

PROPOSED PART IVA AMENDMENTS

20 November 2012

The release of the explanatory memorandum and draft amendments to Part IVA on Friday night can only be said to be disappointing and devoid of any commercial reality.

Notwithstanding that the:

1. Regime was introduced to only counter blatant, artificial and contrived arrangements that proliferated in the 70s and 80s (which are now interesting history, but are just that; history);
2. Recent indications by the Commissioner at that time, Trevor Boucher, who was responsible for its introduction, is that it has largely been a success (although conceding that he had not kept up to date with recent cases); and
3. Proposed changes have more to do with the recent defeat of the ATO in a number of cases and less with any deficiencies in the regime,

we are asked to find acceptable the introduction of a notion of a 'holistic and single inquiry' as to whether a person participated in a particular scheme to obtain a tax benefit but to not include any consideration as to potential tax liabilities in any chosen course of action.

This quite clearly closes the doors on the "do nothing" and "that is tax inefficient, so find another way" alternatives.

Whilst both may be abhorrent to the revenue authorities, both are conclusions often reached by business owners who are required to juggle and balance considerations that include tax!

Alternatives limited to achieving non-tax objectives without a tax benefit may be sound in the minds of those who petitioned for change but has no equivalence with those required to make decisions that relate to profitability of an enterprise and the employment of Australians in those enterprises.

What seems even more preposterous is the direction to omit tax considerations and potential liabilities from a commercial decision given recent changes to ensure directors are exposed to personal liability much sooner from when a company incurs such liabilities.

The proposed amendments are, in short, unacceptable and cannot be shown support to any extent. A simple overview is set out in the table which is contained within the Explanatory Memorandum accompanying the draft amendments:

<i>New Law</i>	<i>Current law</i>
The question of whether Part IVA applies to a scheme necessarily involves a single, holistic, inquiry into whether a person participated in the scheme with a sole or dominant purpose of securing for the taxpayer a particular tax benefit in connection with the scheme.	The question of whether Part IVA applies to a scheme starts with a consideration of whether a taxpayer has secured a particular tax benefit in connection with the scheme.
When hypothesising alternative postulates to a scheme, consideration should be given to other ways in which the taxpayer could reasonably be expected to achieve the same non-tax effects (if any) as it achieved from the scheme.	The question of what might reasonably be expected to have happened, absent the scheme, is answered by an unconstrained enquiry about what other alternatives were open to the participants in the scheme.
When hypothesising alternative postulates to a scheme, no consideration is to be given to the potential tax costs of those alternatives.	The question of what might reasonably be expected to have happened, absent a scheme, can involve a consideration of potential tax costs.

The closing date for submissions is 19 December 2012.

Whilst we will make submissions both to Treasury and the Tax Institute separately, we strongly encourage all practitioners engaged by private business to express their own views to both organisations as well.