AVOIDANCE OF TAXATION: SECTION 260 OF THE INCOME TAX ASSESSMENT ACT

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[*Section 260 is a provision aimed at preventing the avoidance of income tax. In this article, the writer considers the judicial interpretation placed on the operative words of the section. Reference is made to the necessity of finding an arrangement having a purpose of tax avoidance and also to the question of whether that purpose must be a sole or principal purpose. Consideration is given to the limitation that the courts have imposed on the literal application of the section as well as to the annihilating effect that the section has on an arrangement coming within its provisions.*]

Section 260 of the Income Tax Assessment Act 1936-72 reads as follows:

> [e]very contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall 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,
>
> be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

TWO LIMBS

In attempting to apply section 260 to any situation there are two basic questions that require consideration. The first of these questions is whether, in the circumstances, there is a contract, agreement or arrangement coming within the ambit of the section. Provided that question is answered in the affirmative the second, and, in some cases, the more difficult question must be answered. That second question relates to the basis on which an assessment may be validly raised. The section requires that the contract, agreement or arrangement caught by the section shall be

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absolutely void, as against the Commissioner. If, as is required by the section, the arrangement is treated as void the second limb raises the question as to what facts remain to support an assessment by the Commissioner against the participants in that arrangement. Shortly stated, does the voidance leave a taxable situation, and if so, what is that situation? The complete answers to both these questions are still not clear despite the many cases on the section.

I FIRST LIMB—ARRANGEMENTS

NEWTON v. FEDERAL COMMISSIONER OF TAXATION

It is considered that any discussion of section 260 may appropriately centre on the case of *Newton v. Federal Commissioner of Taxation*.[1] Not only was it the first case on the section to be considered by the Privy Council but it was also the first case in which an attempt was made to give a comprehensive definition of many of the key words contained in the section. To some extent also it represented a consideration of all the important cases on the section up until that time.

CONTRACTS, AGREEMENTS, ARRANGEMENTS

With the use of the terms 'contract, agreement or arrangement' the aim of the section appears to be to cover the whole range of possibilities and the words have accordingly been defined very widely. Contracts and agreements must be taken to apply in accordance with their usual legal meaning and in considering 'arrangement' in *Newton's* case,[1] the Privy Council was of the opinion that it described 'something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law'.[2]

Throughout their opinion the Privy Council used the term 'arrangement' to cover the three words actually used in the section and this article has applied the same abbreviation.

WIDTH OF ARRANGEMENT—WIDTH OF AVOIDANCE

It appears that a distinction must be drawn between the various transactions and steps which form part of the arrangement and the steps and transactions that are avoided as against the Commissioner. The two are not co-extensive. At least this seems to be the result of the opinion of the Privy Council in *Newton's* case[1] expressed in the following way: '[b]ut it [the arrangement] must in this section comprehend, not only the initial plan but also all the transactions by which it is carried into effect—all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else.'[3]

[1] (1957) 96 C.L.R. 577 (H.C.), (1958) 98 C.L.R. 1 (P.C.), [1958] A.C. 450.
[2] [1958] A.C. 450, 465.
[3] *Ibid.*

The Privy Council can be seen to be relying on that part of the section which says that the arrangement 'so far as it has' one of the designated purposes shall be void. And yet it is clear that the arrangement itself in *Newton's* case[1] covered a much wider area. In that case the arrangement included an amendment to the Articles of Association to attach special dividend rights to the issued shares and also the issue of additional preference shares to Pactolus.

However, in its opinion, the Privy Council declared, the Commissioner could treat as void neither the creation of the special dividend rights attached to the original shares nor the issue of the additional shares in the company, the reason being that neither of these steps did anything to avoid tax.[4]

Of the High Court judges who took part in *Newton's* case,[1] Kitto J.[5] and McTiernan J.[6] appeared to agree that the voidance was limited to those steps which had the effect of avoiding tax. Williams J., however, took the opposite view and stated that the whole of the steps commencing with the passing of the special resolutions may be treated as void.[7]

Following *Newton's* case,[1] the view appears also to have been taken that the voidance of the arrangement was limited to those steps which had the effect of avoiding tax. It may be noted that if the Privy Council had not applied some limit to the extent of the voidance of the arrangement the result would have been that the payment of the dividend itself would have been void as being one of the steps in the arrangement. This would have changed the whole complex of the matter because the only assessment then sustainable would have been a Division 7 assessment against the operating company for failing to distribute its required amount of profit.

However, the problem was brought into focus again by the Privy Council opinions expressed in *Peate v. Federal Commissioner of Taxation.*[8] That case concerned a doctor who was carrying on a medical practice in partnership with other doctors. The arrangement considered by the High Court and the Privy Council commenced with the dissolution of the partnership of doctors carrying on that practice. Each of the doctors then entered into an agreement with a private company which had been formed with the shares in that company held by or on behalf of the doctor's family. By the agreement the doctor agreed to serve the company as a medical practitioner in the medical practice which the company had acquired from the doctor. A second company was also incorporated. The shares in the latter company were held by the family company and those

[4] *Ibid.* 468.
[5] (1957) 96 C.L.R. 577, 597.
[6] *Ibid.* 621.
[7] *Ibid.* 632.
[8] (1964) 111 C.L.R. 443.

two companies had also entered into an agreement with each other by which the family company agreed to supply the operating company with the doctor's services in return for a fee.

The Privy Council concluded, albeit briefly, that the whole of the arrangement including the dissolution of the partnership and the formation of the two companies was to be treated as void.[9]

In the High Court decision in *Peate,*[10] however, Menzies J., at first instance, had concluded that the agreements between Westbank and Raleigh and between Raleigh and Dr Peate were to be treated as void. The formation of Westbank and Raleigh were not expressed to be void.[11] In the Full High Court one judgment was given by Kitto J. with which Owen and McTiernan JJ. agreed. Kitto J. concluded that the word 'arrangement' comprehended both a plan made between two or more persons and all the transactions by which it was carried into effect. However, he does not appear to decide that the formation of both Westbank and Raleigh, both of which played vital roles in the plan, were to be treated as void.[12] Taylor J. in his judgment appears to have decided that the agreements between the companies and Dr Peate may be treated as void.[13]

The same point rose again for consideration in *Casuarina Pty Ltd v. Federal Commissioner of Taxation.*[14] At first instance in that case, Windeyer J. seemed to be of the opinion that if the section were applicable the whole of the arrangement must be treated as void and not just part of it.[15]

When *Casuarina's* case[14] came before the Full High Court,[16] Walsh J. made reference to the observation of Windeyer J., but ruled that it was unnecessary to decide the point in question.[17]

In the recent decision of *Federal Commissioner of Taxation v. Ellers Motor Sales Pty Ltd and ors*[18] the Full High Court (McTiernan, Windeyer, Walsh and Gibbs JJ.) heard an appeal by the Commissioner against the decision of Menzies J.[19] In a somewhat complicated group of companies, Mr Ellers, Mrs Ellers, Ellers Motor Sales Pty Ltd and Junelle Holdings Pty Ltd held the shares in a company, Harcourt Holdings Pty Ltd. It may be noted also that at the same time Ellers Motor Sales and Junelle were also subsidiaries of Harcourt Holdings. Towards the end of the relevant year of income, a 'Keighery-type' company[20] was

[9] (1966) 116 C.L.R. 38.
[10] *Ibid.* 54.
[11] (1964) 111 C.L.R. 443, 461.
[12] *Ibid.* 471.
[13] *Ibid.* 476.
[14] (1970) 70 A.T.C. 4069, *F.C.T. v. Casuarina Pty Ltd* (1971) 71 A.T.C. 4068.
[15] (1970) 70 A.T.C. 4069, 4077.
[16] (1971) 71 A.T.C. 4068.
[17] *Ibid.* 4077.
[18] (1972) 72 A.T.C. 4033.
[19] (1970) 70 A.T.C. 4008.
[20] *Infra* n. 22.

formed as John Holdings Pty Ltd and the latter purchased the shares held in Harcourt by the two individuals and the two companies indicated above. Having purchased the shares for an amount of £356,900 (financed by a loan from Mr Ellers who in turn had borrowed from his bank) a dividend of £358,923 was paid to John Holdings by Harcourt. The Commissioner argued that the transfers of shares in Harcourt to John Holdings were void by virtue of section 260. The effect of this voidance held, according to the Commissioner, two implications. Firstly, the four original shareholders of Harcourt were liable to ordinary tax on their respective shares of the dividends paid by Harcourt to John Holdings and received by the original shareholders in the form of the purchase price on the sale of their shares to John Holdings. Secondly, because the transfers of shares were void, Harcourt did not become a subsidiary of John Holdings (a public company for tax purposes) and therefore Harcourt retained its status as a private company. Junelle Sales and Ellers Motor Sales, as subsidiaries of Harcourt were also private companies and liable to Division 7 tax.

The leading judgment of the Full High Court was delivered by Walsh J. The effect of his judgment was that the transfers of shares by the original shareholders to John Holdings were void in so far as they effected an avoidance by those shareholders of the tax due on the dividends paid by Harcourt. But the transfers were not void in so far as they effected a change in the status of the companies, Junelle and Ellers Motor Sales. It was summed up by Walsh J. in the following words:[21]

> in my opinion, it is legitimate in the circumstances of this case to hold that sec. 260 operates to entitle the appellant [the Commissioner] to disregard the transfers of the shares, in so far as they would serve the purpose of altering the character of the receipt of money by the former shareholders from an income receipt to a capital receipt and at the same time to hold that sec. 260 cannot be applied so as to obliterate the change brought about by the transfers of the shares in the character, for taxation purposes, of the respondent companies. In so far as the transfers effected the latter change they must be treated as having taken effect, in relation to the status for taxation purposes of the respondent companies. That was an effect which, according to the principle of *Keighery's* case,[22] lay outside the scope of the operation of sec. 260. But in so far as the transfers effected the former change, they were within the scope of the provision and may be disregarded. The application of sec. 260 does not require that if a step in an arrangement is treated as void for some purposes it must necessarily be treated as void for all purposes. That is illustrated by the case of *Rowdell Pty Ltd v. F.C.T.*[23]

It is considered, with respect, that the reliance on *Rowdell v. Federal Commissioner of Taxation*[23] by Walsh J. in the circumstances was taking the former case a lot further than could be considered legitimate. Due to

[21] (1972) 72 A.T.C. 4033, 4046.
[22] (1957) 100 C.L.R. 66.
[23] (1963) 111 C.L.R. 106.

the meaning given to void as used in section 260, in *Rowdell's* case[23] it was held that while a transfer of shares may be void as against one taxpayer for the reason that it was an arrangement for that taxpayer to avoid tax, it did not render the arrangement void for the purposes of assessment of another taxpayer where the purpose was not for the latter to avoid tax. The emphasis was on the way the section affected two different taxpayers who took part in the one arrangement. However, there was no reference to one transaction in an 'arrangement' being void for one purpose but not void for another purpose in respect of the *same taxpayer*.

Despite this, however, it seems that the weight of the current views on the extent to which transactions forming part of the arrangement are rendered void by the application of the section suggests that only those parts which in fact have the effect of avoiding taxation will be void.

Furthermore, the one transaction in an arrangement may have more than one purpose and if one of those purposes is considered legitimate (in the sense of not being carried out for a purpose contrary to section 260) to that extent it will not be void.

PURPOSE OR EFFECT

It is necessary to consider the meaning attributed to the use of 'purpose or effect' in the section. The Privy Council made it clear in *Newton's* case[24] that the application of the section was not to depend on the motives of the individuals who were participating in the arrangement. On the contrary, their motives were irrelevant. It was stated by the Privy Council in the following way:

> [t]he 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. The whole set of words denotes concerted action to an end—the end of avoiding tax.[25]

Later in the judgment the Privy Council expanded this:

> [t]hey [the opening words of the section] show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every 'contract, agreement or arrangement' . . . which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement *itself* and see which is *its* effect—which *it* does—irrespective of the motives of the persons who made it.[26]

It may be noted that despite the use of the alternative between 'purpose' and 'effect' in the section itself, in most cases it is referred to as 'purpose *and* effect'.[27]

[24] [1958] A.C. 450. [25] *Ibid.* 465.
[26] *Ibid.*
[27] See *e.g. Peate v. F.C.T.* (1966) 116 C.L.R. 38, 43.

SOLE OR PRINCIPAL PURPOSE

The objective test put forward by the Privy Council has been accepted as appropriate since *Newton's* case.[28] However, one problem that has arisen recently has been the question of whether tax avoidance must be the sole or principal purpose of the arrangement before the section can apply.

It is considered at least a little surprising that this matter has arisen. In *Newton's* case,[28] the Privy Council stated that there were three purposes involved in the arrangement: (i) to increase the capital of the motor companies; (ii) to enable the shareholders to receive a large sum without paying tax on it; and (iii) to enable the company Pactolus to make a profit in return for its part in the affair.[29] Having stated those purposes, however, the Privy Council still found that the arrangement was caught by section 260. It specifically dealt with the matter in the following words:

> [i]t is clear from this analysis that the avoidance of tax was not the *sole* purpose or effect of the arrangement. The raising of new capital was an associated purpose. But nevertheless the section can still work if one of the purposes or effects was to avoid liability for tax. The section distinctly says *'so far* as it has' the purpose or effect. This seems to their Lordships to import that it need not be the sole purpose.[30]

Despite what appears to be a fairly clear exposition of its views of the matter the problem of sole purpose was the subject of comment by the Privy Council in its decision on the 'paddock trusts'[31] under the New Zealand legislation. Section 108 of the Land and Income Tax Act (N.Z.) corresponds to but is not identical with section 260 of the Australian Act.[32]

The Privy Council in *Mangin v. Inland Revenue Commissioner*[33] cited the *dicta* of Lord Denning (who delivered the opinion of the Privy Council in *Newton's* case.[34]

> [i]n order to bring the arrangement within the section 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.

Having cited that extract, the Privy Council in *Mangin's* case[33] went on to put forward their view of the matter:

[28] [1958] A.C. 450. [29] *Ibid.* 466.
[30] *Ibid.* 467.
[31] *Mangin v. Inland Revenue Commissioner* (1970) 70 A.T.C. 6001 (N.Z.).
[32] Following its amendment in 1968 by the insertion of the words 'as against the Commissioner', s. 108 read as follows: 'Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes in so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax.'
[33] (1970) 70 A.T.C. 6001, 6006. [34] [1958] A.C. 450, 466.

> [i]n their Lordships' view this passage, properly interpreted, does not mean that every transaction having as one of its ingredients some tax saving feature thereby becomes caught by a section such as sec. 108 . . . The clue to Lord Denning's meaning lies in the words 'without necessarily being labelled as a means to avoid tax'. . . . Their Lordships think that what this phrase refers to is, to adopt the language of Turner J. in the present case 'a scheme . . . devised for the sole purpose, or at least the principal purpose, of bringing it about that this taxpayer should escape liability on tax for a substantial part of the income which, without it, he would have derived'.[35]

It must be noted that the above extract was clearly an *obiter dictum.* The majority of the Privy Council had already expressed agreement[36] with the view put forward in the Court of Appeal by Turner J. that '. . . the only proper inference to be drawn from the facts of the arrangement, and of the profits resulting therefrom is that this scheme was devised for the sole purpose, or at least the principal purpose, of bringing it about that this taxpayer should escape liability on tax for a substantial part of the income which, without it, he would have derived'.[37] Having said that, it was clearly unnecessary to its decision for the Privy Council to observe that it was essential that the purpose of tax avoidance must be a sole or at least principal purpose of the arrangement before the section can apply.

In respect of one New Zealand case since *Mangin's* case,[37] *Grierson v. Inland Revenue Commissioner,*[38] decided by Henry J., of the Supreme Court of New Zealand, it may be argued that the decision in that case that section 108 did not apply to the arrangement in question (a service company set up by a firm of consulting engineers, registered surveyors and town planners) was based at least to some extent on the failure to convince the judge that tax avoidance was a sole or principal purpose.

As far as Australia is concerned, the matter has arisen specifically in one case only since *Mangin's* case.[37] That case was *Hollyock v. Federal Commissioner of Taxation*[39] decided before Gibbs J. by way of an appeal from a decision of Board of Review No. 2.[40] In that case Gibbs J. made it clear that he could not accept as valid the interpretation put on Lord Denning's words by Turner J. and approved by the Privy Council in *Mangin's* case.[37] He also put forward that the view of the Privy Council may lead to further difficulties in interpretation rather than make the section clearer. His views were quite strongly put and it is worthwhile noting them:

> [t]o say that the section applies only to arrangements whose sole purpose is tax avoidance would be contrary to the decisions in *Newton's* case[41] and *Hancock v. F.C. of T.*[42] To hold that the tax avoidance should be the principal purpose of the arrangement would seem to me to be opposed to the reasoning on which those decisions rest, and would introduce into sec. 260 a

[35] *Supra* n. 33.
[36] *Ibid.*
[37] [1970] N.Z.L.R. 222, 235.
[38] (1971) 71 A.T.C. 6018.
[39] (1971) 71 A.T.C. 4202.
[40] Unpublished, but see (1971) 71 A.T.C. 4202.
[41] [1958] A.C. 450.
[42] (1961) 108 C.L.R. 258, 283.

> refinement which is not suggested by the words of the section itself, and which would tend to increase, rather than remove, the difficulties to which the section gives rise, by requiring the courts to weigh one purpose against another and to decide which was predominant.[43]

It remains to be seen, of course, what attitude the other members of the High Court will adopt in regard to this point. However, it would seem that it was essential to the High Court's decision in *Ellers Motor Sales* case[44] that the view of Gibbs J. outlined above would prevail.

It is submitted that there may be two points that are worthy of consideration. The first is that determination of a sole or principal purpose can in many cases be an extremely difficult task. The many cases on the point of principal or dominant purpose determined under section 26 (a) of the Act exemplify this. Furthermore it may be well nigh impossible to determine such a purpose on purely objective grounds. It has already been seen that the motives of a taxpayer are irrelevant and the purpose or effect must be determined from the 'overt acts' of the arrangement. Although it has also been held that 'motives' are irrelevant and are to be distinguished from 'purposes' in considerdering section 26 (a) of the Act,[45] the dominant purpose in many cases under that section comes down to a subjective test.

The second point that may be noted is that it is arguable that, in practical terms, there is not very much difference between the Privy Council's view and the view adopted in a number of Australian cases since *Newton's* case.[46] Gibbs J., in *Hollyock's* case,[47] cited the reference to the use of 'essential feature' adopted in *Hancock v. Federal Commissioner of Taxation*,[48] and the reference by Taylor J. in *Peate's* case[49] to tax avoidance which, while being a means to other ends, was 'at the very heart of the arrangement'. Moreover, no case can be found where an arrangement has been found to be within the section despite tax avoidance being only a minor or inessential element. Furthermore, as Gibbs J. indicated,[50] the absence of tax avoidance as at least an essential feature of an arrangement would be sufficient to conclude that the arrangement could not necessarily be labelled as a means to avoid tax.

To the extent that this point can be summarised, therefore, it is submitted that firstly, as far as can be presently judged, the High Court is unlikely to adopt the view that before the section can apply the sole or principal purpose of an arrangement must be to avoid tax. Secondly, from a practical viewpoint, there is little to be gained from adopting an interpretation requiring tax avoidance to be shown as a sole or principal purpose. In fact it may only raise greater difficulties.

[43] (1971) 71 A.T.C. 4202, 4205.
[44] (1972) 72 A.T.C. 4033.
[45] See *X Co. Pty Ltd v. F.C.T.* (1971) 71 A.T.C. 4152, 4156.
[46] [1958] A.C. 450.
[47] (1971) 71 A.T.C. 4202, 4205.
[48] (1961) 108 C.L.R. 258, 283.
[49] (1964) 111 C.L.R. 443, 476.
[50] (1971) 71 A.T.C. 4202, 4206.

II LIMITS OF APPLICATION

PREDICATION TEST

Having considered all these matters, the Privy Council in *Newton's* case[28] was then faced with the difficulty of expressing some limit on its interpretation of the section. It did this by the use of words that have been accepted since as the key test put forward by *Newton's* case.[28] The test was expressed thus:[51]

> [i]n order to bring the arrangement within the section 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.

The Privy Council may be seen in the above extract to be applying the legal technique of reading down the statute in order to avoid an interpretation of the section which, if allowed to be interpreted literally, would produce absurd results unintended by the legislature. This attempt to read down the section was of course not new. Expositions with the same end in view had been made in many earlier cases; for example, Knox C.J.,[52] Gavan Duffy and Starke JJ.[53] in *Deputy Federal Commissioner of Taxation v. Purcell,* Isaacs J. in *Jaques v. Federal Commissioner of Taxation*[54]; the Court in *W. P. Keighery Pty Ltd v. Federal Commissioner of Taxation.*[55]

It is necessary to see how clear and effective is the limitation imposed by the Privy Council. It is submitted that it is far from clear what the limitation is and in what circumstances it should apply. It may be argued that the above *dicta* from *Newton's* case[51] indicate that every arrangement should fall into one of two distinct classes—in the one group, those in which it can be asserted or declared that the purpose was to avoid tax and, in the other group, those in which it can be asserted or declared that they are capable of explanation 'by reference to ordinary business or family dealing'. It is not possible however, in practice to find all arrangements capable of such categorization. In many instances, there will be an arrangement in respect of which it may be asserted that its purpose is to avoid tax whilst conceding also that it is capable of explanation by reference to ordinary business dealing. Perhaps, however, this problem only arises if the test outlined above is taken out of its context and read in isolation. It should be remembered that the other aspects of the section discussed in previous parts of this paper play decisive roles. For example, the purpose of tax

[51] (1958) 98 C.L.R. 1, 8-9.
[52] (1921) 29 C.L.R. 464, 466.
[53] *Ibid.* 473.
[54] (1924) 34 C.L.R. 328, 359.
[55] (1957) 100 C.L.R. 66. See also *Newton v. F.C.T.* (1956) 96 C.L.R. 577, 646 *per* Fullagar J.

avoidance must be, if not the sole or principal purpose, at least an essential purpose or a purpose going to the heart of the matter.

In cases after *Newton's* case,[51] moreover, the primary stress seems to have been placed on whether the arrangement is capable of explanation by reference to ordinary business or family dealing. The reasoning seems to be that only by considering this aspect and excluding it can it then be concluded that the arrangement had a purpose of avoiding tax. If the arrangement is capable of explanation on this basis, the fact that it was also a means to avoid tax is not sufficient to bring it within the section. It is not clear that this practical application of the matter is in accordance with the test in *Newton's* case.[51] It is arguable that the inclusion of 'without necessarily being labelled as a means to avoid tax' indicates that the first thing to look for is the purpose of tax avoidance. If that purpose is found, it may be argued, the possible explanation by reference to ordinary business or family dealing is of no avail. However, as indicated above, this is not the way the test has been applied.

MEANS ADOPTED TO CARRY OUT ARRANGEMENT

It may be noticed also that the Privy Council has placed emphasis on the way a particular arrangement was carried out. Apart from the reference in the above *dicta,* this is made clearer in parts of the judgment immediately following; for example, reference is made to 'the way the transactions were effected' in the cases of *Jaques'* case,[56] *Clarke's* case[57] and *Bell's* case.[58] The Privy Council also specifically referred to 'the way cheques were exchanged for like amounts and so forth' in *Bell's* case and concluded that 'there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax'.[59]

This same approach is evident in many cases after *Newton's* case.[60] For example, in *Hancock's* case,[61] Kitto J. gave consideration to the overt acts by which the plan in that case had been implemented. In *Millard v. Commissioner of Taxation,*[62] Taylor J. considered it desirable to discuss the form of the agreement and its somewhat unusual circumstances. The depth of the analyses of the transactions in both *Peate's* case[63] and *Wisheart v. Inland Revenue Commissioner*[64] is also relevant. So, it was concluded by Wild C.J. in *McKay v. Inland Revenue Commissioner*: '[b]ut the authorities show that the Court must look not only at the arrangement but also at the way in which it was implemented.'[65]

This stress on the way in which the transaction was carried out or on the means adopted to carry out the arrangement is probably logically necessary in that the test of the purpose or effect of an arrangement must be

[56] (1924) 34 C.L.R. 328.
[57] (1932) 48 C.L.R. 56.
[58] (1953) 87 C.L.R. 548.
[59] [1958] A.C. 450, 466.
[60] (1958) 98 C.L.R. 1.
[61] (1961) 108 C.L.R. 258, 283.
[62] (1962) 108 C.L.R. 336, 341.
[63] (1964) 111 C.L.R. 443.
[64] (1971) 71 A.T.C. 6001 (N.Z.).
[65] (1972) 72 A.T.C. 6008, 6017 (N.Z.).

looked at in the light of the 'overt acts'. However, it is submitted that it also emphasises that it is misleading to abbreviate the circumstances of any case to simple statements, for example, a transfer of property, a sale of shares *cum* dividend, and then conclude that such a transaction is, or is not, within the application of the section. It is considered that it is more pertinent to look at the means adopted to carry out that transaction. This is considered to be illustrated from *Newton's* case[66] itself. Following the predication test set down above, the Privy Council by way of explanation went on to say that '[t]hus, no one by looking at a transfer of shares *cum* dividend, can predicate that the transfer was made to avoid tax'.[67] But the circumstances of *Newton's* case[66] itself, when broken down to its essential element, could be summed up by saying that it was a transfer of shares *cum* dividend. But section 260 was still found to apply to it. The justification for the application of the section in that case, it is submitted, can be found in the means adopted or the methods employed to carry out that transaction.

It may be argued that in *Newton's* case[66] it was more than a transfer of shares *cum* dividend. The re-purchase of shares by the original shareholders (not the same shares as those first sold but similar in that they enabled control of the company to be exercised) was a vital element. It undoubtedly was, but in later cases, it has been held that the re-purchase was not essential in order that section 260 could apply. In this regard reference is invited to *Mayfield v. Federal Commissioner of Taxation*[68] and *Ellers Motor Sales'* case.[69]

ORDINARY BUSINESS OR FAMILY DEALING

A problem has also arisen from the failure of the Privy Council to explain what it meant by 'ordinary business or family dealing'. Later cases also are notable for their failure to give any real guidance on this matter.

In *Hancock's* case,[70] decided by the High Court shortly after *Newton's* case,[66] Kitto J. expressed the matter in slightly different terms. In the fourth of the seven general propositions which he laid down as derived from what was said and implied by the Privy Council in *Newton's* case,[66] he said:

> [i]f those acts are capable of explanation by reference to ordinary dealing, such as business or family dealing, without necessarily being labelled as a means to avoid tax, the arrangement does not come within the section.[71]

This may be recognized as a wider proposition than that put forward by the Privy Council. It acknowledges that there may be transactions which do not lend themselves to characterization as 'business dealing' or 'family dealing'. The failure of a transaction to be so characterized could result, if the words of the Privy Council were to be applied literally, in the

[66] (1958) 98 C.L.R. 1.
[67] *Ibid.* 8-9.
[68] (No. 1) (1961) 108 C.L.R. 303; (No. 2) (1961) 108 C.L.R. 323.
[69] (1972) 72 A.T.C. 4033, 4044.
[70] (1961) 108 C.L.R. 258.
[71] *Ibid.* 283.

avoidance of the transaction by section 260. Kitto J. himself put the example of a simple sale or gift of shares prior to payment of a dividend on such shares. Despite this, however, there is still left open the question of what constitutes an ordinary business or family dealing. As indicated above, there is no short answer to this question. It is a matter of the Court's approach to each set of circumstances which comes before it.

In this regard it is relevant to note the comment by Lord Wilberforce in his dissenting judgment in *Mangin's* case.[72] After referring to *Newton's* case,[71] he remarked: '[b]ut one difficulty leads to another and the courts are now having to decide how "ordinary" a transaction must be to escape'.[73]

COMPANY FORMATIONS—PROFESSIONAL PRACTICES

It is appropriate to consider here how the test of an 'ordinary' transaction has been applied in those cases concerning persons conducting professional practices. In *Peate's* case[74] all the members of the Board of the Privy Council concluded very shortly, without reference to any cases and without much explanation, that the circumstances showed that there was an arrangement within the provisions of section 260. The High Court had given a little more attention to this aspect of the case. Menzies J. at first instance, after noting that the arrangement consisted of the formation of companies to take over the doctor's business, with benefits passing to his family but control still remaining with the doctor, said that it was not in his view:

> an ordinary business transaction for a body of professional men who are entitled to sue for fees for medical services to transfer their practices, their libraries and their instruments to a company which could not sue for fees and to become that company's servants in the conduct of their profession.[75]

He went on to refer to section 82 F of the Act (the section allowing deductions for medical expenses) but with respect, the effect of the arrangement on another taxpayer (the doctor's patient) does not appear to be particularly relevant. He then concluded by saying that 'what, outside a profession, might be regarded as an ordinary business transaction may, within a profession, have an altogether different appearance'.[76]

Menzies J. can be seen to face the obvious comparison between what the doctors did (*i.e.* basically, formed a company to take over their business) and what must be accepted as a fairly widespread practice, at least among non-professional businesses. This argument had of course, been put by Counsel for Dr Peate.

Windeyer J. also faced the same question. He concluded also that: '[t]he resemblances seem to me remote. Whatever may be said of the company, Westbank Pty Ltd separately regarded, the combined and inter-related

[72] (1970) 70 A.T.C. 6001.
[73] *Ibid.* 6010.
[74] (1966) 116 C.L.R. 38.
[75] (1964) 111 C.L.R. 443, 460.
[76] *Ibid.*

activities and purposes of it and its companion Raleigh Pty Ltd are certainly remarkable and out of the ordinary'.[77]

In the New Zealand case of *Wisheart v. Inland Revenue Commissioner*[78] concerning arrangements carried out by a firm of solicitors, similar sentiments were expressed. North P., in the Court of Appeal, agreed with Wild C.J. of the New Zealand Supreme Court that it was an unusual and indeed extraordinary arrangement 'patently a scheme of tax alteration and relief as surprising, when found within the legal profession, as it was bold'.[79] References to arrangements as 'extraordinary within the profession' may also be seen in the New Zealand case of *McKay*.[80]

Common to all these cases appears to be the idea that the test of what is 'ordinary' is determined by what is in the judge's view an accepted practice in the particular profession being considered. While a judge's qualifications to determine what is ordinary within a profession, albeit the legal profession, may be subject to speculation, it appears a more appropriate enquiry to ask why it is valid for trades and other businesses to be conducted through the media of companies but not valid for a professional man to make use of the same legal entity for his business.[81]

There appears to be no merit in the argument based on the notion of personal services rendered in a profession.

A professional practice on the one hand, may be so substantial in size that considerations of personal services rendered intimately by the professional person to his client[82] are pure fiction, while on the other extreme, the tradesman acting under the guise of a company may be the sole supplier of all activities connected therewith. Furthermore, many doctors are paid servants of employers, for example, public servants, doctors employed by other doctors or by large corporations.

It must be noticed, moreover, that as the judgment of Menzies J. in *Peate's* case indicated, the legislative restriction against companies in professional fields was not related to a company providing such services.[83] The only restriction found to exist was that such a company could not sue for recovery of fees.[84] That this in itself was sufficient to take the circumstances of the case outside of the ordinary appears unconvincing.

It is considered that there is support for the view that in the area of professional companies and arrangements, the above cases indicate that

[77] *Ibid.* 478.
[78] (1971) 71 A.T.C. 6001 (N.Z.).
[79] *Ibid.* 6003.
[80] (1972) 72 A.T.C. 6008, 6018.
[81] See also *Millard v. F.C.T.* (1962) 108 C.L.R. 336 and *Hollyock v. F.C.T.* (1971) 71 A.T.C. 4202.
[82] See *Henderson v. F.C.T.* (1970) 70 A.T.C. 4016.
[83] (1964) 111 C.L.R. 443, 456.
[84] *Re* the legal profession in Victoria, see Legal Profession Practice Act 1958, s. 90.

the courts to some extent have allowed ethical considerations to influence their judgments. This influence may, perhaps, be more related to the ethics of a profession and only indirectly related to the ethics of tax avoidance.[85]

It must be noted, however, that in all the cases cited on this point, considerable weight was placed on the means that were employed to carry out the arrangement. It may be that the proper conclusion to be drawn is that in those instances that have come before the Courts, perhaps unfortunately for the professions, the participants went just too far! Perhaps a less extreme case may come before the Courts in the not too distant future to clarify this matter.

It is understood that the legal profession is considering the desirability of allowing legal practitioners to operate through the media of a company. If such a proposal is accepted by the profession the question might then be asked whether the conduct of a legal practice by that means would have become accepted as ordinary business dealing; similarly, if a substantial number of such a profession decided to employ a service company along the lines encountered in *Wisheart's* case.[86]

III LIMITS OTHER THAN PREDICATION TEST

GENERAL

There has been considerable debate on whether the cases decided before *Newton's* case[87] still stand and if so on what basis they survive. This concern for the earlier cases comes down to some extent at least to the question of whether the predication test formulated by the Privy Council was intended to set down the only limits to the section. It may be argued that the Privy Council's reference in *Newton's* case[87] to the major cases decided before that case, positioned as it was immediately after setting out its own test, indicates that is was intended to 'cover the field' *i.e.,* set down the only valid limits to the application of the section. This argument is reinforced by the manner in which the other cases were introduced. Having set down its 'predication test' the Privy Council continued:

> [t]hus, no one, by looking at a transfer of shares *cum* dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Div. 7 tax, see *W. P. Keighery Pty Ltd v. Federal Commissioner of Taxation.*[88] Nor could anyone, on seeing a declaration of trust made by a father in favour of his wife and daughter, predicate that it was done to avoid tax, see *Deputy Federal Commissioner of Taxation v. Purcell.*[89] But when one looks at the way the transactions were effected in *Jaques v. Federal Commissioner of Taxation;*[90] *Clarke v. Federal Commissioner of Taxation,*[91] and

[85] The difference between a professional practice providing services by the medium of a company and services rendered in other occupations was referred to by Board of Review No. 2 in *Case A55* (1969) 69 A.T.C. 318, 322 (*per* Mr J. D. Davies).
[86] (1971) 71 A.T.C. 6001.
[87] (1958) 98 C.L.R. 1.
[88] (1957) 100 C.L.R. 66.
[89] (1921) 29 C.L.R. 464.
[90] (1924) 34 C.L.R. 328.
[91] (1932) 48 C.L.R. 56.

> *Bell v. Federal Commissioner of Taxation*[92]—the way cheques were exchanged for like amounts and so forth—there can be no doubt at all that the purpose and effect of that way of doing things was to avoid tax.[93]

The Privy Council may be seen therefore, to be attempting briefly to explain each of the earlier major cases in accordance with its own predication test.

The standing of two cases in particular, and the reasoning behind them, has aroused particular comment. Those cases are *Purcell's* case[89] and *Keighery's* case.[88]

DEPUTY FEDERAL COMMISSIONER OF TAXATION v. PURCELL

The facts of *Purcell's* case[89] may be simply stated. The taxpayer Purcell was a grazier and he declared himself a trustee of his farming property and business for himself, his wife and his daughter in equal shares. The Deputy Commissioner sought to avoid this trust by means of section 53 of the Act (the section then in force corresponding to the present section 260) and assessed the taxpayer on all of the income derived from the property. The attempt to rely on section 53 failed.

Knox C.J. said, *inter alia:* '[i]t (section 53) does not extend to the case of a *bona fide* disposition by virtue of which the right to receive income arising from a source which theretofore belonged to the taxpayer is transferred to and vested in some other person.'[94]

Gavan Duffy and Starke JJ. supported much the same view.

> The section, as the Chief Justice says, does not prohibit the disposition of property. Its office is to avoid contracts, etc., which place the incidence of the tax or the burden of tax upon some person or body other than the person or body contemplated by the Act. If a person actually disposed of income-producing property to another so as to reduce the burden of taxation, the Act contemplates that the new owner should pay the tax. The incidence of the tax and the burden of the tax fall precisely as the Act intends, namely, upon the new owner. But any agreement which directly or indirectly throws the burden of the tax upon a person who is not liable to pay it, is within the ambit of sec. 53.[95]

The view of the section, therefore, was that it did not operate to avoid a conveyance or transfer of property. In the case of a transfer of property, the income from that property after its transfer was derived by the transferee and it was clearly contemplated by the Act that the new owner should bear the burden of tax upon that income.

It is submitted that the Privy Council clearly approved of the decision in *Purcell's* case.[95] However, it is considered that it did so, not on the basis that a transfer or conveyance of property could never be avoided by the

[92] (1953) 87 C.L.R. 548.
[93] (1958) 98 C.L.R. 2, 8-9.
[94] (1921) 29 C.L.R. 464, 466.
[95] *Ibid.* 473.

section, but on the basis that the trust and the transfer of property in that case were capable of explanation by reference to ordinary family dealing. Moreover, there was nothing in the way the transfer occurred, or in the means adopted to carry out the transfer, to support an assertion that it was only done in that way to avoid tax.

The proposition that section 53 did not apply because the tax was a burden on the new owner which was according to the contemplations of the Act cannot be supported as a universal rule. In *Newton's* case[96] (and other dividend-stripping cases) the whole scheme was based on a plan to ensure that at the time the dividends were declared, the shareholder upon whom under the Act the imposition of tax was placed, was legally Pactolus and not Newton. The tax fell on the shareholder Pactolus exactly as contemplated by the general provisions of the Act. Similarly, the same may be said in respect of other section 260 cases, for example, *Peate's* case,[97] and *Hollyock's* case.[98] Menzies J. at first instance in *Peate's* case[97] concluded that there was little similarity between *Peate's* case[97] and *Purcell's* case.[95] The greater width of the arrangement and the complicated way it was carried out in *Peate's* case[97] distinguishes the latter, although basically it may be seen as a case of a transfer of property with tax falling as intended by the general provisions of the Act after the transfer of the doctor's business.

It is the essence of all section 260 cases that the whole arrangement be designed to ensure that legally the tax is to fall in accordance with the general provisions of the Act on some person other than he whom the scheme is designed to benefit.

Moreover, for the same reasons it is not possible to argue that on the authority of *Purcell's* case,[95] section 260 cannot be used to avoid a declaration of trust. The New Zealand case of *Mangin*[99] is an example of a trust situation treated as void by the New Zealand equivalent of section 260. The circumstances of that case were in the opinion of the majority of the Privy Council sufficient to conclude that the arrangement in that case could not be described as an ordinary family dealing, a typical family trust.

It may be stated, therefore, that the principle derived from *Purcell's* case[1] should not be declared too broadly. It is submitted that it is no more than an example of the circumstances in which a transfer of property (be it by way of gift or sale of a legal or equitable interest in that property) will be outside the ambit of section 260 as not liable to the assertion that the transfer was to avoid tax but capable of explanation by reference to ordinary business or family dealings.[2]

[96] (1958) 98 C.L.R. 1.
[97] (1964) 111 C.L.R. 443.
[98] (1966) 116 C.L.R. 38.
[99] (1970) 70 A.T.C. 6001.
[1] (1921) 29 C.L.R. 464.
[2] See *Hollyock v. F.C.T.* (1971) 71 A.T.C. 4202, 4205, *per* Gibbs J.

W. P. KEIGHERY PTY LTD v. FEDERAL COMMISSIONER OF TAXATION

The decision in *Keighery's* case[3] was given after the High Court's decision in *Newton's* case[4] but before the opinion of the Privy Council in that latter case had been handed down. For this reason, and despite the reference by the Privy Council in *Newton's* case[5] to *Keighery's* case[3] there has been considerable speculation as to the standing of the reasoning in the latter case in the light of the Privy Council's predication test. The Act at the time relevant to *Keighery's* case[3] drew a distinction between a private and a non-private company and the primary question at issue in the case was whether W. P. Keighery Pty Ltd came within the definition of a private company in section 105(1) of the 1936-52 Act. The relevance of being a 'private company' was that such a company was obliged to make a 'sufficient distribution' of its profits or suffer the imposition of additional tax under Division 7 of the Act. As an alternative to the main argument based on section 105 of the Act the Commissioner argued that section 260 of the Act applied.

At first instance, Williams J. found for the Commissioner on the basis that the company was within the definition of a private company contained in section 105. On this view, it was not necessary for him to refer to the arguments on section 260 and accordingly, he did not consider them.[6] The Full High Court, however,[7] reversed the decision of Williams J. on the basis of section 105. Moreover, it took little trouble to reject the argument that section 260 of the Act applied. The debate on the standing of the case, however, arises from the *dicta* adopted by Dixon C.J., Kitto and Taylor JJ. in their joint judgment in the case. The much quoted *dicta* read as follows:

> [w]hatever difficulties there may be in interpreting s. 260, one thing at least is clear: the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them. It is therefore important to consider whether the result of treating the section as applying in a case such as the present would be to render ineffectual an attempt to defeat etc. a liability imposed by the Act or to render ineffectual an attempt to give a company an advantage which the Act intended that it might be given.[8]

At a later part of its judgment, the following opinion was also expressed:

> an attempt by the Commissioner to rely upon s. 260 in the present case in order to avoid only the applications for and allotments of the redeemable preference shares would be an attempt to deny to the appellant company the benefit arising from an exercise which was made of a choice offered by the Act itself. The very purpose or policy of Div. 7 is to present the choice to

[3] (1957) 100 C.L.R. 66.
[4] (1958) 98 C.L.R. 1.
[5] *Ibid.* 9.
[6] (1957) 100 C.L.R. 66, 79.
[7] Dixon C.J., McTiernan, Kitto and Taylor JJ., Webb J. dissenting.
[8] (1957) 100 C.L.R. 66, 92-3.

> a company between incurring the liability it provides and taking measures to enlarge the number capable of controlling its affairs. To choose the latter course cannot be to defeat evade or avoid a liability imposed on any person by the Act or to prevent the operation of the Act.[9]

It may be noted that the High Court did not refer to any previous cases on the section. Yet it was able to conclude that 'one thing at least is clear: the section intends only to protect the general provisions of the Act from frustration.'[10]

It may be argued that support for this interpretation may be found in the High Court's earlier decision in *Purcell's* case.[11] Relevant extracts from that case have previously been cited in this paper where it was also argued that such a principle was not supported by all cases on the section as being of universal application.[12]

The principle of 'right of choice open to a taxpayer' might also be thought to have come from *Clarke v. Federal Commissioner of Taxation.*[13] In that case the Court referred to circumstances where a choice was presented to a taxpayer between two courses of which one would and the other would not expose him to liability to taxation.[14] However, the criticism of the reliance on *Clarke's*[13] case for the point currently being discussed is that it seems clear that the Court in that case was concerned with the annihilation aspect of section 260. It will be remembered that there are two limbs to section 260. On the one hand, there is the question of whether there is an arrangement that comes within the section. On the other hand, if the first question is answered in the affirmative, there is the additional problem of what taxable situation remains when the arrangement is annihilated.

The relevant extract from *Clarke's* case[13] has been accepted as one of the authorities for the proposition that the section enables the arrangement to be eliminated but does not permit additional facts to be inserted to produce a taxable situation. On this view, it is not possible to say of *Clarke's* case[13] that it is authority for any test of what constitutes an 'arrangement' for the purposes of section 260, as it was not dealing precisely with that question at the time.

Keighery's case[15] was the subject of comment in *Newton's* case.[16] Following the statement of its predication test the Privy Council concluded:[17] '[n]or can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Div. 7 tax, see *W. P. Keighery Pty Ltd v. F.C.T.*'[15] It has already been argued[18] that the Privy

[9] *Ibid.* 93-4.
[10] *Ibid.* 92.
[11] (1921) 29 C.L.R. 464.
[12] See text at n. 94, *supra.*
[13] (1932) 48 C.L.R. 56.
[14] *Ibid.* 77.
[15] (1957) 100 C.L.R. 66.
[16] (1958) 98 C.L.R. 1.
[17] *Ibid.* 9.
[18] See text at n. 96, *supra.*

Council was here attempting to justify the decision in *Keighery's* case[15] (and the decisions in the other earlier cases referred to by the Privy Council in the same paragraph) not necessarily on the reasoning adopted in *Keighery's* case[15] but on its own test put forward in *Newton's* case.[16] But with greatest respect, the Privy Council's observation appears clearly insupportable. The only possible relevance that the 'scheme' adopted in *Keighery's* case[15] could have had was related to the avoidance of tax. The distinction between a private and a non-private company adopted by the Act was completely irrelevant to any area of business other than taxation.[19]

For these reasons, after *Newton's* case,[16] there were in regard to *Keighery's* case[15] two possible views open. One view was that the limits on section 260 set forth in the predication test formulated by the Privy Council had not been exhaustively stated. It was put forward that the section was also limited in those instances where it could be said that there was 'right of choice open to the taxpayer' under the general provisions of the Act. The second view[20] was that *Keighery's* case[15] had to be reviewed in the light of the Privy Council's test in *Newton's* case.[61]

It was arguable that the application of the *dicta* in *Newton's* case[21] to the circumstances of *Keighery's* case[22] may have resulted in a different conclusion to that actually reached in *Keighery's* case.[22] It may have been considered that the relevant question was not limited to whether the taxpayer has exercised a 'right of choice' provided for by the Act. It is submitted that the correct criteria to be applied following *Newton's* case[21] relates to the means adopted to exercise that right of choice. With respect, the question considered by the Court should have been whether the way in which the arrangement was carried out was such that it could be asserted that it was done in such a way only to avoid tax. It is submitted that an affirmative answer to such a question would have been required. It is submitted also that a negative answer would have been reasonable to the question of whether the way in which the transaction was carried out was capable of explanation by reference to ordinary business dealing.

However, this view did not prevail. The principle of *Keighery's* case[22] was clearly affirmed by the later decisions of the Full High Court in *Casuarina's* case[23] and, more recently, in *Ellers Motor Sales'* case.[24] Moreover, section 260 was found not to apply in *Casuarina's* case[23] despite the finding that there was an understanding as part of the arrangement involved that the shareholder, (Forum Ltd), introduced as the vital element to avoid private

[19] See also *F.C.T. v. Casuarina Pty Ltd* (1971) 71 A.T.C. 4068, 4080 *per* Gibbs J.
[20] This view was put forward by McTiernan J. in *Hooker-Rex Pty Ltd v. F.C.T.* (1970) 70 A.T.C. 4033, 4042. See also his dissenting judgment in *F.C.T. v. Casuarina Pty Ltd* (1971) 71 A.T.C. 4068, 4071.
[21] (1958) 98 C.L.R. 1.
[22] (1957) 100 C.L.R. 66.
[23] (1971) 71 A.T.C. 4068.
[24] (1972) 72 A.T.C. 4033.

company status, would not exercise any of the powers or rights attaching to its shareholding, provided it received its agreed fee. Similarly in *Keighery's* case[22] it was clear that the shareholders introduced to satisfy the criteria of the number of shareholders being in excess of twenty would not exercise their rights contrary to the wishes of Mr and Mrs Keighery. In practical terms, control was intended to remain always with Mr and Mrs Keighery, although legally it was made to appear otherwise.

Following the decisions in *Casuarina's* case[23] and *Ellers Motor Sales'* case,[24] two observations may be made. Firstly, the decision in *Ellers Motor Sales'* case[24] may be seen to have effectively cut down the force of the 'right of choice open to the taxpayer' under the Act as a limit to section 260. In that case the Court found that the transfers of shares from the original shareholders to the Keighery-type company could not be avoided in so far as the transfers affected the status of the companies involved. However, the transfers were avoided by section 260 to the extent that they resulted in avoidance of tax by the original shareholders on the dividends declared on the transferred shares. This leads to the second observation which relates to whether the limit to section 260 introduced by the principle of 'a right of choice open to the taxpayer' is of general application. It may be argued that such a limit is restricted to questions of a choice of status to be exercised by companies.

It is considered that the abovementioned limitation is neither of general application nor limited to the choice of status. The actual width of the principle is, however, difficult to define at this stage. The view that it is not of general application may be supported from both *Newton's* case[25] and from *Peate's* case.[26] It is arguable that the general provisions of the Act provide the shareholder in a company about to declare a dividend with a choice. On the one hand, the shareholder may retain his shares, receive the dividends and in accordance with section 44(1) of the Act be liable to tax as a shareholder on those dividends. On the other hand, he may sell his shares prior to payment of the dividend, accepting a price that takes account of the dividend about to be paid but without incurring any liability to tax in accordance with the general provisions of the Act. It has already been seen that in many instances the exercise of such a choice was not sufficient to prevent the application of section 260. In *Ellers Motor Sales'* case[27] Walsh J. denied that in such a situation the taxpayer was merely exercising a right of choice between two alternatives which the Act lays open to him.

Peate's case[26] (and similarly *Millard's* case[28] and *Hollyock's* case[29]) may also be seen to be cases where the 'right of choice was not applied. It may

[25] (1958) 98 C.L.R. 1.
[26] (1966) 116 C.L.R. 38.
[27] (1972) 72 A.T.C. 4033.
[28] (1962) 108 C.L.R. 336.
[29] (1971) 71 A.T.C. 4202.

be argued that the general provisions of the Act recognize that an individual may determine whether he should operate his business as an individual or by means of a company or partnership. In this light, *Peate's* case[26] may be seen as a case in which the individual exercised his right of choice to practise by means of a company. But that view did not prevail as against other considerations which satisfied the Court that section 260 should apply to avoid the arrangement.

The detailed provisions in the Act as to the status of a company may be the distinguishing feature of the status choice and may therefore support an argument that in such a case the legislature has intended to provide the full criteria under which the question of status should be determined. This is considered to be not an unreasonable view. It receives some support from the actions taken by the legislature following the Commissioner's losses in both *Keighery's* case[30] and *Casuarina's* case.[31] The means adopted by the legislature in an attempt to overcome the 'schemes' revealed in those two cases were not centred on section 260. On the contrary, the legislature preferred to approach the problem from the point of view of altering the definitions relevant to the status of companies.

On this view, it may be submitted, therefore, that the criteria for the application of the 'right of choice' test put forward originally in *Keighery's* case[30] may not be limited solely to status questions but rather is limited to those areas where the legislature has given taxpayers a specific choice by means of detailed provisions. An example of the latter situation may be found in the detailed provisions relating to assignments of income. In this regard see Part III Division 6A—Alienation of Income for Short Periods.[32]

It should, however, be recognised that there is a narrower view of the circumstances under which the 'right of choice' may restrict the application of section 260. In *Ellers Motor Sales'* case,[33] Walsh J. quoting from *Keighery's* case[30] referred to the 'right of choice between alternatives which the Act lays open to him'. These words may suggest that before the right of choice can be relied upon it must be shown that the Act sets out two courses, one of which must be adopted. When the taxpayer adopts one of those two alternatives, he exercises his 'right of choice'. On this criterion, the test of the 'right of choice' will be very limited in its application, perhaps limited only to status cases.

The only safe conclusion that can be drawn is therefore that the test of a 'right of choice' has been accepted as a test limiting the application of section 260 over and above the predication test of *Newton's* case.[34] It remains to be seen how far this test will be relevant to questions other than

[30] (1957) 100 C.L.R. 66.
[31] (1971) 71 A.T.C. 4068.
[32] On this view, it is considered with respect, that the decision in *McKay v. I.R.C. (N.Z.)* (1972) 72 A.T.C. 6008 may be treated with some reservations for Australian purposes.
[33] (1972) 72 A.T.C. 4033, 4043.
[34] (1958) 98 C.L.R. 1.

those of status. If it is to be extended to other areas, it is submitted that there are two possible limitations:

(i) limited to those situations which are covered in the Act by very detailed provisions; or,

(ii) a narrower view, that it can only be relied upon in circumstances where two alternatives are clearly set out in the Act, one of which must be accepted by the taxpayer.

IV SECOND LIMB—TAXABLE SITUATION

GENERAL

Having determined that there is an arrangement coming within the scope of the section, consideration must be given to what may be referred to as the second limb of the section. That limb relates to the question of what effect section 260 has on the arrangement. The section provides that every arrangement coming within its provisions shall be absolutely void, as against the Commissioner. The difficulty, however, comes down to the meaning of 'absolutely void' in the section and, given that meaning, what basis can be found for showing that there exists a situation which justifies the raising of the particular assessments for income tax as against the participants in the arrangement.

In the cases on the section the Courts have been at pains to point out that it is an annihilating provision only, *i.e.* the application of the section entitles the Commissioner to disregard the arrangement and the steps taken as part thereof, but does not entitle him to assume or introduce additional facts. The facts which remain after the arrangement has been treated as void must support the assessments raised by the Commissioner against the taxpayers who had sought by way of the arrangement to avoid tax.

ANNIHILATION

Support for the above propositions may be found in the earlier cases of *Clarke's* case[35] and also *Bell v. Federal Commissioner of Taxation.*[36] In *Newton's* case[34] itself, it was put forward by the Privy Council in the following words:

> [w]hat is the effect of section 260 on that arrangement? It is quite clear that nothing is avoided as between the parties but only as against the Commissioner.[37] As against him the arrangement is 'absolutely void' so far as it has the purpose or effect of avoiding tax. This is not a very precise use of the words 'absolutely void'. Ordinarily, if a transaction is absolutely void, it is void as against all the world. In this case what is meant is that the commissioner is entitled completely to disregard the arrangement—and the ensuing

[35] (1932) 48 C.L.R. 56, 77. [36] (1953) 87 C.L.R. 548, 572-3.

[37] The words 'as against the Commissioner' were introduced by the 1936 amendment to the Act to overcome the decision in *De Romero v. Read* (1933) 48 C.L.R. 649.

> transactions—so far as they have the purpose or effect of avoiding tax. In the words of the courts of Australia, it is an 'annihilating' provision—the commissioner can use the section so as to ignore the transactions which are caught by it. But the ignoring of the transactions—or the annihilation of them—does not itself create a liability to tax. In order to make the taxpayers liable, the commissioner must show that moneys have come into the hands of the taxpayers which the commissioner is entitled to treat as income derived by them. Their Lordships agree with the way in which Fullagar J. put it in his judgment: 'Section 260 alters nothing that was done as between the parties. But, for purposes of income tax, it entitles the commissioner to look at the end result and to ignore all the steps which were taken in pursuance of the avoided arrangement.'[38]

When the section has done its work the facts must show that the assessment is justified on the basis that the income has been 'derived' by the taxpayer. That is, the assessment must be shown to be in accordance with section 17 of the Act. However, section 19 of the Act must also be taken into account. That section indicates that derivation is not limited to actual physical receipt of moneys but, broadly, includes any application of money for the benefit of the taxpayer.

As stated above, the annihilation effect of the section has received universal support. The difficulty has arisen, however, because it appears that it may not have been consistently applied in all cases.

In *Newton's* case[39] it was held that the transfers of the shares from Newton *et al.* to Pactolus were to be treated as void. What were then the remaining facts on which an assessment could be raised? Dividends were declared and paid on shares which were deemed to be still held by Newton *et al.* The dividends totalled £1,764,136 and it was shown that of that amount £1,661,772 had reached the hands of the original shareholders in cash. It will be noted that in the above extract from *Newton's* case[40] the Privy Council had said that the 'Commissioner must show that moneys have come into the hands of the taxpayers which the commissioner is entitled to treat as income derived by them'.[41] In applying that *dictum* it could be seen that the Commissioner could treat £1,661,772 as dividends received by Newton *et al.* and therefore they were liable to assessment thereon. However, indicating that despite that reference, physical receipt was not an exhaustive test, the Privy Council proceeded to find that Newton *et al.* were also liable to be assessed on the remaining £102,414 which had remained with Pactolus as profit for its part in the arrangement. The basis for this view was that, having avoided the transfers of the shares,

> that profit is seen to be nothing more nor less than remuneration which the original shareholders allowed Pactolus to retain for services rendered. The position is the same as if the shareholders had received it as part of the

[38] [1958] A.C. 450, 467.
[39] (1958) 98 C.L.R. 1.
[40] See text at n. 38, *supra*.
[41] [1958] A.C. 450, 467.

special dividend and then returned it to Pactolus as remuneration. The commissioner can therefore treat this £102,414 also as income derived by the shareholders.[42]

The implication of this analysis therefore, may be seen to be that the deemed shareholders may be considered as having derived the total dividends paid on their shares. To the extent that the amount of the dividends had actually come into the hands of the deemed shareholders the matter is clear. The amount not physically received must be seen as constituting an application of income so that in accordance with section 19 the shareholders are deemed to have derived that amount also.

It may be argued that this analysis involves a reconstruction of the facts or an assumption of an implied agreement by the original shareholders that (i) the dividends should be paid to Pactolus and (ii) that the dividend moneys should be used to pay the original shareholders for the purchase price of the shares. This was substantially what Kitto J. had said at first instance in *Newton's* case when he decided that section 260 did not apply.[43] However, when that decision of Kitto J. was overruled by the Full High Court (by a majority) it was pointed out by Williams J. and relied on by him that the only funds used in the whole arrangement were the dividend payments by the companies.[44] He also took the view that it was clearly understood by all the participants that the funds would originate from those dividend payments. Therefore, on this basis, the original shareholders as participants in the scheme must have agreed that the funds from the dividend payments would be used as the purchase money for their shares and that with their consent, Pactolus could retain part of those dividend payments as its profit.[45] If this analysis is correct, there were no implied agreements introduced by the Court to support the assessments raised on the remaining facts.

Hancock's[46] case may be seen as another important illustration. It threw further light on whether it was necessary to show that the dividend moneys were identical with the funds received by the original shareholders before the latter could be assessed. At first instance, Fullagar J. took the view that as the deposit of £2,500 on the purchase of the shares was paid by Rowdell to the Hancocks prior to any dividend having been paid on the shares, that £2,500 could not be identified with any dividend and the assessment to the Hancocks could not include that amount.[47]

On appeal to the Full High Court, Dixon C.J.[48] rejected the argument that it was necessary to show that the dividend moneys financed the whole arrangement and that the dividend moneys had to be traced through to

[42] *Ibid.* 468.
[43] (1957) 96 C.L.R. 577, 610.
[44] *Ibid.* 633.
[45] *Ibid.* 635.
[46] (1961) 108 C.L.R. 258.
[47] *Ibid.* 273.
[48] *Ibid.* 281-2.

the original shareholders. He took the view that the real test was the end result of the arrangement[49] (it may be noted that the reference by Fullagar J. in *Newton's* case[50] to the 'end result' had been approved by the Privy Council).[51] Windeyer J.[52] agreed with Dixon C.J. on this point. Kitto J. put the matter in the following way:

> [t]he consequence which s. 260 produces is that the transfers of the 7,728 shares to Rowdell are to be treated as void, and Rowdell's receipt of the dividend moneys in respect of those shares is considered a receipt of the Hancocks' money by arrangement with them, and therefore as a derivation of those moneys by the Hancocks, with the character of company distribution upon them.[53]

Menzies J. put forward in his strong dissenting judgment, that the majority view represented more than an annihilation but also a reconstruction in that it necessitated an assumption that certain agreements between Rowdell and the Hancocks had taken place.[54]

END RESULT

The result of these cases seems to be that while the courts acknowledge only the 'annihilation' aspect of the section, they are not concerned with difficulties of tracing or indentifying the dividend funds in the hands of the original taxpayers. They are more concerned with the end result of the arrangement. In *Ellers Motor Sales'*[55] decision Walsh J. placed some significance on the fact that the 'only real money' used was from Harcourt but held that it was irrelevant that the payment for the shares was made before the dividends. He also made reference to the 'end result'. Having cited the cases of *Bell,*[56] *Newton*[57] and *Hancock,*[58] Walsh J. said:

> [a]ccording to those authorities it is appropriate to look at the end result of the transaction from the point of view of Harcourt and from the point of view of those who were its shareholders before the transfer of the shares to Holdings. The end result was that the profits had gone out from Harcourt and that an equivalent amount had come into the hands of its shareholders.[59]

In looking at the end result, two views are considered to be open. Firstly, the Courts are not deterred from finding implied agreements by the original shareholders as to the use of the dividends before concluding that there has been a receipt and an application of those dividends for the benefit of those original shareholders. The meaning of annihilation must therefore be read down to accord with this view.

[49] *Ibid.* 281.
[50] (1957) 96 C.L.R. 577, 656.
[51] [1958] A.C. 450, 467.
[52] (1961) 108 C.L.R. 258, 301.
[53] *Ibid.* 292.
[54] *Ibid.* 298-9.
[55] (1972) 72 A.T.C. 4033, 4042.
[56] (1953) 87 C.L.R. 548.
[57] (1958) 98 C.L.R. 1.
[58] (1961) 108 C.L.R. 258.
[59] (1972) 72 A.T.C. 4033, 4042.

Alternatively, the whole arrangement may be seen to be clearly undertaken for the benefit of the original shareholders and, if not at their instigation, at least with their full consent. Consequently, it is considered unrealistic to argue, for example as it would be necessary in the *Hancock*[58] situation, that Rowdell was to receive the dividends and apply those funds in purchasing the Leroy shares but that there was no agreement by the Hancocks that this should be done. It is submitted that this view is not contrary to the accepted annihilation effect of section 260.

MEANING AND EFFECT OF 'VOID'

Greatest difficulty on the question of annihilation seems to have arisen from the decision by the Privy Council in *Peate's* case.[60] That decision has been the subject of considerable criticism for its alleged failure to limit the effect of the section to one of destroying.[61] In view of the considerable criticism it is not proposed to discuss in this article in detail the extent to which the reasoning of the Privy Council has been considered inadequate.

However, it is submitted for consideration that the real importance of *Peate's* case[60] is that it highlights the difference between the Privy Council and the High Court in their respective approaches to a number of questions raised by the annihilation aspect of section 260. It has already been seen that in *Peate's* case[60] there was a difference between the two bodies as to the extent to which the arrangement was void.[62] The view of the High Court[63] was that the agreement between the doctor and his family company Raleigh was void as was also the agreement between Westbank and Raleigh. The Privy Council,[64] however, was of the opinion that the whole arrangement and everything done under it was void. While the majority of the Privy Council may not have taken this conclusion to its logical end, Lord Donovan, in his dissenting judgment, particularly relied on this voidance and stated his view that all parts of the arrangement were completely destroyed and must be ignored together with any actions taken in pursuance of that arrangement.[65] The majority of the Privy Council may also be seen to come to the same conclusion.

The emphasis of the High Court, however, was not placed on the 'destruction' of any part of the arrangement. The leading judgment was was given by Kitto J.[66] In dealing with the annihilation he said:

> [t]he provision, it is true, operates to destroy; it supplies nothing. But if a statutory denial of any of the legal consequences of the steps taken in carrying a concerted plan into effect will suffice to defeat a tax-avoidance for

[60] (1964) 111 C.L.R. 443 (H.C.), (1966) 116 C.L.R. 38 (P.C.).
[61] *E.g.* Trebilcock, 'Section 260 further considered—Peate's case' (a note) (1966) 40 *Australian Law Journal* 244. *Wisheart v. I.R.C.* (1971) 71 A.T.C. 6001 (N.Z.).
[62] See text at n. 74, *supra.*
[63] (1964) 111 C.L.R. 443.
[64] (1966) 116 C.L.R. 38.
[65] *Ibid.* 58.
[66] (1964) 111 C.L.R. 443, 466.

> which the arrangement as a whole is a recognizable means, the section provides the denial, and by so doing enables an assessment to be made in disregard of those legal consequences.[67]

Despite his reference to 'destroy' it seems fairly clear that he is arguing that the only parts of the plan avoided are the legal consequences of the acts. The acts themselves are not 'destroyed' in the normal sense of that word. It is considered that this view of 'annihilation' may be traced back to the *dicta* of Kitto J. in *Newton's* case[68] and *Rowdell's* case.[69] In considering the limited extent of the voiding effect of the section he said in the latter case:

> [f]or many purposes the operation of s. 260 in relation to the vendor-shareholders may be described quite satisfactorily by saying that as against the Commissioner the section renders void *inter alia* the transfers from the shareholders to Rowdell; but the statement is not completely accurate. What is accurate is that as against the Commissioner the transfers cannot be relied upon for the purpose of contesting an assessment of tax which has been made against the shareholders on the footing that the dividends were derived by them. The section cannot be treated as having an operation extending its expressly delineated function of defeating the purpose of tax-avoidance by the shareholders which it was the overtly manifested nature of the arrangement to achieve: (see the language of Lord *Denning* in *Newton's Case*[70]). To grasp that s. 260 defeats as against the commissioner the tax-avoiding efficacy of an arrangement, and not any part of the arrangement itself or anything done under it, is to see at once that it cannot support an assessment made against Rowdell on the footing that any of the transfers of shares to it were void—unless, of course, the arrangement was a means of tax avoidance by Rowdell itself.[71]

It is submitted that the approach of the High Court to the effect of the section has followed the line which Kitto J. set out in *Rowdell's* case.[72] As well as being the basis for *Rowdell's*[71] decision itself, it was also the basis of the decision by the High Court in *Peate's* case.[73] The conclusion may be drawn that the reference to section 260 as an 'annihilating' provision and the reference to 'destroy', is only a means of stressing that the section does not entitle the Commissioner to supply additional facts. But nothing is annihilated. What the section does is to defeat only the 'tax-avoiding efficacy of an arrangement and not any part of the arrangement itself or anything done under it'.[74]

It is considered, moreover, that this view of the effect of void explains to some extent the decision in *Ellers Motor Sales'* case.[75] In the circumstances of that case, the transfers of the shares were not void but the tax-avoiding efficacy of the transfers, *viz.* the transmutation of an income

[67] *Ibid.* 470.
[68] (1957) 96 C.L.R. 577, 597.
[69] (1963) 111 C.L.R. 106.
[70] (1958) 98 C.L.R. 1.
[71] (1963) 111 C.L.R. 106, 124-5.
[72] *Ibid.*
[73] (1964) 111 C.L.R. 443.
[74] (1963) 111 C.L.R. 106, 124.
[75] (1972) 72 A.T.C. 4033.

receipt into a capital receipt, was defeated. The efficacy of the transfers in so far as they affected the status of the companies was not considered to be within the necessary purpose of tax avoidance required by the section. It is difficult to see how the Privy Council's view of the voiding effect could produce such a result as that achieved by the High Court in *Ellers Motor Sales*' case.[75]

If this view of the effect to be given to 'void' as used in the section is correct it is considered that it overcomes the difficulty of what happens to expenditure incurred in the course of the arrangement, for example, by Westbank in *Peate's* case.[73] This matter was raised by Lord Donovan[76] in his dissenting judgment in that case and was taken up also by the New Zealand Court of Appeal in the case of *Wisheart.*[77] Lord Donovan, in *Peate's* case,[78] was of the opinion that in accordance with his view of 'void', Westbank must be destroyed. It was therefore impossible to say that it had incurred any expenditure. Nor, moreover, could deductions be allowed to Dr Peate in respect of such expenditure.

It is a necessary conclusion from the High Court's decision in *Peate's* case[78] that it did not accept Lord Donovan's view of expenditure. Menzies J. specifically said that it was correct to allow to Dr Peate the deductions in respect of the expenditure met by Westbank.[79]

The High Court's view of the matter may be explicable by their concentration on the 'end result' in order to show a taxable situation.[80] However, it is submitted that the different attitudes of the High Court and Lord Donovan (and the New Zealand Court of Appeal) again come down to the different approach to the meaning of 'void'. As the expenditure met by Westbank did not in itself have a tax-avoidance efficacy it follows that the fact of such expenditure does not have to be 'destroyed'. The expenditure may be considered an application of Dr Peate's income in the same way as the disposition of income to the taxpayer's family represented an application of Dr Peate income under section 19.

IMPLICATIONS FROM MEANING OF VOID

It may be noted the High Court's view on annihilation can have some, if not unfortunate, at least unintended results. *Dicta* in *Hancock's*[81] case by Kitto and Windeyer JJ. showed that they disagreed as to the basis on which Rowdell could be assessed in the light of the decision in *Hancock's* case.[82] This actual problem arose in *Rowdell's* case[83] when the view of Kitto J. prevailed. When considering in general terms the effect of section 260 he pointed out that the section prevents anyone from maintaining as against

[76] (1966) 116 C.L.R. 38, 57.
[77] (1971) 71 A.T.C. 6001.
[78] (1966) 116 C.L.R. 38, 59.
[79] (1964) 111 C.L.R. 443, 461.
[80] See text at n. 55, *supra.*
[81] (1961) 108 C.L.R. 258, 288 *per* Kitto J., 302 *per* Windeyer J.
[82] (1961) 108 C.L.R. 258.
[83] (1963) 111 C.L.R. 106.

the Commissioner that the transfers of shares were part of an effectual means adopted for the avoidance of tax. It does not prevent the Commissioner, however, from maintaining as against Rowdell that the transfers were effected and that the latter was liable to tax on the dividends it received.[84]

The result of the decision in *Rowdell's* case[83] was that, despite the avoidance of the transfers of the shares by the Hancocks to Rowdell (*Hancock's* case)[82] Rowdell was still held to be assessable on the dividends paid on the shares, the transfers of which were 'void as against the Commissioner'. Both Rowdell and the Hancocks were therefore assessable in respect of the same dividends.

It may be noted that on the basis of the same reasoning in the context of *Peate's* case[85] assessments may have been raised by the Commissioner against Westbank, Raleigh, and the latter's shareholders in respect of the same income that was held to be assessable in the hands of Dr Peate in that case.

Similarly, in the *Ellers Motor Sales'* case[86] situation. In this case the possibility goes even further. Walsh J. held that it was irrelevant to consider what would eventually happen to the dividends paid to the 'Keighery company'.[87] It was irrelevant that the latter held profits which they could distribute by way of dividends. But it is interesting to note that if dividends were to be paid out of such profits they could go to the same shareholders who had already been subject to tax thereon as a result of the *Ellers Motor Sales'*[86] decision. The same taxpayers could therefore be assessed on the same income in two assessments.

It is considered that there is an argument that the results indicated above represent a fundamental breach of the equitable principle, applied in the taxation field, that the same income should not be subject to double taxation.[88] On the other hand, there is the point which may be considered valid that this is a penalty which those who take part in tax-avoidance 'schemes' must risk as a normal consequence of such activity. The Privy Council's attitude in *Newton's* case[89] to be omitted income penalty imposed on the taxpayers in that case may be seen in the same light.[90]

There has been no indication, apart from *Rowdell's* case[91] that any assessments along the lines set out above have been or will be raised. However, if the view of the law set out above is correct, it is arguable that the Commissioner has no option but to apply the law by raising the necessary assessments along those lines.

[84] *Ibid.* 123-4.
[85] (1966) 116 C.L.R. 38.
[86] (1972) 72 A.T.C. 4033.
[87] *Ibid.* 4044.
[88] *Executor Trustee and Agency Co. of South Australia Ltd v. F.C.T.* (1932) 48 C.L.R. 26, 44 *per* Dixon J.
[89] [1958] A.C. 450.
[90] *Ibid.* 469.
[91] (1963) 111 C.L.R. 106.

CONCLUSIONS

It is submitted for consideration that the following conclusions can be drawn on this aspect of section 260:—

1. All cases pay at least lip service to the proposition that the effect of the word 'void' as used in the section is to annihilate and not to reconstruct or add facts.

2. The High Court's approach has been on the whole to look at the end result of the arrangement and raise appropriate assessments in accordance with that result.

3. That approach by the High Court is justified and does not contradict the annihilation effect of the section provided it is understood what is meant by 'annihilation'.

4. The High Court has applied the view that 'void' means 'annihilation' in the sense of defeating the tax-avoiding efficacy of transactions in an arrangement. It follows that parts of an arrangement are only void in accordance with that meaning to the extent that they can been seen to have a tax-avoiding purpose or effect.

5. The different reasoning adopted by the High Court as compared with the Privy Council (particularly Lord Donovan) is not brought about by the fact that the former is prepared to add or reconstruct whereas the latter is not. The real difference lies in the meaning given to 'void' by the two bodies and the views that each holds as to the extent to which parts of an arrangement are void.

6. It is considered that the High Court is more likely to follow its own views and that to some extent this is illustrated by the recent *Ellers Motor Sales*'[92] decision where the one transaction was held to be void for one purpose but not void for another purpose.

7. The High Court's view of 'void' also permits it to treat a transaction as void for one taxpayer who took part in the arrangement but not for another taxpayer, also a party to the same arrangement (*Rowdell's* case[93]). This view, however, does have unintended implications.

[92] (1972) 72 A.T.C. 4033.

[93] (1963) 111 C.L.R. 106.