By Stephen Barkoczy

116 This article examines the general anti-avoidance provisions in Div 165 of the A New Tax System (Goods and Services Tax) Act 1999 (Cth). The object of Div 165 is to deter schemes which give entities benefits by reducing GST, increasing refunds, or altering the timing of payment of GST or refunds.

The provisions in Div 165 are loosely modelled on the general anti-avoidance provisions in Pt IVA of the Income Tax Assessment Act 1936 (Cth). The article highlights similarities and differences between the relevant provisions and, in particular, examines the nature of a "scheme" and the concepts of "GST benefit" and "reasonable expectation". The article also explores the circumstances in which the Commissioner may negate the "avoider's" GST benefit and compensate a "loser".

1. INTRODUCTION

It seems that a common feature of modern Australian tax legislation is that it inevitably contains some form of general anti-avoidance provision. This is often in spite of the fact that the legislation may nevertheless also be peppered with specific anti-avoidance provisions to combat particular kinds of schemes.

Certainly, the most well known general anti-avoidance provisions of the modern era are those contained in Pt IVA (ss 177A to 177H) of the Income Tax Assessment Act 1936 (Cth) ("ITAA36"). The sales tax anti-avoidance provisions contained in Pt 8 of the Sales Tax Assessment Act 1992 (Cth) were modelled on these provisions as were the anti-avoidance provisions in s 67 of the Fringe Benefits Tax Assessment Act 1986 (Cth). Continuing on with this trend, the legislature has seen fit to also include anti-avoidance provisions loosely modelled on Pt IVA in Div 165 of the A New Tax System (Goods and Services Tax) Act 1999 (Cth) ("GSTA"). This approach follows the general trend of many other jurisdictions that have also adopted general anti-avoidance provisions in their corresponding GST legislation.1 Although the drafting of the anti-avoidance provisions in each jurisdiction differ, the provisions are broadly all designed to strike at similar practices - namely, arrangements designed to reduce GST, increase input tax credits or vary the time at which GST is payable or refunds are due.

This article embarks on a detailed examination of Div 165 of the GSTA. Given that it will be some time before any case law evolves on the operation of these provisions, much analysis is devoted in the article to comparing and contrasting the operation of the income tax general anti-avoidance 1

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116 This article is based on research conducted for the forthcoming "GST Avoidance" chapter in the The GST Guide (CCH loose leaf service). A previous version of this article was presented as a paper at the Australasian Tax Teachers Association Conference held at Monash University in February 2000.

1 See eg, Excise Tax Act (Can), s 274; Goods and Services Tax Act (NZ), s 76; and Goods and Services Tax Act (Sing), s 47. Contrast the United Kingdom position, where the legislature has instead preferred to enact a growing number of specific anti-avoidance provisions to combat VAT avoidance.
provisions in Pt IVA. It should be noted, however, that whilst the GST provisions have a number of similarities with their income tax counterparts, there are also many differences. In this respect, the Div 165 provisions should be interpreted in their special context. Indeed, the Explanatory Memorandum accompanying the Bill which introduced Div 165 warns that the Division “has been designed to meet the needs of a transaction based tax, such as a GST, and accordingly it has its own peculiar features.” Whilst caution should therefore generally be exercised in directly applying Pt IVA principles to Div 165, this does not, however, mean that the learning on Pt IVA is entirely irrelevant. Indeed, comparing the established case law principles concerning Pt IVA is helpful in the interpretation of Div 165. As will be seen below, when one contrasts the provisions, it is apparent that there has been an attempt at making Div 165 even broader than Pt IVA.

2. WHAT IS TAX AVOIDANCE?

To ensure that the desired amount of revenue is collected and that the burden of taxation lies squarely where it is intended, taxation legislation should be framed in precise terms and the opportunity for revenue leakage should be tapped as far as possible. Revenue leakage may arise from either "tax evasion" or "tax avoidance". The meaning of these quite different terms has become "blurred" over time and it is therefore important to clearly distinguish their respective meanings at this early juncture.

In Wilson v Chambers & Co Pty Ltd, a case involving customs duty, Starke J indicated that evasion involves "the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation to pay duty." This case was subsequently referred to in the income tax case of Barrripp v C of T (NSW), where Williams J, after indicating that it was inadvisable to define what is meant by "evasion", stated that "where a taxpayer makes a profit, which he knows to be taxable income, and wilfully omits this profit from his income tax return, he would be guilty of evasion in the absence of some satisfactory explanation for the omission."

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3 A similar observation was made by the High Court in construing the provisions of Pt IVA in FC of T v Spotless Services Ltd & Anor 96 ATC 5201, 5205 (per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ): "Part IVA is to be construed and applied according to its terms, not under the influence of 'muffled echoes of old arguments' concerning other legislation."

4 Paragraph 6.313.

5 See eg Barrripp v C of T (NSW) (1941) 6 ATD 69, 71 (per Menzies J).

6 (1926) 38 CLR 131, 151.

7 (1941) 6 ATD 69.

8 Ibid 72.
Tax evasion therefore involves the clear illegal act of non-payment of tax lawfully due. Typically, some purposeful non-disclosure or covert act hiding a liability is involved. Being illegal in nature, tax evasion is a policing matter and the traditional response to combat this practice has been by way of deterrent in the form of the imposition of penalties (either monetary or custodial sentence).

Tax avoidance, on the other hand, involves something less than tax evasion, but something which is still nevertheless perceived by community standards as unacceptable or improper. It involves the otherwise legal arrangement of a taxpayer's affairs in such a way so as to circumvent the tax laws. Tax avoidance arrangements are often contrived and artificial and are designed to exploit defects and omissions in the drafting of the relevant legislation.\(^9\)

The obvious legislative response to combat tax avoidance is to tighten legislation by enacting general or specific anti-avoidance provisions. The advantage of general anti-avoidance provisions over specific ones is that they have an "umbrella effect" against "future rainy days". General anti-avoidance provisions offer flexibility in that they have the potential to apply to a wide range of arrangements, many of which might not even have been specifically contemplated at the time of enacting the provisions. In contrast, specific anti-avoidance provisions are usually reactive responses to particular arrangements that have hitherto been able to circumvent the law.

It has been observed that "[w]henever a general anti-avoidance provision is inserted into legislation several philosophical issues inevitably arise."\(^10\) This is not the place to embark on a discussion of the many issues that arise in this context. Nevertheless, it is worthwhile mentioning that a major problem that often exists with general anti-avoidance provisions stems from the "umbrella effect". Given that such provisions are designed to cover a wide variety of potential arrangements and are therefore usually drafted in broad terms, it is often difficult to find the line which separates legitimate tax planning and illegitimate tax avoidance. This blurring causes much consternation amongst tax professionals who, in advising on arrangements, are often compelled to hedge their advice because of the imprecise goalposts which have been placed on the playing field. There would be few experienced tax practitioners who have not, at some stage or another, been concerned about which side of the line a particular arrangement falls.\(^11\)

3. PRELIMINARY MATTERS

3.1 Will Div 165 Apply to Shams?

A preliminary question to raise before proceeding with an examination of the operation of Div 165 concerns whether or not the Division could apply to strike at "sham transactions". It is submitted that Div 165 has no operation in respect of such transactions (nor need it apply to such transactions) as a sham transaction is "inherently worthless" and requires "no enactment to nullify it".\(^12\) In other words, Div 165, like other general anti-avoidance provisions, is only aimed at schemes that involve "genuine transactions".

What therefore is a "sham transaction"? In Richard Walter Pty Ltd v FC of T,\(^13\) Hill J defined a "sham" as a transaction that involves a "common intention between the parties to the apparent transaction that it be a disguise for some other and

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\(^11\) Perhaps, this is partly why the United Kingdom legislature has been so reluctant to adopt general anti-avoidance provisions in its tax legislation and has instead relied on common law alternatives such as "fiscal nullity" to combat tax avoidance. See further the discussion of fiscal nullity in the context of GST below.

\(^12\) Jaques v FC of T (1924) 34 CLR 328, 358 (per Isaacs J).

\(^13\) 96 ATC 4550.
real transaction or for no transaction at all.14 In arriving at this definition, Hill J relied on the leading judicial pronouncement on the nature of a sham transaction enunciated by Diplock LJ in *Snook v London and West Riding Investments Ltd*15 where his Lordship stated:

I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a ' sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived.16

Thus, a sham transaction is a "facade" or a "cloak"17 in the sense that it is something which is not genuine or true but which is false or deceptive.18 The income tax jurisprudence is peppered with cases involving shams. Two well-known examples are found in *Cranstoun v FC of T*19 and *Alloyweld Pty Ltd v FC of T*20 One suspects that in time, there may also be a number of GST cases dealing with shams given the transactional nature of the tax.

### 3.2 Will the Doctrine of Fiscal Nullity Apply to Strike at GST Avoidance?

Another unrelated preliminary question concerns whether or not the common law doctrine of "fiscal nullity" could apply to strike at GST avoidance arrangements.21 This doctrine emerged out of a trilogy of House of Lords decisions handed down in the 1980’s (*IRC v Burmah Oil Co Ltd*22; *WT Ramsay Ltd v IRC*23 and *Furniss (Inspector of Taxes) v Dawson*24). The circumstances in which the doctrine applies was outlined by Lord Brightman in *Furniss v Dawson* as follows:

First, there must be a preordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. ... Second, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax - not 'no business effect'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.

The formulation, therefore, involves two findings of fact; first whether there was a

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14 Ibid 4562.
15 [1967] 2 QB 786.
16 Ibid 802.
17 *Faucilles Pty Ltd v FC of T* 90 ATC 4113, 4025 (per Hill J).
18 *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449, 454 (per Lockhart J).
19 84 ATC 4876. This case concerned a purported loan transaction involving the prepayment of interest. Carter J stated (4882):

"If two persons sign a document which on its face purports to be a loan agreement evidencing a loan from one to the other for $180,000 but it is agreed either expressly or impliedly that the document is intended to give the appearance only of a loan transaction then it is, in my view, a sham; it is something devised to delude, it is a trick or a hoax, an imposture ... ."

20 84 ATC 4328. In this case, the Supreme Court of Queensland found that a purported arrangement involving the prepayment of interest was a sham because there was no intention between the parties that the "loan" would give rise to a borrower-creditor relationship.
preordained series of transactions, i.e. a single composite transaction; second, whether that transaction contained steps which were inserted without any commercial or business purpose apart from a tax advantage. 25

It is well accepted that the absence of general anti-avoidance provisions in the relevant United Kingdom legislation was what led to the need for the evolution of the doctrine of fiscal nullity. In other words, the doctrine developed as a response to the fact that there were no general statutory measures to combat tax avoidance in the United Kingdom legislation. Since the ITAA36 contained such provisions (originally in former s 260 and now in Pt IVA), the Australian Courts have not applied the doctrine in the income tax context. The reason for rejection of the doctrine is best encapsulated in the following passage from John v FC of T, 26 where the High Court stated:

If any such or similar principle is to be applied in relation to the Act, it is one that must be capable of implication consonant with the general rules of statutory construction. One such general rule, expressed in the maxim expressum facit cessare tacitum, is that where there is specific statutory provision on a topic there is no room for implication of any further matter on that same topic. The Act, in sec 260 and now in Pt IVA, makes specific provision on the topic of what may be called tax minimisation arrangements and thereby excludes any implication of a further limitation upon that which a taxpayer may or may not do for the purpose of obtaining a taxation advantage. We would respectfully adopt as correct that which was said by Gibbs J in Patcorp (at ATC pp 4232-4233; CLR p 292):

"The presence of sec 260 makes it impossible to place upon other provisions of the Act a qualification which they do not express, for the purpose of inhibiting tax avoidance." 27

Based on analogous reasoning, it is submitted that there is no room for the doctrine of fiscal nullity in the context of the GSTA given that it contains Div 165.

4. BROAD OVERVIEW OF DIV 165

The Explanatory Memorandum accompanying the Bill which introduced the GSTA states that the Division "operates to deter avoidance schemes that are designed to obtain GST benefits by taking advantage of the GST law in circumstances other than that intended by the GST law." 28

Very broadly, Div 165 applies where an entity (the "avoider") has obtained a "GST benefit" from a "scheme" and it is reasonable to conclude that the sole or dominant purpose of an entity that entered into the scheme (or part of the scheme) is to give any entity a GST benefit, or the principal effect of a scheme (or part of a scheme) is to give the avoider a GST benefit. 29

Where the Division applies, the Commissioner has the power to make a declaration which operates to negate the tax benefit and to make a declaration which has the effect of compensating an entity (other than the avoider) for any "GST disadvantage" that entity has got from the scheme. 30 The Commissioner may also impose an additional penalty on the avoider. 31

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25 Ibid 527.
26 89 ATC 4101.
27 Ibid 4109 - 4110 (per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
28 Paragraph 6.303.
29 See Subdiv 165-A.
30 See Subdiv 165-B.
31 See Subdiv 165-C.
5. OBJECT OF DIV 165

The object of the Division is legislatively spelled out in s 165-1 which provides that it is designed to deter schemes to give entities benefits by:

- reducing GST;
- increasing refunds; or
- altering the timing of payment of GST or refunds.

Section 165-1 goes on to provide that: "[i]f the dominant purpose or principal effect of a scheme is to give an entity such a benefit, the Commissioner may negate the benefit an entity gets from the scheme by declaring how much GST or refund would have been payable, and when it would have been payable apart from the scheme."

When introducing Pt IVA into the ITAA36, the Treasurer, in his Second Reading Speech, indicated that the provisions were intended "to strike down blatant, artificial or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their affairs." Likewise, this policy is enshrined in Div 165. In particular, s 165-1 provides that the Division "is aimed at artificial or contrived schemes." The provision continues by listing examples of where the provision is not intended to apply. Four examples are provided:

- An exporter electing to have monthly tax periods in order to bring forward the entitlement to input tax credits.
- A supplier choosing under the A New Tax System (Wine Equalisation Tax) Act 1999 to use the average wholesale price method for working out the taxable value of retain sales of grape wine.
- A bank having its car fleet serviced earlier than usual, and before 1 July 2000, so that the servicing does not, at least initially bear GST.

The policy behind s 165-1 would appear to reflect the "predication test" espoused in Newton & Ors v FC of T. In Newton, Lord Denning explained that for an arrangement to fall within the former anti-avoidance provision in s 260 of the ITAA36:

... you must be able to predicate – by looking at the overt acts by which it was implemented – that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.

Whilst the implication in s 165-1 is that Div 165 is not aimed at ordinary commercial transactions, this is not necessarily plain from a literal reading of the Division's operative provisions which are framed in broad language and which do not specifically refer to merely "artificial or contrived schemes". Nevertheless, it is submitted that, so far as possible, the operative provisions should be read in the light of s 165-1.

The role of s 165-1 was considered by Justice Hill in a recent article in this Journal. He indicated that the provision "ensures that schemes designed to have other purposes, or, if you like, ordinary business transactions, were not intended to fall within the net which Div 165 sets out to

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32 (1958) 98 CLR 1.
33 Ibid 8.
34 In particular, the 12 factors listed in s 165-15 (discussed at 6.4 below).
35 Hill, above n 10.
cast". Earlier on, he stated:

... there is the need to ensure that the anti-
avoidance section does not become section one
of the legislation. What does this mean? It means
that the section should not need to be consulted
each time any transaction is entered into to
ensure whether it applies. It is, ultimately there,
not to tax the ordinary transaction, but the
extraordinary transaction. That is made clear in
the explanation in s 165-1 ... 37

In this context, it is submitted that s 165-1 has
a vital role in defining the parameters of the
operation of Div 165. 38

6. OPERATION OF DIV 165

Division 165 operates where the following
criteria are fulfilled:

1. there must be an entity (the "avoider") which
gets or got a "GST benefit" 39 from a
"scheme" 40 which is entered
into on or after 2 December 1998 or which is
carried out or commenced on or after that
date 41 (s 165-5(1)(c)); and

2. taking into account the matters listed in s 165-
15, it must be reasonable to conclude that
either:

(i) an entity that (whether alone or with others)
entered into or carried out the scheme, or
part of the scheme, did so with the sole or
dominant purpose of that entity or another
entity getting a "GST benefit" from the
scheme; or

(ii) the principal effect of the scheme, or of part
of the scheme, is that the avoider gets the
GST benefit from the scheme directly or
indirectly (s 165-5(1)(b)).

Division 165 can operate even if the scheme or
any part of the scheme is entered into or carried out
outside of Australia: s 165-5(2).

6.1 Scheme

6.1.1 Definition

Central to the operation of Div 165 is the
concept of a "scheme" which is defined widely in s
165-10(2) in similar fashion to the definition of that
term in s 177 A of Pt IVA. According to s 165-10(2)
a "scheme" is:

(a) any arrangement, agreement, understanding,
promise or undertaking

(i) whether it is express or implied; and

(ii) whether or not it is, or is intended to be,
enforceable by legal proceedings; or

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

36 bid 296.
37 Ibid.
38 This is the case even though it is merely an "explanatory section" within the meaning in s 182-10 and therefore it can only be
considered: in determining the purpose or object underlying an operative provision; to confirm that an operative provision's
meaning is the ordinary meaning conveyed by its text, taking into account its context in the Act and the purpose or object under-
lying the provision; in determining an operative provision's meaning if it is ambiguous or obscure; or in determining an oper-
ative provision's meaning if the ordinary meaning conveyed by its text, taking into account its context in this Act and the purpose or
object underlying the provision, leads to a result that is manifestly absurd or is unreasonable (s 182-10(2)).
39 Defined in s 165-10(1). The GST benefit must not be attributable to the making, by any entity, of a choice, election, application
or agreement that is expressly provided for by the "GST law", the "wine tax law", or the "luxury car tax law": s 165-
5(1)(aa).
40 Defined in s 165-10(2).
41 Provided it was not entered into before that date.
The term "scheme" also appeared in s 26(a) of the ITAA36 and has been judicially defined to mean "plan, design or programme of action".\footnote{XCO Pty Ltd v FC of T 71 ATC 4152, 4155 (per Gibbs J). See also Investment and Merchant Finance Corporation Ltd v FC of T 70 ATC 4001, 4007 (per Windeyer J): "A scheme presupposes some programme of action, a series of steps all directed to an end result. Similarly an undertaking is an enterprise directed to an end result. Each word connotes activities that are co-ordinated by plan and purpose - that whatever is done under the scheme or pursuant to the undertaking is done as a means to an end. There may, in one sense, be several transactions, but they are related because all directed to the attainment of the one end, profit."}

It is apparent from the definition in s 165-10(2) that a "scheme" can arise even though the relevant arrangement etc may not be enforceable by a court or where there may only be one party to the relevant transaction.

### 6.1.2 Identifying the Scheme

The meaning of "scheme" for the purposes of s 177A of Pt IVA was considered by the Full Federal Court in [FC of T v Spotless Services Ltd & Anor.\footnote{95 ATC 4775.}] In Spotless, the Commissioner had sought to apply Pt IVA to include in the taxpayers' assessable incomes certain amounts of interest obtained from a Cook Islands deposit. The taxpayers had entered into arrangements proposed in an "information memorandum". In brief, under these arrangements, an agent of the taxpayers was sent to the Cook Islands to deposit $40m with a Cook Islands bank which subsequently paid the taxpayers interest (subject to Cook Islands withholding tax). The taxpayers had argued that the interest fell within former s 23(q) of the ITAA36 which provided that income derived by an Australian resident from foreign sources was exempt from tax so long as the income was taxable in the country of source. Cooper J (with whom Northrop J concurred) stated that the definition of scheme in s 177A "requires that the parties to the scheme, insofar as they are known, must be identified and the terms or content of any agreement, arrangement, understanding, promise or undertaking and the steps or stages of any course of action or proposal, insofar as they are relevant, be identified."\footnote{Ibid 4805.} His Honour went on to note that:

> It is not sufficient to identify a scheme by reference to a hoped for fiscal outcome. Section 177A requires that the scheme has an existence based in fact and reality and is not something based in the Commissioner's views of the facts or their legal effect.\footnote{Ibid.}

The High Court had considered the nature of a scheme earlier on in [FC of T v Peabody\footnote{94 ATC 4663.}] and indicated that the Commissioner may identify alternative schemes including both wide and narrow schemes.\footnote{“Of course, the Commissioner may be required to supply particulars of the scheme relied on ... But the Commissioner is entitled to put his case in alternative ways. If, within a wider scheme which has been identified, the Commissioner seeks also to rely upon a narrower scheme as meeting the requirements of Pt IVA, then in our view there is no reason why the Commissioner should not be permitted to do so ... provided it causes no undue embarrassment or surprise to the other side. If it does, the situation may be cured by amendment, provided the interests of justice allow such a course ...” Ibid 4670 (per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).} Taking this into account, the Commissioner before the Full Federal Court in Spotless had identified both a broad and narrow scheme to which he submitted Pt IVA applied.\footnote{The broad scheme was said to involve the "deliberate and calculated adoption of a means of investment to render income immune from tax by reason of s 23(q)". The narrow scheme was said to involve the carrying out of a plan under which it was proposed that a lending agreement should be made in a location chosen on the basis of considerations other than commercial ones.} However, Cooper J (Northrop J concurring) found that neither of the schemes identified was a relevant scheme for the purposes of Pt IVA. It is implicit from his Honour's judgment that he...
reached this conclusion because he considered that the Commissioner had identified the scheme according to fiscal outcome or legal effect rather than according to fact.\footnote{Interestingly, Cooper J was able to nevertheless identify a relevant scheme as being either "the offer and the acceptance together with the intervening acts and probably steps commencing with the receipt by the taxpayers of the information memorandum and other documents" or "the proposal of the taxpayer to invest $40m on deposit in the Cook Islands and to pay Cook Islands withholding tax on the interest earned, and the taking of all necessary steps to implement the proposal."}

Although, on appeal, the High Court\footnote{FC of T v Spotless Services Ltd 96 ATC 5201.} eventually reversed the decision of the Full Federal Court which had, by a majority, held that Pt IVA did not apply to the arrangements, it did so on a different point and in doing so it did not disturb the above analysis.

Given the similarities between the Pt IVA and the Div 165 definitions of scheme, it would appear that the Commissioner in applying the Division may identify alternative schemes provided they are all based on fact. In other words, the respective scheme/schemes must be identified by reference to the actual transactions involved or the series of steps that make it/them up (rather than simply its/their fiscal outcomes).

\subsection*{6.1.3 Part of a Scheme}

Whilst the High Court decision in \textit{Peabody} indicates that the Commissioner may identify alternative schemes, it also demonstrates that he must apply the provisions in Pt IVA to a particular scheme rather than to merely "part of" a scheme. This is so in spite of the fact that Pt IVA (in s 177A(5) and 177D(b)) specifically contains references to "part of" a scheme, as these references are merely concerned with the purpose of a scheme participant.\footnote{In particular, s 177D(b) provides that Pt IVA will only apply where, after taking into account a number of listed factors, "it would be concluded that the person, or one of the persons, who entered into or carried out ... any part of that scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit ..." Section 177A(5) indicates that where a person has two or more purposes in entering into a scheme or part of a scheme, it is that person's "dominant purpose" which is relevant.} Furthermore, it should also be noted that whilst the High Court in \textit{Peabody} expressly stated that a scheme does not include part of a scheme, it nevertheless also indicated that the particular scheme identified can form part of a larger scheme, so long as it can stand by itself as an "entire" scheme rather than merely being an integral element of the larger scheme.\footnote{"... Pt IVA does not provide that a scheme includes part of a scheme and it is possible, despite the very wide definition of a scheme, to conceive of a set of circumstances which constitutes only part of a scheme and not a scheme in itself. That will occur where the circumstances are incapable of standing on their own without being 'robbed of all practical meaning' ... In that event, it is not possible in our view to say that those circumstances constitute a scheme rather than part of a scheme merely because of the provision made by ss 177D and 177A. The fact that the relevant purpose under s. 177D may be the purpose or dominant purpose under s 177A(5) of a person who carries out only part of the scheme is insufficient to enable part of a scheme to be regarded as a scheme on its own. That, of course, does not mean that if part of a scheme may be identified as a scheme in itself the Commissioner is precluded from relying upon it as well as the wider scheme." 94 ATC 4663, 4670 (per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).}

Section 165-5(1)(b), like s 177A(5) and 177D(b), contains references to "part of" a scheme. Section 165-5(1)(b) is concerned with the conclusion that must be drawn under that provision, after taking into account the relevant matters in s 165-15, as to the purpose of a relevant entity that took part in the scheme (or, more particularly, part of the scheme) or the principal effect of the scheme (or, again, more particularly, part of the scheme). In this respect, the provision has strong parallels with s 177D(b) and would seem to indicate that Div 165 should be construed in a similar fashion to Pt IVA in that it must be applied to a particular scheme rather than to merely part of a scheme.

However, there is a notable difference between Pt IVA and Div 165 in that the definition of "tax benefit" in s 177C(1) does not contain any references to "part of a scheme" whereas the definition of "GST benefit" in s 165-10(1) does. This difference may be sufficient to overcome the limitation expressed in \textit{Peabody}'s case. In other words, it is arguable that Div 165 might be able to operate on "part of a scheme" and not just on a "full scheme".
6.2 GST Benefit

6.2.1 When Does an Entity Get a GST Benefit?

According to s 165-10(1), an entity gets a "GST benefit" from a scheme if:

(a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme; or

(b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or

(c) all or part of an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme; or

(d) 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.

It is clear from s 165-10(1) that a GST benefit can arise not only where (apart from the operation of the Division) because of a scheme a lesser amount of GST is payable (para (a)) or a greater refund is available (para (b)), but also where timing benefits are obtained ie where GST is paid later or refunds are received earlier than otherwise could reasonably be expected (paras (c) and (d)).

The corresponding provision to s 165-10(1) in Pt IVA is 177C(1) which (at the time of writing this article) provided that a taxpayer obtains a "tax benefit" in connection with a scheme where:

(a) an amount is not included in the assessable income of the taxpayer of a year of income and that amount would 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 is allowable to the taxpayer in relation to a year of income and 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.

Interestingly, as mentioned at 6.1.3 above, the definition of "tax benefit" in s 177C(1) does not contain any references to "part of a scheme" whereas the definition of "GST benefit" in s 165-10(1) does. As a result, the Div 165 definition is therefore ostensibly wider than the corresponding Pt IVA provision. According to the Explanatory Memorandum, the reference in the definition of GST benefit to part of a scheme was inserted because GST is a "transaction based tax" and "GST benefits may arise from a single transaction". The Explanatory Memorandum states: "[t]o ensure Division 165 applies appropriately and effectively to a GST benefit arising from a single transaction, subsection 165-10(1) provides that a GST benefit can arise from 'part of a scheme'."

6.2.2 Reasonable Expectation

Like the definition of "tax benefit" in s 177C(1) of Pt IVA, the definition of "GST benefit" in s 165-10(1) is based around the concept of "reasonable expectation". For instance, in order for a GST benefit to arise under para (a) of the definition, it is necessary to show that (ignoring Div 165) the amount of GST payable is, or could reasonably be expected to be, smaller than it would have been apart from the scheme or part of the scheme. Corresponding requirements apply in respect of the other paragraphs listed in the sub-section.

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Paragraph 6.336.

Ibid
which all contain the phrase "or could reasonably be expected to be". The equivalent phrase used in s 177C(1) is "might reasonably be expected" which was considered by the High Court in FC of T v Peabody\textsuperscript{55} where the Court stated:

A reasonable expectation requires more than a possibility. It involves a 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.\textsuperscript{56}

Thus, the concept of reasonable expectation involves an enquiry into what would have occurred if the scheme or part of the scheme had not been entered into or carried out. What would have otherwise occurred must be more than a mere possibility ie a sufficiently reliable predication is required. The Explanatory Memorandum the Bill which introduced the GSTA indicates that the "enquiry will be in relation to the most economically equivalent transaction to the scheme or part of the scheme actually entered into or carried out."\textsuperscript{57}

The concept of reasonable expectation needs, however, also to be further examined in the context of s 165-10(3). This provision, which has no Pt IVA equivalent, provides:

An entity can get a GST benefit from a scheme even if the entity or entities that entered into or carried out the scheme, or a part of the scheme, could not have engaged economically in any activities:

(a) of the kind to which this Act applies; and
(b) that would produce an effect equivalent (except in terms of this Act) to the effect of the scheme or part of the scheme.

According to the Explanatory Memorandum, the effect of this provision is that:

An entity that gets a GST benefit from a scheme, even if the entity claims it would not have entered into any type of transaction had the actual scheme not been entered into can still have the GST benefit negated under Subdivision 165-B ... \textsuperscript{58}

By providing that a GST benefit can arise even if an entity could not have economically engaged in any other activities other than the scheme activities, s 165-10(3) gives the concept of reasonable expectation a very broad operation. The provision is clearly targeted at situations where, if the scheme did not exist, the taxpayer would not have entered into any transaction at all. The intention behind s 165-10(3) would appear to be to prevent an entity from arguing, in such case, that no GST benefit arises from the scheme because in its absence nothing would have happened. Whilst the Explanatory Memorandum is silent on this point, it seems that s 165-10(3) may be aimed at overcoming the problems faced by the Commissioner in Peabody's case.

The breadth of the wording used in s 165-10(3) is disturbing as, taken to the extreme, it has the potential to make the concept of GST benefit quite open ended. Whilst the courts have traditionally reacted to broadly drafted anti-avoidance provisions by reading them down,\textsuperscript{59} the concern for taxpayers is that in recent times, a more liberal approach has been adopted in construing such legislation.\textsuperscript{60} This approach is consistent with the modern leaning towards a purposive approach to statutory interpretation (particularly where anti-

\textsuperscript{55} 94 ATC 4663.
\textsuperscript{56} 6 Ibid 4671 (per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
\textsuperscript{57} Paragraph 6.334.
\textsuperscript{58} Paragraph 6.335.
\textsuperscript{59} Illustrations of this approach are found in several of the earlier cases dealing with former s 260 of the ITAA36 (see eg, Mullens & Ors v FC of T 76 ATC 4288; Shatzkin & Ors v FC of T 76 ATC 4019; and Cridland v FC of T 77 ATC 4538).
\textsuperscript{60} See eg, FC of T v Gulland; FC of T v Watson; Pincus v FC of T 85 ATC 4765 and Tupicoff v FC of T 84 ATC 4851.
avoidance provisions are concerned).  

6.2.3 An Amount

Each of the paragraphs in s 165-10(1) refer to "an amount" (or "part of an amount") that is either payable by, or payable to, an entity. The definition of "tax benefit" in s 177C(1)(a) of Pt IVA also refers to "an amount". The meaning of this term was considered by the High Court in Spotless (the facts of which were previously discussed at 6.1.2 above). The taxpayers had argued that no tax benefit existed because without the scheme (ie if the Cook Islands loan had not been entered into) the relevant amount would not have existed (ie no Cook Islands interest would have been earned). In other words, the taxpayers had argued that the phrase "an amount" as used in s 177C(1)(a) referred to a specific kind of assessable income. The High Court rejected this narrow argument and held that the reference to "an amount" was quantitative rather than qualitative. On this basis, the High Court concluded that the taxpayers received a tax benefit in an amount equal to the interest less withholding tax which they received from the investment which, but for the operation of Pt IVA, had not been included in their assessable incomes.

Given the above analysis, it is likely that the references to "an amount" and "part of an amount" in s 165-10 will also be interpreted broadly so that they are taken to refer to a particular quantum of money payable or refundable. This view is supported by ss 195-1 which provides that the term "amount" includes a "nil amount". This is obviously a reference to quantum rather than quality. Thus, an entity will obtain a GST benefit under s 165-10(1)(a) where, but for the operation of the Division, it pays no GST because of a scheme (provided it would otherwise have been liable to pay GST). Likewise, an entity will obtain a GST benefit under s 165-10(1)(b) where, but for the operation of the Division, it is entitled to a refund because of a scheme when otherwise it would not have been entitled to any refund (ie its refund would have otherwise been zero). Furthermore, it would appear that the combined effect of s 165-10(1)(a) and (b) is that the provisions would cover cases where, because of a scheme, a net amount payable by an entity to the Commissioner is converted into a refund payable by the Commissioner to the entity.

6.2.4 GST Benefit Does Not Arise Where it is Attributable to an Express Choice etc

Section 165-5(1)(aa) provides that a GST benefit will not arise where it is attributable to the making, by any entity, of a choice, election,
application or agreement that is expressly provided for by either: the "GST law", the "wine tax law", or the "luxury car tax law".

It would appear that s 165-5(1)(aa) is intended to have a similar role to s 177C(2) of Pt IVA. Like s 177C(2), s 165-5(1)(aa) only applies to choices etc that are "expressly provided for" under specified laws. The Supplementary Explanatory Memorandum to the Bill which introduced the GSTA indicates that s 165(1)(aa) was included in the legislation to ensure that the exercise of an explicit choice etc under the relevant laws would not trigger the operation of the anti-avoidance provisions.

It will be recalled from the discussion at Part 5 above that s 165-1 lists four situations that are deemed to fall outside the operation of the anti-avoidance provisions. Whilst the situations are provided as examples of arrangements that are not artificial or contrived, certainly the first three examples also illustrate situations that fall within s 165-5(1)(aa).

Another illustration of where it is considered Div 165 will not apply arises where GST is not payable by a company because it has been approved as a member of a group of companies and another company (the representative member) pays GST on behalf of the group under Div 48. It is considered that Div 165 should not apply in this case because the non-payment of GST is attributable to the making of an "application" expressly provided for under the GST law.

An interesting question raised by Justice Hill is whether the difference between a GST taxable and GST-free supply would be a "choice expressly provided for" under the specified laws. He indicates that "[i]t is easy to argue that it is not."

6.3 Purpose of an Entity and Effect of the Scheme

Section 165-5(1)(b) requires that in order for Div 165 to apply, taking into account the matters listed in s 165-15, it must be reasonable to conclude that either:

(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a GST benefit from the scheme; or

(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly.

6.3.1 Meaning of "purpose" and "effect"

It is evident that s 165-5(1)(b) contains alternative tests ie a "purpose test" and an "effect test". Section 165-5(1)(b)(i) is concerned with the "purpose" of an entity that entered into the scheme (or part thereof) whereas s 165-5(1)(b)(ii) is concerned with the "effect" of the scheme (or part thereof).

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64 Defined in s 195-1 of the GSTA as: (a) the GSTA; (b) any Act that imposes GST; (c) the A New Tax System (Goods and Services Tax Transition) Act; the Taxation Administration Act 1953, so far as it relates to any Act covered by (a) to (c); (d) any other Act, so far as it relates to any Act covered by (a) to (d); and (f) regulations under any Act, so far as they relate to any Act covered by (a) to (e).

65 Defined in s 195-1 of the GSTA as having the same meaning as under s 33-1 of the A New Tax System (Wine Equalisation Tax) Act 1999.

66 Defined in s 195-1 of the GSTA as having the same meaning as under s 33-1 of the A New Tax System (Luxury Car Tax) Act 1999.

67 Section 177C(2) provides that a tax benefit obtained by a taxpayer in connection with a scheme does not arise where the non-inclusion of an amount that would have been, or might reasonably be expected to have been, included in the assessable income of a taxpayer, or the allowance of a deduction that would not have been allowable, or might reasonably be expected not to have been allowable, is attributable to the making of an agreement, choice, declaration, election or selection, the giving of a notice or the exercise of an option (expressly provided for by the ITAA36 or ITAA97) by any person.

68 GSTA, s 48-5. For background discussion, see Barkoczky and Begg "GST Grouping: Pros Cons and Suggested Reforms" (1999) 73:5 Law Institute Journal 77 in which the operation of the original version of the A New Tax System (Goods and Services Tax) Bill is discussed in relation to group companies (ie prior to the introduction of the amendments to the Bill which inserting s 165(1)(aa)).

69 Hill, above n 10, 300.
The courts have had the opportunity to examine the words "purpose" and "effect" in the context of the former anti-avoidance provision in s 260 of the ITAA36.\textsuperscript{70} When considering the expression "purpose or effect" in s 260 in *Newton & Ors v FC of T*,\textsuperscript{71} Williams J considered that whilst the words were alternatives, they did not appear to have any real difference in meaning:

> The purpose of a contract, agreement or arrangement must be what it is intended to effect and that intention must be ascertained from its terms. These terms may be oral or written or may have to be inferred from the circumstances but, when they have been so ascertained, their purpose must be what they effect.\textsuperscript{72}

However, on appeal in *Newton & Ors v FC of T*,\textsuperscript{73} the Privy Council indicated that the words "purpose" and "effect" were not synonymous. Their Lordships said:

> The word "purpose" means, not motive, but the effect which it is sought to achieve - the end in view. The word "effect" means the end accomplished or achieved.\textsuperscript{74}

A similar interpretation was provided in *Insomnia (No 2) Pty Ltd v FC of T*; *Insomnia (No 3) Pty Ltd v FC of T*\textsuperscript{75} where Murphy J stated:

> "Purpose" may be defined as the result aimed at and "effect" may be defined as the result achieved.\textsuperscript{76}

It is considered that the Privy Council view in *Newton* and Murphy J's observations in *Insomnia* represent the better interpretation of the meaning of the words "purpose" and "effect". It is therefore possible that situations will arise where the purpose of a scheme participant may well be different from the effect of the scheme.

### 6.3.2 Meaning of dominant and principal

Under the purpose test (which is similar to the test applying under s 177D(b) of Pt IVA), it is the sole or dominant purpose of the entity that entered into or carried out the scheme (or part of the scheme) which is relevant, whether or not that entity is the avoider. "Sole purpose" means "only purpose". The *Explanatory Memorandum* indicates that "dominant purpose" is "the ruling, prevailing or most influential purpose".\textsuperscript{77} These words can be traced to the High Court definition of this expression in *Spotless*.\textsuperscript{78}

The effect test (for which there is no equivalent under Pt IVA), is concerned with "the principal effect" of the scheme on the avoider. Prior to its amendment during its passage through Parliament, the A New Tax System (Goods and Services Tax) Bill contained the phrase "a principal effect" rather than the phrase "the principal effect". The *Explanatory Memorandum* indicated that "a principal effect" is "an important effect, as opposed to merely an incidental effect".\textsuperscript{79} The *Supplementary Explanatory Memorandum* which accompanied the amendments to the Bill did not address the significance of the substitution of the word "the" for the word "a". It is considered that

\textsuperscript{70} This provision applied to render void against the Commissioner: “Every contract, agreement, or arrangement ... so far as it has or purports to have the purpose or effect of in any way, directly or indirectly:

(a) altering the incidence of any income tax;
(b) relieving any person from liability to pay any income tax or make any return;
(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
(d) preventing the operation of this Act in any respect ...”.

\textsuperscript{71} (1957) 11 ATD 187.

\textsuperscript{72} Ibid 216.

\textsuperscript{73} (1958) 11 ATD 442.

\textsuperscript{74} Ibid 445.

\textsuperscript{75} 86 ATC 4145.

\textsuperscript{76} Ibid 4156.

\textsuperscript{77} Paragraph 6.342.

\textsuperscript{78} 96 ATC 5201, 5206.

\textsuperscript{79} Paragraph 6.345.
the *Explanatory Memorandum* definition was arguably too wide in the first place and is now, in any case, inappropriate given the substitution of the word "the" for the word "a". The word "principal" has been defined as "first in rank of performance", "chief", "main" or "leading". It is submitted that "an important effect" of a scheme will not necessarily also always be its first, chief, main or leading effect. Given that the word "principal" appears in a similar context to the word "dominant" in s 165-5(1)(b), it is considered that according to the maxim *noscitur a sociis*, these two expressions should be interpreted similarly.

6.3.3 From the scheme

The GST benefit under Div 165 must be obtained "from" the scheme. This should be contrasted with the tax benefits under Pt IVA of the ITAA36 and under Pt 8 of the *Sales Tax Assessment Act 1992* which must respectively be obtained "in connection with" or "under" the scheme. Whether anything turns on the difference in the wording used in the provisions is debatable. Nevertheless, it is worth noting that Justice Hill has made the following observations regarding this point:

Perhaps these three alternative methods of expression are no more than three ways of expressing the one idea. But it is not easy to see why yet a third formulation was trialed. The word "under" implies that the benefit in question be part of the definition of the scheme itself. The tax benefit had to be at least a rationale for the scheme for it serves to define the scheme. The phrase "in connection with", as used in the income tax legislation, might be wider. It sufficed if the relevant benefit had some connection with the scheme. It need not be the sole benefit which arises to the parties in connection with the scheme. The word "from" in the GST legislation suggests that the benefit must flow from (or out of) the scheme (ie, the scheme must result in the benefit, notwithstanding that the benefit forms no part of the definition of the scheme). It may be wider

than the WST formulation, although narrower than the income tax formulation.

6.4 Matters to be Considered in Determining Reasonable Conclusion

The purpose or effect referred to in s 165-5(1)(b) must be determined by reference to a reasonable conclusion drawn after consideration of a list of matters set out in s 165-15(1).

The relevant matters to be considered under s 165-15(1) are:

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme; and

(ii) the economic and commercial substance of the scheme;

(c) the purpose or object of this Act, the *Customs Act 1901* (so far as it is relevant to this Act) and any relevant provision of this Act or that Act (whether the purpose or object is stated expressly or not);

(d) the timing of the scheme;

(e) the period over which the scheme was entered into and carried out;

(f) the effect that this Act would have in relation to the scheme apart from this Division;

(g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme;

(h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a

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80 The Australian Concise Oxford Dictionary (2nd ed, Oxford University Press).

81 Hill, above n 10, 301.
connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;

(i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;

(j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length;

(k) the circumstances surrounding the scheme;

(l) any other relevant circumstances.

Section 165-15(2) goes on to provide that:

Sub-section (1) applies in relation to consideration of an entity's purpose in entering into or carrying out a part of a scheme from which the avoider gets or got a GST benefit, and the effect of part of the scheme, as if the part were itself the scheme from which the avoider gets or got the GST benefit.

Section 165-15(1) corresponds with s 177D(b) of Pt IVA which lists a number of matters that must be considered in determining whether Pt IVA applies (although s 177D(b) only specifies 8 matters whereas s 165-15(1) specifies 12 matters). Section 165-15(2) corresponds with s 177A(5) of Pt IVA in that it dictates that the matters operate to parts of a scheme in the same manner that they apply to a scheme.

In the Full Federal Court decision in Peabody, Hill J indicated that "the Commissioner must have regard to each and every one of the matters referred to in s 177D(b)." His Honour, however, went on to explain:

This does not mean that each of those matters must point to the necessary purpose referred to in s. 177D. Some of the matters may point in one direction and others may point in another direction. 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 to which s. 177D refers.

One assumes that s 165-15(1) would need to be tackled in a similar fashion.

Like s 177D(b), the problem with s 165-15(1) is that it does not specify how the listed matters are to be weighed against each other. The matters are broadly described and there is no indication of what the effect of a conclusion made one way or another has. It is evident that the matters have the potential to overlap. It is considered that the matters have been purposefully drafted widely so as to allow flexibility in application. This is particularly illustrated by para (1) which ensures that any relevant circumstance not otherwise covered is taken into account. The inclusion of this paragraph in the listed matters (it is not found in s 177D(b)) raises a very interesting issue which is discussed in the following paragraphs.

In the Full Federal Court decision in Peabody v FC of T, Hill J stated that s 177D "requires an objective conclusion to be drawn, having regard to the matters referred to in para (b) of the section, but

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82 93 ATC 4104, 4117.
83 Ibid.
84 There is some elaboration of the various matters in the Explanatory Memorandum, although this is scant. For instance, in relation to para (a), the Explanatory Memorandum indicates that the manner in which a scheme (or part of a scheme) is entered into or carried out is not intended to have any restricted meaning. Manner would include consideration of the way in which, and method or procedure by which, the particular scheme (or part of the scheme) in question was established (see further Spotless 96 ATC 5201, 5209). In relation to para (b), the Explanatory Memorandum states that the form and substance of the scheme (or part of the scheme) requires consideration of the legal rights and obligations involved in the scheme (or part of the scheme) and the economic and commercial substance of the scheme (or part of the scheme). The Explanatory Memorandum also states that para (k) allows an enquiry into matters and events prior to an entity entering into or commencing a scheme (or part of a scheme). See further the discussion in Hill, above n 10, 301-304.
85 It has been observed that "form and substance generally would require regard to be taken to the manner in which the scheme was entered into or carried out. Economic and commercial substance would require consideration, inter alia, of the changes in financial position caused to persons affected by the scheme." Hill, above n 10, 301.
86 93 ATC 4104.
87 Ryan and Cooper JJ concurring.
The view that the matters listed in s 177D(b) are objective criteria has since been reiterated in *Spotless* by both the Full Federal Court and the High Court.

Consistent with the *Peabody* and *Spotless* authorities, one might have assumed that the subjective purpose of a relevant entity is completely irrelevant for the purposes of reaching the conclusion required under s 165-5(1)(b). *Prima facie*, this would appear to be the case. However, Justice Hill makes the interesting observation that para (1) of s 165-15 may have the effect of bringing subjective purpose in as a relevant matter through the "back door". He makes the point that this is the case "notwithstanding that actual purpose is nowhere directly mentioned and the legislation still refers to 'it is reasonable to conclude'." He argues:

> It would be difficult to say that actual subjective purpose was an irrelevant circumstance, assuming subjective state of mind is a "circumstance", and once subjective purpose is introduced, it is hard to see how a conclusion could reasonably be reached which was not consistent with that actual purpose, at least where the subjective purpose is GST avoidance.

It is difficult to argue against this logic. Indeed, if it transpires that subjective purpose is viewed by the courts as a relevant circumstance to consider, one would assume that where an entity that has entered into a scheme actually had the sole or dominant purpose of obtaining a GST benefit, the "reasonable conclusion" that must ipso facto be drawn is that the entity's purpose in entering into or carrying out the scheme was to obtain a GST benefit. If this analysis is correct, then subjective purpose would appear to dictate the conclusion required to be drawn in relation to determining whether to be or not the criteria in s 165-5(b)(i) has been fulfilled. A similar analysis would not, however, apply in relation to s 165-5(b)(ii). In other words, just because an entity's subjective purpose for entering into a scheme is to obtain a GST benefit for the avoider, this does not necessarily mean that it is reasonable to conclude that this is also the principal effect of the scheme. The corollary to this is that even if an entity enters into a scheme without the subjective purpose of obtaining a GST benefit for the avoider, this does not necessarily mean that the principal effect of the scheme is not to obtain the requisite GST benefit.

### 7. COMMISSIONER MAY NEGATE THE AVOIDER'S GST BENEFIT AND COMPENSATE A LOSER

Where Div 165 applies to a scheme, the Commissioner may make a declaration negating the avoider's GST benefit under s 165-40. There are two kinds of declarations that can be made. A declaration can state:

- the amount that is (and has been at all times) the avoider's "net amount" (see s 17-5) for a specified tax period that has ended (s 165-40(a)); and/or
- the amount that is (and has been at all times) the amount of GST on a specified taxable importation made by the avoider (s 165-40(b)).

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88 Ibid 4113.
89 95 ATC 4775, 4810 (per Cooper J; Northrop J concurring).
90 96 ATC 5201, 5205 (per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).
91 But see, *Eastern Nitrogen Ltd v FC of T* 99 ATC 5163, 5179 where Drummond J held that evidence of the subjective intentions of scheme participants was relevant for the purposes of considering s 177D(b)(i) which concerns "the manner in which the scheme was entered into or carried out". Subject to the outcome of the pending appeal in this case, the correctness of this observation is, with respect, open to doubt.
92 Hill, above n 10, 304.
93 Ibid.
94 Ibid.
95 The reason why two different kinds of declarations are provided for is because GST on taxable importations is not taken into account in determining the "net amount" under Div 17 of the GSTA in relation to taxable supplies. In other words GST on taxable importations is calculated separately under s 33-15 of the GSTA.
The Commissioner also has the power under s 165-45 to make a declaration compensating an entity other than the avoider ("the loser") for a "GST disadvantage" that the loser has got from the scheme.  

According to s 165-45(2), an entity gets a GST disadvantage from a scheme if, under the Act, apart from the operation of Div 165:

(a) an amount that is payable by the entity is, or could reasonably be expected to be, larger than it would have been apart from the scheme or a part of the scheme; or

(b) an amount that is payable to the entity is, or could reasonably be expected to be, smaller than it would have been apart from the scheme or a part of the scheme; or

(c) all or part of an amount that is payable by the entity 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; or

(d) all or part of an amount that is payable to the entity is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme.

The following three conditions must all be satisfied before the Commissioner can make a declaration under s 165-45:

- the Commissioner must have made a declaration in relation to the avoider's GST benefit under s 165-40;97
- the Commissioner must consider that the loser gets a "GST disadvantage" from the scheme;98 and
- the Commissioner must consider it fair and reasonable to adjust the loser's net amount for a tax period or tax periods, or GST on a taxable importation or taxable importations, so as to compensate for the GST disadvantage.99

Again, the Commissioner can make two kinds of declarations. A declaration can state:

- the amount that is (and has been at all times) the loser's "net amount" for a specified tax period that has ended,100 and/or
- the amount that is (and has been at all times) the amount of GST on a specified taxable importation made by the loser.101

Section 165-45(4) provides that the declaration cannot have the effect of placing the loser in a more favourable position for GST than it would have been in apart from the scheme or part of the scheme.

Section 165-55 provides that for the purposes of making the requisite declarations under s 165-40 and s 165-45, the Commissioner may:

- treat a particular event that actually happened as not having happened; and
- treat a particular event that did not actually happen as having happened and, if appropriate, treat the event as:
  - having happened at a particular time; and
  - having involved a particular action by a particular entity;
- treat a particular event that actually happened as:
  - having happened at a time different from the

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96 An entity seeking a declaration can give the Commissioner a written request to make a compensating declaration relating to that entity under s 165-45(5). The Commissioner must decide whether to grant the request, and must give the entity written notice of the decision.
97 Section 165-45(1)(a).
98 Section 165-45(1)(b).
99 Section 165-45(1)(c).
100 Section 165-45(3)(a).
101 Section 165-45(3)(b).
time it actually happened; or
- having involved particular action by a particular entity (whether or not the event actually involved any action by that entity).

The Explanatory Memorandum indicates that "[t]his allows the Commissioner to disregard the scheme or part of the scheme and reconstruct the events that took place."102

The combined effect of ss 165-40, 165-45 and 165-55 is therefore similar to the effect of s 177F of Pt IVA which allows the Commissioner a discretion to reconstruct arrangements that fall within the income tax anti-avoidance provisions. Section 177F was introduced to overcome defects in the predecessor anti-avoidance provision, contained in s 260 of the ITAA36, which operated to render tax avoidance schemes "void against the Commissioner" but which did not allow the Commissioner to reconstruct arrangements for the purposes of determining the liability to tax.103

7.1 Will Negation and Compensation Necessarily be Neutral?

It is interesting to consider the way in which the negation and compensation rules might operate in practice. Justice Hill provides an illustration of the quandary that may be faced in their application.104 The illustration relates to a scheme involving the payment of less GST than would otherwise be payable:

If it be assumed that on a transaction with a consideration of $100, the vendor, who is the winner from the scheme pays $10, but after declaration that is increased to $15. Then presumably the purchaser, assuming it is registered and in due course pays GST on a supply will obtain an increased credit of $5 as the loser. But since the purchaser may never have to pay the extra $5 of GST for the goods it buys, the credit it receives may come as a windfall.

One of the criteria for the Commissioner to make the compensatory declaration is stated to be, in s 165-45 that the Commissioner considers that it is "fair and reasonable that the loser's GST disadvantage be negated or reduced". Given the fact that the loser may have a windfall, that might be a relevant matter merely to reduce the disadvantage, or indeed not compensate for it at all.105

This example demonstrates that where, under a scheme, an avoider pays less GST than would otherwise be the case and the loser therefore obtains a GST disadvantage of lesser input tax credits, the application of the negation and compensation provisions may not necessarily operate in a neutral fashion. In other words, the amount of the GST benefit negated may not necessarily equal the amount of the compensating adjustment.

7.2 Ancillary Matters

The following ancillary matters should also be noted about declarations:

- A statement in a declaration made under ss 165-40 and 165-45 has effect according to its terms for the purposes of Div 33 (relating to payments of GST) and Div 35 (relating to refunds of GST) despite the provisions of the Act outside those Divisions and Div 165.106

This is designed to ensure that adjustments made under Div 165 are given the appropriate administrative treatment and that the collection and recovery provisions can apply to these adjustments. It also ensures that interest is

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102 Paragraph 6.365.
103 In other words, s 260 operated as an "annihilating" provision: see eg, Newton v FC of T (1958) 11 ATD 442, 446-447.
104 Hill, above n 10, 305-306
105 Ibid.
106 Section 165-50.
payable on under-payments or over-payments of GST as a result of a declaration in accordance with the *Taxation Administration Act 1953* ("TAA") and *Taxation (Interest on Overpayments and Early Payments) Act 1983* ("T(IOEP)A83").

- Statements relating to various tax periods and taxable importations can be included in a single declaration.\(^{107}\) In other words, the Commissioner does not have to make a separate declaration for every adjustment to a net amount or GST on a taxable importation.

- The Commissioner must give a copy of a declaration made to the entity whose net amount or GST liability is stated in the declaration.\(^{108}\) This requirement is, however, only a formal requirement and failure to comply with it will not affect the validity of the declaration.\(^{109}\)

- Declarations made by the Commissioner under s 165-40 or s 165-45(3) as well as a decision made by the Commissioner under s 165-45(5) are "reviewable GST decisions" within the meaning of that term in s 62(2) of Div 7 of Pt VI of the TAA. As a result, taxpayers can object against these decisions in the manner set out in Pt IVC of the TAA.\(^{110}\)

8. PENALTY

Anti-avoidance provisions would be impotent as a deterrent if they did not also provide for the imposition of penalties as a preventative measure. The penalty provision in Div 165 is contained in s 165-80(1). The sub-section imposes a penalty on the avoider calculated in accordance with s 165-80(2). In simple terms, the penalty is double the sum of:

- all of the increases a declaration makes to the avoider's net amounts.; and
- all of the increases a declaration makes to the GST the avoider is liable on taxable importations.

The penalty operates in addition to any other payments an avoider must make under the Act, the TAA and the T(IOEP)A83.\(^{111}\)

 Provision exists for the remission of the penalty under the general rules contained in Pt VI of the TAA.\(^{112}\)

9. CONCLUSION

Although Div 165 is clearly modelled on Pt IVA, it is not simply a carbon copy of the income tax provisions with a "GST twist". The Division has been designed with much forethought and must be interpreted in its special context. In particular, although not specifically mentioned in the *Explanatory Memorandum*, this article has highlighted that in its drafting of Div 165, the legislature has attempted to subtly address a number of "limitations" that have confronted Pt IVA.

It will be interesting to see whether or not Div 165 will have a major role to play in GST practice. The fact that GST is a multi-level tax may mean that it will be much less "avoidable" than, for instance, the single stage sales tax. Moreover, the fact that registered entities obtain input tax credits for their creditable acquisitions may also mean that it is less likely that avoidance arrangements will be entered into. One suspects that, in practice, the ATO will be much more concerned with GST evasion than GST avoidance.

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107 Section 165-60.
108 Section 165-65(1).
109 Section 165-65(2).
110 TAA, s 62(1).
111 Section 165-80(3).
112 Section 165-80(4).
Stephen Barkocz is an Associate Professor at Monash University and Tax Director at Blake Dawson Waldron. He has contributed to several editions of various textbooks on taxation law and has authored/co-authored many journal articles. Stephen is Editor of the Journal of Australian Taxation and a member of the CCH GST Advisory Board. He also serves on various Law Institute of Victoria committees.