

**National Tax Conference 2012**

22 – 23 November, Hilton Sydney

# TH6

## Internal restructures – ATO and practical perspectives

**David Drummond**

**Partner, National Leader, Tax  
Management Services**

**KPMG**



Institute of  
Chartered Accountants  
Australia

GAA  
Global Accounting Alliance

# 1. Agenda

1. Introduction
2. Some Guiding Principles
3. Section 260- Demise, Death and Resurrection
4. Introduction of Part IVA revisited
5. Part IVA Jurisprudence – 1981 – 2012
6. Legacy of Mark Arbib, Former Assistant Treasurer
7. ATO Risk Reviews and Audits
8. Practical Insights
9. A Case Study
10. Conclusion

**National Tax Conference 2012**

22 – 23 November, Hilton Sydney



## 2. Some Guiding Principles

- History repeats
- The Elephant Test
- Duke of Westminster
- Predication – “tax avoidance” / “ordinary business and family dealing”
- “*generalia specialibus non derogant*”
- Love of Sport
- Corporate Reconstruction Relief from Stamp Duty



# 3. Section 260 - demise, death & resurrection

- Purcell and Keighery
- Predication Test (Newton)
- The Choice Principle
- A tale of two trilogies:
  - Mullens, Slutzkin and Cridland (1976/77);
  - Gulland, Watson and Pincus (1985).
- Limitations of Section 260 – 1981 vs 1985



## 4. Introduction of Part IVA

- Tax avoidance means different things to different people
- Policy: “[Part IVA] ought 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.”



## 4. Introduction of Part IVA (cont.)

- Legal language – the difficult problem:
  - Scheme;
  - Tax benefit;
  - Sole or dominant purpose.
- The Predication Test:
  - Positive Test of inclusion (tax avoidance);
  - Negative Test of exclusion (ordinary business or family dealing).
- Naked Dividends
  - Would have been or might reasonably expected to have been
  - A deemed tax benefit

**National Tax Conference 2012**

22 – 23 November, Hilton Sydney



# 5. Part IVA Jurisprudence – 1981 - 2012

- Peabody (1994)
- Eastern Nitrogen and Metal Manufactures
- Spotless, Consolidated Press Holdings and Hart
- Macquarie Finance
- British American Tobacco
- Citigroup
- BHP, Trail Bros, Ashwick

**National Tax Conference 2012**

22 – 23 November, Hilton Sydney



# 5. Part IVA Jurisprudence – 1981 – 2012 (cont.)

- Axa
- News
- RCI
- Macquarie Bank (Mongoose)
- Futuris
- Noza
- Mills

**National Tax Conference 2012**

22 – 23 November, Hilton Sydney





## 6. Legacy of Mark Arbib

- Senator Arbib said:

*“Part IVA was enacted in 1981 and was intended to counter schemes that comply with the technical requirements of the tax law but, when objectively viewed, were conducted or carried out in a particular way to avoid tax”*

- John Howard actually said:

*“The proposed provisions [Part IVA] seek to give effect to a policy that [general anti-avoidance] measures ought 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”.*



## 6. Legacy of Mark Arbib (cont.)

- Lord Denning said:
  - *By looking at the overt acts by which the arrangement implemented.....*
  - *Must be able to predicate it was implemented in that particular way so as to avoid tax (Positive Test).*
  - *An arrangement you cannot so predicate but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing - not a means to avoid tax. (Negative Test)*



## 6. Legacy of Mark Arbib (cont.)

- John Howard said:
  - *“One possibility considered was to adopt the language of the Privy Council in the well known decision in Newton’s case and, positive tests of inclusion having been expressed, make the new provisions **inapplicable** to schemes entered into in the course of ‘ordinary business or family dealing’” .*
  - *Decided: “the better test of what is “blatant”, “contrived” or “artificial” is the positive one that has been adopted”.*
  - *The positive test best captures the ESSENCE of the views expressed by the Privy Council.*
  - *“Ordinary business and family dealing” represents “a situation (arrangement) other than one of which it can be predicated that it was implemented in the particular way so as to avoid tax”.*



## 6. Legacy of Mark Arbib (cont.)

- The High Court said in 1985 of the Newton Test:

- *“The question, according to this test, is whether the arrangement, on its face, must necessarily be labelled as a means to avoid tax. That test is a useful one, and it has often been applied, but it does not provide a guide to the decision of every case”.*

*An arrangement which is not capable of explanation by reference to ordinary dealing and which on its face is obviously designed to bring about the result that less tax will be paid may nevertheless do no more than take advantage of an opportunity to reduce tax which the Act itself proves. A line of decisions illustrates that if the Act offers to the taxpayer **a choice of alternative tax consequences**, either of which he is free to choose, or **offers certain tax benefits to taxpayers who adopt a particular course of conduct**, the choice of the advantageous alternative or the adoption of the beneficial course does not mean that Section 260 is attracted.....”*

- *“Section 260 of the Act, in performing its task of “protecting the general provisions of the Act”, cannot be allowed to negative the Act’s specific and particular provisions....” These cases apply the principle of construction expressed in the maxim “generalia specialibus non derogant”. They show that Lord Denning’s statement in Newton v F.C. of T. needs to be understood subject to the qualification which I have indicated, but do not otherwise detract from the authority that that statement.”*



## 6. Legacy of Mark Arbib (cont.)

- Mark Arbib said:
- *“The Government amendments will confirm that Part IVA always intended to apply to commercial arrangements which have been implemented in a particular way to avoid tax. This also includes steps within broader commercial arrangements.”*
- *“The Government was mindful that any amendments should not interfere with genuine commercial transactions and activities of taxpayers.”*



# 7. ATO Risk Reviews and Audits

- Current
- Two compliance Bubbles :
  - Pre 1 March 2012 not yet subject to Risk Review and Audit
  - Post 1 March 2012
- Administration to 2020 – will history repeat?



## 8. Practical Insights

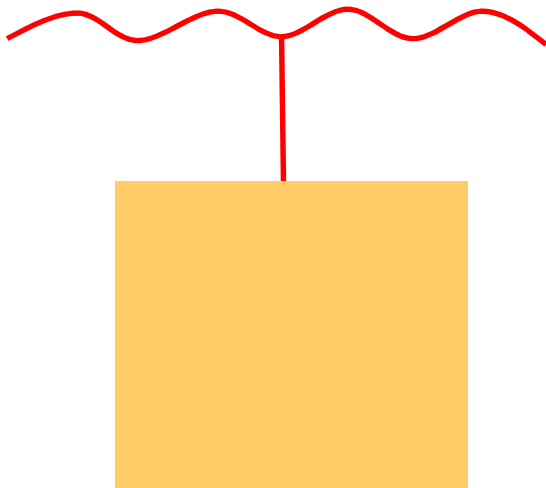
- ATO Line of sight
- Case Selection and Risk Hypothesis
- Impact of the absence of the Negative Test on a Revenue Administrator
- Burden of Proof
- Evidence
- ACA, PCR and RTP



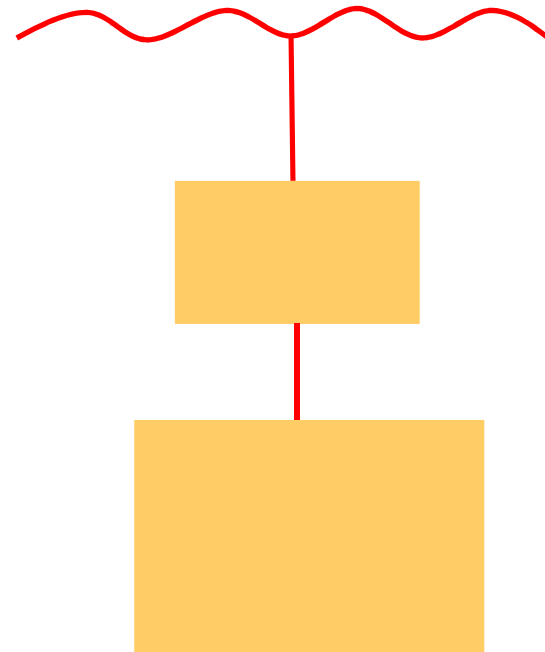
# 9. A Case Study

## The ATO Lens

BEFORE



AFTER



**National Tax Conference 2012**

22 – 23 November, Hilton Sydney

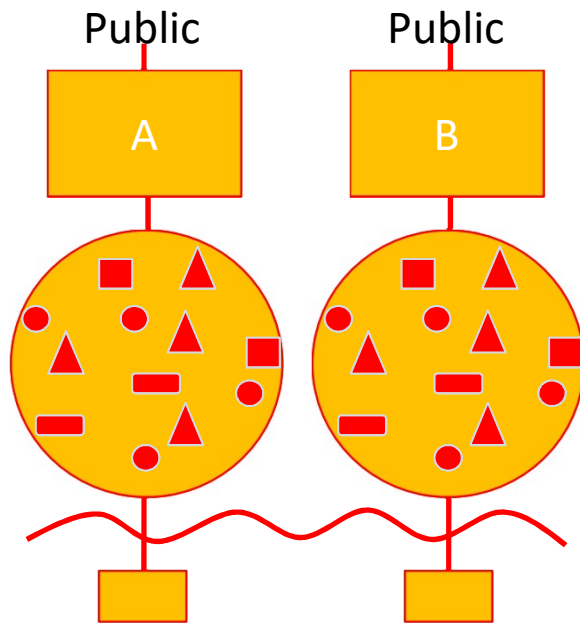




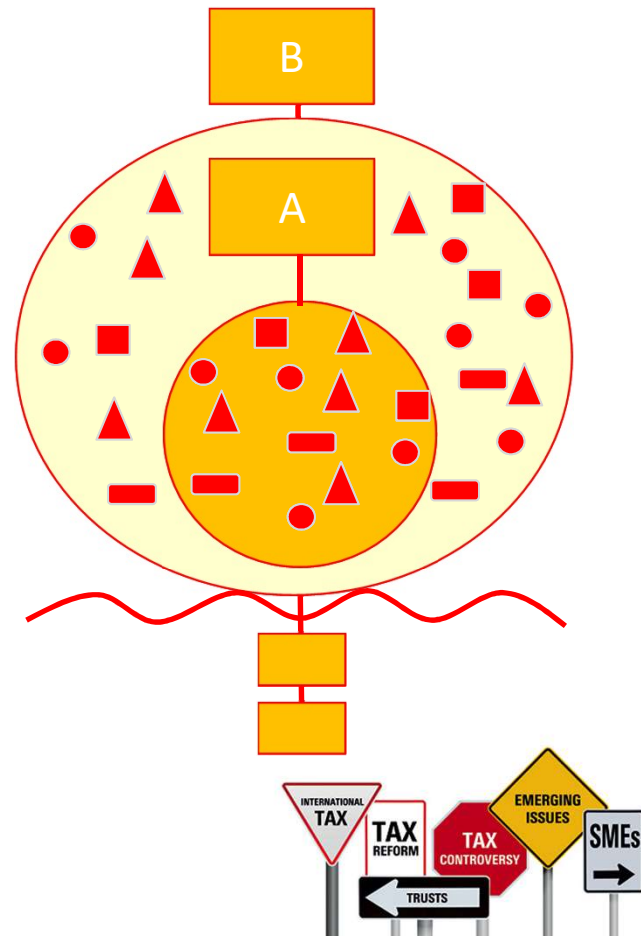
## 9. A Case Study (cont.)

- The Taxpayer Lens

BEFORE



AFTER



National Tax Conference 2012

22 – 23 November, Hilton Sydney

# 10. Conclusion

- Implications for current Internal Restructures
- Implications for Exposure Draft
- Implications for ATO administration to 2020



*This presentation represents the opinion of the author(s) and not necessarily those of the Institute of Chartered Accountants in Australia (the Institute) or its members. The contents are for general information only. They are not intended as professional advice - for that you should consult a Chartered Accountant or other suitably qualified professional. The Institute expressly disclaims all liability for any loss or damage arising from reliance upon any information in these papers.*



**Tweet us @Chartered\_accts #TAXCONF**

**National Tax Conference 2012**

22 – 23 November, Hilton Sydney

