Is tax planning dead? Part IVA cases

By Chris Peadon, FTI, Barrister, New Chambers

The answer is of course "no"—tax planning ain't dead; nor is it resting on its perch. Rather, a survey of recent Pt IVA decisions speaks to the need for a sophisticated and nuanced approach to tax planning informed by the provisions of the general anti-avoidance rules.

The distinction between permissible and impermissible tax planning is best described as the difference between the tax planning *influencing* the form of the transaction and tax planning directed to maximising the taxpayer's after-tax returns being the dominant *driver* of the form of the transaction.

This article is a reproduction of a paper presented at a conference held by The Tax Institute on 27 February 2025. It states the law as at that date. Notably, the taxpayer's recently decided appeal to the Full Federal Court in *Merchant* was a "wipeout" (see [2025] FCAFC 56).

Preface

Swinging attitudes to tax planning in Australia[1]

Commencing in the author's formative years: a "teddy bears' picnic" for taxpayers

> "[T]he citizen has every right to mould the transaction into which he is about to enter into a form which satisfies the requirements of the statute. It is nothing to the point that he might have attained the same or a similar result as that achieved by the transaction into which he in fact entered by some other transaction, which, if he had entered into it, would or might have involved him in a liability to tax, or to more tax than that attracted by the transaction into which he in fact entered. Nor can it matter that his choice of transaction was influenced wholly or in part by its effect upon his obligation to pay tax." (per Barwick CJ in *FCT v Westraders Pty Ltd*)[2]

A new wave becomes fashionable in the early 1980s

> "When, in 1981, the Commonwealth Parliament decided to re-visit the possibility of a general provision to replace s 260 it was faced with a political problem … It had to respond to public exasperation with increasingly aggressive tax schemes, and the apparent inability of the three branches of government to control them, without resort to over-kill. At the same time it had to find a way of making a reasonable distinction between legitimate tax planning and illegitimate tax avoidance; a distinction that was acceptable both to the profession and to the public." (per The Hon. Murray Gleeson AC KC (former Chief Justice of the High Court))[3]

The new wave was not to everyone's taste (19 July 2006)

> "Your Honour, this is a tax avoidance scheme, and it works …" (the author's unreliable recollection of the taxpayer's Senior Counsel's opening submission in *Trust Co of Australia v Chief Commissioner of State Revenue*)[4]

And a warning for those still living in the 70s

> "I direct the Registrar to forward a copy of these reasons to the Commonwealth Director of Public Prosecutions, the Australian Securities and Investments Commission and the Australian Federal Police. The facts I have found strongly suggest widespread money laundering, tax fraud of the most serious kind and, possibly in some instances, insider trading. The conduct revealed in this case is disgraceful." (Perram J in *Hua Wang Bank Berhad v FCT* (the *Bywater* case)[5]

Ethical and professional conundrums of the tax adviser

On the ethics (or morals) of tax planning

> "Requesting a tax lawyer to discuss the ethics of tax planning will be considered by some as akin to inviting the devil to deliver a sermon. A fresh outlook will be anticipated. At least it will be expected that the statement should be brief." (attributed to leading Canadian tax lawyer of the mid-20th century, Philip Vineberg QC)

On the pitfalls of failing to advise on tax planning

> "One thing a reasonably prudent [tax lawyer] could not do was stay mute, especially if they proposed to charge for their time. Marcel Marceau was not a tax lawyer." (per Beech Jones J (when a Judge of the NSW Supreme Court) in *Symond v Gadens Lawyers Pty Ltd*)[6]

Introduction

Where is the boundary?

This is the question posed not by another ageing out-of-form middle-order test batsman curiously selected out of position to open for his or her country without having played any long form cricket for 18 months, but by the organising committee to me as regards the metes and bounds of permissible tax planning.