FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3

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| Appeal from: | *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation* [2021] FCA 1619 |
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| File numbers: | QUD 36 of 2022QUD 37 of 2022 |
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| Judgment of: | **PERRY, DERRINGTON AND HESPE JJ** |
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| Date of judgment: | 24 January 2023  |
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| Catchwords: | **TAXATION** – appeal from judgment of a single judge to set aside taxation decision under Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA 1953**) – application of s 100A of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) – whether primary judge erred in holding that present entitlement to trust income did not arise out of a reimbursement agreement or by reason of any act, transaction or circumstance in connection with or as a result of reimbursement agreement**TAXATION** – appeal from judgment of a single judge to set aside taxation decision under Part IVC of the TAA 1953 – application of Part IVA of the ITAA 1936 |
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| Legislation: | *Income Tax Assessment Act 1936* (Cth) ss 97, 98A, 99A, 100A, 128B, 128D, 177A, 177C, 177CB, 177D*Income Tax Rates Act 1986* (Cth) s 12(1), Sch 7 *Taxation Administration Act 1953* (Cth) s 14ZZ  |
|  |  |
| Cases cited: | *Commissioner of Taxation v Hart* (2004) 217 CLR 216; [2004] HCA 26*Commissioner of Taxation v* *Lenzo* (2008) 167 FCR 255; [2008] FCAFC 50*Commissioner of Taxation v News Australia Holdings Pty Ltd* [2010] FCAFC 78*Commissioner of Taxation v Prestige Motors Pty Ltd* (1998) 82 FCR 195; [1998] FCA 221*Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404; [1996] HCA 34*Commissioner of Taxation of the Commonwealth of Australia v Consolidated Press Holdings Limited* (2001) 207 CLR 235; [2001] HCA 32*CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21; [1998] FCA 1276*Devries v Australian National Railways Commission* (1993) 177 CLR 472; [1993] HCA 78*East Finchley Pty Ltd v Federal Commissioner of Taxation* (1989) 90 ALR 457*Federal Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd* (2011) 192 FCR 325; [2011] FCAFC 49*Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434*Federal Commissioner of Taxation v Macquarie Bank Ltd* (2013) 210 FCR 164; [2013] FCAFC 13*Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359; [1994] HCA 43*Federal Commissioner of Taxation v Star City Pty Ltd* (2009) 175 FCR 39; [2009] FCAFC 19*Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd* (2010) 186 FCR 410; [2010] FCAFC 94*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; [2010] HCA 31*Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30*RCI Pty Ltd v Federal Commissioner of Taxation* [2011] FCAFC 104*Re Day* (2017) 340 ALR 368 at 386 [73];[2017] HCA 2*Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550;[2016] HCA 22  |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Taxation |
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| Number of paragraphs: | 229 |
|  |  |
| Date of hearing: | 24–25 August 2022  |
|  |  |
| Counsel for the Appellant: | Ms K Deards SC with Mr J Phillips |
|  |  |
| Solicitor for the Appellant: | Australian Government Solicitor |
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| Counsel for the Respondents: | Mr B L Jones SC with MS F J Chen |
|  |  |
| Solicitor for the Respondents: | Holding Redlich |

ORDERS

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|  | QUD 36 of 2022 |
|  |
| BETWEEN: | COMMISSIONER OF TAXATIONAppellant |
| AND: | GUARDIAN AIT PTY LTD AS TRUSTEE FOR THE AUSTRALIAN INVESTMENT TRUSTRespondent |

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| order made by: | PERRY, DERRINGTON AND HESPE JJ |
| DATE OF ORDER: | 24 January 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. There be no order as to costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | QUD 37 of 2022 |
|  |
| BETWEEN: | COMMISSIONER OF TAXATIONAppellant |
| AND: | ALEXANDER SPRINGERRespondent |

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| order made by: | PERRY, DERRINGTON AND HESPE JJ |
| DATE OF ORDER: | 24 January 2023 |

THE COURT ORDERS THAT:

1. The appeal be allowed in part.

2. Orders 1 to 4 of the orders of the Federal Court made on 21 December 2021 in proceeding number QUD 147 of 2020 be set aside insofar as the appeals pursuant to s 14ZZ(1)(a)(ii) of the *Taxation Administration Act 1953* (Cth) relate to the 2013 income year.

3. In lieu thereof, the Respondent’s objection decision in relation to the 2013 income year be affirmed.

4. The parties file and serve, not later than seven days from the date hereof, either a consent in respect of costs of and incidental to the proceedings in the original jurisdiction or, failing consent, their respective submissions of not more than five pages as to the order sought in respect of costs, following or in default of which, the Court will determine on the papers the order as to costs which ought be made.

5. There be no order as to costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRY J:

1 I am indebted to Hespe J for preparing reasons and orders which I have read in draft and with which I agree.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Perry. |

Associate:

Dated: 24 January 2023

REASONS FOR JUDGMENT

DERRINGTON J:

2 I agree with the reasons and orders of Hespe J.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 24 January 2023

REASONS FOR JUDGMENT

HESPE J:

# INTRODUCTION

3 This is an appeal from a judgment of this Court in relation to the application of s 100A and Part IVA of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) to distributions made by Guardian AIT Pty Ltd (**Guardian**) as trustee for the Australian Investment Trust (**AIT**) to AIT Corporate Services Pty Ltd (**AITCS**), a corporate beneficiary.

4 The Appellant (**Commissioner**) assessed Guardian as trustee for the AIT for the 2012 to 2014 income years under s 100A and s 99A (QUD 36/2022). In the alternative, the Commissioner made determinations under Part IVA and assessed Mr Alexander Kurt Springer (**Mr Springer**) in each of those income years to the amounts appointed to AITCS (QUD 37/2022). At first instance, the learned primary judge held that s 100A did not apply in any of the income years in question. His Honour also held that Part IVA did not apply in any of those years on the basis that there was no tax benefit and, if there were a tax benefit, that the requisite dominant purpose was not to obtain the tax benefit.

5 The Commissioner does not appeal the primary judge’s decisions in relation to the 2014 income year.

6 The Commissioner’s Notices of Appeal raise two grounds.

(1) The first ground relates to the primary judge’s conclusion regarding the application of s 100A for the 2013 income year only. The Commissioner contends that the primary judge erred in holding that the present entitlement of AITCS to a share of the income of the AIT for the 2013 income year did not arise out of a reimbursement agreement or by reason of any act, transaction or circumstance that occurred in connection with, or as a result of, a reimbursement agreement. Instead, the primary judge ought to have held that an understanding existed (particularised at first instance as the **2013 Understanding** and explained further at [78], below) which constituted a reimbursement agreement; and AITCS’s present entitlement to a share of the income of the AIT for the 2013 income year arose out of the 2013 Understanding or arose by reason of an act, transaction or circumstance that occurred in connection with, or as a result of, the 2013 Understanding. The Commissioner does not appeal the primary judge’s finding that s 100A did not apply in the 2012 income year.

(2) The second ground relates to the primary judge’s conclusion in respect of the application of Part IVA for the 2012 and 2013 income years. The Commissioner contends that the primary judge erred in holding that there was no scheme to which Part IVA applied, but instead ought to have held that Part IVA applied to what were referred to in the primary judge’s reasons as the “2012 related Scheme” and the “2013 related Scheme”.

7 For the reasons set out below, it is concluded that:

(1) Section 100A did not apply to 2013 income year.

(2) Part IVA did not apply to enable the Commissioner to make a determination in respect of the 2012 income year.

(3) Part IVA did apply to enable the Commissioner to make a determination in respect of the 2013 income year.

# BACKGROUND

## Material facts and findings at first instance

8 Given the issues raised in this appeal, it is necessary to set out the relevant background facts in some detail. This includes not only the relevant facts for the income years in question, but also the facts and circumstances in relation to events which occurred prior to the 2012 income year.

9 To place the issues in their proper context, it will also be necessary to refer to and repeat many of the findings made by the primary judge (**PJ**). These findings were based on his Honour’s acceptance of Mr Springer’s evidence, supplemented by corroboration offered by one of his sons, Mr Eric Springer; Mr Daniel Shafferman, a longstanding and trusted business associate of Mr Springer; and Mr Nigel Fischer, a chartered accountant of the firm Pitcher Partners, a long‑time accounting and taxation adviser to Mr Springer and the entities controlled by him (PJ [39], [41]). At the outset, it should be noted that his Honour found that each of these witnesses offered honest, candid and consistent evidence (PJ [39]). Critically, these credibility findings were not challenged by the Commissioner in this appeal.

10 Without intending any disrespect, to avoid confusion, these reasons refer to Mr Springer’s sons, Mr Eric Springer and Mr Richard Springer, simply by their first names.

### Events prior to the 2012 and 2013 income years

11 The AIT is a discretionary trust settled on 25 June 1998 and is governed by a trust deed of that date. Mr Springer was the trustee of the AIT until he retired from that role on 14 November 1999 (PJ [6]).

12 Guardian was incorporated on 7 May 1998 and from 14 November 1999 acted as trustee for the AIT. Guardian acts and has acted in no other capacity. Mr Springer has always owned all of the issued shares in Guardian (PJ [5]–[6]).

13 Mr Springer is the “Principal” (as defined in cl 1.1 of the trust deed) of the AIT. One of the powers exercisable under the trust deed by the Principal is the appointment of “any person or corporation (not being the Settlor) determined by the Trustee or the Principal to be a Beneficiary for the purposes of this Deed” (PJ [7]).

14 Mr Springer had undertaken several business ventures with varying degrees of success (PJ [42]). The entities through which Mr Springer’s wider business career in Australia was conducted included (PJ [44]):

(a) Springer Property Developments Pty Ltd (**SPD**);

(b) Paulownia Holdings Pty Ltd (**Paulownia**);

(c) Australian Agricultural Finance Pty Ltd (**AAF**);

(d) Queensland Forestry Holdings Pty Ltd (**QFH**); and

(e) Guardian as trustee for the AIT,

(together, the **Springer Group**).

15 Relevantly, by the income years in question (PJ [45]):

(a) Guardian as trustee for the AIT held:

(i) 100% of the issued shares in QFH;

(ii) 99.9% of the issued shares in Paulownia; and

(iii) 67% of the issued shares in AAF.

(b) Mr Springer held:

(i) 100% of the issued shares in Guardian;

(ii) 100% of the issued shares in SPD;

(iii) 33% of the issued shares in AAF; and

(iv) 0.1% of the issued shares in Paulownia.

16 By 2007, Mr Springer had made a decision to transition to retirement (PJ [54]). For this purpose, he took up residence in Vanuatu in late 2007 and, from the income year commencing 1 July 2008, was a tax resident of Vanuatu (PJ [57]). After Mr Springer moved to Vanuatu, he resigned as director of each of the companies in the Springer Group (except for AAF, in respect of which he resigned on 1 April 2009) and was initially replaced by his 18 year old son, Eric (PJ [63]). Although not a director, whilst living in Vanuatu, Mr Springer continued to take a keen interest in the business of the Springer Group and continued to control the group (PJ [66]).

17 The implementation of Mr Springer’s transition to retirement was not precipitous. From 2003, Mr Springer had started to reduce his involvement in his business activities and caused the various entities in the Springer Group gradually to wind down their respective businesses (PJ [55]–[56]).

18 The winding down of the operations and eventual de-registration of SPD, Paulownia, QFH and AAF occurred gradually over the period from 2010 to 2014 (PJ [69]). SPD was de-registered on 17 June 2011 (PJ [70]), Paulownia was deregistered on 24 December 2014 (PJ [75]), QFH was deregistered on 12 November 2014 (PJ [78]), and AAF was deregistered on 24 December 2014 (PJ [80]). Accordingly, by the 2012 income year, the informal winding up of the Springer Group was well-progressed (PJ [81]).

19 The result of the winding down of the activities of the Springer Group and the realisation of its assets was that Guardian as trustee for the AIT became a passive investor (PJ [68]).

20 During the time that he was a director, Eric relied upon assistance from Mr Shafferman (PJ [65]). As a director of Guardian, Eric signed the resolution for the distribution of the income of the AIT in the year ended 30 June 2012 (**2012 trust distribution resolution**). Eric’s practice was to act in accordance with documents drafted by Pitcher Partners after consultation with Mr Springer (PJ [96]).

21 Mr Shafferman became a co-director of the companies in the Springer Group, including Guardian, when Eric moved to the Unites States in November 2012 (PJ [93]). Apart from the 2012 trust distribution resolution signed by Eric, Mr Shafferman signed the transaction documents that are the subject of this appeal. The evidence at trial, which was not in dispute on appeal, was that Mr Shafferman acted on instructions from Mr Springer and would not have done anything that he thought was contrary to Mr Springer’s preferences (PJ [96], [189]).

### The role of Pitcher Partners

22 About two years before Mr Springer made his decision to transition to retirement, he retained Mr Nigel Fischer, a chartered accountant and now Managing Partner of Pitcher Partners, to provide accounting and taxation services to the Springer Group and to him personally. Mr Fischer was assisted by another accountant, Ms Majella Burke. Ms Burke worked for and under the supervision of Mr Fischer. Ms Burke left the employ of Pitcher Partners in January 2015. Mr Fischer had not had any contact with her since (PJ [58]). She was not called as a witness at trial.

23 It was a feature of Mr Springer’s operation of the Springer Group that no formal, forward budgets regarding cash flow needs were prepared. Rather, Mr Springer engaged in a form of reactive management, meeting expenses as and when required or identified, from funds available within the Springer Group at a given time. The retainer of Pitcher Partners to provide advisory and accounting services to the Springer Group did not extend to a forward budgeting task. Mr Fischer confirmed in evidence that what occurred was an annual review, prior to the close of an income year, by Pitcher Partners of the overall position of Mr Springer and of the companies and trusts controlled by him, and of transactions which had occurred in the year to date. This review did not identify future cash flow needs as such, as opposed to identifying from transfers where those needs had arisen and what distributions should be made, and to which entity (PJ [59]).

24 The primary judge considered Mr Fischer to be an impressive witness who was a careful, astute and prudent accountant, and who understood Mr Springer’s retirement aspirations. Mr Fischer had come to understand, on a gradual basis, the wider aspects of Mr Springer’s personal and family life. Mr Springer was found by the primary judge to “generally” act on Mr Fischer’s advice but was “no mere, uncritical cypher” (PJ [61], [111]). On one occasion, Mr Springer expressly differed from the advice proffered by Pitcher Partners. This was a result of a particular set of circumstances involving his son, Richard (PJ [61]).

25 The learned primary judge considered that Mr Springer’s sensitivity to the respective circumstances of his sons Eric and Richard, along with his transition to retirement, his decision to relocate to Vanuatu and his experience from his career in business that not all businesses were successful, were important determinatives in the occurrence of the events in the relevant income years (PJ [62]). His Honour also emphasised Mr Springer’s concern, voiced in cross‑examination, in relation to the disposal of particular businesses in the Springer Group, that those businesses might be bought by persons who did not have the same depth of knowledge and experience of Mr Springer as an arborist. His Honour accepted this evidence unreservedly, as well as Mr Springer’s evidence that this concern informed his thinking in relation to risk assessment when assessing advice about proposals for his transition to retirement (PJ [62]).

### Incorporation of AITCS

26 On 27 June 2012, Mr Springer, without assistance from Pitcher Partners, caused AITCS to be incorporated with Guardian as trustee for the AIT holding 100% of the issued shares (PJ [82]). On its incorporation, Eric became the sole director of AITCS. As noted above at [21], Mr Shafferman became a co‑director of AITCS on 15 November 2012 (PJ [93]).

27 In June 2012, Mr Springer as Principal determined that AITCS be a beneficiary of the AIT. AITCS therefore became a member of the eligible class of beneficiaries in respect of which the trustee of the AIT might exercise a discretion to distribute income for the purposes of the AIT (cl 3 of the trust deed) (PJ [7]).

28 Mr Springer’s decision to incorporate AITCS was informed by a series of prior discussions with Ms Burke in which she had advised him about the process of reorganising the group and winding up the various companies. His Honour accepted Mr Springer’s recollection that, during one discussion, Ms Burke advised him with words to the effect of “you need to have a clean skin corporate beneficiary now that the existing corporate entities will be wound up” and “a new company would insulate the future wealth accumulated in a separate legal entity by providing protection from any litigation that might be commenced against the former operating entities involving the businesses they carried on” (PJ [83]).

29 His Honour found that this discussion was consistent with and likely preceded an email of 26 June 2012 from Ms Burke to Mr Springer (PJ [83]). In that email, Ms Burke provided Mr Springer with her view as to the tax liabilities of each of the Springer Group companies in relation to the year ended 30 June 2012 as follows (PJ [85]) (emphasis in original):

This tax would be payable **May 2013**. However, if you wanted to deregister the companies before May 2013, you would need to pay the tax before doing so.

We are still working on GAIT Pty Ltd [which the primary judge inferred to mean a reference to Guardian (at PJ [86])] and the consequences of winding up this entity. However, your decision to wind-up this entity does not have to be made prior to 30 June 2012.

Our questions to you are:

1. What entity would you like the 2012 AIT distribution to go to? If you don’t particularly need a ‘clean skin’ corporate entity, you can distribute to QFH (this would defer having to pay the $145k tax on windup of this entity).

**2. If you wanted a clean skin corporate entity, we will need to discuss the shareholders and company name, directors etc and organise set-up this week.**

3. It is worthwhile winding up PH on the basis that you only have tax of $461K to pay out nearly $6.5m of retained earnings.

4. The tax payable for AAF is as a consequence of the Myers debt forgiveness.

Once you have decided which companies to wind-up, we will issue instructions on step by step to windup.

After you have had a chance to digest this information, please give me a call to discuss.

30 An internal document created by Pitcher Partners titled “2012 Tax Planning Alex Springer” was received into evidence, although his Honour noted that there was no evidence that it was ever sent to, or adopted by, Mr Springer (PJ [84]).

31 The primary judge found that, at the time the email of 26 June 2012 was sent, no decision had been taken by Mr Springer to cause AITCS to be incorporated, nor had any final decision been taken by Mr Springer as to the recipient of a distribution from the AIT for the 2012 income year (PJ [88]). The absence of any definitive decision by Mr Springer on these subjects was found to be consistent with the evidence given by Mr Fischer, when shown the email of 26 June 2012 in the course of his cross-examination. His Honour found that, at the time of the email, Mr Fischer did not know what decision Mr Springer would make on these subjects (PJ [89]).

32 The learned primary judge found that the incorporation of AITCS was congruent with Mr Springer’s averseness to using a company that had a trading history. Mr Springer’s intention, at the time AITCS was incorporated, was that it would replace the function of all the other operating companies which he had resolved informally to wind up. Mr Springer wanted the ability to use a new company as an investment vehicle in which he could accumulate income‑producing assets (PJ [90]).

33 The learned primary judge found that, at the time AITCS was incorporated, Mr Springer had neither given any consideration to, nor had any discussions with anybody about, any future dividend or other payments from AITCS. The email of 26 June 2012 was “noteworthy” for the omission of any reference to such subjects (PJ [91]). His Honour accepted Mr Fischer’s evidence that he had no expectation that AITCS would “declare a franked dividend in relation to the income that it had received from the trust back to the trust” (PJ [91]).

### AIT Distributions

34 Prior to the financial year ended 30 June 2012, the companies in the Springer Group received trust distributions from the AIT, depending upon their cash requirements. His Honour accepted Mr Springer’s evidence that the decision regarding distributions from the AIT to the companies in the Springer Group was predominantly made on an “as needs” basis, depending upon which operating entity was expected to require funds for commercial or investment activities. His Honour found that Mr Springer never had any pre-determined plans for distributions and that no such plan was ever raised in the discussions he had with Pitcher Partners, Eric or Mr Shafferman (or anyone else). This was found to be consistent with the absence of forward budgets (PJ [94]).

35 Following his move to Vanuatu, Mr Springer was kept informed by Ms Burke of, and proffered his opinion about, the basis of the annual allocation of the AIT’s income for a given year. Mr Springer was also kept informed by Ms Burke of the accumulation of what would be his entitlement as a beneficiary of the AIT (PJ [95]).

36 Eric acted in accordance with the draft resolutions and other documents drafted by Pitcher Partners after consultation with Mr Springer. After he became a director, Mr Shafferman adopted a like approach (PJ [96]).

37 Although not referred to by the primary judge in his reasons, the evidence before his Honour included contemporaneous evidence relating to the distributions made in the income years ended 30 June 2010 and 30 June 2011.

38 The special purpose trust accounts for the AIT for the income year ended 30 June 2010 record the following distributions as having been made during the year:

|  |  |
| --- | --- |
| Eric Springer | $60,000 |
| Richard Springer | $80,000 |
| [QFH] – UPE – Post 15/12/2009 | $397,244 |
| [Paulownia] –UPE – Post 15/12/2009 | $397,244 |
| [AAF] –UPE – Post 15/12/2009 | $980,000 |
| **Total** | **$1,914,488** |

The total of $1,914,488 represented the entire profit recorded as available for distribution in that year.

39 On 9 June 2011, QFH declared and paid a fully franked dividend of $650,000 to Guardian as trustee for the AIT.

40 On 30 June 2011, Paulownia declared and paid a fully franked dividend of $650,000 to Guardian as trustee for the AIT.

41 The special purpose trust accounts for the AIT for the year ended 30 June 2011 record the following distributions as having been made during the year:

|  |  |
| --- | --- |
| Alex Springer | $2,611,411 |
| Eric Springer  | $20,000 |
| Richard Springer | $43,999 |
| [Paulownia] –UPE – 2011 | $3,536,481 |
| **Total** | **$6,211,891** |

The total of $6,211,891 represented the entire profit recorded as available for distribution in that year.

42 The resolution of the director of Guardian as trustee for the AIT made on 30 June 2011 resolved that all of the net income of the trust attributable to franked dividends (after reducing for directly relevant expenses) was to be set aside and held on trust absolutely for Mr Springer. No other net income was set aside and held on trust for Mr Springer pursuant to that resolution.

43 On 30 June 2012, Paulownia declared and paid a dividend (franked to 99.14%) of $6,284,013 to Guardian as trustee for the AIT.

#### Distribution in respect of the year ended 30 June 2012

44 As noted above at [17]–[19], by 2012, the business operations conducted by the companies in the Springer Group were in the process of being wound down and the companies deregistered. This necessarily had implications for the basis on which distributions from the AIT would be made. In earlier years, distributions to the companies in the Springer Group were made on an “as needs” basis to meet funding requirements of those companies for operating and investment requirements. With the winding down of the operations, it would not be expected that the AIT would be making distributions to the companies in the Springer Group on that basis.

45 On 29 June 2012, Mr Springer received an email from Ms Burke attaching a draft proposed trustee resolution for the distribution of the AIT’s income for that year. She requested that Mr Springer arrange for Eric to sign it by 30 June 2012 and return it to her (PJ [97]).

46 The 2012 trust distribution resolution was signed by Eric as sole director of Guardian (PJ [98]). The resolution was not reproduced by the primary judge. The resolution relating to the distribution of income for the year ended 30 June 2012 was in the following terms:

RESOLVED that the income, defined in clause 3.1 of the Trust Deed, for the year ended 30 June 2012 is to be set aside and held on trust absolutely for the beneficiaries in the manner outlined below.

Pursuant to clause 3.3 of the Trust Deed, the trustee will identify and segregate income from different sources as follows:

**FRANKED DIVIDENDS**

The amount of income attributable to franked dividends (after reducing for directly relevant expenses) is to be set aside and held on trust absolutely for the beneficiaries as follows:

Alex Springer 100%

**INTEREST INCOME**

The amount of income attributable to interest income (after reducing for directly relevant expenses) is to be set aside and held on trust absolutely for the beneficiaries as follows:

Alex Springer 100%

**OTHER INCOME**

The balance of the income for the year ended 30 June 2012 is to be set aside and held on trust absolutely for the beneficiaries as follows:

Richard Springer $45,000

[AITCS] Balance

RESOLVED that all amounts distributed in accordance with this resolution are held on trust absolutely for the benefit of the beneficiaries and no action by the trustee is intended to result in any amount distributed being paid or applied to the benefit of the beneficiary or otherwise dealt with such that the trustee causes a loan from the beneficiary to the trustee. The trustee will account for the distributions made pursuant to this resolution in the financial statements of the trust as unpaid beneficial entitlements.

RESOLVED that the trustee can satisfy its obligation by transferring whatever trust property it sees fit (including accounts or sums receivable) to one or more of the above beneficiaries.

RESOLVED that if any of the amounts set aside above are attributable to an amount that is unrealised then, in discharging its obligation, the trustee will discharge that part attributable to realised amounts first.

47 The financial statements of the AIT for the year ended 30 June 2012 record the AIT as having distributed $8,254,222 in that year and that Mr Springer had, as at 30 June 2012, $10,548,815 in unpaid trust distributions.

48 On 15 November 2012, Mr Springer received a letter from Pitcher Partners, enclosing various finalised income tax returns for the year ended 30 June 2012 and setting out some options in relation to the distribution made by AIT in favour of AITCS. Given the submissions made on appeal, it is necessary to set out an extract of Appendix E to the letter, which was in the following terms:

LOANS & INVESTMENT AGREEMENTS

As you are aware historically profits from AIT have been distributed to corporate beneficiaries to achieve a tax rate of 30% rather than 46.5%. The ATO has recently changed its view on these “paper” distributions to corporate entities of which the profits are not physically transferred to the company, adding to the complexity of accounting for such distributions.

In summary, the ATO currently considers that any such unpaid present entitlements (UPEs) which are not paid before the tax return due date, [convert] to loans at that date. The following UPE in your family group is affected by the new interpretation:

|  |  |  |
| --- | --- | --- |
|  | **BENEFICIARY** | **UPE AT 30/6/12****$** |
| Australian Investment Trust | AIT Corporate Services Pty Ltd | 2,640,207 |

There are a number of options available to avoid the following UPE from converting to a loan. We see the following two options applying to your circumstance:

**Option 1**

The UPE of $2.6M is fully paid before lodgement of the AIT 2012 tax return (i.e. by 15 April 2013). As indicated at Appendix A this involves AIT transferring cash to the corporate beneficiary. Please note that if AIT attends to payment of the company’s tax by 15 April 2013 this can reduce the required cash transfer to be $1,848,145.

Please note that [AITCS] will require its own bank account to be set up if this has not already occurred.

**Option 2**

If the UPE is not paid in full by 15 April 2013, a 7 year investment agreement is required to be in place for the 2012 UPE.

Interest is required to be physically paid annually by the Trustee on the UPE and is determined with reference to the Division 7A benchmark rate (7.05% for the year ended 30 June 2013). The principal will be required to be repaid by no later than the 7 year loan period (but can be paid earlier). As tax will be paid by AIT on behalf of [AITCS], such payments can be considered as payment of the UPE and interest.

Please note that UPEs existing in your family group that were in existence prior to 16 December 2009 will remain quarantined and will not be affected by the new ATO interpretation.

49 On or about 16 November 2012, Mr Springer informed Ms Burke that he would like to enter into a 7 year investment agreement. Mr Springer’s evidence, accepted by the primary judge (at PJ [102]), was that:

whilst my son Eric was then a director of the trustee Guardian I was the only signatory on AIT’s bank account and I thought that having cheques signed by me while overseas might be logistically difficult. In addition, at the time I wasn’t comfortable with transferring such a large sum to a new bank account over which I would have no control (at least initially). At this time I gave no consideration to the possibility of AITCS declaring a dividend.

50 Mr Springer and Pitcher Partners exchanged emails between 25 and 28 March 2013, while Mr Springer was in Mexico. By that time, a bank account for AITCS had been opened (PJ [103]). Again, in light of the emphasis given to this email exchange on appeal, the terms of the email of 25 March 2013 from Ms Burke is set out as follows (emphasis in original):

Now that the bank account for [AITCS] has been opened, I wanted to clarify the transfer of monies from AIT to this company.

The transfer that is required next month, cannot then be transferred out of the company’s bank account back toAIT (the trust).

The cash can be invested/utilised by the company, however if the company then loans the money back to the trust, this creates a Division 7A problem.

The amount of the cash transfer **is $1,848,200** by **30 April 2013 (bank account details are attached).**

The reason the cash transfer is required, is that the trust has distributed profit to [AITCS] and the tax legislation now requires that the cash be “physically paid across” to the company. In the past, it was just a book entry and there was no requirement to physically pay across the cash within a specified period of time.

If you do not want to/ are unable to transfer this amount of cash to the company, the other option is to enter into what iscalled an “investment agreement” whereby the Trust has 7 or 10 years (depending on what option you choose) to pay across the profit entitlement and all that is required in the meantime, is a payment of interest each year at approximately 8%. The difference between the 7 and 10 year agreements, is that the interest rate on the 7 year agreement is lower than the 10 year agreement. There is no tax disadvantage of entering into an investment agreement, as the interest payment from AIT (and assessable to the company), will be tax deductible.

It is important to bear in mind what the company invests in, as capital appreciating assets are not eligible for any CGT discounts when held by a company.

51 The primary judge considered it “particularly noteworthy” that Ms Burke’s email of 25 March 2013 made no reference to the prospect of a dividend being paid by AITCS back to the AIT (PJ [104]).

52 Mr Springer responded by email dated 27 March 2013. As the primary judge recorded (at PJ [105]), the email relevantly said:

I am not comfortable transferring that much money into an account that I have no control over. I therefore would like to enter into a 10 [sic] loan agreement with AIT and [AITCS]. The other option which I would do is to transfer to [sic] money directly to myself as 100% shareholder of [AITCS]. The books could show the funds going directly to [AITCS] and from [AITCS] to me via a dividend payment. Would this comply with ATO requirements. I could then pay the 10% non resident tax on any interest generated.

53 The primary judge accepted Mr Springer’s evidence that he was not sure why he thought AITCS could pay a dividend to him as he now knew that the shareholder of AITCS was the AIT. The primary judge accepted that at least one reason Mr Springer raised the subject of a dividend by AITCS was Mr Springer’s concern about a large sum of money sitting in a bank account over which he had no control (PJ [105]).

54 By email sent on 26 March 2013 (the Commissioner accepted that the date appeared to be a consequence of some time difference between Australia and Mexico), Ms Burke responded to Mr Springer in the following terms:

A strategy that will work is as follows:

1. Pay income tax of [AITCS] by AIT (by 30 April 2013 – as scheduled)

2. On 1 May 2013, pay a fully franked dividend from [AITCS] to AIT (as AIT is 100% shareholder) for the amount of retained earnings in the company i.e. $1,848,145, which will also extinguish the unpaid present entitlement to the company.

3. At 30 June 2013, AIT distributes 100% of its fully franked dividend to [Mr Springer] (given you are a non-resident for Australian tax purposes, this is a final tax)

4. Therefore, no cash transfers are required, the above all occurs via book entry.

So all that you need to do is to pay the tax, and we will take care of the rest.

55 The primary judge accepted Mr Springer’s evidence that, at that time, the payment of a dividend by AITCS seemed to Mr Springer to be the simplest means of dealing with the problem of AITCS’s unpaid income entitlement from the AIT. The primary judge considered that one reason why Mr Springer was happy with this proposal “may well have been an apprehension on his part of a personal need at that time for money” (PJ [106]).

56 On 11 April 2013, Ms Burke sent an email to Mr Springer attaching an unsigned 10 year investment agreement in the following terms:

in addition to our strategy to deal with the UPE to [AITCS] i.e. being cleared with a dividend, Nigel [Fischer] would also like the 10 year investment strategy signed as a safety net.

57 Mr Shafferman, as director of Guardian, signed the agreement. Although the terms of the agreement were not set out by the primary judge, a copy was annexed to the affidavit of Mr Fischer whose evidence was accepted. The agreement bore the date 1 March 2013 (said by Mr Fischer to be an oversight as the agreement was executed on or about 12 April 2013). The parties to the agreement were Guardian as trustee for AIT (as the “Main Trust”) and Guardian as trustee for the AITCS (2012 UPE-10 year sub-trust) (as the “Sub-Trust”). Clause 3 of the agreement provided:

3.1 The stated acknowledgements and agreements of the Main Trust and Sub-trust concerning the treatment of the UPE are:

3.1.1 made for the sole purpose of seeking to comply with the views and requirements of the Commissioner of Taxation stated in PS LA 2010/4, without any admission as to the appropriateness of those requirements; and

3.1.2 subject to the ongoing application of the current requirements of the Commissioner of Taxation.

3.2 If the Commissioner of Taxation no longer holds the view that UPEs are characterised as a loan for Division 7A purposes, or there is a change in law to that effect, such that the acknowledgements contained in this Agreement are unnecessary, obsolete or mistaken, this Agreement will have no further effect without the need for the parties to do anything further, in which case the UPE will continue to be recognised in accordance with the terms of the relevant trust deed.

58 The term “Unpaid Present Entitlement” or “UPE” was defined in item 3 of the Schedule as follows:

**Unpaid Present Entitlement** (Recitals): The amount representing the distribution made by the Main Trust to a private company beneficiary in the income year immediately preceding the income year in which an “investment agreement” must be made in order to comply with PS LA 2010/4

59 In relation to the net income of the AIT for the year ended 30 June 2012, the following transactions occurred:

(1) on 28 June 2012, Guardian as trustee for the AIT appointed income of $2,640,209 that was not in the form of franked dividends to AITCS. The distribution of $2,640,209 was not paid to AITCS, creating an unpaid entitlement (**2012 UPE**) (PJ [9]);

(2) on 17 April 2013, AITCS drew on the 2012 UPE to discharge its liability to tax for the 2012 income year (PJ [10]). All of the liability arose because the trust distribution created assessable income for AITCS under s 97 of the ITAA 1936 (PJ [20(a)]);

(3) on 1 May 2013, AITCS declared a fully franked dividend of $1,848,145 to the AIT which was an amount equal to the remaining 2012 UPE. The dividend was paid by reducing the balance of the 2012 UPE to nil (PJ [11]); and

(4) on 23 June 2013, Guardian as trustee for the AIT appointed the net income of the 2013 income year attributable to franked dividends to Mr Springer (PJ [12(a)]). This amount included the fully franked dividend declared by AITCS on 1 May 2013.

60 The financial statements of the AIT for the income year ended 30 June 2013 disclose that, as at 30 June 2013, Mr Springer had unpaid beneficiary entitlements (including interest) of $12,546,677.

#### Distribution in respect of the year ended 30 June 2013

61 The primary judge found that Mr Springer had no recollection of his involvement in June 2013 in decisions as to the allocation of income for the year ended 30 June 2013, except in one particular respect. Although Ms Burke had initially drafted a resolution for the allocation of a distribution to Mr Springer’s son, Richard, the trustee resolution, as made, contained no such distribution. The primary judge found (based on inference) that Mr Springer had instructed Mr Shafferman and Ms Burke that Richard was not to receive a distribution for that year (PJ [109]).

62 The primary judge accepted Mr Springer’s evidence that he was not informed by either Ms Burke or Mr Fischer about the prospect of a dividend being declared during the year ended 30 June 2014 or that he would ultimately receive it. The primary judge accepted Mr Springer’s evidence that he did not suggest it be paid. The primary judge speculated that one reason for this “may well have been” that, unlike in the previous income year, he did not have any particular personal need for funds (PJ [115]).

63 A letter dated 15 January 2014 was sent by Pitcher Partners to Mr Shafferman as director of AITCS. Although his Honour described the correspondence as “eloquent” (PJ [168]), the letter assumed some importance on appeal. Enclosed with the letter were the financial statements and income tax returns for the Springer Group and Mr Springer and his sons, for the year ended 30 June 2013. The letter relevantly stated:

We estimate the PAYG commitments, income tax and other payments due for AIT over the next 12 months, on behalf of the entities listed, to be as follows:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Period** | **Due Date** | **AIT Corporate Services** | **AIT** | **Richard** | **Total** |
|  |  | $ | $ | $ | $ |
| A$ Interest Payment (net drawings) | 31/12/2013 |  | paid |  |  |
| 2013 Balance of Tax(2) | 14/02/2014 | 595,845(2) |  |  | 595,845 |
| 2014 PAYG December | 28/02/2014 | 70,645 |  | 1,968(1) | 72,613 |
| December 2013 BAS | 28/02/2014 |  | 148,153 |  | 148,153 |
| 2014 PAYG March (est) | 28/04/2014 | 327,000 |  |  | 327,000 |
| March 2014 BAS (est) | 28/04/2014 |  | 129,500 |  | 129,500 |
| 2014 PAYG June (est) | 28/07/2014 | 133,000 |  |  | 133,000 |
| June 2014 BAS (est) | 28/07/2014 |  | 129,500 |  | 129,500 |
| 2015 PAYG September (est) | 28/10/2014 | 133,000 |  |  | 133,000 |
| September 2014 BAS (est) | 28/10/2014 |  | 129,500 |  | 129,500 |

1. Please advise if a variation to nil is required for Richard’s December 2013 PAYG instalment.

2. The balance of 2013 tax is required to be paid by 14 February 2014 to ensure that there are sufficient franking credits to pay a fully franked dividend to AIT prior to lodgement of the AIT tax return on 28 February 2014. Please refer to further UPE & Loan discussion below.

**UPE & Loans**

|  |  |  |
| --- | --- | --- |
|  | Beneficiary | UPE at 30/6/13 |
| Australian Investment Trust | AIT Corporate Services Pty Ltd | $2,646,163 |

As you are aware historically profits from AIT have been distributed to corporate beneficiaries to achieve a tax rate of 30% rather than 46.5%. As advised last year, the ATO currently considers that any such unpaid present entitlements (UPEs) which are not paid before the tax return due date, [convert] to loans at that date. The following UPE in your family group is affected by the new interpretation:

There are a number of options available to avoid the UPE from converting to a loan, the relevant option for your situation being to pay the UPE in full prior to lodgement of the AIT 2013 tax return.

Instead of transferring cash to the company, payment can be effected by declaring a dividend by 28 February 2014 to pay out the balance of the UPE. For this to occur, the 2013 company tax must be paid by AIT by 14 February 2014 to ensure sufficient franking credits are available. We note that AIT is to attend to all tax and PAYG instalment payments on behalf of AIT Corporate Services.

64 In relation to the net income of the AIT for the year ended 30 June 2013, the following transactions occurred:

(1) on 23 June 2013, Guardian as trustee for the AIT appointed all of its income of $2,646,163 (other than franked dividends) to AITCS. This was not paid, creating an unpaid entitlement (**2013 UPE**) (PJ [12(b)]). The net income of the 2013 income year attributable to franked dividends was appointed to Mr Springer;

(2) on 14 February 2014, AITCS drew on the 2013 UPE to discharge its liability to tax for the 2013 income year (PJ [13]). All of the liability arose because the trust distribution created assessable income for AITCS under s 97 of the ITAA 1936 (PJ [20(b)]);

(3) on 27 February 2014, AITCS declared a fully franked dividend to the AIT in an amount equal to the remaining 2013 UPE of $1,780,453. The dividend was paid by reducing the balance of the 2013 UPE to nil (PJ [14]); and

(4) on 23 June 2014, Guardian as trustee for the AIT appointed the net income of the 2014 income year attributable to franked dividends to Mr Springer (PJ [15(a)]). This amount included the dividend paid by AITCS on 27 February 2014.

### Loan Agreement in relation to the 2014 UPE

65 On 18 March 2016, AITCS and the AIT entered into a loan agreement (that complied with Division 7A) in respect of the unpaid balance of AITCS’s present entitlement to a share of the net income of the AIT for the year ended 30 June 2014 (PJ [17]).

66 Although not set out in the reasons of the primary judge, the loan agreement included the following terms:

2 Loans

**2.1 Timing**

The Lender may have lent money to the Borrower before the Commencement Date at the Borrower’s request and may lend money to the Borrower on or after the Commencement Date at the Borrower’s request.

**2.2 Terms**

This document sets out the terms of all loans made by the Lender to the Borrower:

(a) before the Commencement Date where the Lodgement Day for the year of income in which the relevant loan was made is after the Commencement Date; and

(b) on or after the Commencement Date.

3.0 Repayment

**3.1 Period for Repayment**

Subject to clause 3.2, the Principal Sum for each Yearly Period must be repaid by the Borrower before the seventh anniversary of the date on which the first loan is made by the Lender to the Borrower during that Yearly Period.

**3.2 Yearly Repayment**

Before the 30th June each year, the Borrower must repay the minimum yearly repayment requirements under section 109E(5) Tax Act (1936) for each Principal Sum for each Yearly Period.

**3.3 Early Repayment**

The Borrower may repay the Principal Sum for each Yearly Period before the date set out in clause 3.1 for any reason.

4 Interest

**4.1 Interest on Principal Sum**

Subject to clause 4.2, the Borrower must pay the Lender interest on the outstanding Principal Sum for each Yearly Period at the Interest Rate.

67 A letter from Pitcher Partners to Mr Shafferman dated 22 March 2016 records that:

We note that from 1 July 2008 [Mr Springer] became a non-resident for Australian taxation purposes. Based on our correspondence throughout the period we understand that [Mr Springer] now currently resides in New Zealand and therefore remains a non‑resident. [Mr Springer]’s 2015 income tax return has been prepared on the basis that he was a non-resident for the entire 2014/2015 financial year.

68 No findings were made by the primary judge as to when Mr Springer ceased to reside in Vanuatu and became a resident of New Zealand.

### Tax consequences to Mr Springer

69 Mr Springer’s status as non-resident meant that he was not liable to any tax in respect of the trust distributions attributable to fully franked dividends derived by the AIT (including the fully franked dividends AIT received from AITCS). These distributions were non-assessable non‑exempt income pursuant to ss 128B(3)(ga) and 128D of the ITAA 1936 (PJ [193]). If the non‑franked income derived by the AIT had been distributed directly to Mr Springer (rather than to AITCS), it would have borne tax at the marginal rates for non-resident taxpayers which, in the 2012 and 2013 income years, did not provide for a tax-free threshold and were up to 45%: ITAA 1936 s 98A(1); *Income Tax Rates Act 1986* (Cth) s 12(1), Sch 7, applicable to the years of income ended 30 June 2012 and 30 June 2013.

70 The Commissioner did not contend before the primary judge (PJ [57]), nor on appeal, that Mr Springer’s residence status in Vanuatu was part of any reimbursement agreement or any scheme.

# SECTION 100A

## Legislative provisions

71 Subsection 100A(1) of the ITAA 1936 provides:

(1) Where:

(a) apart from this section, a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate; and

(b) the present entitlement of the beneficiary to that share or to a part of that share of the income of the trust estate (which share or part, as the case may be, is in this subsection referred to as the ***relevant trust income***) arose out of a reimbursement agreement or arose by reason of any act, transaction or circumstance that occurred in connection with, or as a result of, a reimbursement agreement;

the beneficiary shall, for the purposes of this Act, be deemed not to be, and never to have been, presently entitled to the relevant trust income.

(emphasis in original)

72 The effect of the deeming provided for in s 100A is that s 99A applies to the trustee of the trust estate because there was no beneficiary presently entitled to the relevant trust income.

73 A “reimbursement agreement” is defined in sub-s 100A(7) as follows:

Subject to subsection (8), a reference in this section, in relation to a beneficiary of a trust estate, to a reimbursement agreement shall be read as a reference to an agreement, whether entered into before or after the commencement of this section, that provides for the payment of money or the transfer of property to, or the provision of services or other benefits for, a person or persons other than the beneficiary or the beneficiary and another person or other persons.

74 Subsection 100A(8) provides:

A reference in subsection (7) to an agreement shall be read as not including a reference to an agreement that was not entered into for the purpose, or for purposes that included the purpose, of securing that a person who, if the agreement had not been entered into, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into.

75 “Agreement” is defined in sub-s 100A(13) as follows:

***agreement*** means any agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings, but does not include an agreement, arrangement or understanding entered into in the course of ordinary family or commercial dealing.

## Section 100A assessments

76 The Commissioner had assessed Guardian as trustee for the AIT as being liable to income tax under s 99A(4A) of the ITAA 1936 on the amounts to which AITCS had otherwise been made presently entitled, on the basis that s 100A of the ITAA 1936 applied in each of the 2012, 2013 and 2014 years of income. The Commissioner also issued assessments for administrative penalties (PJ [22]).

77 Before the primary judge, the Commissioner’s position was that, on or before 27 June 2012, Guardian (as trustee) and Mr Springer reached an understanding that, in the 2012 income year and future income years:

(a) AITCS would be incorporated for the purpose of being made presently entitled to the income of the AIT;

(b) Guardian as trustee would benefit from the amount to which AITCS was made presently entitled; and

(c) Mr Springer would ultimately benefit from the amount to which AITCS was made presently entitled.

This was referred to in the primary judge’s reasons as the “**2012 Understanding**”. The Commissioner’s contention was that the 2012 Understanding was a reimbursement agreement for the purposes of s 100A of the ITAA 1936 (PJ [23]).

78 In the alternative, the Commissioner had contended at trial that, on or before 23 June 2013, Guardian and Mr Springer reached an understanding that, in the 2013 income year and future income years (PJ [24]):

(a) Guardian as trustee would benefit from the amount to which AITCS was made presently entitled; and

(b) Mr Springer would ultimately benefit from the amount to which AITCS was made presently entitled.

This was referred to in the primary judge’s reasons as the “**2013 Understanding**”. The Commissioner’s alternative position was that the 2013 Understanding was a reimbursement agreement for the purposes of s 100A of the ITAA 1936 (PJ [25]).

## Primary Judge’s decision in relation to s 100A

### 2012 income year

79 The learned primary judge concluded that s 100A had no application in the 2012 income year (PJ [132], [142], [154], [167]).

80 His Honour observed (at PJ [120]) that, flowing from the text of s 100A, three principal issues arose:

(a) Was there a reimbursement agreement, as defined?

(b) If so, did the present entitlement of AITCS in a given income year arise from such an agreement?

(c) If so, was that present entitlement attended with a tax avoidance purpose?

81 As his Honour recognised, the second issue arises from the text of s 100A(1)(b), which requires a relevant connection between a reimbursement agreement and a present entitlement (PJ [123]). His Honour found that, based on a textual approach (and in particular the text of ss 100A(1)(b) and 100A(7)), for s 100A to apply, the reimbursement agreement concerned must precede the payment of money or transfer of property to or the provision of services or other benefits and the present entitlement of the beneficiaries (PJ [128]–[130]).

82 The third issue arises from the text of s 100A(8). As his Honour correctly observed (at PJ [125]):

With its succession of negatives, s 100A(8) is awkwardly drafted. Working through these, its effect is [to] remove from the agreements otherwise captured by s 100A(7) those which do not have as a purpose the removal or reduction of a liability to tax by a relevant person in a given income year.

83 His Honour concluded that, based on his findings of fact, the 2012 Understanding did not exist (PJ [131]). Critically, his Honour found that there was no support for the existence of such an understanding in the contemporaneous evidence as to the events in June 2012 on or prior to the resolution of 28 June 2012 (which created the present entitlement of AITCS). His Honour had found that, as at 28 June 2012, Mr Springer had given no consideration to and had no discussion with anybody about any future dividend from AITCS (PJ [90], [97], [99], [105]–[106]).

84 His Honour further found that the agreement or understanding that was in fact entered into in June 2012 involved the incorporation of AITCS, the appointment of AITCS as a member of the class of eligible beneficiaries of the AIT and the resolution by Guardian that AITCS be entitled to the relevant net income of AIT for the 2012 income year (PJ [135]). That agreement was further found by his Honour to be an agreement entered into in the course of ordinary family or commercial dealing. No element of that agreement as made in June 2012 in any way entailed the future payment of a dividend by AITCS (PJ [136]). The incorporation of AITCS and its appointment as a potential beneficiary of the AIT were explicable by Mr Springer’s transition to retirement and his desire to minimise the prospect of any risks from the trading life of the companies in the Springer Group carrying over into that retirement. This conclusion flowed from findings based on the primary judge’s assessment of the credit of Mr Springer (PJ [146]–[152]).

85 His Honour further held, based on dicta of Hill J in *East Finchley Pty Ltd v Federal Commissioner of Taxation* (1989) 90 ALR 457at 474, that s 100A(8) required the hypothesis to be formulated as to what income tax *would* become payable if the relevant agreement had not been entered into (PJ [158], [160]). This led his Honour to undertake a counterfactual analysis (PJ [161]). His Honour accepted that it was a lawful possibility that, absent the distribution to AITCS, the trust income may have gone directly to Mr Springer (PJ [161]). However, based on his Honour’s evaluation of the prevailing circumstances in 2012, his Honour concluded that, objectively, what would have occurred is that either AITCS would have received and retained in full its unpaid present entitlement in cash, or it would have invested it with Guardian in accordance with a Division 7A compliant loan agreement, or some combination of these. Neither of these counterfactuals entailed any tax consequences for Mr Springer (PJ [165]–[166]).

### 2013 income year

86 The primary judge also held that s 100A had no application in the 2013 income year (PJ [173]). Unlike in the 2012 income year, by the time AITCS became presently entitled to trust income in the 2013 income year, consideration had been given to the payment of a dividend by AITCS and a franked dividend had been paid. However, his Honour concluded that, as at 23 June 2013 (the time of the resolution which resulted in AITCS’s present entitlement), whether AITCS would again pay a dividend was “wholly conjectural” (PJ [168]). His Honour concluded that neither then nor beforehand was there any agreement, arrangement or understanding between Mr Springer and Guardian that this would happen (PJ [168]). His Honour read the email correspondence from Pitcher Partners of 15 January 2014 as revealing that “it was not until some six months after the trust distribution resolution that Pitcher Partners put to Mr Shafferman in relation to how to deal with the unpaid present entitlement for the 2013 income year were the options of a payment in cash or the payment of a franked dividend” (PJ [168]).

87 His Honour expressed the following conclusions:

170 Of course what is disclosed by the January 2014 email is not determinative. But this accounting firm was an influential adviser. And what is in the advice is consistent with all of the background circumstances. Mr Springer remained in transition to full retirement; indeed, that longstanding plan was further advanced. There remained a need for AITCS, a “clean skin” corporate beneficiary, for risk minimisation, flexibility and wealth accumulation and investment purposes. Also by then, the theoretical contingency of an adult son relocating overseas had, in the person of Eric, been realised. Both as at the time of the 2013 income year trust distribution and, for that matter thereafter, Mr Springer remained, independently of any distribution or dividend, a wealthy man.

171 What the Commissioner termed the 2013 Understanding just did not exist as between Mr Springer and Guardian. Further, for like reasons to the 2012 income year, this was just an ordinary family or commercial dealing. Yet further, again for like reasons to those given in respect of the 2012 income year, what “would have” occurred was that AITCS would have received and retained in full its unpaid present entitlement in cash or it would have invested it with Guardian in accordance with a Div 7A compliant loan agreement, or perhaps some combination of these. The Commissioner’s postulated distribution to Mr Springer would never have occurred. That was never more than a, lawful, theoretically available possibility.

88 A dividend was ultimately declared by AITCS on 27 February 2014 (PJ [169]). Mr Springer’s evidence was that the first Mr Springer became aware of the dividend was after it had been paid (PJ [115]).

## Commissioner’s case on appeal in relation to s 100A

89 The Commissioner’s case on appeal in relation to s 100A was narrower than the case put before the primary judge. On appeal, the Commissioner did not seek to contend that a reimbursement agreement existed as at 28 June 2012, at the time Guardian as trustee for the AIT appointed income to AITCS. The Commissioner on appeal accepted the primary judge’s conclusion that s 100A did not apply in respect of the year ended 30 June 2012.

90 The Commissioner on appeal also accepted that s 100A did not apply in respect of the distributions of AIT’s net income for the year ended 30 June 2014.

91 The Commissioner’s case on appeal was that a different conclusion should be drawn in respect of the year ended 30 June 2013. He relied on the “alternative” position described by the primary judge at PJ [24] and [25] (and defined at [78] of these reasons as the 2013 Understanding). The Commissioner contended that, in respect of the year ended 30 June 2013, on or before 23 June 2013, Guardian (as trustee) and Mr Springer reached an understanding that Guardian as trustee would benefit from the amount to which AITCS was made presently entitled and Mr Springer would ultimately benefit from that amount. This 2013 Understanding was said to be a reimbursement agreement for the purposes of s 100A.

92 The Commissioner submitted that the parties to the agreement or understanding were Guardian and Mr Springer. The precise capacity in which Mr Springer was said to be such a party was less clearly articulated. The Commissioner relied upon the primary judge’s findings (at PJ [113] and [135]) that Mr Springer controlled Guardian, the AIT and AITCS.

93 The Commissioner submitted that it was necessary to focus on the representatives of Pitcher Partners in evaluating whether an arrangement existed as at 23 June 2013 pursuant to which AITCS would pay a dividend to AIT. The Commissioner contended that as at 23 June 2013, there existed within Pitcher Partners an understanding that a dividend would be paid by AITCS and that this understanding could properly be imputed to Mr Springer because of his existing practice of following the advice of Pitcher Partners. Whilst not a mere cypher, Mr Springer generally acted in accordance with the recommendations and advice of Pitcher Partners. Although Mr Shafferman signed the resolution by which Guardian made the distribution to AITCS and the resolution by which AITCS paid the dividend to Guardian, he did so at the request of and on the recommendation of Pitcher Partners.

94 The Commissioner expressly challenged the finding made by the primary judge that, as at 23 June 2013 (the date on which the resolution making AITCS presently entitled to the unfranked income of the AIT was made), “whether AITCS would again pay a dividend was wholly conjectural”(PJ [168]). The Commissioner disputed the primary judge’s construction of the correspondence from Pitcher Partners sent in January 2014.

95 The primary judge construed the letter from Pitcher Partners dated 15 January 2014 as putting to Mr Shafferman options in relation to how to deal with AITCS’s unpaid present entitlement for the 2013 year; those options being the payment of a dividend in cash or a franked dividend (PJ [168]).

96 The Commissioner contended that the letter of 15 January 2014 needed to be read in light of the history of the Springer Group and the emails from Pitcher Partners the previous year (sent on 25 and 28 March 2013, set out at [50] and [52], above). When construed in light of those emails, it was apparent that, rather than presenting options to Mr Shafferman, the letter of 15 January 2014 was summarising the “strategy” set out in the email of 25 March 2013. The sentence “[i]nstead of transferring cash to the company, payment can be effected by declaring a dividend by 28 February 2014 to pay out the balance of the UPE” was not to be construed as inviting Mr Shafferman to consider the transfer of cash to AITCS as an alternative to the declaration of a dividend. Rather, that sentence (consistent with the email of 11 April 2013) was to be read as a summary of the strategy that had been developed in the previous year of AITCS declaring and paying a dividend to Guardian as way of “clearing out” the unpaid present entitlement, without requiring the transfer of cash to AITCS. That reading was submitted to be consistent with the terms of note 2 to the table which refers to the need for the balance of tax to be paid by AITCS “to ensure there’s sufficient franking credits to pay the franked dividend to AIT prior to the lodgement of the [AIT] return” (see [63] above).

97 The Commissioner contended that the payment of cash would not have been an option because Pitcher Partners had been instructed by Mr Springer in March 2013 that he was not comfortable with a large sum being deposited into a bank account over which he had no control, a concern which the primary judge had found was not “a passing concern” (PJ [103]).

98 The Commissioner contended that his preferred construction of the letter of January 2014 was consistent with the affidavit evidence of Mr Shafferman who said, in relation to that letter:

I no longer have any recollection of any discussions about the issues raised in the letter — in particular, about the UPE converting to a loan. As was my *practice, I trusted that the recommendation to pay the dividend would solve the issue, and if Alex had any difficulty, he would tell me.*

In other words, Mr Shafferman had read the letter as containing a “recommendation”.

99 In his affidavit, Mr Fischer said in relation to the letter of 15 January 2014:

[54] On 15 January 2014, I approved a letter to Mr Shafferman enclosing the financial statements for the 2013 financial year for Springer Group companies … The financial statements of AITCS recorded an unpaid income distribution from AIT payable to AITCS of $2,646,163 (**2013 UPE**). In this letter, Mr Shafferman was referred to previous advice of the three available options to avoid a Division 7A deemed dividend on the 2013 UPE, namely:

(a) entering into a loan agreement (in accordance with the ATO view expressed in PSLA 2010/4) prior to lodgement of the AIT’s 2013 tax return;

(b) paying the UPE in full prior to the lodgement of the AIT’s 2013 tax return;

(c) have AITCS declare a dividend by 28 February 2014 to set-off the balance of the UPE.

[55] Prior to asking Ms Burke to send this letter I did not have any discussions with Ms Burke, Mr Shafferman or Mr Springer about which option would be best.

100 In oral examination in chief, Mr Fischer gave the following evidence in relation to the letter of 15 January 2014 and para [54] of his affidavit:

Sorry. Paragraph 54. And the wording of this paragraph is a bit ambiguous, and I apologise for that. It’s ambiguous in that the letter [of 15 January 2014] does not specifically refer to the three options which I have tabled here in paragraph 54, being options A, B and C. Instead, the letter only referred to option B and option C. So in this paragraph, I state three options, where the letter itself, specifically, only stated two options. However, what I was trying to say in here was that the three options referred to the previous advice that I had provided, being the previous advice to the letter [of 15 January 2014]. And so when you read the letter … the letter refers to previous advice as to the options available and, in this paragraph, I was referring to those three options, albeit the letter itself then only stated the two options. So I just wanted to make that clarification.

101 Whilst expressly disclaiming a challenge to his Honour’s credibility finding, the Commissioner contended that Mr Fischer’s evidence, although honestly given, needed to be viewed in light of the fact that his evidence related to a letter sent almost 10 years earlier and which he approved, but did not write.

102 Counsel for the Commissioner also drew the Court’s attention to the evidence of Mr Fischer in cross-examination at first instance:

[COMMISSIONER’S COUNSEL]: It was the case, Mr Fischer, that there was a pattern — which I will describe before I get you to answer the question — of the trust’s non-franked dividend income having been dealt with in a certain way in a series of transactions in each of 2010 and 2011, that is, the non-franked dividend income of the trust for those two years. The pattern, I will describe to you: step 1 was a distribution by the trust of that non-franked dividend income to a corporate beneficiary; in the following year — step 2 — a declaration of a franked dividend by the corporate beneficiary to the trust; and, step 3, a distribution of franked dividends to Mr Springer in that following year.

You would agree with that?---Yes.

That pattern was repeated for distributions of non-franked dividend income by the trust in each 2012 and 2013?---Yes.

The pattern was started, but not completed, in 2014?---Yes. The words pattern and steps are your words, though, sir.

And I’ve put it to you that there was a pattern of transactions and you’ve agreed with me?---Well, I would like to make a correction that there were isolated transactions. I would not refer to them as a pattern, and I would not refer to them as steps. I agree with each transaction that you have stated in your statement to me.

You agree with me that there was a coincidence of the nature and series of transactions, that I’ve described as a pattern with three steps, between each of the years 2010 through to and including 2013?---Yes.

103 And later:

COMMISSIONER’S COUNSEL: My proposition to you is that the step 1 transaction in relation to 2013 was recommended to facilitate what I’ve described as the steps 2 and 3 in 2014?---No.

## Role of the Court on Appeal

104 Given the submissions made by the parties, it is worthwhile restating the role of this Court on appeal.

105 In *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22 (2016); 331 ALR 550, the Court (French CJ, Bell, Keane, Nettle and Gordon JJ) said at 558–9 [43]:

The fact that the judge and the majority of the Court of Appeal came to different conclusions is in itself unremarkable. A court of appeal conducting an appeal by way of rehearing is bound to conduct a “real review” [*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22at 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ)] of the evidence given at first instance and of the judge’s reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings [*Devries v Australian National Railways Commission*(1993) 177 CLR 472 at 479–81; [1993] HCA 78 (Deane and Dawson JJ); *Fox* 214 CLRat 128 [29] (Gleeson CJ, Gummow and Kirby JJ); *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; [2010] HCA 31 at 380 [76] (Heydon, Crennan and Bell JJ)]. But a court of appeal should not interfere with a judge’s findings of fact unless they are demonstrated to be wrong by “incontrovertible facts or uncontested testimony” [*Fox* 214 CLR at 128 [28] (Gleeson CJ, Gummow and Kirby)], or they are “glaringly improbable” or “contrary to compelling inferences” [*Fox* 214 CLR at 128 [29]; see also *Miller & Associates* 241 CLRat 380 [76]]. In this case, they were not. The judge’s findings of fact accorded to the weight of lay and expert evidence and to the range of permissible inferences. The majority of the Court of Appeal should not have overturned them.

(footnotes inserted)

106 In *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (2018); 264 CLR 541, Kiefel CJ said (at 556–7 [32]–[33]) (footnotes omitted):

[32] To the extent necessary to address the ground or grounds on which an appellant claims that a judgment under appeal is erroneous, an appellate court in an appeal (whether in the strict sense or by way of rehearing) from a final judgment of a judge sitting without a jury “is obliged to conduct a real review of the trial and ... of [the] judge’s reasons”. The appellate court “cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions”.

[33] Performing its obligation to conduct a “real review”, the appellate court “must, of necessity, observe the ‘natural limitations’ that exist in the case of any appellate court proceeding wholly or substantially on the record”. Limitations of that nature can include: “those occasioned by the resolution of any conflicts at trial about witness credibility based on factors such as the demeanour or impression of witnesses; any disadvantages that may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from that evidence, viewed as a whole”. The appellate court needs to be conscious that “[n]o judicial reasons can ever state all of the pertinent factors; nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another”. The more prominently limitations of that nature feature in a particular appeal, the more difficult it will be for the appellate court to be satisfied that the primary judge was in error.

107 It is thus important to understand the basis on which a particular finding of fact is based. A Court on appeal is in as good a position as the primary judge in making a finding based on the interpretation of a document. It is in a more difficult position in interpreting evidence given orally where the meaning can depend as much on the way it is stated as on its content.

## Reimbursement Agreement

108 The Commissioner correctly conceded that s 100A requires a reimbursement agreement to exist at or prior to the time by which a beneficiary is made presently entitled to net income of the trust. As the primary judge held, this required that a reimbursement agreement existed as at 23 June 2013 (PJ [128]–[130]).

109 As is evident from the text of s 100A(13), “agreement” for these purposes is defined broadly to include any agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether enforceable or not or intended to be enforceable by legal proceedings.

110 The summary of principles set out in the decision of Gordon J in *Re Day* [2017] HCA 2; (2017) 340 ALR 368 at 386 [73] are equally applicable in the present context (footnotes omitted):

The applicable principles may be summarised as follows. An arrangement is something less than a binding contract or agreement. It may be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it. An arrangement should be consensual, and there should be some adoption of it. But it is not essential that the parties are committed to it or are bound to support it.

111 To this summary, having regard to the present context, respectfully, the following are added:

(1) Whilst it is not necessary that an understanding be enforceable or that it be intended to be enforceable in order to constitute an “agreement” for the purposes of s 100A, the understanding must nevertheless reflect a common intention, or consensus existing between at least two parties. Each of the terms “agreement, arrangement or understanding” in context imply at least an arrangement to which there is more than one party: *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 443–4 (Gibbs and Mason JJ). A plan drawn up or conceived by one person alone cannot be an arrangement: *Lutovi* 140 CLR at 443 (Gibbs and Mason JJ).

(2) Furthermore, where the payment of moneys is proposed to be made to the trustee by a beneficiary (here AITCS), the beneficiary ordinarily needs to be a party to the reimbursement agreement. As Hill J said in *East Finchley* 90 ALR at 474:

Since the relevant agreement requires the payment of moneys to be made by some person, generally the beneficiary (in this case the payment clearly relied upon was a payment by the beneficiary to the trustee) it seems to me to be a matter of necessity that the relevant reimbursement agreement could only have been entered into where the beneficiary is in fact a party. It was not in dispute that for there to be an arrangement there had to be at least two parties to it: [*Lutovi* 140 CLR at 443 (Gibbs and Mason JJ), Murphy J agreeing at 453, 451 (Stephen J)].

And later (at 475):

I have great difficulty in conceiving in the context of s 100A of the Act, how an arrangement to which that section applies could be constituted by the directors of a trustee company alone or for that matter by them and the trustee without the beneficiary being also a party. This will certainly be the case where the so called “reimbursement agreement” is one requiring payment by the beneficiary to the trustee … [I]t seems to me that the question who are parties or necessary parties to an arrangement must depend upon the circumstances of each particular case and the legislative context under consideration. In a case such as the present for there to be a reimbursement agreement, the necessary parties must be at the very least the trustee and each non-resident beneficiary, the trustee being represented for the purposes of the arrangement by some one or more individuals.

(3) For an arrangement or understanding to exist, it must be adopted in the sense that it must be assented to, whether expressly or impliedly. Assent, in this context, requires a consensus between two or more parties: *Lutovi* 140 CLR at 443–4 (Gibbs and Mason JJ).

(4) An arrangement whereby a person would act in accordance with the wishes of another is capable of being an “agreement” within s 100A(13): *Commissioner of Taxation v Prestige Motors Pty Ltd* [1998] FCA 221; (1998) 82 FCR 195 at 216 (Hill and Sackville JJ, Beaumont J agreeing at 197). By contrast, an *expectation* that an arrangement *will be entered* into after the creation of the present entitlement is not sufficient for the purposes of s 100A. The distinction is a fine one but is important. As Hill J said in *East Finchley* 90 ALR at 476:

It is sufficient for present circumstances to say that in a case where all that has happened is that a trustee has resolved to distribute to a beneficiary in circumstances where that beneficiary becomes presently entitled and thereafter enters into an arrangement with the beneficiary for a payment to be made by the beneficiary those facts alone will not bring the arrangement within the meaning of s 100A of the Act. And in my view it matters not that the trustee has some expectation that he could reach an arrangement with the beneficiary for reimbursement in the future.

Of course it would be a different case if the tribunal had concluded on the evidence before it that there was some arrangement reached between the trustee and the beneficiaries through the agency of Dr Thomas or his wife prior to the resolution of 23 June 1983.

112 As explained further below, given the circumstances as they existed at 23 June 2013, it ought not to be concluded that the payment of a dividend by AITCS was objectively “wholly conjectural”.

113 *First*, contrary to PJ [106], any speculated need by Mr Springer for funds had no relevance to the likelihood or expectation that a dividend would be declared by AITCS to the AIT or that the franked income resulting therefrom would be distributed to Mr Springer. The documentary evidence does not support a finding that distributions of franked income by the AIT to Mr Springer were based on Mr Springer’s need for funds. As set out above, the financial statements of the AIT for the year ended 30 June 2012 record the AIT as having distributed $8,254,222 to Mr Springer in that year and that Mr Springer had, as at 30 June 2012, $10,548,815 in unpaid trust distributions. As at 21 March 2013, it is not inferred that Mr Springer had any “need for funds” that required a further distribution be paid to him. This conclusion is consistent with the findings of the primary judge (at PJ [165]) and the evidence given by Mr Fischer in examination in chief (emphasis added):

TAXPAYER COUNSEL: So, Mr Fischer, casting your mind back to June 2012, when you were coming to consider drafting [the] resolution to the trustees — or the trustee, rather, to appoint AIT trust income, would you have advised the trustees to distribute substantial amounts of income … directly to Mr Springer?---It depends on the form of the income, so---

So how would your advice differ to the form of income?---Well, from an overall setting, I wouldn’t — I wouldn’t recommend, in the first instance, any income be declared — distributed to Mr Springer.

Why is that?---Well, he didn’t need it.

**And why didn’t he need it?---He was due substantial amounts of money from the trust in the form of a loan owed to him, and also an unpaid present entitlement owed to him, which he was able to withdraw upon at any time.**

114 *Second*,it is noted that, by 23 June 2013, Mr Springer had been advised of the need to ensure that, absent AITCS loaning its unpaid present entitlement to the AIT, any unpaid present entitlement created in AITCS be cleared out before the lodgement of the AIT tax return. It was also apparent, as at 23 June 2013, that Mr Springer had decided not to implement a loan arrangement for the 2012 AITCS unpaid present entitlement because AITCS had, on 1 May 2013, declared a dividend to the AIT to discharge the 2012 unpaid present entitlement. In order to comply with the Commissioner’s views as to Division 7A, having created an unpaid present entitlement in AITCS on 23 June 2013, to comply with that advice, it was thus necessary for that present entitlement to be paid or discharged prior to the lodgement of the tax return for the AIT for the year ended 30 June 2013.

115 *Third*,by 23 June 2013, Mr Springer had made his discomfort with cash being held the bank account of AITCS known to those advising him.

116 *Fourth*, the Commissioner’s construction of the correspondence of 15 January 2014, in light of the advice provided by Pitcher Partners the previous year, is accepted. That is, the letter of 15 January 2014 is to be construed as recording a recommendation rather than presenting alternative options.

117 However, there is a difference between a matter not being wholly conjectural and a matter being the subject of an understanding or arrangement. For s 100A to be satisfied, there must be an “agreement” in existence at or prior to the date of the resolution by which AITCS was made presently entitled. As Hill J considered in *East Finchley* 90 ALR at 474, where the reimbursement agreement is said to require the payment by a beneficiary,the parties to the agreement must include that beneficiary or at the least a representative or controller of that beneficiary. An expectation by a party that an arrangement could be reached with AITCS at some later date for a dividend to be paid by AITCS to the AIT is not sufficient. For s 100A to be satisfied as at 23 June 2013, there had to be an arrangement or understanding between two or more parties that AITCS would pay a dividend to the AIT.

118 The Commissioner contended that it was to be inferred not only that there was a plan in existence as at 23 June 2013 for AITCS to pay a dividend to the AIT, but that it had been assented to by Guardian and Mr Springer. That assent was to be inferred from the practice of Mr Springer in following the advice of Pitcher Partners.

119 However, based on the findings of the primary judge, any such advice or recommendation was not communicated to Mr Springer on or before 23 June 2013.

120 The primary judge accepted Mr Springer’s evidence that he was not informed by Pitcher Partners about the prospect of a dividend being declared during the 2014 income year or that he would ultimately receive it, and that Mr Springer did not raise a suggestion that it be paid (PJ [115]). That finding was based on the primary judge’s assessment of Mr Springer’s oral evidence and was not challenged on appeal as glaringly improbable.

121 The Court is unable to accept the Commissioner’s invitation to find that an understanding between Ms Burke and Mr Fischer existed as at 23 June 2013 that AITCS would pay a dividend based on his proffered construction of the letter of 15 January 2014 and the surrounding circumstances. Mr Fischer’s evidence was that he did not discuss the declaration of a dividend by AITCS to “clear out” its UPE for the year ended 30 June 2013 with Ms Burke prior to reviewing the letter of 15 January 2014. Although challenged in cross-examination, Mr Fischer’s evidence that he did not recommend the distribution of AIT income to AITCS in 2013 in order to facilitate the payment of a dividend by AITCS to AIT was accepted by the primary judge (PJ [39], [61]). The Commissioner on appeal did not seek to challenge the primary judge’s findings as glaringly improbable.

122 Even if there were an understanding between Ms Burke and Mr Fischer, the findings made by the primary judge fall short of founding a basis for imputing that understanding to Mr Springer. The Commissioner sought to invoke the following passage from the High Court’s decision in *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Press Holdings Limited* [2001] HCA 32; (2001) 207 CLR 235 at 264 [95] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ):

There is no point in making a finding about what would be concluded concerning the purpose of an advisor unless that purpose is then attributed to a relevant person. It is reasonably clear that, albeit in a slightly elliptical fashion, Hill J was doing that. He was justified in doing so. As was mentioned above, it is to be expected that those who participate in a complex, international, commercial transaction will be concerned about its tax implications, and will seek expert advice. Attributing the purpose of a professional advisor to one or more of the corporate parties in the present case is both possible and appropriate. In some cases, the actual parties to a scheme subjectively may not have any purpose, independent of that of a professional advisor, in relation to the scheme or part of the scheme, but that does not defeat the operation of s 177D.

123 The context of the comments made by the High Court was Part IVA of the ITAA 1936 and, in particular, the inquiry mandated by s 177D. As explained further below at [179]–[180], the entire object of s 177D is to require a conclusion be drawn in respect of the purpose of a party based on the factors specified in s 177D. That purpose is not the party’s actual subjective purpose but an attributed purpose: see *Commissioner of Taxation v Hart* [2004] HCA 26; (2004) 217 CLR 216 at 242–3 [63] (Gummow and Hayne JJ). Subjective purpose of any person is not relevant to Part IVA: *Hart* 217 CLR at 243 [65] (Gummow and Hayne JJ).

124 The inquiry in relation to the existence of a reimbursement agreement in s 100A is different. It requires the existence of an “agreement” (as defined in s 100A(10)) invoking, as it does, a requirement of consensus and adoption. The scope for attribution in that context is far more limited. In the absence of a finding that a communication had been made to Mr Springer or his agent of a plan or recommendation prior to 23 June 2013, it was necessary to find that Ms Burke or Mr Fischer had authorisation to act on or behalf of those entities in order to conclude that there was consensus or adoption by Guardian and Mr Springer. No such finding was made by the primary judge and, apart from relying on the general practice of Mr Springer to follow the advice of Pitcher Partners, the Commissioner did not press for such a finding before this Court. Mr Fischer’s evidence was that Ms Burke worked under his supervision. There was no evidence that she had authority to act on behalf of Mr Springer or the entities in the Springer Group. Whilst the evidence supports a finding that Mr Springer generally followed the advice of Mr Fischer, there is no evidence that Mr Fischer was an authorised representative of Mr Springer or the Springer Group.

125 For these reasons, it is concluded that, although the payment of a dividend by AITCS to the AIT as at 23 June 2013 was not “wholly conjectural”, there was no “agreement” as at 23 June 2013 within s 100A(13) which involved the payment of such a dividend and, therefore, there was no “reimbursement agreement” for the purposes of s 100A.

126 This conclusion makes it unnecessary to consider the issues of purpose and the scope of the phrase “ordinary commercial or family dealing”. It is noted that the Commissioner’s submissions on both of these issues were necessarily predicated on the payment of the dividend forming part of the reimbursement agreement. Counsel for the Commissioner expressly and, in our view, correctly denied that the mere inclusion of a corporate beneficiary as an eligible beneficiary and the fact that a distribution may be made to such a beneficiary would be sufficient to demonstrate a dealing that was not an ordinary commercial or family dealing. The Commissioner’s submissions in relation to the non-application of the exception of ordinary commercial or family dealings were premised on the payment of the dividend by AITCS forming part of the agreement.

# PART IVA OF ITAA 1936

## Part IVA Assessments

127 On 5 January 2018, the Commissioner issued the following alternative assessments to Mr Springer to give effect to determinations made under Part IVA of the ITAA 1936 (PJ [28]):

|  |  |  |  |
| --- | --- | --- | --- |
| **Income year** | **Increase in assessable income** | **Tax liability** | **Penalty amount** |
| 2012 | $2,640,209 | $1,193,376.10 | $596,688.00 |
| 2013 | $2,646,166 | $1,172,774.70 | $586,387.35 |
| 2014 | $2,670,117 | $1,183,552.65 | $591,776.30 |
| **Total** | **$7,956,492** | **$3,549,703.45** | **$1,774,851.65** |

### Commissioner’s position in relation to Part IVA at first instance

128 At first instance, the Commissioner identified alternative schemes to support the Part IVA determinations and assessments as follows.

129 The “**Primary Scheme**” involving (PJ [26(a)]):

(a) the incorporation of AITCS and the determination by Mr Springer, as Principal of the AIT, to make AITCS a member of the eligible class of beneficiaries;

(b) the appointment of income of the AIT for the 2012 year to AITCS;

(c) the drawing down by AITCS of part of that entitlement to discharge its liability to income tax for the year ended 30 June 2012;

(d) the declaration and payment by AITCS of a fully franked dividend on 1 May 2013 to the trustee for the AIT (reducing AITCS’s unpaid present entitlement from the year ended 30 June 2012 to nil);

(e) the appointment of franked income of the AIT for the year ended 30 June 2013 to Mr Springer and the appointment of the unfranked income of the AIT for the 2013 year to AITCS;

(f) the drawing down by AITCS of part of that entitlement to discharge its liability to income tax for the year ended 30 June 2013;

(g) the declaration and payment by AITCS of a fully franked dividend on 27 February 2014 to the trustee for the AIT (reducing AITCS’s unpaid present entitlement from the year ended 30 June 2013 to nil);

(h) the appointment of franked income of the AIT for the year ended 30 June 2014 to Mr Springer and the appointment of unfranked income of the AIT for the 2014 year to AITCS;

(i) the drawing down by AITCS of part of that entitlement to discharge its liability to income tax for the year ended 30 June 2014; and

(j) the entry into a loan agreement between AIT and AITCS that complied with Division 7A in relation to the balance of AITCS’s unpaid present entitlement for the year ended 30 June 2014.

130 In the alternative, the Commissioner identified narrower related schemes in the following terms:

(a) The 2012 related scheme involving (PJ [30(a)]):

(i) the incorporation of AITCS and the determination by Mr Springer, as Principal of the AIT, to make AITCS a member of the eligible class of beneficiaries;

(ii) the appointment of income of the AIT for the 2012 year to AITCS;

(iii) the drawing down by AITCS of part of that entitlement to discharge its liability to income tax for the year ended 30 June 2012;

(iv) the declaration and payment by AITCS of a fully franked dividend on 1 May 2013 to the trustee for the AIT (reducing AITCS’s unpaid present entitlement from the year ended 30 June 2012 to nil); and

(v) the appointment of franked income of the AIT for the year ended 30 June 2013 to Mr Springer.

(b) The 2013 related scheme involving (PJ [30(b)]):

(i) the appointment of the unfranked income of the AIT for the 2013 year to AITCS;

(ii) the drawing down by AITCS of part of that entitlement to discharge its liability to income tax for the year ended 30 June 2013;

(iii) the declaration and payment by AITCS of a fully franked dividend on 27 February 2014 to the trustee for the AIT (reducing AITCS’s unpaid present entitlement from the year ended 30 June 2013 to nil); and

(iv) the appointment of franked income of the AIT for the year ended 30 June 2014 to Mr Springer.

(c) The 2014 related scheme involving (PJ [30(c)]):

(i) the appointment of unfranked income of the AIT for the 2014 year to AITCS; and

(ii) the entry into a loan agreement between the AIT and AITCS that complied with Division 7A in relation to the balance of AITCS’s unpaid present entitlement for the year ended 30 June 2014.

131 Before the primary judge, the Commissioner’s position was that, if the Primary Scheme had not been entered into or carried out, Mr Springer would, or might reasonably be expected to have had included in his assessable income the amounts of AIT net income appointed to AITCS in each of the years ended 30 June 2012, 30 June 2013 and 30 June 2014, pursuant to s 98A(1) of the ITAA 1936 (PJ [31]).

132 In the alternative, the Commissioner’s position was that (PJ [32]):

(a) if the 2012 related scheme had not been entered into or carried out, Mr Springer would, or might reasonably be expected to have had included in his assessable income the amount of the AIT net income appointed to AITCS in the 2012 income year (being $2,640,209), pursuant to s 98A(1) of the ITAA 1936;

(b) if the 2013 related scheme had not been entered into or carried out, Mr Springer would, or might reasonably be expected to have had included in his assessable income the amount of the AIT net income appointed to AITCS in the 2013 income year (being $2,646,166), pursuant to s 98A(1) of the ITAA 1936; and

(c) if the 2014 related scheme had not been entered into or carried out, Mr Springer would, or might reasonably be expected to have had included in his assessable income the amount of the AIT net income appointed to AITCS in the 2014 income year (being $2,670,117) pursuant to s 98A(1) of the ITAA 1936.

133 It was said by the Commissioner that, in each of the relevant income years, Mr Springer obtained a tax benefit within the meaning of s 177C(1) of the ITAA 1936 in connection with the scheme, being the amount of assessable income identified at [132] not being included in his assessable income (PJ [33]).

134 At first instance, the Commissioner’s position was that, having regard to the matters set out in s 177D(2), it would be concluded that one or more persons entered into or carried out the scheme or part of it for the dominant purpose of enabling Mr Springer to obtain this tax benefit. The Commissioner’s view was that the persons and entities which entered into and carried out the scheme or part of it included each of Mr Springer, AITCS and Guardian (as trustee) (PJ [34]).

135 On this basis, the Commissioner’s position was that Part IVA of the ITAA 1936 applied to negate the tax benefit obtained by Mr Springer by including these amounts of assessable income in Mr Springer’s assessable income (PJ [35]).

### Conclusions of the primary judge in relation to Part IVA

136 The learned primary judge held that the steps and course of conduct identified by the Commissioner as the Primary Scheme could constitute a “scheme” within the broad definition in s 177A. His Honour stated (at PJ [182]):

So broad is the definition that the steps and course of conduct identified by the Commissioner as the Primary Scheme could constitute a “scheme”, as defined. But, as at June 2012, there was nothing pre-ordained about either the declaring on 1 May 2013 by AITCS of a fully-franked dividend payable to the AIT or the like declaring of a fully franked dividend by AITCS on 27 February 2014. These were just theoretical contingencies open in law by the enlarging of the eligible beneficiary class of the AIT so as to include another corporation. However, as the contemporaneous correspondence in June 2012 reveals, even the existence of that theoretical contingency was not then adverted to.

137 His Honour concluded (at [183]) that:

[T]he purpose, objectively, and certainly not the dominant purpose, of the Primary Scheme as identified by the Commissioner was never the streaming of a franked dividend to AIT and thence to Mr Springer. There is a contrivance or artificiality about the Primary Scheme but that contrivance or artificiality is that of the Commissioner, informed by the false wisdom of hindsight.

138 The primary judge held (at PJ [184]) in relation to the Primary Scheme that:

[T]he dominant purpose of Mr Springer, Guardian and, for that matter, even AITCS (controlled by Mr Springer in any event) or Mr Fischer, was always, on and from 27 June 2012, the minimisation of risk to Mr Springer in retirement and having a new corporate beneficiary to AIT’s eligibility class to which distributions might be made instead of to an individual and which might, into the indefinite future, serve as a vehicle for wealth accumulation and passive investment.

139 In relation to the determination of whether Mr Springer obtained a tax benefit, the learned primary judge noted that, over the income years in question, Part IVA was amended principally to insert new s 177CB. His Honour further observed that neither party had submitted that, in the circumstances of the present case, the amendments to Part IVA required any “particular differentiation” as between versions of Part IVA, income year by income year. Accordingly his Honour did not embark on any such consideration (PJ [177]).

140 In relation to s 177C, his Honour recognised that Mr Springer bore the onus of proving that he did not obtain a tax benefit in connection with the scheme and concluded that Mr Springer had discharged that onus (at PJ [188]–[189]):

[188] In this case, Mr Springer has sought to discharge the onus of proof by a combination of evidence — his own, that of Mr Fischer and, overwhelmingly and underpinning and consistent with his and Mr Fischer’s evidence, by reference to contemporaneous correspondence and events. For like reasons to those already given in relation to the s 100A based assessments of Guardian, and even allowing for whatever difference there may be between “would have” and “might reasonably be expected”, the Commissioner’s posited counterfactual is not just something which might not reasonably be expected to have occurred but for the Primary Scheme. It is, with respect, against all reason.

[189] It is clear to the point of demonstration that what might reasonably be expected to have occurred is that AITCS would have received and retained in full its unpaid present entitlement in cash or it would have invested it with Guardian in accordance with a Division 7A compliant loan agreement, or perhaps some combination of these. The loan agreement option would have had attraction to Mr Springer, because of an expressed concern on his part about leaving a large amount of funds in a bank account over which he had no control. There is contemporaneous support for such a predication in the form of such loan agreements. The Commissioner’s postulated distribution to Mr Springer would never, ever, have occurred. There is Mr Fischer’s emphatic evidence to this effect. No competent adviser would have recommended such a course. Yet further, Mr Springer just did not need the money and would never, in this respect, have acted contrary to Mr Fischer’s advice. And neither Eric nor [Mr Shafferman] would have embarked on a frolic of their own.

141 The primary judge further held (at PJ [191]) that, even if there were a tax benefit, a consideration of the eight factors in s 177D served “only to reinforce a conclusion as to an absence of a dominant purpose to obtain a tax benefit”. His Honour’s conclusions (at PJ [192]–‍[197]) may be summarised as follows:

(1) *Manner in which the scheme was entered into or carried out*: the appointment of income to the corporate beneficiary, AITCS, in each year created a present entitlement which was unpaid. The dividend was declared in each of the following two years of income in order to set off that unpaid present entitlement, thereby ensuring that there would not be a deemed dividend under Division 7A, “initially as a sequel to the subject of a dividend later having been raised by Mr Springer” (PJ [192]).

(2) *Form and Substance*: the form and substance of the scheme were identical.

(3) *Timing*: the timing of the dividend was, in each instance, shortly before the end of an income year and was concerned with ensuring the provisions of Division 7A would not be infringed.

(4) *The operation of the ITAA 1936 but for Part IVA*:The operation of the ITAA 1936, but for Part IVA, was that AITCS was assessed, and paid tax, on the income to which it was presently entitled at the corporate rate and Division 7A did not operate to deem any unpaid present entitlement of AITCS to be a dividend. The appointment of fully franked income to Mr Springer resulted in Mr Springer deriving non-assessable non‑exempt income because he was a non-resident at that time.

(5) *The change in the taxpayer’s financial position*:during the 2012 income year, Mr Springer received an appointment but his financial position in that year did not change as a result of the Primary Scheme. It did change in the following year when he received a franked distribution from the AIT. The primary judge considered that Mr Springer did not receive any benefit or part of any of the income that was appointed to the corporate beneficiary. There was no collateral arrangement by which he benefitted in substance from that income at all. Similarly, in the 2013 and 2014 income years, Mr Springer’s financial position only improved to the extent of the franked dividends. The improvement in his financial position was not, in his Honour’s view, explicable by any tax benefit. Mr Springer was entitled to cash as a consequence of the appointments and that is how his financial position improved.

(6) *Change in the financial position of any person connected to the taxpayer*: the primary judge considered that AITCS “accumulated substantial assets, being a sequel to its present entitlements” (PJ [195]). The improvement in its financial position was not explicable by any tax benefit but, rather, by the income to which it was entitled. According to his Honour, that, in particular, was very difficult to reconcile with a dominant purpose on the part of any relevant person to obtain a tax benefit.

(7) *Any other consequence of the Primary Scheme for Mr Springer or any other person*: the primary judge considered that the scheme fulfilled its purpose of asset protection and other benefits for Mr Springer as a man in advanced transition to full retirement, including a related purpose of the accumulation of assets by AITCS. This also was considered to accord with Mr Fischer’s evidence as to various non-tax reasons for why he would recommend a trust appointing to a corporate beneficiary. Although one consequence of the scheme was that the corporate beneficiary thereby had the flexibility to declare a dividend, the payment of such a dividend (franked or otherwise) was never a dominant purpose. It was just an inherent feature, beneficial in the contingency it offered, of a corporate beneficiary.

(8) *Nature of connection*: while there was undoubtedly a connection between Mr Springer and each of AITCS, Guardian and AIT, the attractions in AITCS had everything to do with Mr Springer’s stage of life and his apprehension as to risk and family circumstances.

142 In his Honour’s view, neither individually nor collectively did these factors lead to a conclusion that there was a dominant purpose to obtain a tax benefit by any relevant actor — Mr Springer (or any entity he controlled), Eric, Mr Shafferman or Mr Fischer (PJ [197]).

143 His Honour’s consideration of the Commissioner’s alternative schemes was set out in PJ [198] in the following terms:

The position is no different if one looks alternatively to what is termed above the 2012 related scheme, the 2013 related scheme or the 2014 related scheme. Indeed, in relation to the 2014 related scheme, the position is even more stark. This “scheme” entailed nothing more than the appointment of income to a corporate beneficiary and the entry into a compliant loan agreement. For reasons already canvassed the income concerned one might never, reasonably, expect that income would have been appointed directly to Mr Springer.

144 Many of the learned primary judge’s conclusions in relation to Part IVA appear to us to flow from the manner in which the Commissioner identified the Primary Scheme and put his case in relation to that identified scheme. That identified scheme encompassed steps carried out between June 2012 and 18 March 2016, including the incorporation of AITCS and the inclusion of AITCS as an eligible beneficiary. His Honour’s conclusions at PJ [184] are derived from the evidence concerning the reasons for the incorporation of AITCS and its inclusion in the class of eligible beneficiaries of the AIT. The conclusions his Honour drew in relation to the 2013 related scheme, in particular, seem to us to have been drawn through the prism of the conclusions drawn by his Honour in relation to the Primary Scheme.

### Commissioner’s Part IVA case on appeal

145 The Commissioner on appeal did not seek to rely upon the Primary Scheme or the 2014 related scheme. The Commissioner’s case on appeal was thus focussed on the narrower 2012 related scheme and the 2013 related scheme. In relation to the 2012 related scheme, the Commissioner’s emphasis was on the steps involving the appointment of income to AITCS and the subsequent dividend paid by AITCS to the AIT, rather than on the reasons for the incorporation of AITCS and its inclusion in the class of eligible beneficiaries.

146 Furthermore, having regard to the conclusions expressed by his Honour in relation to s 177C, and, in particular, the reliance placed by the primary judge on the evidence of Mr Fischer at PJ [189] to support his conclusion, the Commissioner submitted on appeal that the new s 177CB was relevant to the 2013 year of income and required consideration.

## Application of Part IVA

### Scheme

147 “Scheme” is defined in s 177A(1) of the ITAA 1936 as meaning:

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and

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

148 The meaning of “scheme” is further extend by s 177A(3) which provides:

The reference in the definition of ***scheme*** in subsection (1) to a scheme, plan, proposal, action, course of action or course of conduct shall be read as including a reference to a unilateral scheme, plan, proposal, action, course of action or course of conduct, as the case may be.

149 The definition of “scheme” encompasses not only a series of steps which together can be said to constitute a “scheme” or a “plan” but also (by its reference to “action” in the singular) the taking of but one step. There is no reference to a scheme having some commercial or other coherence: *Hart* 217 CLR at 238 [47] (Gummow and Hayne JJ). It is noted, however, that the manner by which the scheme came to be entered into or carried out is a factor required to be considered in determining the dominant purpose of the parties to the scheme: s 177D(2)(a). In that respect, any cohesion or planning may have implications for the conclusion to be drawn in respect of that purpose. This is considered further below.

150 The definition of scheme in s 177A, by its inclusion of sub-paragraph (b) and subsection (3), stands in contrast to the definition of agreement in s 100A(10), which more closely resembles s 177A(1)(a). In *Federal Commissioner of Taxation v Star City Pty Ltd* [2009] FCAFC 19; (2009) 175 FCR 39 the following observation was made by Dowsett J at 93 [205]–[208] in relation to s 177A(1)(a):

[205] … The various terms used in that paragraph may arguably assume a common purpose or other meeting of minds in a multilateral transaction. However the expressions used in para (b) are to different effect. Sections 177A(3) and (4) demonstrate that such conduct may be unilateral or multilateral. Whilst a scheme, plan or proposal may involve some integrated purpose, an action, course of action or course of conduct need not. It is not necessary that all participants participate in all elements of the scheme.

…

[208] As the primary judge observed, the definition of the term “scheme” is very broad. It includes both unilateral and multilateral conduct. The terms “action”, “course of action” and “course of conduct” suggest that Parliament intended to include virtually any action or collection of actions in the definition of the word “scheme”.

151 The “scheme” looks to the particular form of the transaction entered into: *Hart* 217 CLR at 228 [18] (Gleeson CJ and McHugh J).

152 The 2012 related scheme and 2013 related scheme were each a “scheme” as defined in s 177A. The particular form of the 2012 related scheme as identified was not limited to the formation of AITCS or the inclusion of AITCS as an eligible beneficiary of the AIT, or even to the creation of the present entitlement of AITCS to net income of the AIT. The 2012 related scheme included the declaration and payment of the franked dividend by AITCS to AIT following the creation of AITCS’s unpaid present entitlement and the distribution by the AIT of that franked income to Mr Springer. The 2013 related scheme was likewise not limited to the creation of the present entitlement of AITCS to net income of the AIT but also included the declaration and payment of the franked dividend by AITCS to the AIT following the creation of AITCS’s unpaid present entitlement and the distribution by the AIT of that franked income to Mr Springer.

### Tax Benefit

153 Part IVA applies only if a taxpayer obtains “a tax benefit in connection with a scheme” within s 177C of the ITAA 1936.

154 Section 177C relevantly provides:

(1) Subject to this section, a reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as a reference to:

(a) an amount not being included in the assessable income of the taxpayer of a year of income where that amount would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out

155 As the Full Court said in *Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd* [2010] FCAFC 94; (2010) 186 FCR 410 at 418 [25]–[26] (Dowsett and Gordon JJ, Edmonds J agreeing at 426 [62]):

[25] The legislation requires a comparison between the relevant scheme and an alternative postulate: [*Hart* 217 CLR at 243 [66] (Gummow and Hayne JJ)].

[26] The alternative postulate requires a “prediction as to events which would have taken place *if the relevant scheme had not been entered into or carried out* and that prediction must be sufficiently reliable for it to be regarded as reasonable” (emphasis added). “A reasonable expectation requires more than a possibility”: [*Commissioner of Taxation v* *Lenzo* [2008] FCAFC 50; (2008) 167 FCR 255 at 278 [122] (Sackville J), citing *Federal Commissioner of Taxation v Peabody* [1994] HCA 43; (1994) 181 CLR 359 at 385 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)]. The question posed by s 177C(1) is answered on the assumption that the scheme had not been entered into or carried out: [*Lenzo* 167 FCR at 277–8 [121] (Sackville J)].

156 As the primary judge recognised (at [187]), Mr Springer bore the onus of proving that he did not obtain a tax benefit in connection with a scheme for the purposes of s 177C. The onus on the taxpayer was explained by the Full Court in *RCI Pty Ltd v Federal Commissioner of Taxation* [2011] FCAFC 104at [128]–[131] (Edmonds, Gilmour and Logan JJ) in the following terms (emphasis added) (footnotes omitted):

[128] It is trite that a taxpayer in this Court bears the onus of proving that an assessment is excessive. It follows that it is the taxpayer who bears the onus to establish that a tax benefit is excessive. It might do that by establishing that there is no tax benefit or by establishing that it is less than that determined by the Commissioner.

[129] It has been said in the past … that the taxpayer carries the onus of establishing that the Commissioner’s counterfactual is unreasonable; and that if the taxpayer does not establish that the Commissioner’s counterfactual is unreasonable, then the taxpayer fails to prove that the assessment is excessive on that ground. (Of course, the taxpayer may establish that the assessment is excessive on some other ground, such as that the conclusion required to be drawn as to the dominant purpose of a party to the scheme under s 177D(b) cannot be drawn, but that is another matter.)

[130] Such an articulation of the onus is erroneous, but if not, certainly unhelpful because it can lead one into error. *Even if a taxpayer establishes that the Commissioner’s counterfactual is unreasonable, it will not necessarily follow that he has established that the assessment is excessive. That is because the issue is not whether the Commissioner puts forward a reasonable counterfactual or not; it is a question of the court determining objectively, and on all of the evidence, including inferences open on the evidence, as well as the apparent logic of events, what would have or might reasonably be expected to have occurred if the scheme had not been entered into*. *Thus, even if a taxpayer establishes that the Commissioner’s counterfactual is unreasonable, that will not discharge the onus the taxpayer carries if the court determines that the taxpayer would have or might reasonably be expected to have done something which gave rise to the same tax benefit.*

[131] That such an articulation of the onus is at worst erroneous and at best unhelpful, can also be illustrated from the other side of the coin, because it implies that if the Commissioner’s counterfactual is reasonable that is the end of the matter; even if the court were to conclude, on all the evidence, inferences and logic referred to, that if the scheme had not been entered into the taxpayer would have or might reasonably be expected to have done something which did not give rise to a tax benefit, or which gave rise to a tax benefit less than that thrown up by the Commissioner’s counterfactual. In our view, that cannot be correct.

157 Mr Springer bore the onus of satisfying the Court of what might reasonably be expected to have occurred in the absence of the scheme. This required Mr Springer to satisfy the Court that, in the absence of the scheme, he would not have received a direct distribution of unfranked income from the AIT, and what might reasonably be expected to have occurred instead.

158 The premise of the determinations and assessments issued to Mr Springer was that, had the 2012 related scheme and the 2013 related scheme not been entered into, it might reasonably be expected that Mr Springer would have been made presently entitled to the amount of net income of the AIT for each of the income years ended 30 June 2012 and 30 June 2013 to which AITCS had been made presently entitled. As a result, Mr Springer might reasonably have been expected to have had included in his assessable income the amounts of the AIT net income which AITCS included in its assessable income in each of those years of income.

159 The primary judge rejected this as a reliable prediction of what would have taken place in the absence of the scheme in the most strident of terms. His Honour was satisfied that, in the absence of the scheme, what might reasonably be expected to have occurred was that AITCS would have received and retained in full its unpaid present entitlement in cash or it would have invested that entitlement with Guardian in accordance with a Division 7A compliant loan agreement, or perhaps some combination of these (PJ [166]).

160 It is not accepted that, absent the scheme, it might reasonably be expected that AITCS would have received and retained in full its unpaid present entitlement in cash. Such an alternate postulate is inconsistent with the concerns Mr Springer expressed to Pitcher Partners at the time about leaving a large amount of funds in a bank account over which he had no control.

161 Nor is it accepted that, absent the scheme, it might reasonably be expected that AITCS would have invested the funds representing its present entitlement with AIT in accordance with a Division 7A compliant loan agreement for the following reasons:

162 *First*, although the learned primary judge considered that there was contemporaneous support in the form of loan agreements for such a prediction (PJ [189]), as set out above, the form of the investment agreement in fact entered into in 2013 does not provide such support. The terms of that agreement make it apparent that, consistent with the description accorded to it in Ms Burke’s email of 11 April 2013, the investment agreement was a “safety net”. It was to operate only to the extent that the Commissioner’s views as expressed in PS LA 2010/14 would characterise any unpaid present entitlement of AITCS as a loan. In other words, the 2013 Division 7A loan agreement was not drafted as a substitute for AITCS’s unpaid present entitlement “being cleared with a dividend” prior to the lodgement of AIT’s tax return for the year ended 30 June 2012 (which Pitcher Partners understood to be the time from which the Commissioner would treat an unpaid present entitlement as a loan). The loan agreement dated 18 March 2016 was in quite different terms but it was not entered into at or near the time of the creation of AITCS’s present entitlement to AIT net income for the years ended 30 June 2012 and 30 June 2013.

163 *Second,* the commercial substance of such an arrangement involving AITCS investing the funds representing its present entitlement with Guardian is quite different from the scheme carried out because, under that alterative arrangement, AITCS would retain an asset (in the form of its investment in Guardian) whereas, under the scheme, the asset is owned directly by Mr Springer. A loan or investment agreement entered into by AITCS would not be an asset owned directly by Mr Springer but an asset owned directly by AITCS, repayments of which would have ended up in a bank account over which Mr Springer did not then have control. Under the scheme, Mr Springer had direct ownership and control of the right to payment of the share of net income. A prediction that has a different commercial outcome from the scheme entered into and carried out is not readily accepted as reliable.

164 *Third*, the very commercial outcome which would result from an investment or loan agreement by AITCS was in fact rejected by Mr Springer when he proposed the payment of a dividend by AITCS. By the time AITCS’s present entitlement was created on 23 June 2013, Mr Springer had evidenced no desire for a loan agreement. The taxpayer’s rejection of an alternative at the relevant time is important evidence in determining what would have occurred in the absence of the scheme: *Federal Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd* [2011] FCAFC 49; (2011) 192 FCR 325 at 372–3 [153(12)] (Edmonds J).

165 The primary judge was firmly of the view that “[t]he Commissioner’s postulated distribution to Mr Springer would never, ever, have occurred” (PJ [189]). In coming to this conclusion, the primary judge relied upon the evidence of Mr Fischer to the effect that no competent adviser would have recommended such a course and the primary judge was satisfied that none of Mr Springer, Eric nor Mr Shafferman would have acted contrary to Mr Fischer’s advice.

166 Mr Fischer’s evidence in examination in chief was that he would not advise “in the first instance” that any income be distributed to Mr Springer, but this advice was dependent “on the form of income”. The history of distributions to Mr Springer shows that franked income of the AIT had been distributed to Mr Springer. Based on this historical fact, the reference to “the form of income” is inferred to be a reference to whether the income took the form of franked income. Mr Fischer had not advised against a distribution of the AIT net income to Mr Springer, irrespective of Mr Springer’s lack of need for funds, where that net income was attributable to franked income.

167 The import of Mr Fischer’s evidence was that a competent adviser would not advise that the AIT *unfranked* income be distributed to Mr Springer. Whilst Mr Springer was a non-resident, that income would have been taxed at the highest marginal tax rate, whereas franked income would be received by Mr Springer without additional Australian tax payable. Mr Fischer’s evidence is understood to be that, absent a demonstrable need by Mr Springer for the money, a competent tax adviser would not recommend Mr Springer incur a tax impost.

168 Prior to the amendments made to Part IVA with effect from the year of income ended 30 June 2013, the Australian tax cost of implementation was an objective consideration to be taken into account in determining the reasonableness and reliability of the alternate postulate. The tax consequences of implementing the alternate postulate might objectively be shown to be such that the potential cost could call into question the reliability of the prediction that the alternative was reasonable. Such was the case in *RCI* [2011] FCAFC 104 at [136] and [141]–[150] (Edmonds, Gilmour and Logan JJ); and *Peabody* 181 CLR at 385–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)*.*

169 The primary judge appears to have been of the view that, given Mr Springer was already a wealthy man, a distribution to Mr Springer in the years ended 30 June 2012 and 2013 that would come with an additional tax cost would not be economically justifiable (albeit that the additional tax cost would, in substance, be the difference between the corporate tax rate in fact paid by AITCS and the marginal tax rate to which Mr Springer would be subject). However, the findings at PJ [165] and [189] are difficult to reconcile with the findings at [106] and [115] about Mr Springer’s need for funds at that time. As explained above at [113], the objective evidence of Mr Springer’s financial position as at 30 June 2012 does not suggest that he had any need for a distribution from the AIT in that year. Furthermore, the primary judge accepted the evidence of Mr Fischer in relation to the nature of the advice that would be provided by a competent tax advisor.

170 In *RCI* [2011] FCAFC 104and *Commissioner of Taxation v News Australia Holdings Pty Ltd* [2010] FCAFC 78, the taxpayers were able to discharge their onus on appeal of s 177C by showing that, absent the scheme, they would not have undertaken a particular activity or a particular course. In this case, Mr Springer did not seek to contend that, in the absence of the scheme, the income would have been accumulated by the trustee of the AIT. This is not surprising given that the evidence before the Court was that the trustee of the AIT had not exercised a power of accumulation in the past. In these circumstances, for Mr Springer to discharge his onus, it was not sufficient for him to show that the Commissioner’s alternate postulate was not reasonable. He had to satisfy the Court of what might reasonably be expected to have happened in the absence of scheme. For the reasons set out above at [161]–[164], it is not considered that Mr Springer satisfied that onus.

171 Accordingly, it is considered that Mr Springer obtained a tax benefit in each of the years ended 30 June 2012 and 30 June 2013 in the form of the non-inclusion of an amount in Mr Springer’s assessable income in those years.

172 The conclusion in relation to the existence of a tax benefit in respect of the 2013 related scheme, is further supported by s 177CB(4). Although raised, but not addressed, before the primary judge, the application of s 177CB(4) is one of construction and law and it was open to the Commissioner to raise the application of that section in his notice of appeal.

173 Section 177CB is a statutory directive as to how the alternate postulate for the purposes of s 177C is to be determined. Relevantly, it is in the following terms:

(1) This section applies to deciding, under section 177C, whether any of the following (***tax effects***) would have occurred, or might reasonably be expected to have occurred, if a scheme had not been entered into or carried out:

(a) an amount being included in the assessable income of the taxpayer;

…

(3) A decision that a tax effect might reasonably be expected to have occurred if the scheme had not been entered into or carried out must be based on a postulate that is a reasonable alternative to entering into or carrying out the scheme.

(4) In determining for the purposes of subsection (3) whether a postulate is such a reasonable alternative:

(a) have particular regard to:

(i) the substance of the scheme; and

(ii) any result or consequence for the taxpayer that is or would be achieved by the scheme (other than a result in relation to the operation of this Act); but

(b) disregard any result in relation to the operation of this Act that would be achieved by the postulate for any person (whether or not a party to the scheme).

174 By reason of s 177CB(4)(b), it was not open to the primary judge to have regard to the higher Australian income tax cost that would have applied had the income been distributed directly to Mr Springer in determining what might reasonably be expected to have happened had the 2013 related scheme not been entered into or carried out.

175 For completeness, it is noted that, for the reasons explained above, given the fact that AITCS paid out as a dividend the post‑tax amount of its present entitlement to the AIT net income for the years ended 30 June 2012 and 30 June 2013, AITCS was not used in those years as a vehicle for wealth accumulation or asset protection (cf PJ [153]). Accordingly, a direct distribution to Mr Springer is not rendered an unreliable prediction of what might have been expected to occur in the absence of the scheme because a direct distribution would not result in wealth being accumulated in AITCS.

176 Notwithstanding the strident terms with which the learned primary judge expressed his conclusion, it is to be concluded that Mr Springer did receive a tax benefit in the year ended 30 June 2013 on the basis that, for the purposes of s 177C in the absence of the scheme, it might reasonably be expected that Mr Springer would have been made presently entitled to the net income of the AIT attributable to unfranked income.

### Dominant Purpose

177 For Part IVA to apply, it is necessary that it would be concluded that at least one of the parties who entered into or carried out the scheme (or any part thereof) did so for the sole or dominant purpose of enabling Mr Springer to obtain at tax benefit in connection with the scheme: ITAA 1936 s 177D. The conclusion must be one that would be drawn by a reasonable person: *Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34;(1996) 186 CLR 404 at 421–2 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

178 The purpose referred to in s 177D is defined in s 177A(5) as including the “dominant purpose”. “Dominant” in this context means “the ruling, prevailing or most influential purpose”: *Spotless Services* 186 CLR at 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

179 As was made clear in *Hart* 217 CLR at 242–3 [63] (Gummow and Hayne JJ), the inquiry mandated by s 177D is directed at the dominant purpose of a party who enters into or carries out the scheme and not at ascertaining the purpose of the scheme itself. To the extent that the primary judge referred to the purpose of a scheme (PJ [183]), his Honour is taken to be referring to the purpose of the parties entering into or carrying out the scheme (as is evident from PJ [184]).

180 The s 177D inquiry is to be answered by having regard to the eight matters set out in that section. Those matters are posited as objective facts: *Peabody* 181 CLRat 382 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Section 177D does not permit any inquiry into the subjective motives or state of mind of any person: *Hart* 217 CLR at 243 [65] (Gummow and Hayne JJ)*.* The s 177D inquiry is not concerned with the actual purpose of a party to a scheme. It requires a conclusion to be drawn about an objectively ascertained intention: *News Australia Holdings* [2010] FCAFC 78 [30] (Stone, Jessup and Jagot JJ)*.* Although the conclusion as to dominant purpose may be drawn in respect of a person who only carried out part of a scheme (*Hart* 217 CLRat 238 (Gummow and Hayne JJ)), the conclusion is to be drawn by applying each of the eight matters identified in s 177D. Those matters refer to the scheme as a whole, rather than distinguishing between the scheme and parts thereof: *Federal Commissioner of Taxation v Macquarie Bank Ltd* [2013] FCAFC 13; (2013) 210 FCR 164 at 216 [199] (Middleton and Robertson JJ).

181 In considering the s 177D matters, it may be appropriate and necessary to have regard to the possibilities that existed outside of the scheme entered into or carried out. The various alternatives that were in fact considered may cast light on the conclusion to be drawn from the application of a particular s 177D matter: *Hart* 217 CLR at 244 [69] (Gummow and Hayne JJ); *Spotless Services* 186 CLR at 422 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ); *Macquarie* 210 FCRat 223–4 [210]–[211] (Middleton and Robertson JJ).

182 There was some debate between the parties as to whether dominant purpose was to be tested at the time the scheme was entered into or at the time the scheme was carried out or completed. This debate is not considered to be of utility. The conclusion as to purpose is required to be drawn from the application of each of the factors referred to in s 177D. Each of those factors is to be applied according to their respective terms. Some of those factors refer to when the scheme was entered into or carried out and some refer to the consequences of the scheme.

183 Each of the s 177D matters is now considered in turn.

#### Manner in which the scheme was entered into or carried out

184 In this context, “manner” includes consideration of the way in which the particular scheme was established or carried out: *Spotless Services* 186 CLR at 420 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ). Objective evidence as to how the scheme came to be entered into or carried out is relevant.

185 The Commissioner’s written submissions did not draw a distinction between the 2012 related scheme and 2013 related scheme, but emphasised the circularity involved in the form of a trust distribution by the AIT to AITCS followed by a dividend back from AITCS to the AIT (except for the income tax paid by AITCS). That circularity was said to reveal an element of artificiality, the existence of which was to be readily explained by a tax purpose.

186 It is important to bear in mind the object of the s 177D inquiry. It is to ascertain whether it would be concluded by a reasonable person that a person who entered into or carried out the scheme (or part thereof) did so for the sole or dominant purpose of enabling Mr Springer to obtain a tax benefit in the form of the non-inclusion of an amount in his assessable income in the year ended 30 June 2012 (in connection with the 2012 related scheme) and the year ended 30 June 2013 (in connection with the 2013 related scheme).

187 To this end, in considering the manner in which the scheme was entered into or carried out, it is necessary to consider how the scheme came to take the form it did. To describe the schemes as involving a circularity is a description of the form or consequence of the scheme. It does not address the manner in which the scheme came to be entered into or carried out.

188 As is apparent from the description accorded to the transactions (at PJ [192]), it was the creation of the present entitlement to income in AITCS that resulted in the need for the declaration of a dividend by AITCS. In this sense the first step was a precondition to and causative of the second step. However there is a danger in using hindsight to reach a conclusion about purpose that is not objectively apparent when the circumstances are considered as an evolving chronology.

189 The manner in which the steps came to be carried out was different in relation to the 2013 related scheme from the manner in which they came to be carried out in relation to the 2012 related scheme. As the primary judge found, at the time the 2012 AIT trust income was appointed to AITCS, there was nothing in the objectively ascertainable circumstances that would have given rise to an expectation that a dividend would be declared by AITCS. At that time, being 28 June 2012, Mr Springer had expressed no discomfort with AITCS holding a significant cash balance in its account. As at that date, Mr Springer was in his transition to retirement and had been advised that it would be appropriate to incorporate a “clean skin” company in which to accumulate wealth. Being a newly incorporated company, AITCS had no history of dividend declarations and the explicit wishes of Mr Springer at that time were that AITCS be used to accumulate wealth (PJ [165]).

190 The dividend that came to be declared and paid by AITCS out of its 2012 AIT trust distribution was entirely referable to objective circumstances which came to exist after the creation of its present entitlement. It was only after the creation of that present entitlement that Mr Springer, having expressed his concern about accumulating a cash balance in AITCS’s bank account, proposed the payment of a dividend by AITCS to himself. Ms Burke, recognising that Mr Springer had erroneously assumed he was the shareholder of AITCS, in turn proposed the payment of a dividend to AIT and a distribution of that franked income by the trustee of the AIT to Mr Springer. There was nothing in the way in which the chronology of events unfolded in relation to the 2012 AITCS unpaid present entitlement that would support a conclusion that the dominant purpose of any party to those steps carried out the scheme for the dominant purpose of enabling Mr Springer to obtain a tax benefit in the year ended 30 June 2012.

191 At the time that the 2013 AIT trust income was appointed to AITCS, the objective circumstances were quite different. By that time, Mr Springer was in receipt of advice that any unpaid present entitlement created in AITCS would need to be cleared out before the lodgement of the AIT’s tax return for that year of income, had expressed his concern about AITCS holding a significant cash balance, and had procured the payment of a dividend by AITCS to the AIT and the distribution of that franked income to himself (see [114]–[115], above).

192 The declaration of the dividend by AITCS in March 2013 necessarily meant that, in the year ended 30 June 2013, AITCS was not being used as a vehicle for the accumulation of wealth. By paying out the distribution it had received as a dividend, the balance of retained earnings recorded in AITCS’s financial statements as at 30 June 2012 were dissipated. Any wealth acquired by AITCS as a result of it being appointed income in the year ended 30 June 2012 was held by AITCS for no more than eight months. By no reasonable commercial measure could the holding of a balance of value for a period of eight months be described as an accumulation of wealth in AITCS. His Honour’s findings on this matter at PJ [195] and [196] are erroneous. The balance of retained earnings of AITCS as at 30 June 2014, referred to at PJ [153], were not and could not be the result of distributions of the AIT’s net income for the years ended 30 June 2012 or 30 June 2013.

193 The fact that Mr Springer may not have subjectively turned his mind to the payment of a dividend by AITCS at the time that the present entitlement in AITCS was created in June 2013, or the fact that Mr Fischer may not have discussed such a recommendation with Ms Burke in June 2013, is not to the point. The inquiry mandated by s 177D does not relate to the subjective state of mind or fiscal awareness of any person: *CPH Property Pty Ltd v Commissioner of Taxation* [1998] FCA 1276; (1998) 88 FCR 21 at 41 (Hill J).

194 Upon the creation of AITCS’s unpaid present entitlement to the income on 23 June 2013, the objective circumstances would give rise to an expectation in an objective, reasonable observer that AITCS’s unpaid present entitlement would be cleared out in the same way as it was in respect of the entitlement created for the year ended 30 June 2012, enabling Mr Springer to enjoy the benefit of that distribution in the form of a franked distribution paid to him in the following year. This is precisely what happened.

195 The essential difference between the 2012 related scheme and the 2013 related scheme was that objective circumstances would support a conclusion that, at the time AITCS’s present entitlement to the AIT income was created for the year ended 30 June 2013, Mr Springer (or those advising him) would procure the payment of a dividend by AITCS to clear out the present entitlement and, following the payment of tax by AITCS, flow the franked dividend income back to Mr Springer, giving him direct ownership and control of the value of that present entitlement. Far from the payment of a dividend by AITCS to clear out that present entitlement being wholly conjectural, it would be the most likely course of action.

196 Unlike the 2012 related scheme, it is considered that the manner in which the 2013 related scheme was entered into and carried out supports a conclusion that Mr Springer, Guardian or AITCS (or those advising them) entered into or carried out that scheme for the dominant purpose of enabling Mr Springer to obtain a tax benefit in the year ended 30 June 2013. The scheme was entered into and carried out in a manner that enabled Mr Springer to obtain the benefit of the unfranked income of the AIT derived by it in the year ended 30 June 2013 at a tax cost limited to the corporate tax rate.

#### Form and substance

197 This factor has been said to be concerned with an evaluation of the extent to which the form of the scheme matches the outcome achieved by it: *Macquarie* 210 FCRat 235 [263] (Middleton and Robertson JJ).

198 The primary judge considered that the form of the scheme matched its substance (PJ [192]). He gave no separate reasons for this conclusion.

199 An example of a material difference between the form and substance of a scheme is where there is a sham: *Macquarie* 210 FCRat 235 [263] (Middleton and Robertson JJ). His Honour found that there was no contrivance in the scheme and no element of sham. It can be accepted that there was no sham involved. It is also accepted that there was no contrivance in the incorporation of AITCS as a clean skin entity or the inclusion of AITCS in the eligible class of beneficiaries, both elements being part of the Commissioner’s Primary Scheme at first instance.

200 However, it is not accepted that it necessarily follows that the form of the scheme matches its substance. The form of the 2012 related scheme and the 2013 related scheme involved making AITCS presently entitled to net income of the AIT but the substance of the schemes was that Mr Springer would enjoy direct ownership and control of the value of that present entitlement (after AITCS paid its resulting tax liability) within a few months of AITCS becoming so presently entitled. The outcome achieved by the schemes was the direct enrichment of Mr Springer.

201 A comparison of the form and substance of the scheme supports a conclusion that a party carrying out the scheme did so for the dominant purpose of enabling Mr Springer to obtain a tax benefit.

#### The time at which the scheme was entered into and the length of the period during which the scheme was carried out

202 The resolution for the creation of AITCS’s present entitlement was passed prior to the end of the income year to ensure the trustee of the AIT was not liable to tax under Division 6. It is also apparent that the timing for the declaration of the dividend by AITCS was driven by the timing of the lodgement of the AIT’s income tax return for the prior year of income. If the dividend was to achieve its purpose of clearing out AITCS’s unpaid present entitlement in a way which ensured that the provisions of Division 7A were not infringed (based on the Commissioner’s published views in PS LA 2010/4), it was necessary for it to be paid prior to the lodgement of that return.

203 Division 7A was an issue to be addressed only because an unpaid present entitlement had been created in AITCS. The timing of the dividend payment was a consequence of the creation of the unpaid present entitlement in AITCS.

204 This factor is considered this factor to be neutral in reaching an objective conclusion as to the dominant purpose of a party to the scheme.

#### The result in relation to the operation of the ITAA 1936 and the Income Tax Assessment Act 1997 that would be achieved by the scheme, but for Part IVA

205 The Commissioner sought to emphasise that, but for Part IVA, the amount of the AIT net income for the years ended 30 June 2012 and 30 June 2013 to which AITCS became presently entitled, but which subsequently came to be distributed to Mr Springer, was taxed at the corporate tax rate rather than at the higher marginal tax rate that would have applied had the income been distributed directly to Mr Springer.

206 So much may be accepted. However, as has been said, this conveys little more than that Mr Springer obtained a tax advantage from the scheme: see *Macquarie* 210 FCRat 237 [273] (Middleton and Robertson JJ).

207 The fact that a party obtains a tax benefit from a scheme does not answer the inquiry posited by s 177D. It does not follow that obtaining the tax benefit is the dominant purpose of the taxpayer in entering into the transaction. *Hart* 217 CLRat 227 [15] (Gleeson CJ and McHugh J), 240 [53] (Gummow and Hayne JJ); *Ashwick* 192 FCRat 380 [189] (Edmonds J).

208 This factor cannot be considered in isolation from the other factors. Of itself, it casts no useful light on the dominant purpose of a party entering into or carrying out the scheme. This factor, *of itself*, is considered to be neutral.

#### Change in financial position of the taxpayer that has resulted from the scheme

209 The primary judge considered that any improvement in the financial position of Mr Springer that was a result of the scheme arose because he received a distribution of franked income from the AIT rather than because of some tax advantage accruing to him (PJ [194]).

210 In considering this factor, it is important to bear in mind the false dichotomy between a “commercial end” and the obtaining of a tax benefit: *Hart* 217 CLRat 243 [64] (Gummow and Hayne JJ); see also *Spotless Services* at 415–6 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ). The presence of a commercial end does not assist in answering the query posited by s 177D: *Hart* 217 CLRat 243 [64] (Gummow and Hayne JJ).

211 For this reason, it is important in considering this factor to have regard not only to the scheme but also to the counterfactual pursuant to which Mr Springer would have received the distribution from AIT directly rather than that net income first being distributed to AITCS. A consideration of this factor without taking into account the other possibilities that may have been open to the parties at the relevant time risks the analysis being artificial and sterile: *Macquarie* 210 FCR at 224 [211] (Middleton and Robertson JJ).

212 It is evident from this comparison that the improvement in Mr Springer’s financial positon that *resulted from the scheme* (when considered in light of the other way in which Mr Springer could have received a distribution of unfranked income from the AIT) could be attributed to the tax advantage he obtained by receiving a distribution in the form of franked income rather than a direct distribution of unfranked income. This points to a party entering into or carrying out the scheme for the dominant purpose of enabling Mr Springer to obtain a tax benefit.

#### Change in the financial position of a connected person

213 As explained above, the primary judge’s conclusion that AITCS accumulated substantial assets as a “sequel to its present entitlements” is considered to be incorrect as a matter of fact. By distributing its unpaid present entitlement in the following income year, AITCS did not accumulate substantial assets as a result of income to which it had been made presently entitled in either of the years ended 30 June 2012 or 30 June 2013. The income to which AITCS had been made presently entitled in each of those income years essentially flowed through AITCS, bearing tax at the corporate rate and enabling AITCS to pay that post-tax income to the AIT, which then on-paid that income to Mr Springer without further tax cost.

214 Whatever Mr Springer’s intent may have been when he incorporated AITCS, that company did not accumulate wealth as a result of the distributions made to it by the AIT in the years ended 30 June 2012 and 30 June 2013. The use which was in fact made of AITCS is consistent with a conclusion that a party to the 2012 related scheme and the 2013 related scheme did have a dominant purpose of enabling Mr Springer to obtain a tax benefit in the years ended 30 June 2012 and 30 June 2013 by enabling Mr Springer to obtain the benefit of the AIT trust income for those years in a manner and at a tax cost which did not exceed the corporate tax rate.

#### Any other consequence of the scheme for Mr Springer or any other person

215 For similar reasons, his Honour’s conclusion (at PJ [196]) that the 2012 related scheme or the 2013 related scheme fulfilled the purpose of asset protection and other benefits for a man in advanced transition to full retirement, including a related purpose of the accumulation of assets by AITCS, is not supported by the facts. As a result of the 2012 related scheme and the 2013 related scheme, no assets were accumulated by AITCS which related to the distributions of the AIT income made to it from the AIT net income of the year ended 30 June 2012 or 30 June 2013. Those distributions to AITCS were used by AITCS to discharge its liability to corporate tax as a result of being made presently entitled to those amounts of income, and the balance was used to pay a fully franked dividend to the AIT in the following months, prior to the lodgement of the AIT’s income tax return. The benefits of having a clean skin corporate beneficiary, which Mr Springer’s advisers may have envisaged when Mr Springer incorporated AITCS, were not realised in the years ended 30 June 2012 or 30 June 2013 because Mr Springer did not use AITCS to accumulate wealth in those years.

216 For the reasons explained above at [189]–[191], in relation to the year ended 30 June 2013, far from being an inherent feature, beneficial in the contingency it offered, the payment of a dividend by AITCS was the natural and expected consequence of the creation of an unpaid present entitlement in AITCS in the year ended 30 June 2013, having regard to the objective facts as they stood at the time the present entitlement for that year was created.

217 This factor is considered here to be of no weight in reaching the conclusion required by s 177D.

#### Nature of any connection between the relevant taxpayer and any connected person

218 Because of the view taken of how AITCS was in fact used as a result of it being made presently entitled to a share of the AIT net income for the years ended 30 June 2012 and 30 June 2013, it is considered, with respect, that his Honour’s evaluation of the nature of the connection between the parties miscarried. There was undoubtedly a connection between Mr Springer and each of AITCS, Guardian and AIT. Because AITCS did not retain for more than several months any of the amount of the AIT 2012 and 2013 net income to which it had been made presently entitled, AITCS was not used a vehicle for asset accumulation or protection.

219 In particular, the attraction of making AITCS presently entitled to income in the year ended 30 June 2013 (by which time Mr Springer had made known his concerns about accumulating cash in a bank account he did not control) could not be explained by Mr Springer’s apprehension as to risk. As an objective matter, AITCS’s present entitlement in the year ended 30 June 2013 was explicable by the tax benefit it conferred on Mr Springer; namely, enabling him to obtain the benefit of that income in a way which limited the tax payable on that income to the corporate tax rate.

#### Section 177D Conclusion

220 The s 177D factors are not in the nature of a mathematical equation adding up two different sides of a notional ledger. The evaluative task required by s 177D is more nuanced. Here, it seems to us critical to consider what was driving the form of the transactions.

221 The learned primary judge concluded (at PJ [184]) that the dominant purpose of Mr Springer, Guardian and AITCS was, on and from 27 June 2012, the minimisation of risk to Mr Springer in his transition to retirement and having a new corporate beneficiary in the AIT’s eligibility class to serve as a vehicle for wealth accumulation and passive investment. However, as explained above, the particular form of the identified schemes included the declaration and payment of the franked dividend by AITCS to the AIT following the creation of AITCS’s unpaid present entitlement and the distribution by AIT of that franked income to Mr Springer. The declaration and payment of those dividends ultimately to Mr Springer was not consistent with either of the commercial benefits identified by the primary judge.

222 As the chronology of events demonstrates, the manner in which the 2012 related scheme came to be entered into and carried out, and the form which it came to take, were the products of an evolving set of circumstances. It was not a scheme that objectively any party could be seen to have entered into for the dominant purpose of enabling Mr Springer to obtain a tax benefit in the year ended 30 June 2012. Furthermore, given that there was no objective basis for expecting, prior to 30 June 2012, that AITCS would declare a dividend to AIT, it would not be concluded that any of the persons who carried out the scheme after that time did so for the dominant purpose of enabling Mr Springer to obtain a tax benefit in the year ended 30 June 2012. The steps carried out in 2013 do not, with hindsight, take on a character that they did not objectively have at the time they were in fact carried out.

223 By contrast, the form of the 2013 related scheme was not the product of an evolving set of circumstances, but was the implementation of a strategy that had been developed with the evolution and implementation of the 2012 related scheme. The 2013 related scheme commenced with the creation in AITCS of a present entitlement, the benefit of which (at the time of its creation in June 2013) would not objectively be expected to be retained by AITCS but was to pass to Mr Springer. In our view, it would be concluded that a party entering into or carrying out the 2013 related scheme did so for the dominant purpose of enabling Mr Springer to obtain a tax benefit in the form of the non-inclusion of an amount in his assessable income in the year ended 30 June 2013.

### Conclusion regarding Part IVA

224 Having regard to s 177D, it is concluded that Part IVA applied to enable the Commissioner to make a determination to include an amount in Mr Springer’s assessable income for the year ended 30 June 2013.

225 It is noted that this same amount has been included in the taxable income of AITCS for that same year of income. Given that the assessment and determination to Mr Springer has been issued on the basis that no present entitlement would have been created in AITCS in the year ended 30 June 2013, it is for the Commissioner to consider making the appropriate compensating adjustments pursuant to s 177F(3) of the ITAA 1936.

# COSTS

226 The parties have agreed that there be no order as to the costs of this appeal.

# ORDERS

227 The following orders will be made.

228 In respect of QUD 36 of 2022:

(1) the appeal be dismissed; and

(2) there be no order as to costs of the appeal.

229 In respect of QUD 37 of 2022:

(1) the appeal be allowed in part;

(2) orders 1 to 4 of the orders of the Federal Court made on 21 December 2021 in proceeding number QUD 147 of 2020 be set aside insofar as the appeals pursuant to s 14ZZ(1)(a)(ii) of the *Taxation Administration Act 1953* (Cth) relate to the 2013 income year;

(3) in lieu thereof, the Respondent’s objection decision in relation to the 2013 income year be affirmed;

(4) the parties file and serve, not later than seven days from the date hereof, either a consent in respect of costs of and incidental to the proceedings in the original jurisdiction or, failing consent, their respective submissions of not more than three pages as to the order sought in respect of costs, following or in default of which, the Court will determine on the papers the order as to costs which ought be made; and

(5) There be no order as to costs of the appeal.

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| I certify that the preceding two hundred and twenty-seven (227) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Hespe. |

Associate:

Dated: 24 January 2023