

*General anti-avoidance provisions for Chpt 2 of Duties Act*

1. The anti-avoidance provisions contained in Part 6 of Chpt 2 of the DA (ss69A and following) were pre-dated by general anti-avoidance provisions in Commonwealth income tax legislation and in the Queensland *Duties Act 2001* and the ACT *Taxation Administration Act 1999*, s8. The provisions are substantially different from those contained in Pt IVA of the *Income Tax Assessment Act 1936* ('ITAA36') and in the Qld Act. The provisions bristle with difficulties. They take effect on and from 17 June, 2004.
2. Under s69A, Part 6 imposes duty on a transaction in respect of which duty would have been charged under Chpt 2 (transactions concerning dutiable property) but for a 'tax avoidance scheme.' The first point to make, is that the provisions apply only where, but for the scheme, duty would have been charged under Chpt 2, and not some other chapter, such as the land rich provisions in Chpt 3. In this respect, Part 6 is different from the anti-avoidance provision in the Qld Act, which have general application.

3. A ‘tax avoidance scheme’ is a scheme that directly or indirectly has tax avoidance as its purpose or effect or as one of its purposes or effects, if the purpose or effect of tax avoidance is not merely incidental to another purpose or effect of the scheme, whether the scheme had that effect at the time that it was entered into, or only subsequently: s63B(1).
4. The test is wider than the dominant purpose test in Pt IVA of the ITAA36, because it is test either of purpose or effect, and requires that the purpose or effect of tax avoidance be more than merely incidental to, but not necessarily prevail over, another purpose or effect of the scheme. As to the meaning of ‘purpose’, see *Newton & Ors v FCT* (1958) 11 ATD 442, 445.
5. In my opinion, the purpose of an arrangement is likely to depend on the attributes of the arrangement or the intention of the parties determined objectively, rather than on the subjective state of mind of a party to the arrangement. Where the parties communicate their intentions to each other, those intentions are likely to be of relevance to the objective test. The cases suggest that there is a significant distinction between the purpose of an arrangement and the purpose for which an arrangement was entered into.

6. In substance, this is the type of language used in s165-180 of the *Income Tax Assessment Act 1997* and s80B(5) of the ITAA36. In *FCT v Lutovi Investments Pty Ltd* 78 ATC 4708, 4713, Gibbs CJ, Mason and Murphy JJ (Aickin and Stephen JJ per contra at 4726) held that the words ‘arrangement...that had the purpose’ in s44(2D) spoke of the objective purpose of the agreement. See also *FCT v Students World (Australia) Pty Ltd* 78 ATC 4040 at 4053 per Aickin J.
7. ‘Scheme’ is defined very widely to include, eg, any part of an action or arrangement: s63B(2), ‘scheme.’
8. ‘Tax avoidance’ means an elimination or reduction in the liability of a person for duty under Chpt 2 or a postponement of such liability: s63B(2), ‘tax avoidance.’
9. The Explanatory Memorandum to the Amending Act<sup>1</sup> states that the anti-avoidance provisions are intended to deter artificial and contrived schemes aimed at avoiding duty. Unfortunately, the actual provisions nowhere state this, and it is open to question whether courts will construe them as containing this limitation.
10. If the Commissioner considers that a person has participated in a tax avoidance scheme, the Commissioner may disregard the scheme,

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<sup>1</sup> Act No 46 of 2004.

determine what duty would have been payable under Chpt 2 but for the scheme, and make an assessment or reassessment of the tax liability of the person or any other person to give effect to that determination: s69C.

11. It has been pointed out that the anti-avoidance provisions could be applied to disregard a step in a transaction.<sup>2</sup> But what is the position if the taxpayer can prove that had the scheme not been entered into, there would have been no or some other transaction? Can the Commissioner, by ignoring the tax avoidance scheme, convert the transaction into some other transaction?
12. And what about the choice principle?<sup>3</sup> Is a purchaser who chooses a nominee which satisfies the requirements for an exemption under s33(3)(a)(ii) or (b) rather than another family company at risk? One would hope not.
13. The problem with the anti-avoidance provisions is that if they are read literally and widely, and are applied aggressively by the Commissioner, they will be an unruly horse or a gorgon, but if read down, may lose most or all their teeth, like s260 of the ITAA36.  
  
More specific provisions would have been preferable.

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<sup>2</sup> See 'Australian Stamp Duties Law' Vol 1, Commentary at [7.0710.]

<sup>3</sup> See *FCT v Westradars Pty Ltd* 80 ATC 4357.

14. Section 69D applies to a person who is employed or concerned in, inter alia, the preparation of an instrument that effects or evidences a dutiable transaction, or provision of any advice regarding the form of a dutiable transaction and requires that the person not omit from or fail to include in the instrument or in any material or data presented to the Commissioner any fact or circumstance affecting the liability of any person for duty under Chpt 2.
15. The Explanatory Memorandum to the Amending Act states that this provision will inhibit persons from preparing instruments where factors crucial to the assessment of duty are omitted or are misleading and will encourage persons seeking assessments of duty to lodge all necessary material pertinent to that transaction. It states that the persons referred to include lawyers and tax advisers.
16. There is a penalty of 10 penalty units for contravention of the provision. The Explanatory Memorandum states that the penalty is attracted only if the failure or omission is made knowingly. In the second reading debate, the Government gave an assurance that this was its intention, but voted against amending the clause to incorporate this limitation.

*Section 31 of the Duties Act*

17. Chapter 2 of the *Duties Act 2000* charges duty on dutiable

transactions: relevantly (for present purposes), these are most likely to be a transfer of an estate in fee-simple in land and a transaction that results in a change in beneficial ownership of such an estate: see ss7(1)(a) and (b)(vi) and 10(1)(a)(i) thereof.

18. Section 31 of the Act applies to certain cases where a vendor transfers

dutiable property to someone other than the purchaser. Section 31, instead of charging duty in respect of transfers of land from the vendor (as defined in s31(1)(a)) to the transferee, makes the transfer separately and distinctly chargeable with duty in respect of the value of the property in the original agreement to transfer, the value of the property transferred to the transferee, and the value of the property in each other transaction or agreement which is of the type caught and intervenes between the original agreement to transfer and the transfer: see ss31(1).

19. Section 31(3) contains a number of exemptions from s31(1). For

example, under s31(3) of the Act, a transfer is not separately and distinctly chargeable with duty in accordance with sub-sec(1) if the

Contract Note was entered into by the first purchaser in anticipation of the incorporation of the transferee and, at the time of the transfer, the first purchaser held a bona fide beneficial interest in the transferee or in a holding company (within the meaning of the Corporations Act 2001) of the transferee.

20. The SRO, in a recent ruling, accepts that the object of a discretionary trust has a bona fide beneficial interest in a company in which the trustee holds shares. I've seen a hard copy of the ruling, but haven't been able to get access to it on the SRO website.

21. Be aware that the SRO requires strict adherence to the terms of the exemptions. This can operate quite arbitrarily, as we shall see in the case I refer to next. As the law presently stands, it is incumbent on taxpayers and their advisers to select a named purchaser who will enable the exemptions to be satisfied. For example, don't select a company as the named purchaser merely because the intended nominee will have common directors or shareholders, and in substance belong to the same persons. More is required.

22. Section 31(6) is entirely incomprehensible so far as I or anyone else I have spoken to about it can tell; and was, I am informed, lifted from

the *Pay-Roll Tax Act 1971*, apparently without any thought as to what effect the provision might have.

23. The Court of Appeal has granted the taxpayer leave to appeal from the decision of VCAT (Morris P) in the *The People's Investment Company Pty Ltd v CSR*.<sup>4</sup> In that case, there having been a sale by the vendor to the named purchaser and/or nominee, the appellant nominated the transferee. The evidence was that the appellant did so after the contract of sale had been entered into, but received no consideration for the transfer. The nominee had directors in common with the named purchaser, but none of the exemptions in s31 applied.

24. In that case, before the President of VCAT, the taxpayer relied on two contentions of present interest.

25. The first of these contentions was that the nominee, pursuant to the Contract Note, was the 'first purchaser' of the land for the purposes of s31(1)(a) of the *Duties Act 2000*, because the meaning of the phrase 'the first purchaser' referred to therein is not confined to a person identified in or identifiable from a contract of sale; and that s31(1)(b)

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<sup>4</sup> VCAT Ref No T36/2004 and in the CA, No 3703 of 2005.



had no application to the transfer because it was not a transfer to a person other than ‘the first purchaser.’

26. Morris P. held (at para 43 of his Reasons) that the other person referred to in sub-sec.(1)(a) - “another person” or “the first purchaser” - must be a person actually: “... identified in the contract of sale, or [who] is identifiable from the contract as a transferee. However the words should not be interpreted to embrace an unidentified or unidentifiable person, even if the person may be a person to whom the vendor may ultimately be required to transfer the land.”

27. The second contention was that s31(1)(b) had no application to the transfer because the nominee had not relevantly ‘acquired’ any rights or interests of the named purchaser because the nominee did not acquire the named purchaser’s rights. Rather, the contract conferred equivalent (but not the same rights) on the nominee. The taxpayer argued that the section applies to circumstances where there has been an assignment of rights, whether directly or indirectly, by the original purchaser to the substitute purchaser or there has been an agreement made between the original purchaser and the sub-purchaser that effectively results in a new contract coming into being between the vendor and the sub-purchaser. The President’s own view was that

s31(1)(b) should not apply, because there was no contractual arrangement between the named purchaser and the nominee relating to the acquisition, or consideration provided to the named purchaser by the nominee in respect of, such an acquisition as between them.<sup>5</sup>

28. Nevertheless, the President felt bound to follow the decision of Nettle

J in *CSR v Politis*.<sup>6</sup> In that case, Nettle J held that in the case of a person taking a transfer of a property as a result of a nomination; or a novation that person does not acquire “the whole or any part of the rights and interest under” the contract of sale of the purchaser named in a contract of sale: see: *Politis* at paras 15 and 16. Nettle J.

construed the statutory language to embrace the direct or indirect acquisition from the purchaser of “equivalent” rights or interests as those in the contract of sale between the vendor and the purchaser.

See: *Politis* at paras 17, 24 and 28.

29. A number of issues arise. In such a case as in *The People’s*

*Investment Company* case, where there is no consideration passing between the named purchaser and the nominee, is there in substance only one transaction, so that to tax the transaction is in effect to

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<sup>5</sup> The President said, “If I had a general discretion to set aside the Commissioner’s decision and to allow the objection I would have done so: as the applicant has not paid any consideration, in relation to the receipt by the nominee of equivalent rights to those held by the applicant.” See [48] of the Reasons.

<sup>6</sup> [2004] VSC 126.

impose double taxation? The affirmative derives some support from *Eastern Bay Builders Ltd v CIR* [1990] 1 NZLR 604. There is a well known presumption against double taxation.<sup>7</sup>

30. Should s31(1) be confined to sub-sales? The heading to s31 of the *Duties Act 2000* is ‘Sub sales of land’. The table of provisions after the title to the Act, contains, ‘31. Sub sales of land.’ Both the heading and the table of provisions appear in the Bill for the Act, indicating that the heading and table were before the Parliament when the Bill was read and debated and the Act passed. The explanatory memorandum to the Bill states, “Liability to duty is imposed in respect of sub sales of land which are not effected by transfer.” In the interpretation of s31, consideration may be given to these references to sub sales, even though, with the possible exception of the table,<sup>8</sup> they do not form part of the Act: see ss35(b)(i) and (iii) and 36(4) of the *Interpretation of Legislation Act 1984*.

16 March 2006

Michael Hines is a member of the Victorian Bar Professional Standards Scheme approved under Professional Standards Legislation. His liability is limited under that Scheme. A copy of the Scheme will be supplied on request.

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<sup>7</sup> See *Executor Trustee & Agency Co of S.A. v F.C. of T* (1932) 48 CLR 26 at 44, per Dixon J (as he then was.)

<sup>8</sup> As to which, see s36(3D) of the *Interpretation of Legislation Act 1984*.

Stamp duty update – Michael Hines, member Victorian Bar