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# PART IVA – HOW'S YOUR POSTULATE?

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# What has happened?

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- Part IVA got redrawn by parliament
  - The Commissioner lost *Futuris* and *RCI*.
  - But rumblings since 09/10 Budget.
  
- HCA looked at the rule about relying on an express election – *Unit Trend Services*

# The journey

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- Part IVA introduced - 1981
- First case decided – 18 Sep 92 *(Peabody)*
- Minister Bowen PR – 12 May 09 *(09/10 budget)*
- Minister Shorten DP – 18 Nov 10
- *RCI* – no special leave – 10 Feb 12
- Minister Arbib's PR – 1 Mar 12 *(PR 10/12)*
- Confidential consultation - 2012
- ED – 16 Nov 12 (retroactive date) *(PR 143/13)*
- Bill in HR - 13 Feb 13; Assent – 29 Jun 13

# The destination

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- Eliminate “do nothing” counterfactual
- Bifurcate the postulates:
  - Annihilate leaving a tax benefit exposed
  - Reconstruct to make a tax benefit
- Refocus on purpose

# Bifurcated postulates

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- “Would”
  - = Annihilate leaving a tax benefit exposed
  
- “Might reasonably be expected”
  - = Reconstruct to make a tax benefit
  
- Not merely gradations on a scale
  - 2 separate concepts
  - To overcome eg Full Ct in *RCI*

# Role of ‘reasonable alternative’

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- On reconstruction –
  - postulate must be a “reasonable alternative to entering into ... the scheme”
  - Dynamics of proof: *Macquarie*
  
- Annihilation
  - No “reasonable alternative” requirement for postulate
  - Residual work for ‘would’?

# ‘Unreasonable alternative’

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- On reconstruction - postulate must be a “reasonable alternative to entering into ... the scheme”
- But disregard tax consequences of a postulate in judging whether ‘reasonable alternative’
- Effectively kills the ‘do nothing’ alternative: *Futuris & RCI*

- Annihilation –
  - Postulate based only on the facts left standing
  - Case management issues if run alternative postulates
  - Attractive to Commissioner because no ‘reasonable alternative’ test
  - Does not suit some cases
  - Typically better for a deduction case, not an income case
  
- Reconstruction – better suited to some cases; no change to present case management issues



# Refocusing s.177D

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- Shuffling words
- At best no change, at worst slight confusion

# What case results would change



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- Best guess

<b>Case</b>	<b>Result</b>	<b>Altered result?</b>
Noza	Taxpayer	No – no tax benefit, no purpose
BATA	Commissioner	No
Citigroup	Commissioner	No
Axa	Taxpayer	No (?) – alternative postulate unlikely
Macquarie	Taxpayer	No – no purpose
Ashwick	Taxpayer	No – no purpose
RCI	Taxpayer	Yes – do nothing alternative
Futuris	Taxpayer	Yes – do nothing alternative

- Forensic choices
  - Not running evidence
  - Not seeking an adjournment when truly needed
  - Not cross-examining

# Scenario – trust distribution

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- Ann is on top marginal rates personally
- She is trustee of a discretionary trust
- She can appoint income to herself, her children, relatives, and a named ‘charity’
- Her former husband is the default beneficiary. (He does not know this. It was done out of spite.)
- She validly appoints \$50,000 income to the charity.
- She pays it to the charity
- The Commissioner investigates the charity’s finances

# Analysis of tax benefit – trust distribution

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- A [rare?] example of an income scheme which works under annihilation
  - She is trustee of a discretionary trust
  - She can appoint income to herself, her children, relatives, and a named charity
  - Her former husband is the default beneficiary (unbeknownst to him)
  - ~~– She validly appoints \$50,000 income to the charity~~
  - ~~– She pays it to the charity~~
- Leaves either trustee (s.99A) or husband exposed

# Further analysis of tax benefit – trust

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- Leaves either trustee (s.99A) or husband (default beneficiary) exposed
- But husband validly disclaims his interest as default beneficiary
- That would leave trustee liable under s.99A, unless Commissioner also annihilates husband's disclaimer

- If the annihilation scheme is simply distribution to a non-genuine charity –
  - purpose enquiry under s.177D starts well for Commissioner
  - Tax benefit is non-inclusion of income for husband
  - Ann’s purpose is nakedly to ensure ‘a tax benefit’ is secured
- If annihilation scheme also includes the disclaimer:
  - leaves former husband exposed despite his refusal of gift
  - Ann is ‘one of the persons’, and her purpose is as above

- Ann & Ben
  - Marriage ended with little acrimony
  - Ann has CGT assets, Ben has nothing but liabilities
  - Ann amenable to transfer Blackacre to Ben to settle affair
  - Blackacre is pregnant with gain
  - Appoint arbitrator under s.13H *FLA*, make joint submissions, arbitrator makes award accordingly
  - Ann transfers Blackacre to Ben
  - Ann suffers no gain: s.126-5



- An income case where annihilation works:
  - Marriage ended with little acrimony
  - Ann has CGT assets, Ben has nothing but liabilities
  - Ann amenable to transfer Blackacre to Ben to settle affair
  - Blackacre is pregnant with gain
  - ~~Appoint arbitrator under s.13H FLA, make joint submissions, arbitrator makes award accordingly~~
  - Ann transfers Blackacre to Ben
  - Ann suffers no gain: s.126-5

# Tax benefit – family law

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- Deleting the arbitration
- Leaves exposed a transfer of asset pregnant with gain
- Tax benefit is the gain, subject to discount, or other concessions & losses

# Purpose – family law

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- If there was no need to arbitrate, the sole purpose of the arbitration appears to be accessing the rollover
- Rollover non-elective, so s.177C(2) does not apply
- This segues into a discussion of *Unit Trend Services*

# No tax benefit where elective?

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- Not that simple!
- eg s.177C(2)(a):
  - non-inclusion of income attributable to express election
  - scheme not entered into for purpose of allowing election to be made
- Must be express election, not simply a choice otherwise made: *Case W58*
- Must truly be attributable: *Noza*

# Whether attributable to election

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- *Unit Trend Services* – HCA
- GST language was “not attributable”
- Held – benefit was “not attributable” to elections
  
- Discounted applicability of earlier HCA CGT case, about width of “attributable”: *Sun Alliance*
- Therefore *Sun Alliance* still good law for s.177C?

# Scheme to set up election

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- If *Sun Alliance* still good law for s.177C, still face a second guardian
- Second guardian under s.177C – where purpose of scheme to access the election
- This was effective in *Walter*

# Upshot of *Unit Trend*

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- Wording of s.177C differs critically as to 'attributable'
- The 'scheme for an election' element remains effective

# Scenario – election to consolidate

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- Holdco is a cleanskin, recently incorporated
- OpCo runs 2 businesses, with internally generated goodwill. It is wholly unrelated to Holdco.
- Holdco issues shares to raise capital
- Holdco buys all issued shares in OpCo
- Holdco elects to consolidate
- OpCo sells one business to Holdco
- OpCo sells 2<sup>nd</sup> business to independent 3<sup>rd</sup> party
- OpCo is liquidated



# Issues – election to consolidate

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- Scheme for OpCo to escape tax on sale of business to Holdco?
  - simply annihilate the election? Or the share sale as well?
- Tax benefit:
  - To whom under consolidation
  - Whether attributable to election; or scheme for an election
- Purpose:
  - seems a vanilla way of getting business into a cleanskin
  - OpCo's former shareholders pay tax on share sale
  - Relevance of those two points?

- Some Part IVA amendments work powerfully:
  - annihilation postulate is free of “reasonably ... expected”
  - reconstruction postulate
    - elimination of tax cost as consideration
    - policy headaches
    - commercial headaches
- Refocus on purpose – drafting a bit esoteric
- Case law on exception for ‘tax benefit’ for election
  - *Unit Trend Services* does not end this, actually helps
  - scope of exception remains inexact science



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