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# Scheme New Zealand or An Example of The Operation of Div 165<sup>+</sup>

**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*<sup>1</sup>. 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 modifications) may have brought with it.

It should, at the outset, be noted that the provisions of the GST Act relating to contracts to acquire property differ from those in New Zealand with the consequence that the scheme could not, at least without modification, work here. As will later be seen the normal provisions in a contract that the deposit would be held by a stakeholder had been deleted. That was a necessary element of the scheme and would ensure that Division 99 of the GST Act would have no application should the scheme be tried in Australia. Section 9-15(3) of the GST Act would create difficulty for the scheme in Australia. However, for the purposes of the paper I propose to assume that the Australian legislation does produce the same attribution mismatch on the same facts. Otherwise there is nothing to talk about.

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<sup>+</sup> Paper delivered by Justice Graham Hill at the 16<sup>th</sup> Annual GST & Indirect Tax Workshop, Noosa, Queensland, 29 April – 1 May 2004.

\* Justice, Federal Court of Australia, Sydney

<sup>1</sup> (1993-1994) 181 CLR 359

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 the analysis of the potential application of Division 165. Indeed, the Tribunal took over 130 paragraphs (or 29 A4 pages) to recite the facts it found.

## THE CONCLUSION IN NEW ZEALAND

It was held that the general anti-avoidance provision (s 76) in the NZ Act applied to negate the input tax credit claimed.

Section 76 of the NZ Act at the relevant time (it was subsequently amended) had two main ingredients. The first was that there be “an arrangement” defined in s 76 as meaning:

...any contract agreement, plan or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect.

The second was that the arrangements identified be:

entered into between persons to defeat the intent and application of this Act, or of any provision of this Act.

If these two elements were, to the Commissioner’s satisfaction, “found to exist, the Commissioner was entitled to treat the arrangement as void for the purposes of this Act, or of any provisions of this Act”, and to adjust the tax payable or the refund required to be made, as the case may be, so as to “counteract any tax advantage obtained...from or under that arrangement.”

The expression “tax advantage” was defined to include:

- a) Any reduction in the liability of any registered person to pay tax:
- b) Any increase in the entitlement of any registered person to a refund of tax:
- c) Any reduction in the total consideration payable by any person in respect of any supply of goods and services.

Not surprisingly the Tribunal found there to be an arrangement in the defined sense. It consisted of the contracts for the sale of land, an understanding how those contracts would fit into a master plan for the purchase of vacant sections by the A Group, the sale to the disputant and resale to the A Group. Central to the plan was, the Tribunal said, the availability of the GST input refunds.

There was a debate in the Tribunal that nothing had been entered into “between persons”. The arrangement had to be consensual. But it was said it was only the taxpayer who had sought to defeat the intent and application of the Act. The debate, resolved in favour of the revenue, has no resonance in the Australian context and can be put to one side.

The difficult question in the NZ Act was the need to find “intent to defeat the intent and application of the Act”, a concept somewhat difficult to understand in a case such as the present. This was not a case like the income tax cases where the taxpayer was seeking to argue that the transaction did not attract tax and the revenue to argue that it

did. Here the taxpayer wished to argue that the Act did operate to bring about a taxable supply. More importantly, the taxpayer wished to argue that the transaction attracted GST consequences which the Act specifically intended, those consequences depending upon which method of GST accounting was applied. What really caused the problem was the long period of time which was to elapse between the allowing of the input tax credit on the one hand and payment of the output tax on the other.

The taxpayer's argument was quite obvious. The parties "constructed" their transaction specifically to meet the requirements of the legislation and not to defeat either the intent or the application of the Act or any provisions of it. Indeed, it was predicated upon the provisions of the Act applying. The problem was merely that many years would elapse before the payment of output tax crystallised. That, however, was a function of the commercial arrangement between the parties.

Under the NZ Act the question of purpose was, so the Tribunal said, subjective and not, as in Division 165, a conclusion as to the purpose of some person where that conclusion was to be ascertained from objective facts. (Of course Division 165 permits effect to be considered as well as purpose). Relevant, so the Tribunal said, to a finding of the subjective purpose of a relevant person were 5 circumstances which may be thought to be reminiscent of the 12 factors in the GST Act. These were:

- a) The relationship of the parties. Are they strictly at arms length, or is there a premeditated collusion in the design of the arrangement?
- b) The significance to the transaction of the GST consequences under consideration.
- c) Whether the arrangement is explicable in ordinary commercial terms if the contested GST component is abstracted.
- d) In what way the arrangement defeats the particular intent and application of the GST Act which is relevant to the facts.
- e) The identity, relevant experience and financial probity of the parties as that touches on their ability to perform their side of the bargain without the benefit of the contested GST component."

The transaction failed, so the Tribunal said, on every count. The Tribunal's analysis was as follows:

- a) The relationships between Mr A and the original proprietor of the disputant company were more social than commercial. The company which she formed was to be no more than a conduit for obtaining the GST input refunds.
- b) The arrangement was entirely dependent on obtaining the GST inputs. The disputant had no ability to pay for any of the land purchased from its own resources. Similarly with the input refunds the A Group of companies had no ability to finance the purchase of the sections which they onsold to the disputant.
- c) If one removes the input refund from the equation the arrangements are wholly inexplicable in commercial terms. They could not and did not come to fruition.
- d) This arrangement defeats the intention of the Act to tax transactions at the time they entered into by exploiting the mismatches which the Courts have found to exist between payment based and invoice based

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 immediate credit and if that meant “disgorging public monies”, so be it. The purpose which a taxpayer has for the use of any refund hardly appears relevant to the question posed by s 76.

Anyway, the outcome seems an appropriate one. It can hardly be doubted that what was before the Tribunal should qualify as tax avoidance, even if the language of s 76 may be thought to present some difficulty. I turn now to consider the application of Div 165 to the scheme.

## THE SCHEME

Division 165, as has become clear from the cases decided under Part IVA, requires some care in identifying the relevant scheme. Given that both an “action” as well as a course of conduct may constitute a scheme, as well as a “plan” or even a “proposal”, there will never be any doubt that there will be a scheme, although there may be some difficulty in deciding how narrowly the scheme might be defined. Certainly, there is no requirement in Australia that there be a meeting of minds such as may be implicit in s 76 of the NZ Act. The only limitation in Division 165 is that the scheme be one from which the taxpayer got the tax benefit. Incidentally, the Part IVA test that the tax benefit be in “connexion” with the scheme may be wider from the point of view of the revenue than a test of whether the taxpayer “got” a GST benefit “**from**” the scheme in the context of GST. It is at least a different test.

The problem of the identification of the scheme is a difficult one because the same facts can give rise to a wider or a narrower scheme. This is the problem that the High Court must face up to in *Commissioner of Taxation v Hart*<sup>2</sup>, an appeal which has been argued and judgment reserved. In dicta in *Federal Commission of Taxation v Peabody*<sup>3</sup> the High Court said that the Commissioner could, subject to questions of fairness, choose between a narrow or broad definition of the scheme. This though was subject to the qualification that the Commissioner could not take a set of circumstances which constituted only part of a broader scheme and test that to see if the required conclusion would be reached in a case where then the circumstances were “incapable of standing on their own without being robbed of all practical meaning.”

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<sup>2</sup> (2002) 121 FCR 206 (FCFCA)

<sup>3</sup> (1993-94) 181 CLR 389; ATC 4663

It is far from clear what that qualification means despite an elliptical reference to *Inland Revenue Commissioners v Brebner*<sup>4</sup> in Peabody which presumably was intended to elucidate it. And, as Hely J pointed out in *Hart*,<sup>5</sup>

The more the scheme can be confined to the essential elements by which the tax benefit is obtained, the more likely it will be that the conclusion will be drawn that the dominant purpose for a person entering into a scheme so defined was to obtain the tax benefit.

Whatever the outcome in *Hart* it will ordinarily not matter whether a wider or narrower definition of the scheme is adopted as the objective facts required to be taken into account in deciding whether the relevant conclusion should be drawn will include all the relevant surrounding circumstances. Naturally these include those elements of the plan or proposal that might be eliminated from the wider scheme in formulating a narrower scheme.

In the present circumstances it is easier to regard the scheme as being the whole of the course of conduct which was set out earlier in this paper under the heading “The Facts”. There is no need to narrow the scheme to some narrower scheme.

#### THE GST BENEFIT

As already noted the relevant scheme must be one from which the “avoider” got a GST benefit. The relevant paragraphs of the definition applicable to the taxpayer will be either s 165 –10(1)(b) [namely that there is an amount payable to the entity (the taxpayer) under the GST Act which is or could reasonably be expected to be larger than it would be apart from the scheme] or s 165-10(1)(d) [namely that all of an amount that is payable to the entity (the taxpayer) is or could reasonably be expected to be payable earlier than it would have been apart from the scheme or a part of the scheme.]

The first of these alternatives is relevantly concerned with a scheme which maximises input tax credits. The latter is relevantly concerned with the timing of the payment of the input tax credits, that is to say advancing the time when refunds are payable. Either could be applicable here.

There is another GST benefit as well here, in that the scheme defers the time at which the vendor companies (the A Group of companies) were required to account for output tax. That other tax benefit would involve a different set of taxpayers. What is perhaps unusual with the deferred payment scheme is that it depended upon both the taxpayer being entitled immediately to the input tax credit and the vendor to the taxpayer not being required to pay GST until a later time. It is not unusual in the income tax context for the Commissioner to issue alternative assessments against different taxpayers.

#### GST BENEFITS TO BE IGNORED IF ATTRIBUTABLE TO AN ELECTION

There is a statutory exclusion from the definition of GST benefit to be found in s 165-5(1)(b) of the GST Act. So, a relevant GST benefit is not to be taken into account if

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<sup>4</sup> [1967] 2 AC 18 at 27

<sup>5</sup> (2002) ATC 4608 at 4628; (2002) 121 FCR 206

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 (3<sup>rd</sup> 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)<sup>6</sup> 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 statute 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*<sup>7</sup> or *Slutzkin v Federal Commissioner of Taxation*<sup>8</sup>. 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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<sup>6</sup> Vol 32 Australian Business Law Review 35 (February 2004)

<sup>7</sup> (1957) 100 CLR 66

<sup>8</sup> (1977) 140 CLR 314

*v Gulland*<sup>9</sup> Dawson J suggested that reconciliation between s 260 and the rest of the Act required a qualification to the choice principle namely,

that s 260 does not deny a taxpayer a choice which is offered by the Act unless there is something other than the making of such a choice to indicate that a contract, agreement or arrangement has the purpose or effect of avoiding tax in a way which is prohibited by the section.

(emphasis added)

His Honour continued by suggesting that there was a distinction between a mere choice on the one hand and the case where the taxpayer sought to avail himself of the choices offered by the Act by means of a contrived scheme which could only be explained upon the basis of tax avoidance.

It might be thought that specific provisions like s 165-5(1)(b) remove the general “choice” doctrine and replace it with a statutory doctrine. That is true. But s 177C(2) in the income tax context goes further than Division 165 does in the GST context, by providing as a qualification to the choice exclusion that it would not operate where the relevant scheme was entered into or carried out “for the purpose of creating any circumstances or state of affairs the existence of which is necessary to enable the choice to be made.”

If there were in the GST Act a comparable qualification such as is to be found in s 177C(2) then the present case would clearly come within it and permit a wider or even narrower definition of scheme to be one from which the taxpayer (that is to say here each company in the A Group of Companies “got” the tax benefit. Presumably the omission of these words was deliberate although it is not clear to me why. The omission provides a respectable argument for the companies in the A group of companies in a case such as the present.

Perhaps it was thought by the drafter that the omitted words added nothing. My own tentative view is that paragraph (b) will not be read widely or certainly not so widely that a scheme such as the deferred payment scheme here under discussion escapes Div 165 on that basis.

In the present case while it is the exercise of the choice to account on a cash basis which produces a GST benefit to the companies which are members of the A Group of companies, the scheme as a whole is more than that. The real benefit of the scheme is not just the deferral of output tax, it is in great part the mismatch between that and the obligation of the taxpayer which is not entitled to account on a cash basis but required to account on an invoice basis. This obligation carries with it the entitlement of the taxpayer to an input tax credit immediately on invoicing. The other matter which adds to this benefit is the long delayed settlement which means that output tax is deferred for up to 15 years. And in any event the contracts between the taxpayer and each of the companies in the A group of companies has been inserted into what is otherwise an ordinary commercial transaction, that is, the contracts to purchase the lots from W Investments Ltd.

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<sup>9</sup> (1985) 160 CLR 55 at 122-3

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 required to pay to W Investments Ltd. To achieve this it is necessary that the A group companies are so structured that each can choose to account on a cash basis and also that the contracts are so structured that settlement is long delayed thereby maximising the amount of the initial input tax credit and delaying payment of the output tax.

In summary, it may be that a taxpayer who sets up a scheme to avail himself or herself of the making of a choice expressly legislated for does not have a relevant tax benefit if that is all that the scheme involves. For then the tax benefit is attributable solely to the election or choice. However, here the tax benefit obtained, whether by the taxpayer or the companies in the A group of companies, is attributable to other factors such as the structuring of the transaction to avail the taxpayer of the mismatch in manner and time of payment of output tax and receipt of the input tax credits. However it can not be said that the question is free from doubt.

Since, however, it is the taxpayer who is to be denied the input tax credit here, the relevant tax benefit has to be the acceleration of the input tax credit or the obtaining of an input tax credit at all by the taxpayer. No election, choice, application or agreement is exercisable by the taxpayer so as to exclude there being a tax benefit. Obtaining a credit arises from the act itself. Accounting on an invoice basis is an obligation the act itself imposes absent the making of a successful election.

It will be recalled that the relevant definition of GST benefit reads:

all or part of an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, payable earlier than it would have been apart from the scheme or a part of the scheme.

There is no doubt that “*reasonable expectation*” involves more than a possibility. Rather, as the High Court said in *Peabody*<sup>10</sup> reasonable expectation involves:

Prediction as to events which would have taken place if the relevant scheme had not been entered into or carried out, and the prediction must be sufficiently reliable for it to be regarded as reasonable.

Where the GST benefit involves the payment of output tax it may sometimes be possible for a taxpayer to argue that it is just plain unreasonable to suggest that if the scheme had not been entered into GST would be payable if only because apart from the scheme the taxpayer would do nothing at all and thus have no GST to pay. In the resolution of such an argument the provisions of s 165-10(3) may have some application.

The same argument can not be made where the relevant benefit is the obtaining of an input tax credit. If the taxpayer did not enter into the scheme and did nothing at all no GST credit would be payable to him or her. So the whole of the input tax credit will be the GST benefit “got” by the taxpayer from the scheme.

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<sup>10</sup> at 385

## 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 follows I use the expression “tax avoidance purpose” to mean the sole or dominant purpose of an entity getting a GST benefit from the scheme in accordance with s 165-5(1)(c)(i) of the GST Act and “tax avoidance conclusion” to mean the conclusion required to be drawn as to the tax avoidance purpose or effect as the case may be. Likewise references to “tax avoidance effect” are to be read as references to the principal effect of the scheme being that the taxpayer or some other entity gets the GST benefit from the scheme directly or indirectly.

Both purpose and effect have to be answered taking account of the matters set out in s 165-15. As long as all of the matters are considered the conclusion can be global: *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd*<sup>11</sup>. Generally Judges seem to look at these matters separately in the Part IVA context. As I pointed out in *Peabody*<sup>12</sup> some matters may point to the conclusion in favour of the Commissioner, other matters may point against the tax avoidance conclusion and some may be neutral. It is the evaluation of these matters, alone or in combination, some for, some against, that s 177D requires in order to reach the conclusion which the section requires. These comments would be as relevant to the principal effect conclusion as they are to the purpose conclusion.

I still doubt that there will be much difference whether the purpose test is adopted or whether the effects test is adopted because every man or woman is to be presumed to have intended the natural and probable consequences of his or her acts. Hence the most obvious way a conclusion as to the purpose of a relevant person will be arrived at when only objective factors may be taken into account will be to have regard to the effects which the scheme has. I propose to consider “purpose” first. However, before doing so I would set out some principles that have been now established in the Part IVA context which would seem to be equally applicable to Division 165.

First, the reference to “dominant purpose” is a reference, in a case where there is more than one purpose present, to the “*ruling, prevailing or most influential purpose*”<sup>13</sup>

Secondly the conclusion as to dominant purpose is one that may be reached not only with respect to the taxpayer but also with respect to some other person so long as the other person entered into or carried out the scheme.<sup>14</sup> So, for example, the purpose of a promoter may be considered. However, the promoter may be quite indifferent to the

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<sup>11</sup> (2001) 297 CLR 235 at para 95.

<sup>12</sup> (1993) 93 ATC 4104 at 4113-4

<sup>13</sup> *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 423.

<sup>14</sup> *Spotless* at 418.

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.<sup>15</sup>

Thirdly, there is no necessary dichotomy between the pursuit of commercial gain in the course of carrying on a business and a finding that the dominant purpose was to obtain a tax benefit.<sup>16</sup>

Fourthly, at least in the operation of Part IVA it is clear that evidence of the actual purpose of a person will be irrelevant to the conclusion. None of the eight matters listed in s 177D(b) include the state of mind of any person. That is less clearly the case in Division 165 where regard is directed to be had to “any other relevant circumstances”. A state of mind may, perhaps, be a circumstance, although I doubt that this is the way paragraph (l) of s 165-15(1) will be construed.

### CONCLUSION AS TO DOMINANT PURPOSE

Rather than go through each of the 12 matters I propose here to confine myself to those which are of the greatest significance, being the manner in which the scheme is entered into or carried out, its form and substance and the advantages to others connected with the taxpayer. These are, after all, almost always the most significant factors in determining whether tax avoidance is present. Naturally in the present case both timing and the period over which the scheme is entered into and carried out will point to the tax avoidance purpose.

There are a number of facts which appear in the evidence before the Tribunal which point towards the tax avoidance purpose.

One important matter is that the insertion of the contracts between the taxpayer and the A group of companies was not really relevant to the commercial deal which the A group of companies had with the W Investments Ltd. The insertion was solely to obtain the mismatch advantage which included the immediate input tax credit.

The mind behind the scheme was the proprietor of the A Group of Companies, a property developer, advised by a tax specialist from a large firm of solicitors and (for those involved with sales tax in the 1980's, shades of the black box schemes) a former senior officer of the Revenue. The sole proprietor of the taxpayer was a person with no business experience or interest much in the scheme and with little or no knowledge of GST. She was a friend of Mr A and her only experience of land development was work with a property publication. Since the purchase price payable by the taxpayer was the expected market value in at least 10 years time, there was no real profit to be had by the taxpayer.

The deposits payable were to come from the input tax refund. The taxpayer had, otherwise, no assets. Mr A, in turn, needed the money from the deposits to help him pay W Developments. Presumably the taxpayer could finance the amount payable on completion from the proceeds of sale of the lots together with houses erected on them to third parties.

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<sup>15</sup> *Consolidated Press* at 264.

<sup>16</sup> *Consolidated Press* at 95.

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 effect of the then s 23(q) of the *Income Tax Assessment Act 1936* was that the ex Australian sourced interest was not liable to tax in Australia. Before tax the interest derived off shore was substantially less than the interest that would have been derived in Australia. The High Court found Part IVA applied. Hence the tax avoidance purpose must predominate where the commercial profit could only arise as a result of the tax benefit.

Perhaps it might be more difficult to draw the necessary tax avoidance conclusion in a deferred payment scheme if the taxpayer could have funded the purchase without the GST refund. For then it could more strongly be argued that the dominant purpose overall was to make the commercial profit and the GST benefit was not a predominant factor in entering into the contracts which gave rise to the input tax credit. It would then depend upon weighing up the quantum of profit from the land transaction which was not to be derived for many years into the future and the advantage of the accelerated use of the input tax credit which was immediate and continued for twenty years until the taxpayer finally completed the contract. However, as earlier noted, the agreement between the taxpayer and the A group of companies was really interposed into the commercial deal and in circumstances where the taxpayer was really just helping out the controller of the A group of companies.

#### CONCLUSION AS TO EFFECT

The GST effect of the scheme is obvious enough. There is an immediate right in the taxpayer to receive the input tax credit brought about by the fact that the taxpayer accounted for GST on an invoice basis and a payment of the output tax by the A group of companies was deferred because the vendor accounted on a cash basis. In the result

the taxpayer would, in the event the scheme was successful, have, as a result of the input tax credit, a large fund from which to pay the deposits on the contract with the A group of Companies which in turn would be used by them to fund the deposit obligations to W Developments Ltd. No amounts would be needed to pay GST to the Revenue until the contracts were completed when the A Group of Companies would become liable to pay output tax on the 114 contracts.

There will be the same commercial advantage as discussed above in the context of purpose – an advantage that would exist only so long as the GST advantage was available. Not surprisingly in the New Zealand case, everything collapsed when the revenue refused to pay to the taxpayer the input tax credit.

The conclusion as to principal effect would, thus, be the same as the conclusion as to dominant purpose.

#### **WHAT CONCLUSION SHOULD BE DRAWN ABOUT DIVISION 165**

Part IVA has been interpreted, generally, quite favourably to the Commissioner in Australia and it may be expected that Division 165 will likewise be interpreted favourably to him.

The above analysis makes it clear that the only possible difficulty for Division 165 overcoming the Deferred Payment Scheme could lie in the definition of GST benefit having regard to the fact that the scheme depended, albeit only in part, upon the express provisions of the Act and particularly the ability of an entity to adopt a cash basis method of accounting for GST if below the threshold. But, I suspect, that the Courts would have little difficulty in upholding the Commissioner and in thus denying the taxpayer the credit.