



Part IVA

DAVID W MARKS KC

HEMMANT'S LIST, BRISBANE

Coverage

Trends in 2024 & going forward

Surprising results & what courts said

Dividend stripping; franking benefits – ss177E & 177EA

GST – digging for gold in Division 165

The action in 2024 – matters about s177D

- **Minerva** – taxpayer’s FCAFC successful – DIS says “no change”
- **Mylan** – no appeal from FCA
- **Merchant** – taxpayer’s FCAFC appeal pending *
- **Ierna** – revenue’s FCAFC appeal pending *
- **Pepsico** – revenue granted SLA to HCA (DPT)
- **BSKF** – taxpayer’s appeal to FCAFC pending *
- **Grant; Collie** – FCAFC remitted to AAT, note retirement of member of AAT

Dividend stripping; franking benefit– ss177E & 177EA

- Merchant – pending FCAFC appeal *
- Michael John Hayes – t/p's SLA refused – still remitted to AAT?
- BSKF – pending FCAFC appeal *

GST – Division 165

- CPG Group – gold – Commissioner's FCAFC appeal pending *

The action in 2024 – other topics

Some surprises

Taxpayers can win in Part IVA cases

Minerva – the evidence run was good; the flow of income accorded with the trust deed's default position

Mylan, Ierna – revenue's counterfactual was not a reasonable prediction; again, won on evidence

Pepsico – revenue misconstrued the bottling agreement (DPT)

Grant, Collie – NVI – basically a misspeaking in the AAT's reasons, sent back

Minerva Financial Group 2024 ATC ¶20-896

Streaming interest, via differential trust units, to Treaty protected investors

- But ATO could not show that default operation of a trust deed was somehow unusual
- DIS – ATO still says they can attack operation of trust discretions
- NB – we are now seeing ATO alleging breach of the “proper purpose” rule
 - Attack on exercise or non-exercise of a power
 - Attack based on improper purpose
 - Exercise of power – void in England:
FS Capital v Adams [2025] EWCA Civ 53

Mylan Australia Holding 2024 ATC ¶20-900

- ATO put up counterfactual that could be rebutted – 100% equity funding
- Taxpayer’s counterfactual most closely aligned with what would likely have occurred – no tax benefit flowed

Although Mylan won, some contentions were rejected, and Button J said:

- Merely because there was a “commercial judgment” did not insulate a step from Pt IVA: [516]
- A tax benefit need not be identifiable at the time a scheme was undertaken, though this is relevant as to whether some alternative course would have been undertaken: [246-247]

Ierna 2024 ATC ¶20-915 *

Part IVA was a back-up case, behind ss45B & 45C (and Division 7A)

- tax played a part in decision to do selective capital reduction & extinguish Div 7A loans
- but more is needed before Part IVA applies: [212]
- revenue's alternative postulate:
 - did not explain how Div 7A loans were to be repaid: [218]
 - inconsistent with retaining profits to fit out stores and maintain the value of the securities over business. (Indeed, ANZ wanted to increase value of its securities): [222]
- essentially the revenue has to put up an alternative postulate that is viable.
- revenue's appeal to FCAFC pending

Grant *, Collie

2024 ATC ¶20-939, ¶20-940

- Related cases – former principals of Cleary Hoare
- Problems with decisions & reasons of AAT – criticism of AAT, remitted to ART
- But of interest here:
 - Evidence supporting taxpayer’s counterfactual may be somewhat speculative but still useful: Grant [86]
 - Have to use previous Part IVA decisions with care – very fact-based: Collie [56]
 - AAT had relied heavily on Michael Hart’s 2018 case (also a principal of CH): 2018 ATC ¶20-653
 - But Hart had completed the circle with cash, Collie didn’t
 - The test was not necessary for the taxpayer definitively to show that a different taxpayer would have included the relevant amounts in their assessable income: Collie [57]

Merchant 2024 ATC ¶20-909 *

- s177D “scheme” re: alleged sale of shares in a listed company at a loss
- allegedly sheltered a capital gain
- taxpayer’s explanation was:
 - generate cash to meet ongoing cash demands from another business
 - shares moved to a super fund effectively maintaining taxpayer’s interest in the list company
- trial judge did not accept these reasons, and pointed to accounting advice and availability of cash to meet cash demands of other business
- This is a complex case, and it is on appeal to FCAFC

Dividend stripping; franking benefits – ss177E, 177EA

- Current prevalence of allegations by revenue
 - Merchant 2024 ATC ¶20-909 *
 - Michael John Hayes 2024 ATC ¶20-916
 - BSKF 2024 ATC ¶10-735 *
 - Note also – capital benefits allegation under s45B – Ierna 2024 ATC ¶20-915 *
- Learnings – many but just a few points here:
 - 177E scheme in Merchant involved a debt forgiveness. That step alone not a dividend strip: no disposal of property: [480]
 - wider scheme in Merchant was a dividend strip – in substance transfer of assets: [505]
 - cannot challenge s177EA on basis no assessment issued to give effect to determination: BSKF [117]
 - cannot challenge s177EA collection tool, ie a 8AAZN notice, under Part IVC: BSKF [149]

Division 165 – GST avoidance

CPG Group 2024 ATC ¶10-710 * – a remarkable case, master-class in Div 165 – on appeal

- who is a participant in a scheme?
- what is a benefit?
- Choice principle
- factors re purpose/effect:

321. It was extraordinary that the Direct Suppliers adulterated bullion, destroyed some of its value and then, ignoring GST effects on prices, sold what had become scrap gold at prices that were less than their acquisition costs. But those prices at which they transacted were not remarkable as a bargain struck between the suppliers and the applicant for scrap gold.

Questions?

- David W Marks KC

Level 16 Inns of Court, Brisbane

+61 7 3236 5477

dmarks@qldbar.asn.au