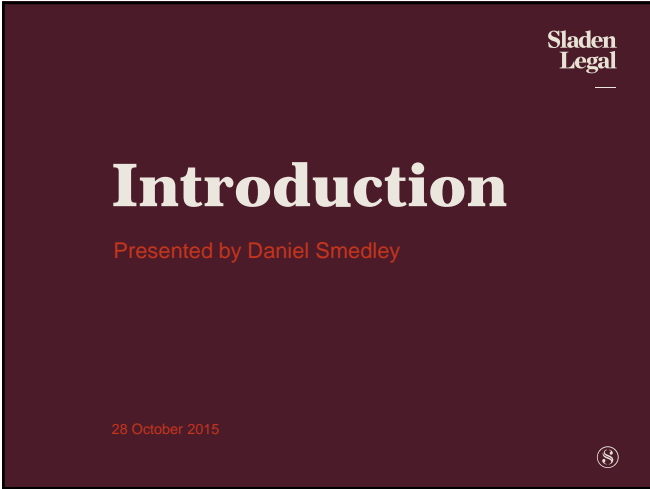


Hot Issues in Structuring and Rewarding Employees

28 October 2015









Superannuation and Employees

Presented by Phil Broderick

28 April 2015





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Outline

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1. What is ordinary times earnings?
2. Super guarantee and contractors
3. What to do if you fail to comply with your super guarantee obligations?



What is ordinary times earnings?

- Super guarantee (SG) only payable on "ordinary times earnings" or OTE
- Is generally narrower than salary or wages as super is not paid on:
 - Earnings outside of ordinary hours worked (eg overtime)
 - The following components of a termination payment:
 - Unused sick leave
 - Unused annual or long service leave
 - Salary over the maximum contribution base for the quarter (currently \$50,810)
 - Salary where paid less than \$450 a month
 - Private or domestic work under 30 hours a week (eg domestic cleaners)
 - Fringe benefits



What is ordinary times earnings?

- Ordinary times earnings is defined to include over-award payments, shift loading or commissions
- SGR 2009/2
- Examples of items not subject to SG:
 - Overtime
 - Expense allowance expected to be fully expended (as compared to an unconditional allowance)
 - Reimbursements
 - Unfair dismissal payments
 - Bonus' in respect of overtime (as compared to a performance bonus)



Super guarantee and contractors

- SG covers **employees** and certain **other persons** caught under s12 of the *Superannuation Guarantee (Administration) Act 1992* (Cth), including:
 - The labour component of someone who is paid under a contract wholly or principally for the labour of that person
 - Payments to directors
 - Parliamentarians
 - Certain performers (musicians, actors, sports persons etc)
 - Certain persons who provide services to the making of movies and tv shows (eg cameraman)
 - Certain public office holders



Super guarantee and contractors

- The most controversial issue is whether someone is an employee or contractor
- Corporate contractors are not caught by super guarantee unless the use of the corporate structure is a sham or ineffective
- For contractors the test was recently considered in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation*:
 - Objective assessment
 - Look at the totality of relationship
 - Form and substance

Super guarantee and contractors

- Although earlier cases have favoured the ATO, more recent judgments have favoured the taxpayer
- *Dominic B Fishing Pty Ltd v FC of T* [2014] AATA 205 – fishermen joint venture - no super guarantee - fisherman who had their own boats, split the proceeds of their catch, beared some of their own costs
- Contrast - *Floorplay Pty Ltd v FC of T* 13 ESL 11 – crew members paid as a % of the catch were employees

Super guarantee and contractors

- Case 3/2014 2014 ATC – no super guarantee – plumbing contractors – reduced control, power to delegate, assumption of risk, ownership of tools
 - contrast - *Trustee for the SR & K Hall Family Trust v FC of T* [2013] AATA 681 – form over substance – “contractors” did not delegate work, did not refuse work, did not rectify defects, paid an hourly rate, wore the company’s logo
- *OEM Supplies Pty Ltd v FC of T* – no super guarantee – IT contractor – fundamental features included lack of control, limited integration into the business and the ability to employ others

What to do if you fail to comply with your superannuation guarantee obligations?

- SG due 28 days after the end of the quarter
- If you miss the due date you are liable for a super guarantee charge (**SGC**) even if you make a late payment
- SGC equals:
 - the shortfall in super (calculated on salary and wages not OTE)
 - interest (currently 10%) from the start of the quarter to the date SGC due
 - an admin charge (\$20 per employee)
- Must lodge a superannuation guarantee charge statement and pay SGC on the 28th day of the second month after the end of the quarter (eg for July-September quarter – 28 November)
- GIC payable on SGC from that date
- SGC not deductible

What to do if you fail to comply with your superannuation guarantee obligations?

- Proposed changes to simplify SGC:
 - SGC calculated on OTE on salary and wages
 - Interest component calculated from the day after SG due (ie the 29th day after the end of a quarter) to when it is paid or the SGC statement is due
 - Penalties to align with the Taxation Administration Act

What to do if you fail to comply with your superannuation guarantee obligations?

- SG due 28 days after the end of the quarter
- If you miss the due date you are liable for a super guarantee charge (**SGC**) even if you make a late payment
- SGC equals the shortfall in super (calculated on salary and wages not OTE) , interest (currently 10%) from the start of the quarter and an admin charge (\$20 per employee)
- Must lodge a superannuation guarantee charge statement
- If you make a late payment you have 2 options:
 - Use the late payment offset
 - Carry the late payment forward as a prepayment for a future super guarantee obligation for the same employee

What to do if you fail to comply with your superannuation guarantee obligations?

Late payment offset

- In order to be eligible you must:
 - Make a contribution to the employee's super fund
 - Make the payment before the SGC assessment
 - Lodge a late payment offset election with the ATO (within 4 years)
- SGC is still payable, but the amount of SGC to be paid is reduced by the amount of the offset
- This will reduce your liability for SGC but will mean the contribution is:
 - Not tax deductible
 - Can't be used for future super contribution obligations
 - The offset amount can't be subsequently changed

What to do if you fail to comply with your superannuation guarantee obligations?

Carry forward your late payment

- Can be used for future contributions in the quarter of payment or future quarters (provided the future quarter is within 12 months of the contribution date)
- Under this option you would have to pay the SGC on the missed contribution



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Employment Risks in Corporate and Business Restructures

Presented by Louise Houlihan

28 October 2015



Employee issues in a corporate and business restructure

- Consultation obligations
- Severance and notice payments
- Minimising risk of claims
 - Unfair dismissals
 - General protections

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Restructuring: consulting with employees and others

If loss of jobs is a possibility and/or if employees are going to be transferred to a new entity, then there are consultation obligations under:

- *Fair Work Act 2009*
- Awards / enterprise agreements
- Contracts
- Policies

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Minimum statutory notice:

Employee's period of continuous service with the employer at the end of the day the notice is given	Notice period*
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

*Period increases by 1 week if the employee is over 45 years old and has worked for the employer for at least 2 years.

Also check enterprise agreements and contracts which may be more generous

Minimum statutory severance pay:

Employee's period of continuous service with the employer on termination	Redundancy pay period
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

Note also check enterprise agreements and contracts which may be more generous and small business exclusion

Unfair dismissal

- Bona fide redundancy defence
- Genuine redundancy
- Compliance with any award / EA consultation obligations
- Procedural fairness
- Complied with payment obligations

General protections

- Ensure reason for termination/redundancy is clear and lawful and unclouded by any unlawful considerations

Tips

- Planning - consider the obligations under:
 - *Fair Work Act 2009*
 - Awards / enterprise agreements
 - Contracts
 - Policies
- Communication is key:
 - Departing staff
 - Remaining staff



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ESS changes: The Promised Land or a Mirage?

Presented by Carlos Barros

28 April 2015





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“Much said, Little done”

(Sir William Campion on Australian politics,
The Argus, 29 April 1931)

- The Changes?
- SO WHY IS THIS INTERESTING TO ME?

“The most terrifying words in the English Language are... “I’m from the government and I’m here to help”

(Ronald Reagan)

Firstly, what is wrong with the old rules?

- Are the modified rules much different?

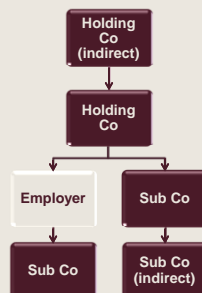
And the new provisions...?

- The Start up Concessions
- Refunds
- Valuations

“It’s better to be looked over than overlooked” (Mae West)

Which company/employee?

- No listed company
- 10 years old (and its holding/sub companies) – timing rule
- The individual employee & associates - 10% of the company shares/voting rights (indirect/direct).
- Any prior ESS schemes?



The short end of the stick

“Nothing in Fine Print is ever good news”

(Andy Rooney, Journalist, CBS News)

Problems that persist:

- 15% of Share MV
- Rights Strike price > Share MV
- Ordinary shares
- Onerous qualification requirements
- Funding - FBT or Division 7A
- Special valuation rules in regulations but...
- Reporting of valuations and other elements

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Where from here?

“...always ask yourself three questions - Why am I doing it, What the results might be and Will I be successful. Only..[then]...go ahead.”

(Chanakya, 275 BCE)

RELEVANT QUESTIONS:

- new private company ?
- \$50 million turnover?
- Australian resident co?
- entice key employees?
- nominal share value?
- room to grow?
- 3 year minimum?
- voting rights to employees ?
- right kind of company?
- co to help in funding?
- cost vs benefit?

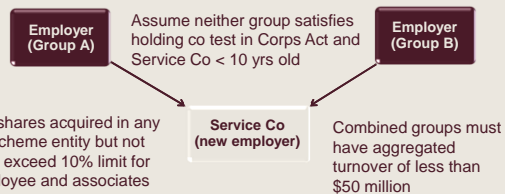
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Interesting aspect to note – but need a private ruling

“The good thing with innovation is, there isn’t a last nugget. Every new thing creates ...new opportunities”

(Jeff Bezos, CEO, Amazon)



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“The 50-50-90 rule : Anytime you have a 50-50 chance of getting something right, there’s a 90% change of getting it wrong”

(Andy Rooney)

- Complex deferral timing rules
- Rights inadvertently created
- Acquiring/acquired by ‘old’ companies
- Indeterminate rights
- Care in use of funding structures
- Care in use of employee share trusts

The Rest ...

TAXING POINT – TERMS AND CONDITIONS

Taxing Point – Shares

The earliest of:

- Time you dispose of the interest if within 30 days of taxing point **OR**
- There is no real risk of forfeiture under the scheme **AND** no restrictions on disposal **OR**
- Employment ceases **OR**
- **15 years from acquisition date**

Taxing Point – Rights

The earliest of:

- Time you dispose of the right or the share acquired after exercise if within 30 days of taxing point **OR**
- No exercise of right, there is no real risk of forfeiture of the right under the scheme **AND** no restrictions on disposal of the right **OR**
- Employment ceases **OR**
- **15 years from acquisition date OR**
- **Exercise of right AND no risk of forfeiture of acquired share AND no restriction on disposal of the share**

DEFERRAL - TERMS AND CONDITIONS

Eligible for Deferral – both Shares and Rights

- Interest acquired at a discount to MV at acquisition date from employer (inc. NRs) by employee (inc. NRs) →
- After application of valuations in ITR 97 Regs for 83A-315 there is still a discount
- Start up concessions do not apply →
- Ordinary shares
- The predominant business of the employment company is compliant in certain circumstances
- No more than 10% of the shares/votes/rights to vote

Eligible for Deferral – Shares

- At least 75% of the permanent Aust res 3 year min. agg. Employees are or were entitled to acquire ESS interests under this or an earlier ESS scheme.
- Real Risk of Forfeiture other than by disposal **OR**
- Salary sacrifice arrangement up to \$5000 p.a.

Eligible for Deferral – Options

- Real Risk of forfeiture other than by disposal, exercise or lapse **OR**
- The scheme genuinely restricts disposal **AND** the scheme expressly states subject to deferral

Professional Practices Structures – the ATO views and the law

Presented by Rob Jeremiah

28 October 2015





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Introduction

Introduction

1. The ATO Guidelines of 2 September 2014 (ATO Guidelines) and permitted structures
2. Everett assignments and the changed position of the ATO on the potential application of Part IVA of 30 June 2015 (Everett Assignment Review)
3. The preferred practice structures – partnerships of natural persons or trusts or companies?
4. Asset protection of income stream and investment assets



1. The ATO Guidelines “*apply where the business is being carried on by a **legally effective** partnership trust or company*”.
2. For assistance in determining whether a structure is legally effective, refer to:
 - Kelly v FC of T [2013] ATC 20-408
 - Taxpayer Alert TA 2013/3
3. The ATO continues: “... *a partnership includes a partnership of trusts or companies*”

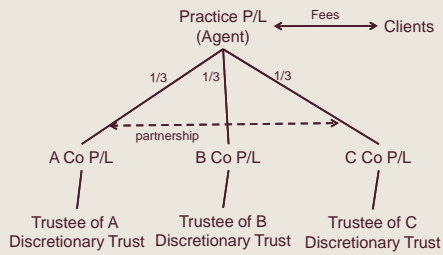
From the ATO Guidelines, the practice entity will only be legally effective where:

1. It “*is a legally valid and enforceable partnership, trust or company*”, and
2. Subject to Part IVA ITAA36, “*the arrangement has the effect of causing the partner, trustee or company to derive income or share in practice profits for income tax purposes*”

Under the ATO Guidelines (p3):

- Practice income will only be income of a practice entity and not an IPP if it is the practice entity that is contracting with clients; and
- Income will only be income of the practice entity if it is not personal services income, i.e. income earned mainly as a result of personal efforts or skills, rather than being generated by assets or employees of the practice

1. At law whether income is income of the practice entity will be determined by:
 - (i) contractual rights; and
 - (ii) the alienation of personal services income rules
2. From a taxation perspective in addition to the rules referred to above, the personal services income regime (PSIR) contained in Part 2-42 ITAA97 will determine whether the income of a practice entity is included in the assessable income of the entity or the relevant IPP. The PSIR will rarely apply to a practice entity because in the conduct of the practice the prescribed tests for the practice to be treated as a personal services business will most usually be satisfied.



Practice Co P/L contracts

1. Agency agreement with A Co P/L, B Co P/L and C Co P/L as trustees
2. Banks, financiers, insurers
3. Engagement with clients

1. Partnership agreement to be between partners – i.e. individuals, trusts or companies
2. On business cards, mail, marketing material – IPPs described as “principals” not “partners”
3. Offers of partnership to partner not IPP
4. Distributions to partners bank accounts not to IPP personal account

From the ATO Guidelines (p3):

- “These guidelines only apply where the practice income is being generated by a business structure and does not, therefore, constitute income from personal services.”
- “In determining whether income earned by an IPP from a professional practice is personal services income, the ATO will... follow the guidelines... in its existing rulings.”

- IT25: Incorporation of medical practices
- IT2121: Income tax – Family companies and trusts in relation to income from personal exertion
- IT2330: Income tax – Income splitting
- IT2503: Income tax – Incorporation of medical and other professional practices
- IT2639: Income tax – Personal services income

IT 2639 provides, as a general rule of thumb, that if the trust, company or partnership carrying on the professional practice has at least as many non-principal practitioners as principal practitioners, then the income will be considered to be derived from the business structure. This rule of thumb will be applied for the purposes of these guidelines.

Note: This ruling is a statement of the ATO position, it has no force of law or legal support.

From the ATO Guidelines (p4):

"... we are concerned that Part IVA may apply to schemes which are designed to ensure that the IPP is not directly rewarded for the services they provide to the business, or receives a reward which is substantially less than the value of those services."

From the ATO Guidelines (p4):

"The ATO acknowledges that the general anti-avoidance provisions have historically been applied to assess income generated by personal exertion rather than profits or income generated by a business structure. However, we consider that Part IVA also has potential application when the IPP arranges for the distribution of business profits without regard to the value of the services the IPP has provided to the business."

The ATO has particular concerns where:

- the level of income received by the IPP does not reflect their contribution to the business
- tax paid by the IPP and/or associated entities on profits of the practice entity is less than if the amounts were assessed in the hands of the IPP
- the IPP is, in substance, being remunerated through arrangements with their associates, and
- the structure does not provide the IPP with advantages, such as limited liability or asset protection

2. *"50% or more of the income to which the IPP and their associated entities are collectively entitled... in the relevant year is assessable in the hands of the IPP."*
3. *"the IPP and their associated entities, both have an effective tax rate of 30% or higher on income received from the firm."*

1. In FC of T v Everett [1980] HCA 6, an assignment by a partner to his spouse of an interest in a partnership together with all rights to a share of the profits in a partnership was found by the High Court to be effective
2. In the later High Court decision of FC of T v Galland [1986] HCA 83 the assignment of an interest in partnership profits to a discretionary trust rather than an individual was found to be valid and effective

Following Everett, the ATO issued IT 2330 in which it is stated:

"19. A recent situation where a disposition of income producing assets was not considered to attract the operation of section 260 occurred in FC of T v Everett [1980] ATC 4076... There, a partner in a legal firm assigned part of his share in the firm to his wife absolutely. The possible operation of section 260 was not advanced in argument for the Commissioner because it was considered that the situation was one to which the decision in the Purcell case applied, i.e. it was a "no strings" attached disposition of an income producing asset. It is still the approach of this office that neither section 260 nor Part IVA applies to "no strings" attached assignments of partnership interests of the same nature as the interest assigned in the Everett case."

> Refer DFC of T v Purcell (1921) 29 CLR 464

After Galland which treated as valid the assignment of an interest in partnership profits to a discretionary trust (in contradiction of IT 2003 but consistent with Everett), IT 2501 was issued in which, in reiterating the view on the application of Part IVA, the ATO states:

"9. Valid assignments on all fours with the Everett or Galland decisions will be accepted for tax purposes and will not be regarded as caught by section 260 or Part IVA."

From TA 2013/3:

"IT 2330 also states that the anti-avoidance provisions will not apply to assignments of partnership interests of the same nature as that considered in FC of T v Everett [1980] ATC 4076 (Everett). A similar statement was made in Taxation Ruling IT 2501 in relation to the decisions in Everett and FT of C v Galland [1986] ATC 4885. The ATO is currently reviewing this position, although arrangements described in this alert may be distinguishable from the arrangements considered in those cases."

The Everett Assignment Review and the ATO change in position on Everett assignments

From the Everett Assignment Review published by the ATO on 30 June 2015:

"In Taxation Ruling IT 2330: Income Tax: Income Splitting (IT 2330) and IT 2501: Income Tax: Assignment of Partnership Interests (IT 2501) the ATO had previously taken the view that Part IVA does not apply to an Everett assignment, provided it constitutes a 'no strings attached' disposition. However, the ATO has revisited this position and now considers that Part IVA is capable of application to such assignments in appropriate cases."

An explanation of Everett assignments from the ATO and the High Court decision

"In Everett, the taxpayer practised in partnership with three other solicitors and held a 13% interest in the capital and income of the partnership. Mr Everett executed a Deed of Assignment to assign 6/13ths of his share of the firm to his wife. The Commissioner assessed both the taxpayer and his wife on the assigned portion. The High Court found that the assignment was effective for tax purposes. Income payable to the taxpayer's spouse was trust income which was assessable in her hands only."

The summary in the ATO Guidelines of the principles established by the High Court in Everett

- *"A partner's interest in a partnership is a chose in action, which is assignable in whole or in part by way of equitable assignment"*
- *The effect of such an assignment is that the assignor holds that assigned partnership interest on trust for the assignee*
- *The assignment does not make the assignee a partner in the partnership nor give the assignee any entitlement to the assets, management or administration of the partnership or the right to inspection of books and accounts*
- *A partner's partnership interest is an entire chose in action; a partner's entitlement to participate in profits is not separate and severable from the interest of the partner*
- *A partner's income is not 'income from personal exertion' but 'income from property', the relevant property being the partner's fractional interest in the partnership"*

1. Per the ATO:

"The disposal of an interest in a partnership is not considered to represent the mere disposition of an income-producing asset. In form, a partner must be entitled to such a share, regardless of how much effort is devoted to the practice. However, in substance, the continued existence of this entitlement will ordinarily be conditional upon the individual professional practitioner's (IPP's) personal involvement in the partnership. In a practical sense, the outcome attributable to such an asset is a product of the IPP continuing to devote personal time and attention to the business. This is the case, whether or not any of the income of the partnership can be directly attributed to the IPP's 'personal exertion'."

(emphasis added)

2. The ATO continues:

*"An Everett assignment produces a result whereby income which is **only** capable of being produced by the personal efforts of the IPP is derived by other persons or entities. This is a factor pointing towards the potential application of Part IVA."*

(emphasis added)

3. There is a clear gap in the logic between paragraphs 1 and 2 for the Commissioner to conclude *"whereby income which is only capable of being produced by the personal efforts of the IPP"*.

1. *"The income attributable to such an asset" (the ATO phrase) is **not only** a "product of the IPP continuing to devote personal time and attention to the business."*

2. The income attributable to the "asset" (the interest in a partnership) is a product of the personal involvement in the partnership of the partners and all employees of the partnership and all assets used in the conduct of the partnership practice/business. It is not *"a product of the IPP continuing to devote personal time and attention to the business"*. **The devotion of personal time and attention may affect the quantum of the income but not the right to it.**

Comment on the ATO changed view on Everett assignments (cont.)

3. It is the ownership of an interest in a partnership that entitles the owner of that interest to a share of the income of the partnership (High Court view and ATO view 2 September 2014). The entitlement to a share of the income is not affected by the "*IPP continuing to devote personal time and attention to the business*". A reduction in the level of "*personal time and attention*" may result in the partner's partnership interest being acquired by the other partners or a "*new partner*" but until that occurs the partner will continue to be entitled to the share of the profits of the partnership which attach to the partner's interest in the partnership whilst at the same time continuing to be jointly and severally exposed to the financial and other risks of the partnership.

Comment on the ATO changed view on Everett assignments

4. The position of a partner who has assigned part of their interest in a partnership to another person and who continues to "*devote personal time and attention to the business*" which comprises a professional practice cannot, at law, be distinguished from that of a person who devotes personal time and attention to a business in industry, e.g. plumbing or electrical or in a restaurant or retail outlet where the contribution to profit is derived from many sources and whose associated entity has an ownership interest in the business; the income/profits of the business attaching to that ownership interest will be income of the associated entity.

Comment on the ATO changed view on Everett assignments (cont.)

5. Is the ATO suggesting that where a person is both a director and shareholder of a private/proprietary company which employs say 10 persons cannot transfer a part or the whole of his shareholding to a related or unrelated party and be satisfied that at law the dividends paid in respect of profits derived by the company in respect of the shares transferred (grossed up by the amount of any attached franking credits) could, subject only to the application of Part IVA by the ATO to the transfer of shares, continue to be included in the director's and not the transferee's assessable income? (Refer to principle from the ATO in paragraph 2 of slide 63 above)
6. To date there is no legal authority to support the proposition advanced in paragraph 5 above and unless legislation is passed to support the proposition if it is tested in court in the writer's view it will fail.
7. No doubt if the ATO did successfully apply Part IVA in the circumstances detailed in paragraph 5 the incidence of employee share and equity schemes would decline dramatically.

The law on the income of an entity from Liedig and Mochkin (including Part IVA)

From Hill J in Liedig v FC of T [1994] 121 ALR 561 at 576:

"It has never been suggested that income earned by the trustee of a trust carrying on business as a milkman or plumber or an electrician is derived by the person pursuing the respective occupation, as each involves significant personal services or personal exertion.

The Commissioner's answer before me was that the income had to be a result 'substantially' of the personal exertion of the taxpayer. How that submission squares with the Full Court's decision in Tupicoff is difficult to say [in Tupicoff it was held the arrangement was "an ineffective attempt by the taxpayer to assign future earnings"]. Equally it is difficult to relate to the examples given above. Only where no trust property was involved could the distinction become meaningful."



The law on the income of an entity from Liedig and Mochkin (including Part IVA) (cont.)

However Hill J states earlier in his judgment:

"There is no reason to doubt that Part IVA... [could have application]... where, ... a conclusion would be reached that a person who entered into or carried out the scheme or any part of it did so for the purpose of enabling a taxpayer to obtain a tax benefit in connection with the scheme."



The law on the income of an entity from Liedig and Mochkin (including Part IVA) (cont.)

From FC of T v Mochkin [2003] FCAFC 15 referenced on page 5 of the ATO Guidelines:

"[84]. It is undoubtedly true that the discretionary trust structure adopted by the Taxpayer had substantial tax advantages when compared with other structures that might have been adopted to achieve the same commercial objectives. The primary Judge, with respect, was clearly correct in accepting that one of the purposes of the Taxpayer in entering into the Ledger scheme was to obtain a tax benefit in the form of the ability to have the net income generated by the stockbroking consultancy business distributed in a tax effective way to the beneficiaries of the discretionary trusts. But, as Eastern Nitrogen and Hart show, the fact that aspects of the scheme are tax driven does not establish that the "dominant purpose" of the relevant person, objectively assessed, was to obtain a tax benefit. Unlike Spotless, the scheme in the present case, even without the tax benefits, would have made commercial sense."

(emphasis added)

The law on the income of an entity from Liedig and Mochkin (including Part IVA) (cont.)

"[91]. ... Viewed objectively, the result sought by the scheme, so far as the ITAA was concerned, was the opportunity to distribute net commission income derived by Daccar and Ledger in a tax effective manner. This result nonetheless must be weighed against other aspects of the scheme in order to determine the Taxpayer's dominant purpose."

"[92]. The Taxpayer achieved the objective of immunising himself from personal liability for the conduct of the stockbroking business. He also received less by way of salary or distributions than his contributions to Ledger, in particular, might have been worth, although he did receive substantial distributions from Ledger from time to time, in one year amounting to \$1,000,000. As I have noted, the fact that the Taxpayer, in effect, forewent remuneration for his services to Ledger would have had more significance in this case had a narrower scheme been identified."

ATO Guidelines and review of position in relation to Everett and Galland and the law

From the statements and examples in the ATO Guidelines and Everett Assignment Review the ATO view is Part IVA may have potential application where the income derived by an IPP from a legally effective practice structure (by which the practice has been effectively acquired at law and for tax purposes such that the income derived is income of the structure) does not reflect their contribution to the business.

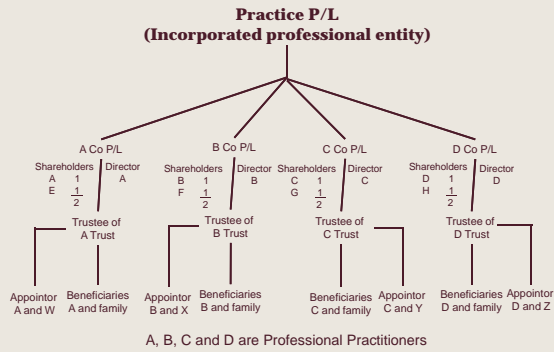
It would seem to the writer that, in the circumstances referred to, for Part IVA to have potential application to distributions of income from the structure directly or indirectly (such as from a company through a discretionary trust) to natural persons or entities other than the IPP, Part IVA must have potential application to every determination by the trustee of a discretionary trust in favour of particular beneficiaries. In the writer's view, at present there is no basis in law for such a conclusion to be reached.

Preferred practice structures

A discretionary trust or partnership of discretionary trusts with a corporate trustee represent the preferred practice structures from the perspectives of:

1. Income distribution flexibility
2. Asset and income stream protection
3. Entry and exit of partners
4. Base for creation of wealth
5. Future restructuring

Preferred practice structures (cont.)



Partnership of trusts preferred structure benefits

1. Limited liability
2. Income distribution to non risk exposed non-IPPs – result income distribution not exposed to risks of IPP. Therefore investment of income by recipient of distribution or a related trust not exposed to bankruptcy clawback rules – 5 years
3. Flexible income distributions
4. On entry and exit of partners and future restructuring potential access to small business concessions

Non-preferred practice structures – companies

Companies tax at 30% but:

1. Excess franking credits "locked up"
2. Small business CGT concessions may not be available or only to a limited extent because:
 - value of assets grouped for purposes of MNAV test
 - significant individual test
 - 50% active asset reduction on distribution from company taxableTherefore difficulties with entry and exit of shareholders and restructuring of practice
3. Retention of profits in a company exposes profits to risk
4. For non-goodwill practice companies where shares bought for no consideration the market value substitution rule may apply and potential application of Division 83-A ITAA 97

Natural persons access to CGT small business concessions but:

1. Direct exposure to business risk
2. Exposure of income gifted to protected investment structure
3. No flexibility with practice income distribution

Conclusion

If an IPP wishes to avoid a dispute with the ATO, compliance with the ATO Guidelines and Everett Assignment Review is the answer.

For other IPPs it would seem that if a professional practice is conducted under an effective legal structure, at law, the income derived by the professional practice will be income of the entities conducting the practice and that distributions of the practice income in accordance with the structure documentation (trust deeds, etc.) will be effective for tax purposes and included in the assessable income of the recipients.
