk asset is transferred/gifted to a safe harbour to remove the risk exposure of the asset. Ordinarily Part IVA would not be of a concern. So much was established by the High Court's decision in **Purcell v DFCT [1920] HCA 46**.

Purcell declared a trust over certain property, albeit that he retained the use and management of the property. The Commissioner sought to apply the then anti-avoidance provisions to negate the tax benefits attributable to the "redirection" of the income derived from the property:

> The effect of the declaration of trust appears to us to be that Mrs. and Miss Purcell each became entitled immediately to one third of the income of the trust property, and Mrs. Purcell immediately, and Miss Purcell eventually, to one third of the corpus, but subject as to both interests to the right of the settlor to retain possession of the property and to continue to manage and carry on the stations for as long as he should think proper, and subject also to his right to provide by his will for the management after his death. These provisions do not seem to us to offend against any rule of law or equity. We see no reason why a settlor should not retain full powers of management with the right to keep possession of property in which, notwithstanding the settlement, he retains a substantial beneficial interest; and we think this is what the settlor has in effect done in the present case, although he has in form declared that he holds one third of the settled property in trust for himself. If the transaction had taken the form of an assignment by the settlor to trustees for Mrs. and Miss Purcell of two thirds of his beneficial interest subject to the same provisions as those contained in the declaration of trust, especially in clauses 1 and 8, we do not think it could have been contended that the trustees of the settlement could have taken possession of any portion of the chattels comprised in the settlement, and in substance we see no difference between that case and the present.

Accordingly, because the actual ownership of the property had changed, the anti-avoidance provisions could not apply to the income generated from the property.

Granting the right to an asset

In some instances, the tax and duty implications might result in a decision that involves moving the risk more-so than moving the asset.

For example, an entity conducts a business and has developed substantial goodwill.

Rather than sell the goodwill to a new entity, an alternative might be to licence the goodwill to a new entity. The new entity has a licence to use the goodwill asset, but in the instance of some financial stress situation, the licence is terminated.

There are a number of taxation issues that arise in this type of arrangement:

1. Can goodwill be licensed;
2. What are the CGT consequences; and
3. Why would Part IVA apply?

The conjecture of the first question concerns what was said in Murry's case and the "connection of goodwill to where the business is conducted". However, the broader view that goodwill (as property) can be licenced is generally accepted. Moreover, ATO IDs 2003/517 and 2004/7 (now withdrawn) confirm the efficacy of the licence arrangement, in that:

1. The granting of the licence is a CGT D1 Event; and

2. The capital proceeds attributable to D1 Event is the amount received (not the entitlement to future income, nor the market value substituted amount (section 116-30(3)(b)).

To the extent that the proper legal documents have been implemented and interests registered (e.g. Personal Property Securities Register), the arrangement will be effective for asset protection purposes.

In regards to the query as to whether Part IVA might apply, the competing arguments are:

1. Why would a taxpayer give away a valuable asset for no consideration; and

2. The asset protection objectives are achieved by the transfer of the risk to a new entity where there will be limited asset loss if a risk event occurs.

The ultimate decision will be determined having regard to the "value" proposition – what does the taxpayer granting the licence achieve by way of value? Pause and think about:

1. The reasonable man test; and

2. The alternative postulate.

Shifting value to reduce asset value

The following is too extreme an example, but does illustrate the contrasting factors.

Example:

A private company with family shareholders have conducted a successful business over many years. Consequently, the company has substantial retained earnings (albeit with franking credits available) and substantial assets.

The nature of the business generates some potential litigation risk. To reduce the company's exposure to trading risk, the company wishes to reduce its asset levels.

Alternative strategies:

1. Pay a substantial dividend to the family shareholders and lend back the dividend;

2. Issue a special class of share (dividend access share) to a newly formed trust, and declare a dividend to the trust which distributes the dividend to a corporate beneficiary;

3. Sell the business to a new entity; or

4. Interpose a holding company between the present shareholders and the trading company (using Division 615), consolidate and then pay a dividend to the holding company.

If the DAS route is chosen, the risk is the application of the dividend stripping provision 177E.[2]

Section 177E is dependent on the dominant intention being the achievement of a tax benefit.

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[2] Refer to TD 2014/1

With regard to the proposition that asset protection is the dominant intention, the matters that would generally be considered are:

1. The timing of the transaction relative to the identification of the risk;

2. Whether the risk has been negated by the arrangement;

3. Whether the arrangement will be wound back if liquidators are appointed pursuant to the Corporations Act;

4. What the alternative (albeit with tax implications) strategies are; and

5. Insurance coverage to limit risk.

With regard to the above scenario, the preferred solution would be to:

1. Interpose a holding company between existing shareholders and trading company;

2. Elect to form a tax consolidated group;

3. Have the trading company declare and pay a dividend to holding company; and

4. Have the holding company lend monies to trading company with appropriate security coverage.

Personal services entity

The income of many small business entities is often dependent on the personal input of a principal. It is well understood for taxation purposes that personal services income cannot be alienated to an entity. There are now taxation provisions (PSI Provisions), however, that clearly delineate when and how income can safely be alienated. The issues that determine the demarcation between whether income that can be alienated are:

1. What constitutes "personal income"; and

2. Whether the entity conducts a personal services business entity.

"Personal services income"

What is "personal income" is illustrated by the examples provided by section 84-5[3]:

Example 1: NewIT Pty. Ltd. provides computer programming services, but Ron does all the work involved in providing those services. Ron uses the clients' equipment and software to do the work. NewIT's ordinary income from providing the services is Ron's personal services income because it is a reward for his personal efforts or skills.

Example 2: Trux Pty. Ltd. owns one semi-trailer, and Tom is the only person who drives it. Trux's ordinary income from transporting goods is not Tom's personal services income because it is produced mainly by use of the semi-trailer, and not mainly as a reward for Tom's personal efforts or skills.

[3] Refer to TR 2001/7

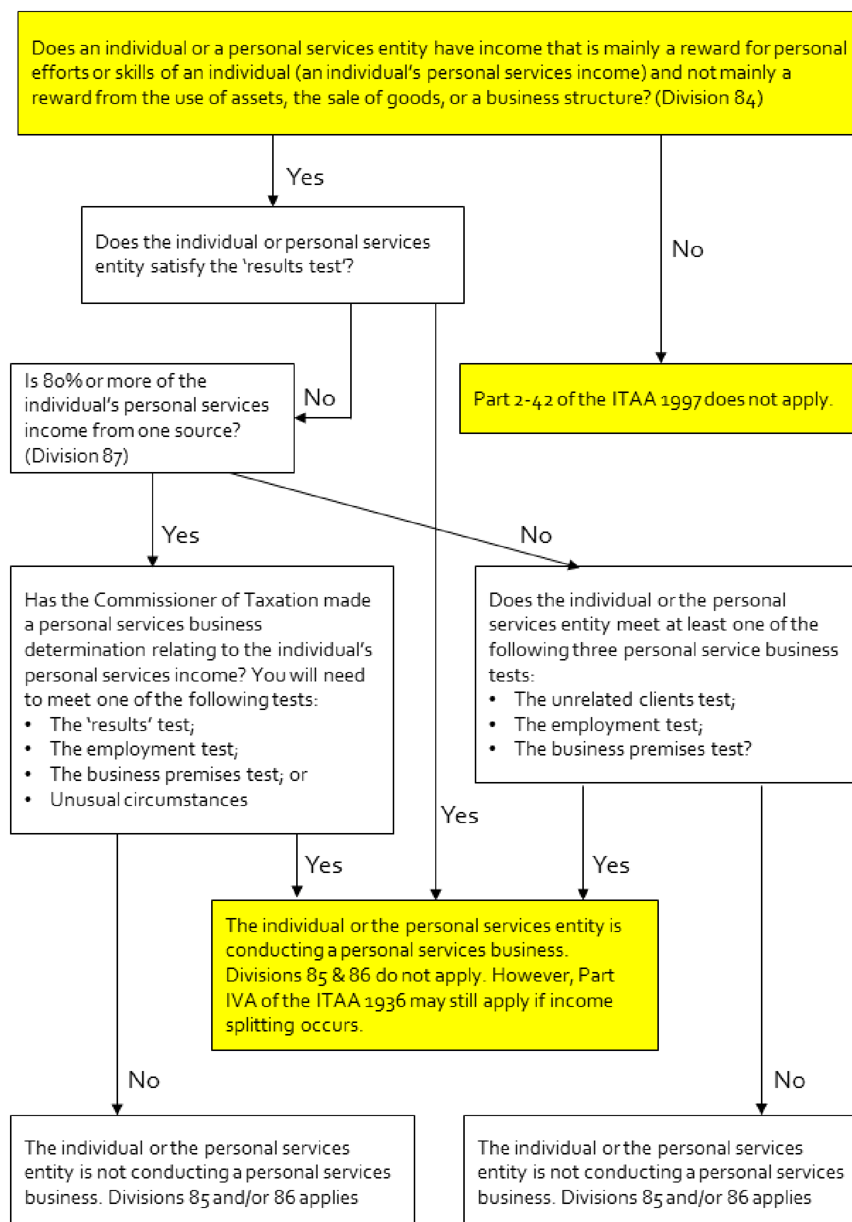
Example 3:

Jim works as an accountant for a large accounting firm that employs many accountants. None of the firm's ordinary income or statutory income is Jim's personal services income because it is produced mainly by the firm's business structure, and not mainly as a reward for Jim's personal efforts or skills.

"Personal services business".[4]

If the taxpayer satisfies the various tests provided by section 87-15, the personal services income derived by the entity is not attributable to the individual that "generates" the income.

The tests are illustrated by the following diagram provided by TR 2001/7:



[4] Refer to TR 2001/8

Application of Part IVA to a PSI scenario

It will be noted that the above diagram identifies that Part IVA can still apply even where the entity otherwise satisfies the four personal services business tests.

In the simple situation, it is common that the use of a personal business entity is to obtain a tax benefit, for example by income splitting.[5]

However, another purpose for the use of an entity is to protect the personal assets of the principal.

In **FCT v Mochkin [2003] FCAFC 15**, The Full Federal Court dealt with the operation of Part IVA and the diversion of personal services income.

The facts of the case are particularly important to understand the Court's decision.

Mochkin ("the taxpayer") entered into an arrangement with "Bridges" for the provision of stockbroking services. Under the arrangement, the taxpayer introduced clients to Bridges, who in turn executed orders on behalf of the taxpayer and paid the taxpayer a commission.

In 1987, Bridges terminated the arrangement and demanded indemnity from the taxpayer in respect of losses arising from defaults made by clients introduced to Bridges by the taxpayer. Bridges sued Mochkin in September 1987, with the matter being settled.

The taxpayer subsequently entered into a similar arrangement to that with Bridges with Pembroke. In 1988, the arrangement was changed to a written agreement between Pembroke and Daccar Pty Ltd as trustee for the Mochkin Family Trust ("Daccar").

In 1989, the taxpayer incorporated a new company, Ledger Pty Ltd as trustee for the Mochkin Family Trust No 2 ("Ledger"), which took over the business of Daccar and became the contracting party with Pembroke. The purpose of the establishment of Ledger was to protect the assets of Daccar. The taxpayer was asked by Pembroke to personally guarantee the obligations of Ledger, but declined to do so.

Ledger subsequently terminated and entered into a number of similar agreements with other stockbroking houses. The arrangement remained the same each time, being that Ledger referred clients to the stockbroking houses and received commissions in respect of the references. Further, the taxpayer at no time after the establishment of Daccar and Ledger gave undertakings in respect of the liabilities which may have arisen out of the stockbroking business.

The ATO argued the case on two principal issues:

1. Whether the amounts in respect of brokerage paid by the sharebrokers to Ledger was "derived" by the taxpayer by virtue of Section 25(1) 1936 Act, and therefore formed a part of the assessable income of the taxpayer; and

2. If not, whether the Part IVA of the 1936 Act determinations made by the Commissioner had the effect that the net brokerages paid to Ledger were to be included in the taxpayer's assessable income.

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[5] Tupicoff v FCT 84 ATC 4851, FCT. v. Gulland, Watson v. FCT and Pincus v FCT 85 ATC 4765

With regard to the first issue, the Court concluded that:

1. The Commissioner's contentions that the payments made to Ledger were in fact made in respect of the personal exertion of the taxpayer was incorrect. This is due to the finding of fact that Ledger was not a "one-person" business. Rather, "Ledger had a "team" of persons who provided services to clients and brokers".

   The Court stated at paragraph 130:

   > ... from a factual point of view, this was not the case to assert that income paid to a corporation was in truth wholly due to the personal exertion of an individual.

   The Court held that the Commissioner's arguments were inconsistent with the decision in **Tupicoff v FCT (1984) 4 FCR 505**, where it was held that, notwithstanding the operation of anti-avoidance provisions, in the event that the source of a company's income is via a contract, the income of the company cannot be imputed back to the directors or shareholders of the company. Rather, the income is considered as that of the company who is party to the contract.

2. With regard to the question of Part IVA, the Court rejected the Commissioner's argument.

   The Court recognised that transactions are affected by the application of tax laws, and that transactions may therefore be adapted so as to limit the taxation exposure on a particular transaction.

   The Court stated in the course of their judgment:

   > Part IVA must be applied having regard to the reality that the tax laws affect the shape of nearly every transaction. Accordingly, the form of the transaction may be tax driven, yet the scheme giving rise to the transaction may be one to which Part IVA does not apply ... it is permissible to take into account the commercial outcome of a transaction, at least where the outcome has nothing to do with tax, even though the form of the transaction is tax-driven and generates a tax benefit for the relevant taxpayer.

   It was a critical fact that the taxpayer was not prepared to incur the liabilities or make good defaults made by clients referred by Ledger. The Court stated:

   > ... the objective facts indicate clearly that, following the settlement of Bridges' claim against him, the Taxpayer was not prepared to conduct the stockbroking business on his own account. He had not merely been exposed to possible personal liability in respect of client defaults, but had actually been required to make good defaults by his clients. The Taxpayer thereafter ... resolutely resisted all attempts by the brokers to secure his agreement to provide guarantees or indemnities in support of liabilities incurred by Daccar and Ledger to the brokers. The Taxpayer's unwillingness to provide services on his own account ... was not tax driven, but the product of commercial imperatives.

   The Court found that to the extent that Daccar and Ledger accepted liability for the default of their clients, and made such liabilities good, the income paid to those entities could not be regarded as that of the taxpayer. It stated:

   > ...the present case ... [is not one] ... where the Taxpayer simply substituted a corporate entity for his own services. Daccar and Ledger accepted that they were liable for the default of their clients. Ledger made good such defaults. The willingness of Daccar and Ledger to indemnify the various brokers against client defaults was essential, from a commercial perspective, to the conduct of the business. In this sense, Daccar and Ledger provided a "service" that, on the objective evidence, the Taxpayer was simply not prepared to provide.

The Court considered that the use of Daccar and Ledger was not merely as substituting of the corporate entity for the taxpayer's services:

> ... in this case the income received by Daccar and Ledger was not generated simply by personal exertion of the Taxpayer. Doubtless ... [the Taxpayer] ... played an important role in the business. But the primary judge's findings establish that Daccar and Ledger each employed or acquired substantial facilities for which they paid. The companies also utilised the services of persons other than the Taxpayer.

The Court accepted the reasoning of **Hill J in Hart v FCT [2002] ATC 4608** at paragraph 98 by stating that "a case such as this involves the weighing up of the commercial side of the scheme against its tax advantages".

Interestingly, having regard to the recent changes made to Part IVA, the Court made the following observation:

> It is undoubtedly true that the discretionary trust structure adopted by the Taxpayer had substantial tax advantages when compared with other structures that might have been adopted to achieve the same commercial objectives. The primary Judge, with respect, was clearly correct in accepting that one of the purposes of the Taxpayer in entering into the Ledger scheme was to obtain a tax benefit in the form of the ability to have the net income generated by the stockbroking consultancy business distributed in a tax effective way to the beneficiaries of the discretionary trusts. But, as Eastern Nitrogen and Hart show, the fact that aspects of the scheme are tax driven does not establish that the "dominant purpose" of the relevant person, objectively assessed, was to obtain a tax benefit. Unlike Spotless, the scheme in the present case, even without the tax benefits, would have made commercial sense.

However, the Court then stated that the question posed by s 177D(b) of the 1936 Act is *not* whether the taxpayer could have chosen a less tax effective means of achieving his commercial objective, but rather whether, when taking into account the matters identified in s 177D(b), "it is reasonable to conclude that the Taxpayer's ruling, prevailing or most influential purpose in entering into or carrying out the scheme was to obtain the tax benefit...".

The decision provides support that where trusts or companies are established by individual taxpayers to limit personal exposure to business risks is arguably outside the application of Part IVA where the facts clearly demonstrate that there were substantial commercial objectives sought from the structure.

3. Division 7A ITAA 1936

The following comments are only applicable where a private company has a "distributable surplus"[6] .

Most asset protection measures include the "movement" of assets out of the reach of the risk event. In the case of a private company, this might involve:

1. The transfer of assets or interests therein;
2. Writing off of assets; or
3. The creation of liabilities to negate the value of assets.

With regard to the potential application of Division 7A, consider the following aspects of Division 7A that need to be cautiously dealt with.

[6] Section 109Y ITAA 1936

3.1 Movement of assets from the company

The term “payment” as defined in section 109C as follows:

(3) In this Division, payment to an entity means:

(a) a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity; and

(b) a credit of an amount to the extent that it is:

(i) to the entity; or

(ii) on behalf of the entity; or

(iii) for the benefit of the entity; and

(c) a transfer of property to the entity.

Where the transaction involves a transfer of property, the amount of the “payment” is determined by subsection 109C(4):

(4) The amount of a payment consisting of a transfer of property is the amount that would have been paid for the transfer by parties dealing at arm's length less any consideration given by the transferee for the transfer. (The amount of a payment is nil if the consideration given by the transferee equals or exceeds the amount that would have been paid at arm's length for the transfer.)

3.2 Granting the right to use the company’s assets

An alternative to the actual transfer of property might include the granting of a lease or a licence in relation to a company’s assets:

Section 109CA Payment includes provision of asset

(1) In this Division, payment to an entity includes the provision of an asset for use by the entity.

Note: This includes provision under a lease or licence.

An example of where this section would apply would include inter alia – the granting of a lease over land held by the company or the grant of a licence of the goodwill of the company.

Notwithstanding the CGT implications of these transactions (CGT Event D1 or CGT Event F1), the revenue consequences are the ultimate taxing point as a consequence of the application of section 118-20 (anti-overlap provision).

If section 109CA does apply, the assessable amount is determined by subsection 109CA(10):

(10) Subject to subsection (11), the amount of the payment is:

(a) the amount that would have been paid for the provision of the asset by the parties dealing at arm's length; less

(b) any consideration given for the provision of the asset by the entity.

(11) The amount of the payment is nil if the consideration given by the entity equals or exceeds the amount that would have been paid at arm's length for the provision of the asset.

3.3 Writing off loans and UPEs owed to the company

As was noted from the definition of the term "payment" in subsection 109C(3), payment to an entity includes:

(b) a credit of an amount to the extent that it is:

(i) to the entity; or

(ii) on behalf of the entity; or

(iii) for the benefit of the entity…

The application of this paragraph has been illustrated by taxation determination **TD 2015/20,** which deals with the application of Division 7A where a private company releases its unpaid present entitlement because it constitutes a "payment".

The TD states that the release of the UPE or part thereof is a payment because the private company credits an amount within the meaning of that word in paragraph 109C(3)(b) of the ITAA 1936. Such a crediting is taken to be a payment for the purposes of subparagraph 109C(3)(b)(iii) to the extent that the release represents a **financial benefit** to an entity.

Obviously, to the extent that the nature of the amount is a loan (legal debt), the writing-off of the amount constitutes a debt forgiveness for the purposes of section 109F ITAA 1936 and Division 245 ITAA 1997.

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4. Trusts: Section 100A

The Commissioner has flagged this section as the new "tool" to attack trust arrangements on many levels. A brief review of where the Commissioner considers the section applies is illustrated from the information provided.

To appreciate the implications of the section, the following explanation of the section should resonate with advisers:

> However, to the extent a beneficiary's entitlement arises out of a reimbursement agreement, section 100A of the Income Tax Assessment Act 1936 (ITAA 1936) disregards it. This means that the net income that would otherwise have been assessed to the beneficiary (or trustee on their behalf) is instead assessed to the trustee at the top marginal tax rate.
>
> The ATO has an unlimited period within which to make an assessment under section 100A.

The latter point is significant, particularly when you understand the factual circumstances the Commissioner is contemplating.

In the first instance the term "reimbursement agreement" is described as follows:

> A reimbursement agreement generally involves making someone presently entitled to trust income in circumstances where both:
>
> (a) someone other than the presently entitled beneficiary actually benefits from that income, and
>
> (b) at least one party enters into the agreement for purposes that include getting a tax benefit.

'Benefit' includes the payment or loan of money, the transfer of property, the provision of services or other benefits; or the release, abandonment, failure to demand payment, or postponed payment, of a debt.

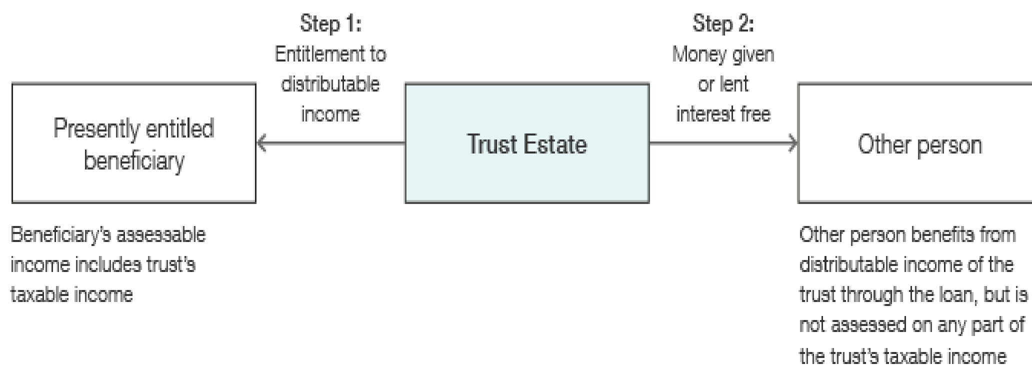
4.1 Beneficiary is taxed at a lower rate to the entity that economically benefits from the income

Example 1: Trust estate

The trustee of a trust estate makes a beneficiary entitled to trust income.

Instead of paying the amount of trust income to the beneficiary, the trustee gives, or lends on interest-free terms, the money to another person. The other person benefits from the trust income, but is not assessed on any part of it.

The arrangement does not constitute ordinary commercial or family dealing.



This arrangement would generally constitute a reimbursement agreement if it was intended that the beneficiary who was made presently entitled to the trust income pays a lower amount of tax than would have been payable by the person who actually enjoyed the economic benefits of that income.

In this example, the presently entitled beneficiary may pay less (or no) tax because it:

- is a tax-exempt entity
- is a foreign resident and the net income of the trust includes foreign source income or income subject to withholding tax in Australia
- has tax losses or excess deductions or capital losses or an unapplied net capital loss, or
- is otherwise subject to a lower rate of tax.

Section 100A doesn't apply where:

1. An agreement has been entered into in the course of an ordinary family or commercial dealing (see below); or
2. The presently entitled beneficiary is under a legal disability (for example, a minor).

The Commissioner explains what is considered to be ordinary commercial and family dealings:

> Loans as ordinary commercial and family dealings
>
> Bona fide loans are a feature of many ordinary commercial and family dealings.

Where a trustee lends money on terms that require repayments of principal and interest, this would generally indicate an ordinary commercial dealing.

However, a loan made in the course of ordinary family dealings may qualify for the exclusion even if it is not made on commercial terms. For example, where money is lent by a trustee to a family member on terms that require repayments of principal only (and such repayments are intended to be made) this could still indicate an ordinary family dealing when considered together with all the other relevant facts.

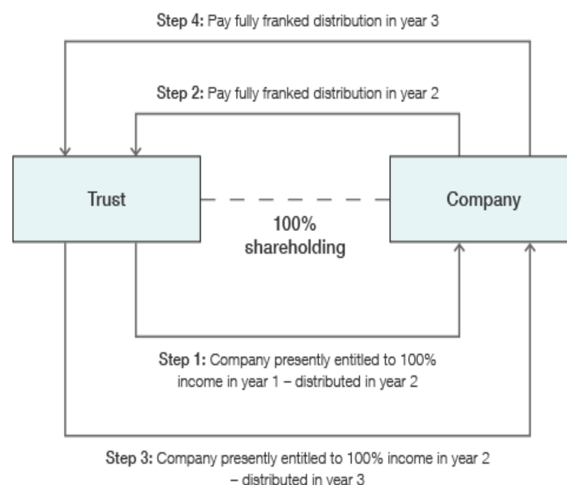
4.2 The washing machine arrangement

A good asset protection strategy is highly problematical from the perspective of section 100A.

Example 5: ATO considers section 100A applies

The ATO considers that the following arrangement would constitute a reimbursement agreement:

- The trustee of a trust owns all of the shares in a private company. The company is also a beneficiary of the trust and undertakes no activity, but derives a small amount of bank interest on its own account.
- The directors of the trustee company and the beneficiary company are the same (or related) individuals.
- The trustee resolves to make the company presently entitled to all, or some part of, trust income at the end of year 1, and distributes it to the company in year 2 before the company lodges its year 1 income tax return.
- The company includes its share of the trust's net income in its assessable income for year 1 and pays tax at the corporate rate. (Division 7A does not apply because the company's entitlement is paid before it lodges its income tax return for the year in which the entitlement arose.)
- The company pays a fully franked dividend to the trustee in year 2, sourced from the trust income, and the dividend forms part of the trust income and net income in year 2.
- The trustee makes the company presently entitled to all, or some part of, the trust income at the end of year 2 (possibly including the franked distribution). The arrangement is repeated.



The reimbursement agreement results in the distribution benefitting a party other than the beneficiary (it instead benefits the trustee). The reimbursement agreement provides for the payment of income from the trustee to the company on the understanding (implied from the repetition in each income year and their common control) that the company would pay a dividend to the trustee of a corresponding amount (less the tax paid).

The agreement is designed to achieve a reduction in tax that would otherwise be payable had the trustee simply accumulated the income."

This agreement is not an ordinary commercial dealing because the ownership structure and, particularly, the perpetual circulation of funds, serve no commercial purpose.

5. Division 152 ITAA 1997

The taxation benefits of Division 152 are obvious, and knowledge of the statutory conditions[7] is well established. The issue might arise that as part of the asset protection strategy the CGT implications of moving an asset might be lessened if the Division 152 concessions were available.

What are the implications if, on the first review of the taxpayer's circumstances, the basic conditions are not able to be satisfied and accordingly a preliminary transaction occurs to facilitate access to Division 152?

Pursuant to section 177C(2), a tax benefit attributable to entering into a transaction is disregarded where the benefit is "...attributable to the making of an agreement, choice, declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option (expressly provided for by this Act or the Income Tax Assessment Act 1997) by any person, except one under Subdivision 126-B, 170-B or 960-D of the Income Tax Assessment Act 1997".

However, the concession conferred by section 177C is not to be available if the taxpayer needed to construct the conditions necessary to come within the statutory choice. Section 177C(2) was introduced to solve the perceived problems in **W.P. Keighery Pty Ltd v F.C.T (1957) 120 CLR 66**, **Mullens v F.C.T (1976) 136 CLR 290**, **Slutzkin v F.C.T (1977) 140 CLR 314** and **Cridland v F.C.T (1977) 140 CLR 330**. Presently, the taxpayer will lose the benefit of any concession of subsection 177C(2) if the entitlement to the concession depends upon the construction of the preconditions to the entitlement.

5.1 Walters v FCT [2007] FCA 1270

In this case, the taxpayer transferred shares and exercised the rollover choice provided by subdivision 122-A and a subsequent sale of the shares.

The taxpayer tried to argue that the rollover choice activated the subsection 177C(2) safeguard.

The Court clearly disagreed with the taxpayer's argument and concluded that the benefit of the subsection 177C(2) concession requires a direct connection:

> 83 The phrase in s 177C(2)(a)(i) 'attributable to' the particular election, choice or event means that there must be a direct relationship between the non-inclusion of the relevant amount and the choice or election made by the taxpayer. Here, each taxpayer chose to obtain a roll-over within the framework of Subdivision 122A of the 1997 Act with the result that upon disposal of the share to Sailpeal and Port Bracknell a capital gain, otherwise realised in the hands of the taxpayer upon disposal of the CGT asset, 'is disregarded' (s 122-40). Had the Commissioner contended that the step of disposing of each share to the relevant entity

[7] Section 152-10 ITAA 1997

constituted a disposal of a CGT asset giving rise to a realised capital gain in the hands of each taxpayer, the respondent would have been met with a complete answer under s 177C(2)(a).

5.2 FCT v Macquarie Bank Limited [2013] FCAFC 13

In **FCT v Macquarie Bank Limited [2013] FCAFC 13**, the Full Federal Court was required to determine to what extent and how Part IVA 1936 Act and Part 3-90 ITAA 1997 (consolidation regime) interacted, as well as the question of the application of Part IVA to the circumstances of the case.

The cost to MBL of acquiring all the membership interests in MALLC was $438,928,590. That was also MBL's pushed down tax cost of Mongoose's interest in Minara for the purposes of the consolidation provisions in Pt 3-90 ITAA 1997 Act. In consequence of Mongoose's sale of the Minara shares, for the year of income ended 30 September 2004, MBL returned as head company of the MBL consolidated group of which Mongoose was, by then, a subsidiary member, an assessable gain of $41,408,357 – being the difference between the proceeds of the disposal by Mongoose of the Minara shares ($480,336,947) and MBL's tax cost of Mongoose's interest in Minara ($438,928,590).

Prior to joining the MBL consolidated group, Mongoose's cost base in the Minara shares was only $161,829,478. The Commissioner made two Part IVA determinations and issued amended assessments to both MBL and Mongoose based on Part IVA, including a gain of $318,507,469 (being the difference between $480,336,947 and $161,829,478) in their respective assessable incomes.

In discussing the interaction between the respective provisions, the Court noted:

> 31 Macquarie and Mongoose seek to restrict the tax consequences of Mongoose's disposal of the Minara shares to the difference between what Macquarie paid to the Vendors and the amount paid by the purchasers of the Minara shares. They seek to do so by the application of the single entity rule in s 701-1 of the 1997 Act. However, s 701-85 of the 1997 Act expressly provides that the operation of each provision of Pt 3-90 is subject to any provision of the Act that so requires, either expressly or impliedly. Under s 995-1 of the 1997 Act, the phrase the Act includes the 1936 Act. Thus, the single entity rule will be subject to another provision of either Act, such as a provision of Pt IVA, if a Pt IVA provision expressly or impliedly requires it.
>
> …
>
> 42 The effect of Pt 3-90 is not that the actions of a subsidiary member will never be subject to, or be the subject of, tax. Rather, its effect is that the head company will be the entity taxed in relation to those actions. Pt 3-90 does not have the effect that there are no tax consequences in relation to subsidiary members of consolidated groups. Rather, it has the effect of transferring the liability of a subsidiary member for income tax to a different entity, being the head company. Thus, the head company will be the relevant taxpayer for Pt IVA purposes, because a subsidiary member is not liable to assessment. All of the members of the consolidated group are treated collectively as a single entity for income tax purposes. The relevant purpose of Pt 3-90 is to avoid double taxation of the same economic gain and to reduce the cost of complying with the taxation legislation. Its object is to ensure that the 1997 Act and the 1936 Act operate in relation to a consolidated group as if the subsidiary members were absorbed into the head company, which becomes the relevant taxpayer for all of the subsidiary members of the consolidated group.

Subsequent to the above decision, PS LA 2005/24 was updated to include references to 177CB and also inter alia the decision in Macquarie as regards the interaction between Part IVA and the consolidation regime:

Consolidated Groups

114. If a scheme involves a company joining a consolidated group, the fact that the scheme has resulted in the company becoming a subsidiary member of that group is no bar to finding that the company has obtained a tax benefit consisting of the non-inclusion of an amount in the company's assessable income, despite the single entity rule in section 701-1 of the ITAA 1997. The Commissioner may issue a section 177F determination to that company and may give effect to the determination by issuing an assessment (or an amended assessment) to that company, even though it is in fact a subsidiary member of a consolidated group. The Commissioner may not however assess the head company in these circumstances.

Relevant case law

Channel Pastoral Holdings Pty Ltd v. Commissioner of Taxation [2015] FCAFC 57; (2015) 2015 ATC 20-503

115. On the other hand, if a scheme involves a company joining a consolidated group, and without the scheme the head company of the group would not have been entitled to a certain deduction from its assessable income, then it is the head company that has obtained the tax benefit. The Commissioner may issue a section 177F determination to the head company and assess it accordingly. (This situation has not yet been considered by a court but, by contrast with the omission of income situation, there seems to be no reason to doubt that the law would apply in this way.)

5.3 FCT v Unit Trend Services Pty Ltd [2013] HCA 16

In **FCT v Unit Trend Services Pty Ltd [2013] HCA 16**, the High Court unanimously decided that the Commissioner can apply the GST anti-avoidance rule, even when a taxpayer makes specific choices or elections to engage in corporate structures, decisions and deals that are expressly allowed in the law. The GST provision is not entirely dissimilar to the income tax subsection 177C(2) provision.

The Unit Trend case confirms that the GST general anti-avoidance rule has removed the "choice principle" as it was found to operate under former section 260 of the Income Tax Assessment Act 1936. The authority of the Commissioner to negate a GST benefit is only constrained where, and to the extent that, the identified tax benefit arises **directly** from a statutory election or choice provided by the GST law. This is a saving provision that, it seems, will only be applied to protect the taxpayer where this would be consistent with the policy and object of the provision that grants the choice.

5.4 Track and Ors and FCT [2015] AATA 45

In a less complex example of pre-planning to access a concession – in this instance, Division 152 – **Track and Ors and FCT [2015] AATA 45** is instructive.

The issue in this case was whether the Track Bros 1 Trust satisfied the maximum net asset value test and more specifically whether various "liabilities" were related to the assets of the trust. One set of those liabilities was "created" as a consequence of a pre-sale transaction.

Relevantly, the AAT observed:

73. I am not satisfied that the unpaid present entitlements and the loans of $500,000 from the protection trusts were not related to the CGT assets of the Track Bros 1 Trust. In my view, it is more likely that they were related to the CGT assets of the Trust.

74. The remaining liabilities are the loans from Track Bros Company 4 Pty Ltd and Track Bros Company 3 Unit Trust. It is not for the Commissioner to put on evidence to show that these liabilities were acquired for a particular business purpose or to fund working capital of the business. It is for the applicants, who bear the onus, to show that the liabilities were not related

to the CGT assets of the Track Bros 1 Trust. In the absence of such evidence (and none was drawn to my attention), I am not prepared to draw the inference suggested in the applicants' submissions.

75. In the result the applicants have not satisfied me that the Track Bros 1 Trust did not, contrary to their earlier position, satisfy the maximum net asset value test. The arrangements effected to satisfy the test were, to that extent, effective.

The importance of this determination was that if the liabilities were included, the taxpayer satisfied the MNAV whereas if there were not, the taxpayer would not satisfy the MNAV test. The question as to whether there was a "tax benefit" for the purposes of Part IVA was dependent on the issue of the status of the liabilities "created" by the pre-sale transaction.

The respective arguments were:

Commissioner:

> The Commissioner identified the scheme as having the object of enabling the Track Bros 1 Trust to obtain access to the small business CGT concessions. To achieve this, it was said, the scheme reduced the Trust's assets and increased its liabilities to ensure that the Trust's net assets at the time of the business sale were less than $5m.

Taxpayer:

> The applicants argue that there is no tax benefit evident on the Commissioner's alternative postulate. They seek to demonstrate that, if the Commissioner's formulation of what would have occurred absent the scheme is adopted, the Track Bros 1 Trust's maximum net asset value exceeded $5 million in any event with the result that there was no tax benefit.
>
> …
>
> Finally, it is said that the alternative postulate is unreasonable as, had it not been implemented, no asset protection would have been achieved. It is said that without the establishment of the protection trusts as "clean trusts", payments to the family trusts were liable to be set aside in the event of warranty claims or as a result of other liabilities "coming home to roost". Despite the evidence of the principals about the claimed needed asset protection I am well short of being satisfied that this arrangement had anything to do with asset protection.

Relevantly, in relation to the evidence on the issue of asset protection, the AAT observed that:

> First, it is pertinent to note that none of the principals, nor indeed Mr Accountant, was able to give any detailed explanation of the purpose of the particular steps in the scheme nor the way in which those steps contributed to the asserted motive of "asset protection". In particular, there was no evidence from Mr Festa, the solicitor from Cleary Hoare who appears to have designed the structure, that explained the relevance of particular steps. As the Commissioner submits, if the arrangements were motivated by a desire to protect assets, it may be wondered how that purpose was served when the proceeds of sale were deposited to, and largely stayed in, a deposit account of Track Bros 1 Trust. I need not go so far as to draw an adverse inference from the failure to call Mr Festa; it is enough to say that his absence makes it more difficult to accept that asset protection played any role in the design or implementation of the scheme.
>
> Additionally, I found the evidence of a need for asset protection unconvincing. Each of the principals gave evidence of an incident, some time earlier, where a customer had a particularly frightening experience when a large molasses tank split. It is not difficult to conceive how Track Bros 1 might be faced with a product liability claim, even a considerable claim. And there was some evidence of claims having been made after completion of the sale in reliance on the

contractual warranty. But there was no satisfactory explanation of why the principals, or the sale proceeds, might be at risk from a product liability claim, or any satisfactory reason why insurance against such a risk was not available or adequate. I should add that whilst these reasons are being delivered considerable time after the principals gave their evidence, the delay has not affected my capacity to gauge the reliability of their evidence. Those conclusions were drawn and noted at the time of the hearing. They flow more from what is absent from the evidence rather than any impression I might have gained from the demeanour of the particular witnesses.

It is a further curiosity of the transaction that Mr Accountant, who was the primary accountant advising the Track Bros 1 Trust in 2005 and who had acted for Mr Michael Track for over 20 years, was not involved in, nor even aware of, the planning undertaken by Cleary Hoare beyond being present at a meeting in, he thought, March or April 2005, with a solicitor from the firm. The accounting functions performed by Mr Accountant in the last days of the 2005 income year were undertaken without him even being aware of the likelihood of the sale of the business. He became aware of that sale only after it had been completed.

...

...in circumstances where the applicants bear the onus, and assert that asset protection was the subjective and objective reason for the scheme, it is certainly desirable that they demonstrate each of those matters. Here, in my view, they have failed to do so.

6. Subdivision 328-G ITAA 1997

6.1 Restructure benefits

As distinct to most rollover concessions provided by the ITAA, this rollover concession is not limited to the nature of the transferee entity. The primary restriction is the requirement that the restructure does not change the ultimate economic ownership of the assets.

Pursuant to one of the elements of section 328-430, the rollover is available if, inter alia, the "... transaction is, or is a part of, a genuine restructure of an ongoing *business...".

Other than the safe harbour provision that will apply if the transaction and subsequent events satisfy the 3 year rule (section 328-435), the ITAA does not specify what constitutes a "genuine restructure".

In that regard we are dependent on the Commissioner's view of what constitutes a genuine restructure in the Law Companion Guideline 2016/3.

It will be noted that asset protection is included in the acceptable reasons, albeit with a caveat.

Genuine restructure

4. The SBRR can apply to transactions that are, or are part of, a 'genuine restructure of an ongoing business'.

5. Whether a transaction is or is part of a 'genuine restructure of an ongoing business' is a question of fact that is determined having regard to all of the circumstances surrounding the restructure.

6. A 'genuine restructure of an ongoing business' is one that could be reasonably expected to deliver benefits to small business owners in respect of their efficient conduct of the business. It can encompass a restructure of the way in which business assets are held where that structure is likely to have been adopted had the business owners obtained appropriate professional advice when setting up the business. However, it is a composite phrase emphasising that the SBRR is

not available to small business owners who are restructuring in the course of winding down or realising their ownership interests.

7. The following features indicate that a transaction is, or is part of, a 'genuine restructure of an ongoing business':

It is a bona fide commercial arrangement undertaken in a real and honest sense to facilitate growth, innovation and diversification adapt to changed conditions, or reduce administrative burdens, compliance costs and/or cash flow impediments.

It is authentically restructuring the way in which the business is conducted as opposed to a 'divestment' or preliminary step to facilitate the economic realisation of assets.

The economic ownership of the business and its restructured assets is maintained.

The small business owners continue to operate the business through a different legal structure. For example, there is:

(a) continued use of the transferred assets as active assets of the business

(b) continuity of employment of key personnel, and

(c) continuity of production, supplies, sales or services.

It results in a structure likely to have been adopted had the small business owners obtained appropriate professional advice when setting up the business.

8. The Commissioner acknowledges that tax considerations are factors that can be taken into account under a genuine small business restructure. For example, a sole trader subject to the highest marginal rate moving to a company structure to access the lower corporate tax rate.

9. However, this is not without limits. There are concerns where the restructure is contrived or unduly tax driven in the sense that it achieves a tax outcome that does not reflect the economic reality or creates an outcome that would, but for the SBRR, ordinarily attract other integrity measures in the law. For example, a restructure directed at eliminating an impending or existing tax liability, would indicate that a restructure is not a 'genuine restructure of an ongoing business'.

10. Other factors which tend to indicate that a restructure is **not** a 'genuine restructure of an ongoing business' include:

(a) where the restructure is a preliminary step to facilitate the economic realisation of assets, or takes place in the course of a winding down to transfer wealth between generations

(b) where the restructure effects an extraction of wealth from the assets of the business (including accumulated profits) for personal investment or consumption or otherwise designed for use outside of the business

(c) where artificial losses are created or there is a bringing forward of their recognition

(d) the restructure effects a permanent non-recognition of gain or the creation of artificial timing advantages, and/or

(e) there are other tax outcomes that do not reflect economic reality.

11. The SBRR contemplates restructures to or from more than one entity. Accordingly, there may be circumstances where not all business assets that are necessary for the continued

operation of an 'ongoing business' are transferred. For example, small business owners may decide to transfer plant and equipment to a new entity, but leave real property in the original entity. On its own, this is not a factor that is inconsistent with the conclusion that a restructure is a 'genuine restructure of an ongoing business.

Example 1: Asset protection

Facts

17. Mark has been operating a small bookkeeping business and has branched out into financial planning after receiving his financial planning licence. Mark's business has grown significantly and his financial advice arm now generates much larger profits.

18. After being sued by a client for negligent financial advice, Mark has decided he is not prepared to conduct his business on his own account.

19. Mark transfers his active assets used to carry on his financial planning business into a discretionary family trust. He and his wife are the beneficiaries and Mark is the primary individual specified in the family trust election in force in respect of the trust. For asset protection purposes, a corporate trustee is appointed and the trust contracts with clients. Mark does not personally provide guarantees or indemnities. Mark has also caused the trustee to employ other staff to service the larger client base. The trustee pays Mark and the other employees a salary commensurate to the services they provide to the business.

20. Mark and the trustee of the discretionary family trust choose to apply the SBRR.

Relevant considerations

21. Mark is transferring assets from the original entity (himself) to quarantine his business from his personal assets. This is a benefit to Mark in terms of his ability to grow the riskier operations and enhance its profits.

22. The evidence available supports Mark's claim of asset protection. Mark's asset protection strategy and commitment to expand his business is comprehensive and effective.

Conclusion

23. Mark has achieved benefits to the ongoing efficient conduct of his small business. The restructure is a response to his business needs, facilitates further growth and is not unduly tax-driven. The economic ownership of the business is maintained. Accordingly, the 'genuine restructure of an ongoing business' condition is satisfied.

7. Conclusion

There are many strategies often considered to restructure assets of a taxpayer to minimise the risk to those assets.

To the extent that most strategies involve the transfer of economic benefits, the various tax integrity measures need to be carefully considered.

What has been noted from a review of the relevant law is that, if relying on an asset protection purpose to justify the transaction, then:

1. Ensure that the asset risk is real;

2. Collate evidence and information that supports the perception of risk;

3. Consider alternative ways of minimising the risks to the assets; and

4. Whilst the understanding of purpose is an objective purpose, note the discretion afforded to the Commissioner to identify simple alternatives as part of the postulates without the need to care about the tax consequences.