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TAX ALERT

AUSTRALIAN GAAR TO BE AMENDED RETROSPECTIVELY – LESSONS FROM DOWN UNDER

The Australian General Anti-Avoidance Rule (GAAR) is found in Part IVA of the Income Tax Assessment Act, 1936. It was originally introduced in 1981 to combat 'blatant, artificial and contrived' schemes entered into with the sole or dominant purpose of reducing tax.

Since 2010, the Australian Tax Office (ATO) has lost six out of thirteen Part IVA cases argued before the Federal Court. This has led to a flurry of action that will culminate in legislative changes to Part IVA during the Spring 2012 Parliamentary sittings.

In brief, the requirements for Part IVA's application are:

- There must be a scheme within the meaning of the applicable provisions.
- A tax benefit must be derived from said scheme.
- The taxpayer's dominant purpose must have been to obtain such tax benefit.

Where the Commissioner is satisfied that said requirements are present, he can make a determination to cancel the tax benefit. The taxpayer bears the onus in relation to Part IVA proceedings.

In two recent Part IVA cases, the taxpayers made a 'no tax benefit' argument and won.

In essence, the 'no tax benefit' argument seeks to prove that the transaction could not have been done in any other way. This means the taxpayer either would have done nothing (in which case no tax whatsoever would have been payable because the scheme would not have been implemented), alternatively, it could have done the transaction in a manner yielding a comparable tax result, that is the tax outcome would have been similar to that achieved under the scheme.

In *RCI Pty Ltd v Commissioner of Taxation [2011] FCAFC 104*, the Full Federal Court found that there was no 'tax benefit' because RCI would not have implemented the restructure of the group (and the consequent sale of shares) if the costs of doing so (including the tax costs), were prohibitively high. In February 2012, the High Court refused the ATO special leave to appeal.

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The case of *FCT v Futuris Corporation Limited [2012] FCAFC 32* followed in March 2012. In *Futuris*, the taxpayer showed that had it not done the transaction in that particular manner (by restructuring to divest a certain services division through a public listing), it would not have entered into the transaction at all. The *Futuris* case held that direct evidence of what the taxpayer would have done (or could reasonably be expected to have done), but for the scheme, was not required.

By accepting the 'no tax benefit' argument, the Australian courts held, in effect, that a taxpayer should not be taxed on the basis of a transaction that it would never have entered into.

On 1 March 2012, the Assistant Treasurer announced that Government would act to protect the integrity of Australia's tax system by introducing amendments to Part IVA. Said amendments "... would ensure that ... Part IVA, continued to be effective in countering tax avoidance schemes that are carried out as part of broader commercial transactions". Furthermore, "The Government amendments will confirm that Part IVA always intended to apply to commercial arrangements which have been implemented in a particular way to avoid tax. This also includes steps within broader commercial arrangements".

Treasury promised extensive consultation but indicated that the envisaged amendments would apply retrospectively from 1 March 2012.

The public consultation process started in May 2012. The ATO representative indicated that the Commissioner was now required (under the *RCI* and *Futuris* approach) to present the most reliable prediction regarding the alternative course of action that a taxpayer would take. Consequently, the new test required of the ATO to "undertake a hypothetical fact finding exercise". Prior to the *RCI* and *Futuris* cases the court would, of its own accord, have decided what would have happened had the taxpayer not implemented the scheme.

The upcoming Part IVA amendments have been widely criticised. One commentator stated: "There was no suggestion at the time Part IVA was designed to prevent ordinary business planning. The selection of one option out of a number of choices taking tax into account was outside the scope of the rule". Another expressed fear that the amended Part IVA might enable the ATO "... to impose tax if one of the possible ways in which the transaction could have been implemented would have involved paying more tax, whether or not that possibility was probable, or even likely". The retrospective effect of the amendments has also been condemned.

The South African GAAR provisions are found in Part IIA of the Income Tax Act, No 58 of 1962. Section 80A provides that "An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit...". Section 80L defines 'avoidance arrangement' as "any arrangement that, but for this Part, results in a tax benefit". 'Tax benefit' is defined in s1 to include "any avoidance, postponement or reduction of any liability for tax".

In relation to onus regarding the alleged 'tax benefit', s80G provides that "An avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit unless and until the party obtaining the tax benefit proves that, reasonably considered in light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement".

The aforementioned makes it clear that the concept of 'tax benefit' is pivotal to the local GAAR.

It is foreseeable that, under appropriate circumstances, a SA taxpayer could testify that:

- It would not have entered into any transaction at all (that is where the tax consequences of the hypothetical alternative would have been more onerous than those of the transaction it actually implemented); or

- Out of a suite of alternatives, it could have entered into a different transaction but such transaction would have resulted in a similar tax outcome compared to that of the transaction actually implemented.

The gist of the taxpayer's argument would consequently be that there was no 'avoidance, postponement or reduction of any tax liability' seeing that it would either have done nothing, alternatively it would have undertaken a transaction where the fiscus would have seen an equivalent tax result. SARS might have its work cut out to convince the court that, despite the taxpayer's evidence to the contrary (that could be hard to contest seeing that it is solely in the taxpayer's domain), there does exist some 'tax benefit'. Without a benchmark (the hypothetical alternative transaction) against which the tax benefit of the actual transaction could be measured, SARS might be hard-pressed to postulate a 'tax benefit'?

It would therefore be interesting, in light of the Australian experience, what South African Courts will make of the ‘no tax benefit' argument.

Johan van der Walt

TAX ON TRAVEL REIMBURSEMENTS SET TO CHANGE

The Taxation Laws Amendment Bill 2012 (TLAB) proposes changes to the taxation of variable remuneration which includes, among others, travel reimbursements.

Currently, where an employee receives a reimbursement pertaining to business travel undertaken, that reimbursement is not subject to the deduction of Pay-As-You-Earn (PAYE) at the time of accrual or payment, provided certain compliance requirements are met. It is only on assessment of the employees' individual tax return when the travel reimbursement (IRP5 code 3702) will become subject to normal tax in full, unless a deduction for business travel is claimed, either on the formula or actual cost basis. In other words, even though the travel reimbursement was *prima facie* for business related travel, this must still be substantiated on submission of the employees' individual tax return.

The TLAB proposes that the tax trigger for travel reimbursements be accelerated to the point where actual payment is made by an employer, as opposed to tax generally being triggered on assessment. What this means is that an employer will be required to deduct PAYE from any travel reimbursement at the time payment is made to an employee and will not be able to pay a travel reimbursement on a tax free basis.

The Explanatory Memorandum (EM) advances various reasons for proposing the taxation of variable remuneration, including travel reimbursements, on a payments basis. It appears the over-arching reason is to avoid tax mismatches where the employer claims a deduction for certain types of remuneration that has not been made subject to tax in the hands of the employee. What the EM does not state is that the payment basis of taxation, especially with regard to travel reimbursements, will again ensure upfront monthly PAYE to the South African Revenue Service that coincides with the 'tax now deduct later' principle that has dominated salary related tax amendments over the last couple of years, examples of which include the tightening of medical aid deductions, travel allowances and most recently the taxation of company cars.

The effective date of the proposed amendment to tax travel reimbursements on a payment basis is 1 March 2013 and employers would need to realign their internal reimbursement processes to ensure that PAYE is deducted when payment is made to an employee.

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