

CC (NEW SOUTH WALES) PTY LTD V FC OF T: PART IVA CAN APPLY TO LOSS TRUSTS

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This article examines the way in which the general anti-avoidance provisions in Pt IVA of the Income Tax Assessment Act 1936 might apply to schemes entered into to take advantage of a deduction available to a trust for tax losses of earlier income years. The article refers to two decisions of the High Court in which fundamental principles were established on the application of the provisions of Pt IVA, and discusses how these principles can apply to such schemes. A major focus of the article is the recent Federal Court decision in CC (New South Wales) Pty Ltd v FC of T 97 ATC 4123. While the Federal Court decision confirms that Pt IVA can apply to schemes involving a loss trust, at least where assessable income is diverted to a trust to take advantage of its past year tax losses, the article concludes that the decision is unlikely to be of wide application to trafficking in loss trusts more generally.

1. INTRODUCTION

The use of a trust as an investment or business vehicle is commonplace.¹ In light of the recession and the crash in the commercial property market in the early 1990s, many of the trusts used for investment or carrying on business incurred substantial losses.² Taking the case of trusts which invested in rental producing real estate,³ factors such as vacancies caused by an over supply of rental space, a reduction in rental income levels, a drop in property values and, where borrowings were used to acquire the rental property, a period of high loan interest rates, contributed to the losses incurred. It is therefore not surprising that anecdotal evidence suggests that since the early 1990s there has been an increase in "trafficking" in loss trusts.

Trafficking in loss trusts may be said to involve the acquisition of the "ownership" structure of the trust which has incurred losses, rather than simply acquiring the trust's assets alone. As part of the acquisition, various changes are made in respect of the loss trust to ensure the rights to control the trust and to benefit from it, pass to the new "owner". For instance, if the loss trust was a unit trust, these

changes could involve some or all of the following:

- (1) a new trustee is appointed or, if the trust has a corporate trustee, control of the trustee company is acquired by changing the company's shareholders and appointing new directors;
- (2) existing units in the unit trust are transferred, redeemed or have their rights varied, and additional units may be issued;
- (3) additional income producing property or a new income source is introduced into the trust;
- (4) a new appointor is nominated; and
- (5) amendments are made to the trust deed itself.

If the loss trust was a discretionary trust, the changes could involve the same steps except that, in lieu of the changes in (2), new beneficiaries would be added and perhaps there would be deletions from the existing class of beneficiaries, whether they be takers in default or merely discretionary objects.

¹ The latest edition of *Taxation Statistics 1996/97* released by the Australian Taxation Office ("ATO") [www.ato.gov.au/general/business/bus.htm] indicates that 427, 431 trusts lodged tax returns for that financial year, compared with 331, 366 trust returns for the 1993/94 financial year.

² The *Explanatory Memorandum* to the Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997 (Cth) states at para 1.32 that the total amount of past year tax losses disclosed in trust tax returns for the 1995/96 financial year was \$5,160 million.

³ ATO, above n 1, indicates that for the 1996/97 financial year, of those trusts where the industry engaged in was known, the largest proportion (42%) were in the property industry.

The acquisition of the "ownership" structure of a loss trust rather than the trust's assets could be undertaken for sound commercial reasons. In the case of a loss trust that has invested in rental producing property, these reasons might include:

- (1) *A saving in stamp duty.* The value of the net assets of a loss trust is likely to be less than the market value of the trust's assets (disregarding their attendant liabilities), given that the losses would usually have resulted from interest incurred on trust borrowings exceeding the rent derived by the trust.
- (2) *The maintenance of rental guarantees under existing leases of a rental property.* Arguably such guarantees comprise personal covenants by tenants to a landlord, and as such their benefit might not pass to the new owner of a property if only the assets of a trust are acquired.
- (3) *The maintenance of other important agreements in place.* Finance, supply and employment agreements are examples of already existing agreements which would otherwise need to be renegotiated.

On the other hand, the acquisition of the "ownership" structure could be undertaken for tax reasons, namely, to take advantage of the deduction available to the trust for tax losses of earlier income years. The advantage arises by sheltering from income tax any future assessable income derived by the loss trust. The assessable income derived is sheltered from tax by the trust's

tax losses being effectively deducted from that income. Alternatively, other steps may be undertaken with a view to otherwise taking advantage of the deduction available for the past year tax losses. The existence of these tax advantages raises the issue of the possible application of the general anti-avoidance provisions in Pt IVA of the *Income Tax Assessment Act 1936* (Cth) ("ITAA36").⁴

The suggested increase in loss trust trafficking in the early 1990s did not go unnoticed by the Federal Government.⁵ In the 1995/96 Federal Budget, the Treasurer announced that the ITAA36 would be amended to introduce specific measures to restrict the circumstances in which trusts could deduct past year and current year tax losses.⁶ The new measures were to apply from 7.30 pm AEST on 9 May 1995 and were to be designed to prevent trafficking in loss trusts. Basically, to deduct past year and current year trust losses, up to three new tests were proposed depending upon the type of trust which incurred the losses. The new tests were to be similar to the continuity of beneficial ownership and same business tests which applied to limit the deductibility of company tax losses. However, a new test - the income injection test - was to apply to all loss trusts. Another difference from the company tax loss limitations would be that the same business test would apply only to widely held listed public unit trusts and not to other types of trusts.⁷

These specific loss trust anti-trafficking measures finally received Royal Assent on 16 April 1998 and were ultimately enacted as Sch 2F

⁴ The ITAA36 is progressively being substituted by the *Income Tax Assessment Act 1997* (Cth) ("ITAA97") as part of a "plain English" rewrite of the income tax legislation. The rewritten provisions are being enacted and come into operation on an annual basis as part of the ITAA97. As the rewritten provisions are enacted in the ITAA97, the provisions in the ITAA36 that have been rewritten cease to operate. Until the rewrite is completed, the income tax legislation is spread over both the ITAA36 and the ITAA97. The two Acts operate together during this transitional period of the rewrite.

⁵ The Federal Government's awareness of the potential for a significant erosion in its tax revenue was reflected in the 1995/96 Budget which estimates that the new measures would result in a gain to revenue of \$90 million in 1995/96, \$185 million in 1996/97, \$155 million in 1997/98 and \$65 million in 1998/99.

⁶ Press Release No 56 of 1995.

⁷ When originally introduced into Parliament on 28 September 1995 as part of the Taxation Laws Amendment Bill (No 4) 1995 (Cth), the loss trust anti-trafficking measures included a further test - the pattern of distributions test - that applied only to non-fixed trusts. This test had not been previously announced by the Federal Government and so the test generally applies only to distributions made after that date.

to the ITAA36. Over the period that the new measures were mooted, there seemed to be little discussion about whether the measures were really warranted given that general anti-avoidance provisions already existed in Pt IVA. The purpose of this article is to examine the way in which these general anti-avoidance provisions might apply to loss trusts. Of necessity, this article refers to two decisions of the High Court in which some fundamental principles were established on the application of the provisions in Pt IVA. This article highlights these principles and discusses how they can apply to a loss trust which has available a carried forward tax deduction for past year losses incurred by the trust. A major focus of this article is the recent Federal Court decision in *CC (New South Wales) Pty Ltd (in liq) v FC of T*⁸ where it was held that Pt IVA applied to a scheme that was implemented to take advantage of a

trust's past year tax losses. This article does not deal with the specific loss trust anti-trafficking measures in Sch 2F,⁹ about which there has been much already written.¹⁰ However, the discussion is still relevant for trusts which satisfy the applicable tests under Sch 2F in circumstances where a tax benefit within the terms of Pt IVA may be said to have nonetheless arisen,¹¹ and for trusts which have sought to take advantage of past year tax losses before the application date of Sch 2F.¹²

2. THE GENERAL ANTI-AVOIDANCE PROVISIONS IN PT IVA

The application of the general anti-avoidance provisions of Pt IVA is governed by s 177D. Basically, the provisions can apply to a scheme

⁸ 97 ATC 4123 ("*CC New South Wales*").

⁹ Of the provisions in Sch 2F of the ITAA97, it is s 270-10 that is of particular relevance to the present discussion. Basically, this section applies to a scheme under which:

- (a) a loss trust derives assessable income;
- (b) an outsider to the trust provides a benefit to the trustee or a beneficiary (or their associate);
- (c) the trustee or a beneficiary (or their associate) provide a benefit to the outsider; and
- (d) it is reasonable to conclude that the assessable income was derived, or either of those benefits was provided, wholly or partly (but not incidentally) because of the loss deduction allowable to the trust.

As noted in the *Explanatory Memorandum* to the Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997 at para 10.2, the test in s 270-10 (known as the income injection test) does *not* have a tax avoidance purpose as one of its required elements. This can, of course, be contrasted with Pt IVA of the ITAA36 which requires a sole or dominant tax avoidance purpose. In this regard, the income injection test may be said to have a broader scope of application than Pt IVA. However, it may be noted that the drafting of s 270-10 has borrowed some features from Pt IVA, namely:

- the term "scheme" has the same broad meaning as ins 177A(1); and
- the income injection test requires the relevant conclusion to be drawn by a reasonable person.

It may also be noted that another feature of the drafting of the income injection test arguably gives the test a narrower scope than Pt IVA. This is the requirement that the elements listed above in paras (a) to (d) must all happen "under" (that is, in pursuance of or in accordance with) the scheme in question. This requirement is likely to be more restrictive than the words "in connection with" a scheme in Pt IVA which merely require a real connection between two subject matters.

¹⁰ C Holland, "Trusts: The New Loss Provisions" 2 *The Tax Specialist* 102; G Cowen & C Holland, "Trust Losses: Unfairness of Draconian Measures" 1 *The Tax Specialist* 74; P Lark, "Family Trusts" 1 *Taxation Institute of Australia 1998-99 Convention Papers* 79; T Murphy & A England, "Trust losses" 1 *Taxation Institute of Australia 1996-97 Convention Papers* 62; M Leibler, "Trust Losses" 1 *Taxation Institute of Australia 1996-97 Convention Papers* 191; J Young, "Family Trusts and Tax Losses" 2 *Taxation Institute of Australia 1996-97 Convention Papers* 376; R Seller, "Trust losses" 2 *Taxation Institute of Australia 1996-97 Convention Papers* 671; R Gelski & J Trethewey, "Trust Losses" 2 *Taxation Institute of Australia 1996-97 Convention Papers* 719; D Carbone, "The Proposed Law for Trust Losses - Preventing Loss Trust Trafficking or Prohibiting Trust Losses?" Australasian Law Teachers Association, 1996 Adelaide Conference (10-13 July 1996); A Andreyev, "Family Trusts' and the Proposed Trust Loss Provisions" 1995 52 *CCH Tax Week* 1; S Lanigan, "Trust Losses" Taxation Institute of Australia, NSW Intensive Seminar on Restructuring (17-18 November 1995); G Lewis & H White, "Proposed Trust Loss Rules" 1995 *CCH Tax Focus* Issue 4; and R Riley, "Trust Loss Amendments: Difficulties with Bill 4 Provisions" 52 *Weekly Tax Bulletin* 1051.

¹¹ This possibility was noted in the *Explanatory Memorandum* to the Taxation Laws Amendment Bill (No 4) 1995 at para 10.216 in the context of the income injection test being satisfied, but the note was curiously not reproduced in the *Explanatory Memorandum* to the Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997.

¹² It seems inconceivable that the provisions of Pt IVA would also be applied by the Commissioner in circumstances where the tests under Sch 2F have not been satisfied. See s 177B(3) and the comments of Hill J in *Traknew Holdings Pty Ltd v FC of T* 91 ATC 4272, 4284.

that has been entered into or carried out after 27 May 1981 where:

- (a) a taxpayer has obtained a tax benefit in connection with the scheme; and
- (b) having regard to the eight factors listed in s 177D(b), it would be concluded that a person who entered into or carried out that scheme, or a part of it, did so for the sole or dominant purpose¹³ of enabling the taxpayer to obtain a tax benefit in connection with the scheme.

The provisions of Pt IVA are not, however, self-executing and the provisions do not simply apply of their own force. As highlighted by the Full High Court in *FC of T v Spotless Services Ltd*,¹⁴ to enliven the provisions, the Commissioner of Taxation must first make a determination under s 177F to, broadly speaking, cancel a tax benefit to which Pt IVA applies. The making of such a determination is therefore the "pivot" upon which the operation of Pt IVA turns.¹⁵

Moreover, the Commissioner is empowered to make a determination only where the criteria specified in s 177D are met. In particular, it is necessary that a taxpayer has obtained a tax benefit in connection with a scheme to which Pt IVA applies. The Full High Court in *FC of T v Peabody*¹⁶ pointed out that this requirement must be satisfied by "objective facts". The satisfaction of the requirement is not dependent upon the Commissioner's own opinion or satisfaction that there is a tax benefit or that, if there is a tax benefit, it was obtained in connection with a scheme to which Pt IVA applies.¹⁷ In any given case, there

must be a consideration of the objective facts of the case to determine whether the criteria in s 177D are met. Accordingly, the application of Pt IVA may be said to ultimately depend on questions of objective fact which must be determined in light of the particular circumstances of each individual case.

It is also worth noting that the High Court in *Peabody* further indicated that the erroneous identification of a scheme as being one to which Pt IVA applies, or a misconception as to the connection of a tax benefit with such a scheme, will invalidate a determination made under s 177F only if the tax benefit is not a "tax benefit" within the meaning of Pt IVA. The High Court pointed out that this is unlikely to be the case if the error made goes to the mere detail of a scheme.¹⁸ Thus, it would seem that in identifying the relevant "scheme" under Pt IVA, it is not critical to determine precisely the details of the scheme.¹⁹ The High Court indicated that an error of a more fundamental kind may, however, invalidate a determination made under s 177F. An example of such an error mentioned by the High Court is an error that leads to the identification of the wrong taxpayer as the recipient of the tax benefit. It added that the relevant question in every case must be whether the particular tax benefit purported to be cancelled by the Commissioner is in fact a tax benefit obtained in connection with a scheme to which Pt IVA applies.²⁰

The fundamental requirement for the Commissioner to make a determination under Pt IVA, namely that a taxpayer has obtained a tax benefit in connection with a scheme to which Pt

¹³ See ITAA36, s 177A(5).

¹⁴ 96 ATC 5201 ("*Spotless Services*").

¹⁵ Ibid 5205. See also *CC (New South Wales)* 97 ATC 4123, 4145.

¹⁶ 94 ATC 4663 ("*Peabody* (HC)").

¹⁷ Ibid 4669.

¹⁸ Ibid.

¹⁹ Provided that the circumstances constitute a whole "scheme" and not merely part of a scheme: *ibid* 4670. The High Court also observed that the Commissioner has the flexibility of putting in alternative ways his case on what constitutes the relevant scheme. If, within a wider scheme that has been identified, there also exists a narrower scheme that meets the requirements of Pt IVA, there is no reason why the Commissioner cannot rely on the narrower scheme as well, provided it causes no undue embarrassment or surprise to the taxpayer. If it does, the High Court said the situation may be cured by an amendment, provided the interests of justice allow such a course. The practical implication of this observation is that it reduces the significance of degree of precision required of the Commissioner in identifying the relevant scheme in making a s 177F determination.

²⁰ *Peabody* (HC) 94 ATC 4663, 4669-4670.

IVA applies, has itself essentially two prerequisites. The first is that a tax benefit must be obtained by a taxpayer in connection with a scheme. The second is that the scheme must be one to which Pt IVA applies. Before considering each of these two prerequisites in greater detail, it is convenient to note at this point the facts and decision of the Federal Court in *CC (New South Wales)*.²¹

3. CC (NEW SOUTH WALES) - SUMMARY OF THE FACTS AND THE DECISION

The taxpayer was a construction company and subsidiary of Concrete Constructions Pty Ltd ("CC"). In 1981, Quay Apartments Pty Ltd ("QA"), as trustee of a unit trust, acquired land and buildings in Sydney to construct a multi-storey residential apartment building. In July 1981, the taxpayer was appointed construction manager for this apartment building project. The principal unit holder and financier of the unit trust subsequently went into receivership in May 1983. On 15 September 1983, CC acquired the units in the trust and the shares in QA, and assumed all of QA's liabilities. At this time, the unit trust had accumulated tax losses of \$50,000. The apartment building project was completed towards the end of 1984. As at the end of the 1984/85 income year, the accounts of the unit trust showed accumulated tax losses of \$6.427 million.

In October 1985 and December 1986, the taxpayer secured contracts to manage construction works at Circular Quay and the Sydney Opera House. The taxpayer purported to enter into the construction management contracts as agent for QA, in that company's capacity as trustee of the unit trust, under an undisclosed principal-agent agreement.²² Accordingly, the taxpayer claimed that the income paid to it under the contracts in the 1985/86 to 1988/89 income years was derived by QA, and could be offset against the past year tax losses of the unit trust.

The Commissioner issued amended assessments which included the construction management contract income in the assessable income of the taxpayer for those income years. The Commissioner argued that the agency agreement made between the taxpayer and QA was ineffective in law to create the relationship of agent and principal. Alternatively, the Commissioner argued that, even if the agency agreement was effective, a tax benefit was obtained by the taxpayer in connection with a scheme to which Pt IVA applied. It was therefore contended that determinations under s 177F to cancel the tax benefit had been validly made by the Commissioner.

The Federal Court upheld the Commissioner's argument on the ineffectiveness of the agency agreement and dismissed the taxpayer's appeal. Although it was not strictly necessary to do so, the Court also decided that, had the agency agreement been effective, Pt IVA would have applied to cancel the tax benefit that would have been obtained by the taxpayer. However, its reasons for agreeing that Pt IVA applied were stated more briefly than if this had been the only live issue in the case. These reasons are discussed under Parts 4 and 5 in this article which consider the prerequisites for a valid determination to be made under Pt IVA.

4. TAX BENEFIT OBTAINED BY A TAXPAYER IN CONNECTION WITH A SCHEME

As suggested, the first prerequisite for the Commissioner to make a determination applying Pt IVA is that a tax benefit has been obtained by a taxpayer in connection with a scheme. The expression "the obtaining by a taxpayer of a tax benefit in connection with a scheme" is relevantly defined in s 177C(1) as:

- (a) an amount not being included in the assessable income of the taxpayer of a year of income where that amount would

²¹ A subsequent appeal by the taxpayer to the Full Federal Court was withdrawn.

²² This agency agreement was actually executed in December 1986 (or perhaps later) but was backdated to 29 January 1986.

have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out; or

- (b) a deduction being allowable to the taxpayer in relation to a year of income where the whole or a part of that deduction would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out

If para (a) of this definition applies, the amount of the tax benefit is the amount not included in assessable income of the relevant taxpayer. If para (b) applies, the amount of the tax benefit is the whole or part of the deduction allowable to the relevant taxpayer. For the purposes of Pt IVA, the term "taxpayer" is given an extended meaning in s 177A(1) to include a "taxpayer in the capacity of a trustee". As such, the definition is intended to confirm that Pt IVA applies to trusts and trustees in all circumstances.²³

The term "scheme" is defined very broadly in s 177A(1)²⁴ to encompass, *inter alia*, non-enforceable arrangements or understandings, as well as courses of action or courses of conduct. A

unilateral action may also constitute a "scheme" for the purposes of the definition.²⁵ However, the High Court in *Peabody* pointed out that the definition of "scheme" does not include part of a scheme. It warned that there may be cases where the circumstances constitute only part of a scheme and not a scheme in itself. This will occur where the circumstances are "incapable of standing on their own without being 'robbed of all practical meaning'".²⁶ Consequently, the first prerequisite for applying Pt IVA may be said to require that the relevant tax benefit must be obtained by a taxpayer in connection with a whole scheme and not merely a part of a scheme. For circumstances to constitute a whole scheme and not part of a scheme, the circumstances standing on their own must have some practical meaning.²⁷

In the context of a loss trust, there are two potential tax benefits which may arise. First, if the trustee of the loss trust (for convenience referred to as the loss trust itself) derives assessable income not previously derived by the trust, the non-inclusion of that amount in the assessable income of a taxpayer other than the loss trust. Secondly, there is the deduction allowable to the loss trust itself for the past year tax losses. Clearly, the mere acquisition of the "ownership" structure of a loss trust does not give rise to a tax benefit being obtained by the new "owner" as the acquisition, of itself, would not give rise to either of the two types of tax consequences mentioned in s 177C(1).

²³ See *Grollo Nominees Pty Ltd v FC of T* 97 ATC 4585. There the Full Federal Court held that Pt IVA is not excluded where the facts of a case otherwise fall within s 97 and the beneficiaries of a trust, and not the trustee, are liable to pay income tax on the trust's income.

²⁴ The definition reads:

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and

(b) any scheme, plan, proposal, action, course of action or course of conduct.

²⁵ See ITAA36, s 177A(3).

²⁶ *Peabody* (HC) 94 ATC 4663, 4670. Unfortunately, the High Court did not provide further guidance on this issue and failed to provide any specific examples of such circumstances which would constitute only part of a scheme and not a whole scheme. It did, however, decide that a conversion of company shares which resulted in their devaluation constituted a whole scheme in itself. The share conversion and devaluation was not merely part of a wider scheme that also involved the public float of the balance of those shares.

²⁷ In *FC of T v Consolidated Press Holdings Ltd* [1999] FCA 1199, para 80 ("*Consolidated Press Holdings*"), the Full Federal Court made the observation that the "first resort in determining whether what the Commissioner ... identified as a 'scheme' properly answered that description must be the words of the definition in s 177A. The caveat in *Peabody* sets a broadly stated outer limit upon those words. It is evaluative in character. Whether circumstances 'standing on their own' are 'robbed of all practical meaning' is a matter of judgment rather than logical analysis."

4.1 Loss Trust Derives Assessable Income from an Existing Source

Where the loss trust derives assessable income not previously derived by it, the issue arises whether that amount would have been included, or might reasonably be expected to have been included, in the assessable income of another taxpayer if a scheme had not been entered into or carried out. The High Court in *Peabody*²⁸ stated that a reasonable expectation requires more than a possibility. It involves a prediction as to events that "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. In making the required prediction, the approach of the High Court was to determine the predicted events against a background of "rational, commercial" decisions being made by persons connected with the scheme.²⁹ Interestingly, in adopting this approach the High Court indicated a preparedness to take into account the tax implications of predicted events in deciding whether the prediction being made was sufficiently reliable.

In *Spotless Services*, the High Court provided further guidance on this issue. More specifically, the High Court said that the application of the definition of a "tax benefit" involves a "consideration of the particular materials answering the various categories" in s 177D(b).³⁰ In approaching the issue in this way, it is apparent that making the required prediction under s 177C(1) also involves taking into account the objective facts which fall within the factors listed in s 177D(b).³¹ The relevant question becomes whether, having regard to the factors listed in s 177D(b) as objective facts, a "reasonable person" would conclude that an amount not included in the taxpayer's assessable income would have been included if the scheme had not been entered into or carried out.³²

4.2 *CC (New South Wales)* - Tax Benefit Obtained by the Taxpayer

This was also the approach adopted by the Federal Court in *CC (New South Wales)*³³ in deciding that a tax benefit had been obtained by the taxpayer in connection with a scheme.

²⁸ The facts in *Peabody* were that TEP Holdings Pty Ltd ("TEP"), as trustee of a family trust of which the taxpayer was a beneficiary, held 62% of the shares in a group of companies. The only directors and shareholders of TEP were the taxpayer and Mr Peabody. The remaining 38% of the shares in the group were held by K. Mr Peabody planned to float the group to the public and K agreed to sell his 38% shareholding to Peabody's interests to facilitate the float. The sale price was based on the group having a net worth of about \$24m. It was estimated that the public float would be capitalised at a figure well in excess of \$24m. The parties thought that commercial difficulties might arise if the float prospectus disclosed that the price of the shares offered to the public was well in excess of the price for which the Peabody interests had recently acquired the K shares. To circumvent this problem, TEP acquired a shelf company which was used to purchase the K shares for \$8.6m. The K shares were then converted from ordinary shares to 'Z' class preference shares with no voting rights. The effect of this was that:

- the K shares, which previously had a value of at least \$8.6m, became preference shares with a total value of less than \$500; and
 - TEP's interest in the group increased from 62% to 100% without any change in the number of shares it held.
- Another effect was to avoid the application of the former s 26AAA which would have included in assessable income a profit arising from the sale into the float of the unconverted K shares, if the sale occurred within 12 months of their purchase.

²⁹ *Peabody* 94 ATC 4663, 4671. The High Court held that, regardless of whether or not the scheme to convert and devalue the shares had been entered into, there was no reasonable expectation that the trustee of the taxpayer's family trust would have purchased the shares. The High Court was of the view that a company and not the trustee had to be the purchaser of the shares so that the cheaper method of financing the purchase, through the issue of redeemable preference shares, could be used. This financing method entitled the company (but not a trustee) to the intercorporate dividend rebate and this resulted in the cheaper finance.

³⁰ *Spotless Services* 96 ATC 5201, 5211. Compare s 177C(1) itself which does not set out any factors to which regard must be had in making the required prediction. This is in contrast with s 177D(b) which lists eight factors to which regard must be had in determining whether a person has entered a scheme for the requisite purpose.

³¹ However, query whether the listed factors are the only materials which can be taken into account in making the prediction required under s 177C(1). If so, the actual subjective intention of a taxpayer cannot be considered in making the required prediction as it is not a factor listed in s 177D(b). If not, and the factors are not an exhaustive list of what may be taken into account, then it seems that the taxpayer's actual subjective intention can be considered in making the prediction as to what would have taken place in the absence of the scheme.

³² See *CC (New South Wales)* 97 ATC 4123, 4149.

³³ *Ibid.*

Sackville J first noted that the taxpayer already had in place the two construction management contracts from which it was entitled to derive income. The scheme, constituted by the entering into of the agency agreement and the performing of the contracts as undisclosed agent of QA, diverted that income to QA and thus the unit trust. His Honour took the view that, but for the scheme, this income would have formed part of the taxpayer's assessable income. It could reasonably be concluded that in the absence of the scheme, the taxpayer would have continued to derive the income from the contracts. Moreover, there was nothing in the evidence to suggest that any other conclusion should be reached. Accordingly, his Honour held that, had the agency agreement been effective, a tax benefit would have been obtained by the taxpayer equivalent to the construction management income diverted to the unit trust.³⁴

Of particular interest in this regard was the attempt made by the taxpayer to convince Sackville J that, if the agency agreement had not been entered into, other steps would have been taken to reduce the assessable income derived by it from the apartment building project.³⁵ The taxpayer therefore submitted that it would have obtained from those other steps a similar tax result to that achieved by entering into the agency agreement. His Honour rejected this submission simply by pointing out that there was no evidence before him that any such other steps giving this result would have been taken by the taxpayer had the agency agreement not been entered into.³⁶

4.3 Loss Trust Derives Assessable Income from a New Source

The decision of Sackville J, that a tax benefit was obtained by the taxpayer equivalent to the income diverted to the unit trust, no doubt was

made easier by the fact that, before the agency agreement was purportedly entered into, the taxpayer already had in place the two construction management contracts from which the diverted income was derived. It is likely that the identification of a tax benefit would have been more difficult if those contracts were not in place, and there was not an already existing source of income at the time the agency agreement (if effective) was entered into.

For example,³⁷ if the facts in *CC (New South Wales)* were that the taxpayer had entered into a valid agency agreement before entering into the construction management contracts, it becomes questionable whether a reasonable person would, or indeed could, conclude that the construction management income would still have been included in the taxpayer's assessable income, if the agency agreement was the relevant scheme and it had not been entered into. This is especially so if evidence could be adduced that it was likely that QA, as trustee of the unit trust, would have entered into the construction management contracts instead of the taxpayer. So too if there was an alternative likelihood that the construction management contracts would have been entered into by another member of the taxpayer's corporate group. In such circumstances, it might be argued that a "sufficiently reliable" prediction could not be made that the taxpayer would have derived the income from the construction management contracts if the relevant scheme had not been entered into.

However, it seems such an argument would not be readily accepted by the courts. In *Spotless Services*, the High Court made the specific observation that the operation of Pt IVA is not confined to cases where a taxpayer diverts "an

³⁴ Ibid.

³⁵ This reference to assessable income derived from the apartment building project appears to be an error on the part of the taxpayer's counsel. The assessable income in question was derived from the construction management contracts and these contracts were independent of and not related to the apartment building project.

³⁶ *CC (New South Wales)* 97 ATC 4123, 4149.

³⁷ It has to be acknowledged that advancing such examples is fraught with difficulty, as the reliability of the required prediction must be judged against the actual evidence that is adduced in the case in question. Also, courts have the benefit of looking at that evidence with judicial hindsight in determining the reliability of any prediction as to what would have taken place in the absence of a scheme.

existing income stream" so that it does not attract tax.³⁸ The taxpayers had argued that if the scheme (constituted by the particular means adopted by the taxpayers to obtain the maximum after tax return on the \$40 million surplus funds invested in the Cook Islands)³⁹ had not been entered into, there would have been no investment made and no interest income derived. The taxpayers further argued that in the absence of the scheme there was no possible way of knowing whether the amount actually derived from the investment, or any other amount, would have been included in their assessable income.

The High Court rejected these arguments and said a "tax benefit" is identified more generally than the taxpayers would have it. The High Court took the view that para (a) of the definition in s 177C(1) is intended to refer to an "amount produced from a particular source or activity". In the case before the Court, this source or activity was the investment of the \$40 million surplus funds by the taxpayers. The evidence showed that the taxpayers were determined to place the surplus funds in short-term investment for the balance of the income year in question. The High Court therefore concluded that, in the absence of any other acceptable alternatives for an off-shore investment, the reasonable expectation was that the taxpayers would have invested the funds in Australia. Accordingly, by investing in the Cook Islands the taxpayers obtained a tax benefit equal

to the exempt income comprising the Cook Islands interest less withholding tax.⁴⁰

In reaching this conclusion, the High Court clearly demonstrated that it was reluctant to accept the argument that a tax benefit cannot exist because the only reasonable expectation is that the relevant assessable income producing activity would not be engaged in, and that the relevant assessable income would not have otherwise been derived. Rather, the reasonable expectation is more likely to be that some form of the assessable income producing activity would still be engaged in, and this activity would produce, the assessable income that is claimed to constitute the tax benefit.⁴¹ The question then becomes whether a reasonable person would conclude that that amount would have been included in the assessable income of the relevant taxpayer if the relevant scheme had not been entered into.⁴²

4.4 Deduction for a Trust's Past Year Tax Losses - a Tax Benefit?

In regard to the deduction for past year tax losses, the issue that arises is whether the whole or part of the deduction would not have been allowable, or might reasonably be expected not to have been allowable, to a loss trust if a scheme had not been entered into or carried out. It is submitted that the correct approach to the issue is that the deduction would still have been allowable under

³⁸ *Spotless Services* 96 ATC 5201, 5208.

³⁹ The Cook Islands levied withholding tax on the interest at the rate of 5%. The taxpayers wished to take advantage of former s 23(q). At the time, that section provided that the interest received from the investment was exempt from income tax in Australia on the basis that it had been derived in the Cook Islands and that withholding tax had been paid in the Cook Islands. Although the Cook Islands interest rate actually payable was about 4% below the Australian bank bill rate, the after tax return would have been greater than what was achievable by investing in Australia because the Cook Islands interest would have been exempt from tax in Australia.

⁴⁰ *Spotless Services* 96 ATC 5201, 5211.

⁴¹ This is consistent with the approach taken by the High Court in *Peabody* (HC) 94 ATC 4663, 4671 which suggests that what is a reasonable expectation must be judged against a background of "rational, commercial" decisions being otherwise taken.

⁴² In *Consolidated Press Holdings* [1999] FCA 1199, para 87, the Full Federal Court observed that there is "no doubt a large range of factual circumstances that may require consideration when hypothesising under s 177C(1), the alternative to a scheme being entered into or carried out. If the scheme is a severable component of a larger array of transactions which have been arranged or executed, the fact that they were arranged or executed can offer support for the hypothesis that they would or might reasonably be expected to have stood absent the scheme. The condition that the scheme be severable assumes that the remaining transactions are commercially and legally possible. If that assumption is falsified, then the hypothesis as to what would or might reasonably be expected to have happened may have to cope with a wider range of possibilities."

the past year tax loss provisions in Div 36 of the *Income Tax Assessment Act 1997* (Cth) ("ITAA97") despite any scheme that may be identified.

The point here is that under s 36-15(1) of the ITAA97, a past year tax loss is allowed as a deduction in a later year of income and the allowance of this deduction is not dependent upon assessable income being derived by a taxpayer. If a taxpayer then derives assessable income (and no net exempt income) in the later income year, s 36-15(2) provides that the deduction allowable is to be made from that assessable income. In this way, the provisions in s 36-15(2), and in the following subsections of s 36-15, merely prescribe the manner in which a past year tax loss is to be deducted. If a taxpayer has no assessable income in a given year, the tax loss remains a deduction that can be carried forward and be deducted in a later income year.

It follows from this analysis that a past year tax loss deduction cannot constitute a "tax benefit" within the meaning of s 177C(1). This outcome might explain why in *CC (New South Wales)*⁴³ the Commissioner made the Pt IVA determinations against the taxpayer with respect to the income derived from the construction management contracts, and not against the trustee of the unit trust with respect to the deduction for the past year tax losses of the trust. It may also explain why in *Case 22/98*⁴⁴ the Commissioner did not put to the Administrative Appeals Tribunal the alternative argument that the deduction for a superannuation fund's past year tax losses was a "tax benefit" obtained in connection with a scheme to which Pt IVA applied. The issue is not free entirely from doubt, however, and it might be argued that a tax benefit is obtained as s 36-15 requires the deduction to be made from assessable income, and in the absence of such income no deduction is ever allowable to a taxpayer.

5. SCHEME TO WHICH PT IVA APPLIES

Once it has been determined that a taxpayer has obtained a tax benefit in connection with a scheme, the second prerequisite that must be considered is whether the scheme is one to which Pt IVA applies. This will be so where the scheme has been entered into or carried out after 27 May 1981 and, having regard to the eight factors set out in s 177D(b), it would be concluded that a person, or one of the persons, who entered into or carried out the scheme, or a part of it, did so for the requisite purpose. The eight factors under s 177D(b) are:

- (i) the manner in which the scheme was entered into or carried out;
- (ii) the form and substance of the scheme;
- (iii) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;
- (iv) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;
- (v) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;
- (vi) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;

⁴³ 97 ATC 4123.

⁴⁴ 98 ATC 282 (upheld on appeal to the Full Federal Court; *FC of T v Commercial Nominees of Australia* [1999] FCA 1455). This case is the first reported decision dealing with the deductibility of trust tax losses under Div 6 and the general tax loss provisions. It involved a superannuation fund which had undergone certain changes to, *inter alia*, take advantage of its past year tax losses. The Administrative Appeals Tribunal held that the superannuation fund that existed in the income year in which the deduction was sought was the "same fund" that incurred the tax losses in loss years in question. Therefore, the superannuation fund was entitled to carry forward the past year losses and deduct them against the fund's assessable income in the later income year.

- (vii) any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and
- (viii) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi)

The High Court in *Spotless Services* stated that these factors are "posited as objective facts" and the conclusion to be reached, having regard to those factors, is the conclusion of a "reasonable person".⁴⁵ The relevant question is whether, having regard to the factors as objective facts, a reasonable person would conclude that a person entered into or carried out the scheme for the sole or dominant purpose of enabling the taxpayer to obtain a tax benefit in connection with the scheme.⁴⁶

5.1 Commercial Reasons and a Dominant Purpose of Obtaining a Tax Benefit

In this regard, it should be noted that the High Court held in *Spotless Services* that there is no "dichotomy" between, on the one hand, the presence of a "rational commercial decision" and, on the other hand, the existence of a dominant purpose of obtaining of a tax benefit. The High Court said:

... references ... on the one hand to a "rational commercial decision" and on the other to the obtaining of a tax benefit as "the dominant purpose of the taxpayers in making the investment" suggest the

acceptance of a false dichotomy. ... A person may enter into or carry out a scheme ... for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.⁴⁷

The High Court later added:

A particular course of action may be ... both "tax driven" and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question whether, within the meaning of Pt IVA, a person entered into or carried out a "scheme" for the "dominant purpose" of enabling the taxpayer to obtain a "tax benefit".

Much turns upon the identification, among various purposes, of that which is "dominant". In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose.⁴⁸

The significance of these passages is that the existence of a purpose of implementing a "rational commercial decision" in entering into or carrying out a scheme does not automatically rule out that Pt IVA may apply to the scheme. A taxpayer cannot simply argue that, because a scheme has been entered into or carried out to implement a rational commercial decision, there cannot be a dominant purpose of obtaining a tax benefit. Rather, the proper analysis in each case is that, despite the existence of such a decision, regard must still be had to the eight factors set out in s

⁴⁵ *Spotless Services* 96 ATC 5201, 5210, citing *Peabody* 94 ATC 4663, 4669 where the High Court had used the expression "posited as objective facts" in the broader context of highlighting the prerequisites to the Commissioner making a determination to apply Pt IVA.

⁴⁶ *Spotless Services* 96 ATC 5201, 5210. The High Court in *Spotless Services* held that the form and substance of the investment proposal implemented by the taxpayers had been to take steps to ensure that the source of the interest was sourced in the Cook Islands. The "dominant purpose" of the taxpayers in doing this was to achieve a tax benefit in Australia in the form of the exemption under former s 23(q). Without that benefit, the proposal would have "made no sense".

⁴⁷ *Ibid*, 5206 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

⁴⁸ *Ibid*.

177D(b) to decide whether a reasonable person would conclude that a person entered into or carried out the scheme for the requisite purpose. The drawing of this conclusion no doubt involves a weighing up and balancing of the factors listed,⁴⁹ and will again ultimately be determined by the particular circumstances of the individual case in question.⁵⁰

5.2 *CC (New South Wales)* - Scheme to which Pt IVA Applied

The passages cited above were relied upon by Sackville J in *CC (New South Wales)*⁵¹ in rejecting the taxpayer's argument that entering into the agency agreement was supported by commercial considerations and could not be characterised as being "tax driven". The taxpayer submitted that the incidence of taxation was a legitimate factor for it to take into account when deciding to enter into the agency agreement. It was further submitted that the increased cash flow resulting from the ability to take advantage of the tax losses, otherwise locked into the unit trust, provided significant commercial advantages to the taxpayer's group. His Honour's succinct response was that this argument set up the "false dichotomy" referred to by the High Court in *Spotless Services*.⁵²

Sackville J also made the point that the taxpayer's submissions proceeded on the basis that the actual motivation of the persons involved in a scheme is relevant to the question posed by s 177D(b).⁵³ His Honour said this approach could not be justified in view of the observation of Hill J of the Full Federal Court in *Peabody v FC of T*⁵⁴ that the actual subjective purpose of a person is not a matter to which regard may be had in drawing the conclusion under s 177D. He accepted that Hill J's observation was also consistent with the way in which the High Court in *Spotless Services* posed the relevant question to be answered under s 177D(b).⁵⁵

Sackville J then sequentially and methodically reviewed each of the eight factors listed in s 177D(b) and concluded that all of them pointed towards the taxpayer's officers having the requisite dominant purpose.⁵⁶ Among the objective facts relied upon by his Honour were:

- (1) the agency agreement was undisclosed and third parties directly affected by the agreement were not made aware of it;
- (2) the agency agreement was executed in December 1986 but backdated to 29 January 1986;

⁴⁹ See *Peabody v FC of T* 93 ATC 4104, 4113-4114 and 4117-4118 (FFC).

⁵⁰ See *WD & HO Wills (Australia) Pty Ltd v FC of T* 96 ATC 4223, 4252.

⁵¹ 97 ATC 4123, 4145.

⁵² 96 ATC 5201, 5206.

⁵³ *CC (New South Wales)* 97 ATC 4123, 4146-4147.

⁵⁴ 93 ATC 4104, 4113.

⁵⁵ *Spotless Services* 96 ATC 5201, 5210.

⁵⁶ This approach to reviewing the listed factors may be contrasted with that of Hill J in *CPH Property Pty Ltd & Ors v FC of T* 98 ATC 4983, 4999-5000 ("*CPH Property*"). On the appeal in that case, the Full Federal Court said the following of the approach that Hill J took at first instance to the application of s 177D(b): "... his Honour went directly to the question of dominant purpose and dealt with it holistically without adverting expressly to each of the eight matters that must be considered in reaching a conclusion on purpose. The section requires the decision-maker, be it the Commissioner or the Court, to have regard to each of these matters. It does not require that they be unbundled from a global consideration of purpose and slavishly ticked off. The relevant dominant purpose may be so apparent on the evidence taken as a whole that consideration of the statutory factors can be collapsed into a global assessment of purpose. But if the reasons of the judge at first instance do not refer to them expressly and the conclusion appears debatable, then it may be necessary to ask whether they have been taken into account in accordance with the mandate of the section. It may appear by necessary implication from the reasons that they have been taken into account. If so, the reasons will be adequate and there will have been no error on that count. But if the consideration is not able to be identified expressly or by necessary implication, then there may have been a failure either to take them into account or to give adequate reasons." (*Consolidated Press Holdings* [1999] FCA 1199, para 93).

- (3) nothing was done to acknowledge or implement the agency agreement in performing the construction management contracts and receiving the income under the contracts;
- (4) all the work under the contracts was actually performed by the taxpayer which employed the necessary staff and bore all the risks associated with the contracts;
- (5) other than executing the agency agreement, the only implementation of the agreement was by book entries made after the close of the income year, and by the subsequent preparation of accounts and income tax returns;
- (6) the cash position of the taxpayer's group was not affected by the book entries made;
- (7) the trustee of the unit trust had never carried on a construction management business and, in fact, was unable to do so;⁵⁷
- (8) both the form and substance of the agency agreement was the diversion of income from the taxpayer to the unit trust to obtain a tax benefit not otherwise available;⁵⁸
- (9) at the time the agency agreement was entered into, the trustee did not actually need the additional income from the contracts to repay its major financial creditor, as had been claimed by the taxpayer;
- (10) at that time, commercial reasons for entering into the agency agreement did not exist as the trustee's major financial creditor had actually already been repaid;⁵⁹
- (11) but for Pt IVA, the agency agreement resulted in diverting assessable income from the taxpayer to the unit trust, thereby enabling the taxpayer to reduce its tax liability and the trust to take advantage of its tax losses;⁶⁰ and
- (12) in cash flow terms, the agency agreement changed nothing except that it benefited the taxpayer's group by its reduced tax liability.⁶¹

Sackville J was therefore of the opinion that a reasonable person would conclude that the taxpayer's officers entered into or carried out the agency agreement for the dominant purpose of enabling the taxpayer to obtain a tax benefit in connection with the agreement.

It can be observed that, with the exception of the matters set out in (8) and (11) above, there seems little doubt that the objective facts relied upon by Sackville J are extreme in nature and very specific to the particular scheme in question. If they cannot be described as making the scheme appear "blatant", they certainly give the scheme a sense of "artificiality" and "contrivance" when viewed from a tax avoidance perspective.⁶² In view of this, and given that the drawing of the conclusion under s 177D(b) is ultimately determined by the particular circumstances of each individual case, it is questionable whether his Honour's decision is of wide application. It therefore remains to be seen how the factors in s 177D(b) will be viewed and weighed in other cases in which an advantage is sought to be taken of the past year tax losses of a trust.

⁵⁷ The facts in (1) to (7) in the text above were referred to under subpara (i) of s 177D(b) that deals with the manner in which the scheme was entered into or carried out.

⁵⁸ Referred to under subpara (ii) of s 177D(b) that deals with the form and substance of the scheme.

⁵⁹ The facts in (9) and (10) in the text above were referred to under subpara (iii) of s 177D(b) that deals with the time the scheme was entered into and the length of the period it was carried out.

⁶⁰ Referred to under subpara (iv) of s 177D(b) that deals with the tax result achieved but for Pt IVA.

⁶¹ Referred to under subpara (v) of s 177D(b) that deals with the change in the financial position of the taxpayer.

⁶² These words are borrowed from the Treasurer's *Second Reading Speech* and the *Explanatory Memorandum* to Income Tax Laws Amendment Bill (No 2) 1981 which led to the enactment of Pt IVA. The *Explanatory Memorandum* states at page 2 that Pt IVA is designed to provide "an effective general measure against those tax avoidance arrangements that - inexact though the words be in legal terms - are blatant, artificial or contrived."

6. CONCLUSION

The decision in *CC (New South Wales)* has confirmed that the general anti-avoidance provisions of Pt IVA can apply to schemes involving a loss trust, at least where assessable income is diverted to the trust to take advantage of its past year tax losses. The diverted assessable income is likely to be a tax benefit obtained by the taxpayer who previously derived the income before the relevant scheme was entered into or carried out. Moreover, it is clear from *Spotless Services* that the application of Pt IVA is not restricted to cases where assessable income is diverted from an already existing source or activity. The issue of whether or not a tax benefit arises in other cases where assessable income is derived from a new source or activity comes down to the question of whether a reasonable expectation exists that some form of the assessable income producing activity would still have been engaged in if the relevant scheme had not been entered into.

In this regard, the courts have demonstrated a reluctance to accept that the only reasonable expectation is that the relevant assessable income producing activity would not otherwise have been engaged in if a scheme had not been entered into. It would seem that very clear evidence would need to be adduced before the court would accept such an argument. *CC (New South Wales)* also shows that a court is likely to be reluctant to accept the argument that a tax benefit does not exist because, if the relevant scheme had not been entered into, a taxpayer would have taken other steps which would have achieved a similar tax result to that achieved by entering into the scheme. Before a court could be convinced that this argument should be accepted, it again seems that very clear evidence would need to be put before the court that other such steps were actually considered by the taxpayer, that those steps would have been taken if the scheme was not entered into, and that the tax consequences of the steps would have produced the similar tax result claimed by the taxpayer.

Where a tax benefit is obtained by a taxpayer in connection with a scheme involving a loss trust, the Commissioner may make a determination cancelling that tax benefit if the scheme is one to which Pt IVA applies. A scheme involving a loss trust will be one to which Pt IVA applies if, having regard to the factors in s 177D(b), a reasonable person would conclude that a person entered into or carried out the scheme for the sole or dominant purpose of enabling the taxpayer to obtain a tax benefit in connection with the scheme. This conclusion must be drawn by considering only the objective facts of a case which fall within the eight factors listed in s 177D(b). The actual subjective purpose of a person entering into the scheme is not a listed factor and cannot be considered, even if that subjective purpose was to obtain the tax benefit.⁶³ Therefore, the question of whether the necessary conclusion as to the requisite purpose can be drawn under s 177D is one which ultimately will be determined by the particular circumstances of the case in question.

Furthermore, it is now established that there is no dichotomy between the presence of a "rational, commercial decision" and the existence of a dominant purpose of obtaining a tax benefit. If a scheme is entered into or carried out to take advantage of the past year tax deductions of a loss trust, it is clear that the application of Pt IVA cannot be ruled out simply by pointing to commercial reasons of the kind outlined in the introduction to this article. Rather, in each case regard must always be had to the factors listed in s 177D(b) to determine whether a reasonable person would draw the necessary conclusion as to the requisite purpose. It is for this reason that the decision of Sackville J in *CC (New South Wales)* is unlikely to be of general application to other cases involving loss trusts. Nevertheless, his Honour's judgment provides a very useful example of the detailed analysis that is required by s 177D in deciding whether Pt IVA applies to a scheme that takes advantage of a trust's past year tax loss deductions.

⁶³ See *CPH Properly* 98 ATC 4983, 4999 (upheld on appeal to the Full Federal Court: *Consolidated Press Holdings* [1999] FCA 1199).

It can therefore be concluded that the general anti-avoidance provisions of Pt IVA can apply to cases involving the trafficking in loss trusts and to schemes taking advantage of trust loss deductions. However, the need to make in every case the detailed analysis required by s 177D, when combined with the inherent difficulty in making the prediction required by s 177C(1), suggests that

the general deterrence provided by Pt IVA against loss trust trafficking and entering into such schemes may not have been sufficiently immediate to protect the revenue which was thought to be at risk. Viewed in this light, the more specific measures in Sch 2F may be regarded as being warranted more out of practical administrative expediency than technical necessity.

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