

A GST WITH GRRRRRR: LEGISLATIVE RESPONSES TO GST TAX AVOIDANCE IN AUSTRALIA AND NEW ZEALAND*

ABSTRACT

GST is a transaction tax and therefore it would be thought it would be hard to avoid. Beyond blatant evasion through the non-declaring of GST taxable supplies, the paper details the ways 'naughty' taxpayers have exploited the GST regimes in both Australia and New Zealand to create artificial tax advantages. In response, these Nations have sought to tackle the problem of GST tax avoidance through General Anti-Avoidance Rules ('GAAR's) rather than relying solely on specific Targeted Anti-Avoidance Rules ('TAAR's). The New Zealand GST GAAR is found in s 76 *Good and Services Tax 1985* ('GSTA 1985') and, in its current version, echoes the income tax GAAR, s BG1 *Income Tax Act 2007* GAAR. The Australian GST GAAR is contained in Division 165, in particular s 165-5, *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ('*GST Act 1999*'). Again it is largely based on the income tax GAAR, Part IVA *Income Tax Assessment Act 1936* (Cth) ('*ITAA 1936*'). However, it will be seen the GST GAAR is in fact broader than Part IVA in a number of important respects.

This paper compares and contrasts the GST GAARs in these two Nations in a bid to determine if one model is optimal. While the legislative goals of each are broadly the same, the approach reflected in the legislation differs dramatically. The Australian legislation is quite prescriptive. Section 165-5 *GST Act 1999* sets out a number of conditions, such as "scheme" (s 165-10(2)), "GST benefit" (s 165-10(1)), that must be met for the GAAR to apply. Even the final element, the question whether it is reasonable to conclude that the sole or dominant purpose of the scheme (or part of the scheme) was to obtain a GST benefit, is determined by a number of factors stated in s 165-15, all of which must be considered by a court. By contrast, while the New Zealand legislation identifies prerequisites to the application of the GAAR, such as "arrangement" (s 76(8)) and "tax avoidance" (s 76(8)), these are defined very broadly. Moreover in contrast to the Australian s 165-15, there is no legislative guidance in s 76 to assist the courts in coming to the conclusion whether obtaining the GST benefit was one of the purposes or effects of the arrangement. It will be seen that instead the courts have developed judicial doctrines to be applied when determining the crucial question in s 76(1), whether an arrangement amounts to a GST avoidance arrangement.

Ultimately, particularly in light of the dearth of authority in both jurisdictions, it is contended that the broad approach in the New Zealand legislation is too uncertain, particularly as it is based on judicial discretion. The Australian GST Act 1999 includes protective safeguards, included in light of the potential breadth of Div 165. Moreover, the prescriptive approach in the Australian GST Act gives taxpayers and their advisors greater guidance and also provides the courts with direction.

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I INTRODUCTION

GST is a transaction tax and therefore it would be thought it would be hard to avoid. However, it will be seen that beyond blatant evasion through the non-declaring of GST taxable supplies, there are a number of the ways ‘naughty’ taxpayers can exploit the GST regimes in both Australia and New Zealand¹ to create artificial tax advantages. In response, these Nations have sought to tackle the problem of GST tax avoidance through General Anti-Avoidance Rules (‘GAAR’s) rather than relying solely on specific Targeted Anti-Avoidance Rules (‘TAAR’s). The New Zealand GST GAAR is found in s 76 *Good and Services Tax 1985* (‘GSTA 1985’) and, in its current version,² echoes the income tax GAAR, s BG1 *Income Tax Act 2007*. The Australian GST GAAR is contained in Division 165, in particular s 165-5, *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (‘GST Act 1999’). Again it is largely based on Part IVA *Income Tax Assessment Act 1936* (Cth) (‘ITAA 1936’). However, it will be seen the GST GAAR is in fact broader than Part IVA in a number of important respects.

This paper compares and contrasts the GST GAARs in these two Nations in a bid to determine if one model is optimal. While the legislative goals of each are broadly the same, the approach reflected in the legislation differs dramatically. The Australian legislation is quite prescriptive. Section 165-5 *GST Act 1999* sets out a number of conditions, such as “scheme” (s 165-10(2)), “GST benefit” (s 165-10(1), that must be met for the GAAR to apply. Even the final element, the question whether the sole or dominant purpose of the scheme (or part of the scheme) was to obtain a GST benefit, is determined by a number of factors stated in s 165-15, all of which must be considered by a court. By contrast, while the New Zealand legislation identifies prerequisites to the application of the GAAR, such as “arrangement” (s 76(8)) and “tax avoidance”(s 76(8)), these are defined very broadly. Moreover in contrast to the Australian s 165-15, there is no legislative guidance in s 76 to assist the courts in coming to the conclusion whether obtaining the GST benefit was one of the purposes or effects of the arrangement. It will be seen that instead the courts have developed judicial doctrines to be applied when determining the crucial question in s 76(1) whether an arrangement amounts to s GST avoidance arrangement.

Ultimately, particularly in light of the dearth of authority in both jurisdictions³, it is contended that the broad approach in the New Zealand legislation is too uncertain, particularly as it is based on judicial discretion. The Australian GST Act 1999 includes protective safeguards, for example s 165-5(1)(b) discussed below, included in light of the potential breadth of Div 165. Moreover, the prescriptive approach in the Australian GST Act gives taxpayers and their advisors greater guidance and also provides the courts with direction.

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¹ See the discussion below in *Glenharrow Holdings Ltd v CIR* (2009) (2009) 2 NZLR 360 (SC) at [42], [46] and [47].

² As discussed below, s 76 GSTA 1985 was rewritten in 2000 to echo the ITA 2007 GAAR (ss BG1 and GA1). See s 116(1) *Taxation (GST and Miscellaneous Provisions Act) 2000* (Cth).

³ There are only four cases in New Zealand (*Ch’elle Properties (NZ) Ltd v CIR* (2008) 2 NZLR 342 (CA), *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC), *Education Administration Ltd v CIR* (2010) 24 NZTC 24,238 and *Tale Holdings Ltd v CIR* (2016) 27 NZTC 22-048)) and in Australia only two cases (*VCE v FCT* [2006] AATA 821 and *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16).

II New Zealand GST GAAR

A Legislative framework

The original version of the GST GAAR focused on an arrangement designed to “defeat the intent and application” of the *GSTA 1985*. A government review⁴ of s 76 *GSTA 1985* expressed concern as to the effectiveness of the GST GAAR. It recommended that s 76 be rewritten to effectively echo ITA 2007 GAAR (ss BG1 and GA1).⁵ Section 76 *GSTA 1985* was accordingly amended in 2000⁶ and as with s BG1 it now revolves around the broad notion of a “tax avoidance arrangement”.

Section 76(1) and (3) *GSTA 1985* provides that a “tax avoidance arrangement” is void. As discussed below, that is supported by broad powers of reconstruction conferred on the Commissioner of Inland Revenue (‘CIR’) under s 76(3) and (4). A “tax avoidance arrangement” is defined in s 76(2). The components of a “tax avoidance arrangement” are then further defined in s 76. First, there must be an “arrangement.” As with the ITA 2007 GAAR, “arrangement” is broadly defined in s 76(8). It includes any “agreement, contract, plan or understanding” “whether enforceable or unenforceable.” Thus a mere unenforceable understanding between the parties can be a tax avoidance arrangement. The arrangement includes “all steps and transactions by which it is carried into effect.” This addition is important. In the context of the ITA 2007 GAAR this phrase has been interpreted by the New Zealand courts to mean that each step or transaction can itself be an arrangement.⁷ Thus when ultimately determining whether the factual arrangement is a tax avoidance arrangement the CIR can focus on just one part of the arrangement. This is important as tax avoidance arrangements often include a step(s) that is purely tax driven, with no true commercial purpose or economic reality. Under s 76(8) that tax driven step can in itself constitute the arrangement that is tested under s 76 *GSTA 1985*. This has been a highly controversial issue in regard to the Australian ITAA 1936 GAAR contained in Part IVA. The Australian courts have been divided as to whether Part IVA can apply to a step/subscheme or whether the scheme as a whole must be examined.⁸ Obviously the wider the factual construct, the less likely it is going to

⁴ GST: A Review – A Government Discussion Document (1999) (<http://taxpolicy.ird.govt.nz/publications/1999-dd-gst-review/overview>) at 44 - 45.

⁵ GST: A Review – A Government Discussion Document (1999) (<http://taxpolicy.ird.govt.nz/publications/1999-dd-gst-review/overview>) at 9 and 45 - 47

⁶ As noted above, s 76 *GSTA 1985* was rewritten in 2000 to echo the ITA 2007 GAAR (ss BG1 and GA1). See s 116(1) Taxation (GST and Miscellaneous Provisions Act) 2000 (Cth).

⁷ *Peterson v Commissioner of Inland Revenue* [2005] UKPC 5, (2005) 22 NZTC 19,098 at [33]; *Russell v Commissioner of Inland Revenue (No 2)* (2010) 24 NZTC 24,463 (HC) at [97].

⁸ A series of leading cases had held that Part IVA can only be applied to the scheme as a whole. See, for example, *Federal Commissioner of Taxation v Peabody* [1994] HCA 43, (1994) 94 ATC 4663 at 4670; *Spotless Services Ltd v Federal Commissioner of Taxation* (1995) 95 ATC 4775 (FCA) at 4797 and 4805; [1996] HCA 34, 96 ATC 5201 at 5210 and 5212. The High Court in *Federal Commissioner of Taxation v Hart* [2004] HCA 26, 2004 ATC 4599 was divided on the issue. In summary, Gleeson CJ and McHugh assert that Part IVA cannot be applied to a subscheme, while Callinan (arguably), Gummow and Hayne JJ accept the ability to apply Part IVA to part of a scheme.

be characterized as a tax avoidance arrangement. As discussed below, unlike Part IVA, the Australian GST GAAR applies to part of a scheme, not just a scheme as a whole.⁹

Second, under s 76(2) the arrangement must “directly or indirectly” have “tax avoidance” as its purpose or effect. “Tax avoidance” is broadly defined in s 76(8) in inclusionary terms. The inclusionary nature is important as it means that if a taxpayer were able to construct a GST tax benefit outside that specifically identified in s 76(8), the GST GAAR can still apply. This has been an issue in Australia as both the GST GAAR (s 165-10(1) GSTA 1985) and Part IVA (s 177C(1))¹⁰ are stated as being exhaustive, any tax concession not delineated in the legislation¹¹ are excluded from the notion of “tax benefit”.¹² The GST tax benefits identified in s 76(8) include (a) reduction in liability to pay GST; (b) postponement in liability to pay GST; (c) increase in GST refund; (d) earlier entitlement to a GST refund; (e) reduction in consideration payable for a supply. Thus the definition identifies the obvious GST tax benefits of reducing GST liability or increasing a GST refund, but also recognises that there can be GST tax benefits from exploiting the GST timing rules, discussed below. Thus s 76(8) is not only inclusionary in nature, but also casts a wide net.

Third, under s 76(2), a tax avoidance arrangement is one where the “arrangement” has tax avoidance as “its” purpose or effect, or one of “its” purposes or effects. The specification to “its” is a reference to the arrangement. Thus, importantly, the focus is on the arrangement’s purpose or effect, rather than on the taxpayer’s (or other participants’) purpose. The New Zealand courts have stressed that this is, therefore, an objective test and the subjective intent of the taxpayer are irrelevant.¹³ As discussed below, this issue is controversial under the Australian GST GAAR.¹⁴ Returning to this part of the definition, it suffices if one of the purposes or effects was to obtain a GST tax benefit. Thus there is no reference to a “sole or dominant purpose” test as in the Australian GST GAAR, s 165-5(1) *GST Act 1999*. The only qualification is that the tax avoidance is purpose or effect must not be “not merely incidental.”

Section 76(2)(b) states that the requirement of a tax avoidance purpose or effect may be satisfied “whether or not any other purpose or effect is referable to ordinary business or family dealings.” As noted above, s 76 was amended in 2000 to echo the ITA 2007 GAAR, in particular s BG1. The predecessor to s BG1, s 108 Land and Income Tax Amendment (No 2) Act 1974 was amended in 1974¹⁵ to legislatively reverse of the “predication test” stated by Lord Denning in *Newton v Federal Commissioner of Taxation*.¹⁶ The New Zealand courts had embraced the predication test as a means of reading down the then GAAR, s 108, to ensure it did not apply to ordinary business or family arrangements. The inclusion of this legislative reversal in s 76 means that, contrary to the predication test, a broader commercial purpose underlying the arrangement will not necessarily

9 See the discussion below of the definition of “scheme” in s 165-10(2).

10 The original version of s 177C(1) has been subsequently amended to broaden its scope, but remains phrased in an exhaustive manner.

11 Such as tax offsets.

12 *Peabody v Federal Commissioner of Taxation* (1993) 93 ATC 4104 (FCA) at 4117.

13 See *Ch’elle Properties (NZ) Ltd v CIR* *Ch’elle Properties (NZ) Ltd v CIR* (2008) 2 NZLR 342 (CA) at [45]; *Glenharrow Holdings Ltd v CIR* *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [35] – [39] and [54].

14 See the discussion below of s 165-5(1).

15 See Land and Income Tax Amendment (No 2) Act 1974, s 9.

16 *Newton v Federal Commissioner of Taxation* (1958) CLR 1 at 8.

exclude the applicability of the GST GAAR. This significantly widens the scope of the GST GAAR, particularly when considered in light of the fact that s 76(8) enables its application to a mere part of the arrangement.

One final point to note in regard to the definition, unlike s 165-15 *GST Act 1999* discussed below, s 76 does not include a list of factors that the court must address in determining the ultimate question “is this a tax avoidance arrangement?”

The tax avoidance arrangement can be entered into by any person, it need not be the GST registered person: s 76(1). As discussed below, if the person that entered into the arrangement is not GST registered, one of the CIR’s powers is to deem that person under s 76(4) to be registered for GST.

If the arrangement is a tax avoidance arrangement, the consequences are specified in s 76(1), (3) and (4). As noted above, a “tax avoidance arrangement” is void: s 76(1) and (3). Under s 76(3) and (4) the Commissioner is conferred broad reconstruction powers. Under s 76(3) the CIR may “counteract any tax advantage” that the GST registered person has obtained from or under a tax avoidance arrangement. This allows the CIR to adjust the tax payable/refundable by a GST registered person in the manner the “Commissioner considers appropriate” to counteract any tax advantage from or under the arrangement. Additional powers are stated in s 76(4): (a) as noted above, treat a party to the arrangement as being a GST registered person; (b) treat a supply as being a taxable supply made by/to a GST registered person; (c) adopt the taxable period that would have occurred but for the arrangement; (d) adopt the open market value of supply. The latter is particularly important as the New Zealand courts have stressed that the GSTA 1985 is based on open market values.¹⁷

Section 76 GSTA 1985 also includes a specific anti-avoidance provision. Under ss 76(5)-(7) if a person enters into an arrangement that involves the transfer of the whole or part of a taxable activity to another person(s), the total turn-over can be attributed to both the transferor and transferee for the purposes of, *inter alia*, the threshold for registration under s 51 GSTA 1985.

Thus the New Zealand s 76 echoes the approach taken in s BG1 ITA 2007, as its application revolves around quite broadly defined terms. Unlike the Australian GST GAAR there is no legislative direction as to the indicia of a tax avoidance arrangement. Apart from the requirement in s 76(2) that the tax avoidance purpose or effect is “not merely incidental”, there are no legislative directives as to what arrangements are excluded from the GAAR. Instead this has been left to the judiciary to formulate. The judicial doctrines developed by the New Zealand courts are discussed in the next section, the leading case being *Glenharrow Holdings Ltd v CIR*.¹⁸

B Leading case

¹⁷ *Glenharrow Holdings Ltd v CIR* (2009) (2009) 2 NZLR 360 (SC) at [44].

¹⁸ See the discussion below in *Glenharrow Holdings Ltd v CIR* (2009) (2009) 2 NZLR 360 (SC) at [42].

As noted above, there is a dearth of cases on s 76 GSTA 1985, both in terms of the original version¹⁹ and the current version.²⁰ Thus the legislation stood for nearly twenty years before the first High Court decision was handed down on its scope.²¹ It was not until 2007 that the Court of Appeal considered the original version of s 76.²² Further, it was not until 2009 that the relatively newly established New Zealand Supreme Court considered the GST GAAR.²³ The Supreme Court's decision in *Glenharrow Holdings Ltd v CIR*²⁴ was handed down the same day as the Supreme Court's first consideration of the ITA 2007 GAAR in *Ben Nevis Forestry Ventures Ltd v CIR*.²⁵ Not surprisingly both decisions essentially echo the same approach to the GAARs. This section will consider *Glenharrow Holdings Ltd v CIR*²⁶ as the Supreme Court's decision sets out the definitive approach to both versions of the GST GAAR. In that regard, despite the different language in the two versions of s 76, the Supreme Court has stated that both sections are to be interpreted in the same manner, drawing on the principles developed in *Ben Nevis Forestry Ventures Ltd v CIR*²⁷ in regard to the ITA 2007 GAAR, s BG1.²⁸

It could be speculated that the dearth of authority on s 76 GSTA 1985 is because of the absence of avoidance opportunities. The GSTA 1985 is regarded as one of the most effective GST/VAT as it is "broad-based, efficient and neutral."²⁹ Particularly the absence of exemptions found in other jurisdictions, such as Australia, might dictate that the GSTA 1985 does not provide the avoidance opportunities available under ITA 2007? To the contrary, the Supreme Court in *Glenharrow Holdings Ltd v CIR*³⁰ recognised that there are still considerable avoidance opportunities in the GST context. There can be manipulation of the distinction between taxable and non-taxable transactions.³¹ As in *Glenharrow Holdings Ltd v CIR*³² itself, impermissible GST benefits may stem from a GST registered party introducing a GST unregistered party into the transaction.³³ Most commonly tax avoidance arrangements will effect a mismatching of inputs and outputs and/or timing mismatches. The latter is typically effected by exploiting the different timing rules for

¹⁹ There are only two cases (*Ch'elle Properties (NZ) Ltd v CIR* (2008) 2 NZLR 342 (CA) and *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC)).

²⁰ There are only two cases (*Education Administration Ltd v CIR* (2010) 24 NZTC 24,238 and *Tale Holdings Ltd v CIR* (2016) 27 NZTC 22-048)).

²¹ Namely, the High Court decision in *Ch'elle Properties (NZ) Ltd v CIR* (2004) 2 NZTC 18,618; [2004] NZLR 274 (HC).

²² Reported in 2008, *Ch'elle Properties (NZ) Ltd v CIR* (2008) 2 NZLR 342 (CA).

²³ The decision was handed down 19 December 2008, but reported in 2009, *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC).

²⁴ The decision was handed down 19 December 2008, but reported in 2009, *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC).

²⁵ (2009) 2 NZLR 289 (SC).

²⁶ The decision was handed down 19 December 2008, but reported in 2009, *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC).

²⁷ (2009) 2 NZLR 289 (SC).

²⁸ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [34] and [36].

²⁹ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [42].

³⁰ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [42], [46] and [47].

³¹ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [42].

³² *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC).

³³ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [42] and [46].

payments basis taxpayers and invoice basis taxpayers.³⁴ Commonly the tax avoidance arrangement will include acquisitions at commercially unrealistically high prices to allow the taxpayer to obtain inflated input tax credits.³⁵ As discussed below, the latter example was factually controversial in *Glenharrow Holdings Ltd v CIR*.³⁶

Glenharrow Holdings Ltd ('Glenharrow') was an undercapitalised shelf company, with a share capital of only \$100. Glenharrow registered for GST on an invoice basis. The other party to the tax avoidance arrangement, Mr Meates, was not registered for GST. Glenharrow contracted to purchase a mining licence from Mr Meates for \$45m. For GST purposes the mining licence is treated as second hand goods. Glenharrow paid a deposit of \$80,000. As noted above, Glenharrow only had share capital of \$100, thus the deposit was provided by a shareholder, Mr Fahey. Glenharrow claimed an input tax credit on that amount. The remaining contractual amount of \$44,920,000 was purportedly provided via vendor finance. This was effected by Glenharrow providing Mr Meates a cheque for \$44,920,000, drawn on its solicitor's trust account, by way of a loan and placing a mortgage in favour of Mr Meates over the mining licence and a general mortgage over Glenharrow's assets. Obviously Glenharrow never intended, nor had the capability,³⁷ to pay this part of the purchase price. Despite this fact Glenharrow claim an input tax credit for the tax fraction (one-ninth) of \$44,920,000 and planned to do same annually for the next nine years. The Commissioner asserted that this was a tax avoidance arrangement within s 76 GSTA 1985.

The history of this licence is highly relevant to the discussion whether the purchase price was inflated. The mining licence was originally issued in 1990 for a period of ten years. It was then on-sold in 1994 for a mere \$100. Mr Meates then acquired the licence in 1996 for \$10,000. It was then on-sold to Glenharrow in 1997 for \$45m. Thus at this point not only was the contracted price 4,500 x Mr Meates acquisition cost, there was only three years left on the licence. Was the purchase price commercially realistic? The High Court held that it was "grossly inflated."³⁸ The Court of Appeal agreed that it was "artificial" and "totally unrealistic".³⁹ In a surprising turn around, the Supreme Court disagreed, stating that the purchase price was not artificially inflated.⁴⁰ The Court, respectively, strangely stated that it was a consequence of a genuine bargain between Glenharrow and Mr Meates that reflected the market value of the licence.⁴¹

Ultimately, however, the Supreme Court held that the arrangement was designed to defeat the intention and application of the GSTA 1985 contrary to s 76.⁴² The Court stressed that, as with the approach to the ITA 2007 GAAR, technical compliance with the relevant provisions of the GSTA 1985 would not prevent the application of s 76.⁴³ The purpose of s 76 was to strike down

³⁴ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [46].

³⁵ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [47].

³⁶ *Glenharrow Holdings Ltd v CIR* (2005) 22 NZTC 19,319 (HC); *Glenharrow Holdings Ltd v CIR* (2008) 1 NZLR 222 (CA); *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [47].

³⁷ Note, the company extracted only \$210,000 worth of minerals.

³⁸ *Glenharrow Holdings Ltd v CIR* (2005) 22 NZTC 19,319 (HC) at [213].

³⁹ *Glenharrow Holdings Ltd v CIR* (2008) 1 NZLR 222 (CA) at [82].

⁴⁰ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [50].

⁴¹ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [50].

⁴² *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [54].

⁴³ *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC) at [33] and [34].

arrangements that frustrated the GST taxing regime.⁴⁴ The Court noted that the GSTA 1985 was premised on transactions being determined on an “open market value.”⁴⁵ This was particularly so in regard to the second-hand good provisions.⁴⁶ When market forces do not prevail s 76 applies. Thus s 76 is designed to attack distortions that are designed to defeat the contemplated application of the GSTA 1985.⁴⁷

Addressing the above discussed elements of s 76, the Court had little difficulty concluding there was an “arrangement” between Mr Meates, Glenharrow and Mr Fahey.⁴⁸ The crux, therefore, was whether it was entered into to defeat the intent and application of the GSTA 1985 or any provision of the Act?⁴⁹ As noted above, the Supreme Court stressed this was objectively determined by inference, having regard to the arrangement and its effect.⁵⁰ Thus the taxpayer’s subjective intent was not determinative of the purpose of the arrangement.⁵¹ Following on from the above discussion of the role of s 76, the Court found on the facts that there were two economic distortions. First, because of the so-called vendor finance the reality was that payment would never be made and thus no consideration truly paid.⁵² There was no economic cost of the goods as intended by Parliament before an input credit could be claimed. Thus it was contrary to the parliamentary contemplation test. Second, as Mr Meates was not registered for GAT there was no corresponding payment of GST.⁵³ The Court concluded that the arrangement was artificial with no economic effect other than attempting to claim a GST input tax credit.⁵⁴ Finally this tax advantage was not merely incidental to the parties’ commercial decision.⁵⁵

Thus the arrangement was void and Commissioner’s decision to treat the deposit as the only true payment was upheld.⁵⁶

III AUSTRALIAN GST GAAR

A Legislative framework

The GST Act 1999, including Div 165, is operative from 2 December 1998. For Div 165 to apply, s 165-5 *GST Act 1999* requires that there must be (i) a “scheme” (defined in s 165-10(2)) that provides the taxpayer (the “avoider”) with a (ii) “GST benefit” (defined primarily in s 165-10(1)) (iii) the GST benefit is the principal effect of entering into the scheme or is the sole or dominant

⁴⁴ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [34].

⁴⁵ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [44] and [47].

⁴⁶ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [47].

⁴⁷ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [47].

⁴⁸ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [47].

⁴⁹ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [35].

⁵⁰ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [40].

⁵¹ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [39].

⁵² Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [51].

⁵³ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [54].

⁵⁴ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [54].

⁵⁵ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [54].

⁵⁶ Glenharrow Holdings Ltd v CIR (2009) 2 NZLR 360 (SC) at [55].

purpose of entering into the scheme (s 165-5(1)) and (iv) that it is reasonable to conclude that the purpose of the scheme was to obtain the GST benefit (ss 165-51)(c) and 165-15).

As with the definition of “arrangement” in s 76(8) GSTA 1985, in the Australian context, s 165-10(2) broadly defines the notion “scheme” as “any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable by legal proceedings.” Thus, as with s 76(8), a scheme may be a mere unenforceable understanding. The second limb of s 165-10(2) includes “any scheme, plan, proposal, action, course of action or course of conduct.” Section 165-10(2) then provides that a “scheme” includes a “unilateral scheme, plan, proposal, action, course of action or course of conduct.” As noted above, the issue whether Part IVA ITAA 1936 can apply to a mere step or sub-scheme has been quite controversial. Section 165-10(2) is intended to ensure that the GST GAAR can apply even where the GST benefit arises from a mere part of the scheme. To this end the Explanatory Memorandum⁵⁷ states that provides that the GST GAAR can apply to parts of a scheme or single transactions. The application of the GST GAAR to part of a scheme is confirmed in ss 165-5(1)(c), (2), (3)(a), 165-10(1), (3) and 165-15(2). Thus in this regard ss 76(8) and 165-10(2) have the same scope, the GST GAAR being applicable to both the scheme as a whole and any sub-scheme. This is particularly important in the context of Div 165. As discussed below, and noted above, unlike s 76 GSTA 1985, the Australian GST GAAR (s 165-5(1)) requires the sole or dominant purpose of entering into the scheme being to obtain a GST benefit. The broader the scheme is framed, the more difficult it will be to conclude that the dominant purpose underlying the scheme is to obtain the GST benefit, as there may be other competing purposes, such as legitimate commercial purposes. By contrast, as the GST GAAR can be applied to a parts of a scheme and a single transaction, tax driven aspects can be isolated as a scheme in themselves and it will be more readily concluded that the sole or dominant purpose of that narrow sub-scheme was obtaining a GST benefit.

A “GST benefit” is defined primarily in s 165-10(1). As noted above, s 165-10(1) is prima facie stated in exhaustive terms and thus any possible GST benefit that is not included in the albeit broad definition will not be caught by the GST GAAR. Section 165-10(1) defines a “GST benefit” as (a) the amount of GST payable is smaller than it would be, or could reasonably be expected to be, due to the scheme; (b) the amount of GST input credit payable is larger than it would be, or could reasonably be expected to be, due to the scheme; (c) postponement in liability to pay GST or (d) earlier entitlement to a GST input tax credit. Note, unlike s 76(8), there is no specific reference in s 165-10(1) to the GST benefit that may arise from the manipulation of the consideration payable for a supply. For example, a non-arm’s length arrangement where an entity acquires goods at commercially unrealistic prices will allow the taxpayer to obtain an inflated input tax credit. Arguably the absence of this express example is not significant as the price manipulation will give rise to one of the other GST benefits identified in s 165-10(1), namely an increase and/or acceleration of a GST input tax credit.⁵⁸

What is particularly important is that s 165-10(1) applies, not only when there is an actual GST benefit, but also if it could reasonably be expected to have arisen but for the scheme. The latter requires the identification of an outcome that “could reasonably be expected” but for the scheme.

⁵⁷ Explanatory Memorandum to *A New Tax System (Goods and Services Tax) Bill 1998* (Cth).

⁵⁸ See Taxpayer Alert TA 2004/1 “Non-arm’s length arrangements using Goods and Services (GST) cash/non-cash accounting methods to obtain a GST benefit”

Similar phrasing is used in the ITAA 1936 GAAR in its definition of a “tax benefit” in s 177C(1). In that context the Australian courts have said that this requires a prediction of the events that may have occurred if the tax avoidance scheme had not been entered into and the “prediction must be sufficiently reliable for it to be regarded as reasonable.”⁵⁹ Thus the courts have stressed that there must be a reasonable probability, not a mere possibility, that the taxpayer would have obtained the tax benefit but for the scheme.⁶⁰ This reasoning would appear equally applicable to s 165-10(1).

There are two further provisions that relate to the notion of a “GST benefit” that do not have an equivalent in the New Zealand GST GAAR. First, s 165-10(3) prevents a taxpayer arguing that there is no scheme and consequent GST benefit on the basis that there was no alternative arrangement that the taxpayer could have pursued other than the subject scheme or part of the scheme. As noted above, the application of the “reasonable expectation” text requires a predication of what the outcome would have been but for the scheme. The essence of this principle is that taxpayers could argue that the GST GAAR cannot apply where, but for the scheme, the taxpayer would have done nothing. This has proven controversial in the context of the ITAA 1936 GAAR. In two cases⁶¹ the taxpayers have successfully argued that the necessary reasonable prediction of what would have occurred but for the scheme could not be satisfied as, but for the course action taken, the taxpayer would have done nothing. Thus there was no alternative factual construct to which the GAAR could apply. Section 165-10(3) makes it clear that the absence of an economic alternative will not prevent the GST GAAR applying.

Second, unlike the s 76 GSTA 1985, s 165-5(1) includes an express exclusionary limb. Section 165-5(1)(b) excludes from Div 165 cases when the GST benefit arises from an election, option, choice, application or agreement provided for under “GST law”. “GST law” includes GST Act 1999, other GST legislation⁶² and Tax Administration Act 1994. The concern was that given the wide definition of “scheme”, Div 165 might include in its reach GST benefits attributable to specific provisions of the Act which allow and entitle the GST benefit.⁶³ Section 165-5(1)(b) validates only those schemes that utilise specific choices provided under the Act. Examples of such legitimate choices would include (a) not registering for GST when the taxpayer is under the registration threshold, (b) electing to be registered on a payments or invoice basis and (c) electing to provide monthly or two monthly GST returns where applicable.⁶⁴

Div 165 has been subsequently amended⁶⁵ to include a further caveat in s 165-5(3). Section 165-5(1)(b) will not validate the when it was entered into for the sole or dominant purpose of “creating

⁵⁹ *Peabody v Federal Commissioner of Taxation* [1994] HCA 43, (1994) 94 ATC 4663 at 4671.

⁶⁰ *Federal Commissioner of Taxation v Spotless Services Ltd* (1995) 95 ATC 4775 (FCA) at 4807–4809; [1996] HCA 34, 96 ATC 5201 at 5211; *WD& HO Wills (Australia) Pty Ltd v Federal Commissioner of Taxation* (1996) 96 ATC 4223 (FCA) at 4255–4256; *Federal Commissioner of Taxation v Hart* [2004] HCA 26, 2004 ATC 4599 at 4602, 4603, 4605, 4614 and 4625; *Macquarie Finance Ltd v Federal Commissioner of Taxation* [2004] FCA 1170, 2004 ATC 4866 at 4885 and 4886; *Pridecraft v Federal Commissioner of Taxation*; *Federal Commissioner of Taxation v Spotlight Stores Pty Ltd* [2004] FCAFC 339, 2005 ATC 4001 at 4015 and 4021.

⁶¹ *Osborne v FCT* (1995) 95 ATC 4323 at 4329–4330 and 4331; *Mochkin v FCT* (2003) 2003 ATC 4272 at 4286 and 4289–4290.

⁶² Such as *A New Tax System (Goods and Service Transition) Act 1999*.

⁶³ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [54].

⁶⁴ Ruling GSTR 2004/3 identifies certain arrangements involving joint ventures and the internal sale of residential properties that the ATO states does not involve a legitimate choice within s 165-5(1)(b).

⁶⁵ Tax Laws Amendment (2008 Measures No 5) Act 2008 (Cth), operative from 9 December 2008.

a circumstance or state of affairs” necessary to enable the choice or election to be made and thus attract the consequent GST benefit. Thus, where taxpayers purposely enter into an arrangement to enable them to take advantage of a GST benefit expressly provided by the Act, s 165-5(1)(b) will not exempt the arrangement. These provisions largely echo s 177C(2) in Part IVA ITAA 1936. As noted above, there is no equivalent in s 76(8) GSTA 1985.

The final elements of Div 165 are the requirements that the GST benefit is the principal effect of entering into the scheme or is the sole or dominant purpose of entering into the scheme (s 165-5(1)) and that it is reasonable to conclude that the purpose of the scheme was to obtain the GST benefit (ss 165-5(1)(c) and 165-15). As with s 76(2) GSTA 1985, s 165-5(1)(c) includes cases where (i) the effect is tax avoidance⁶⁶ (s 165(1)(c)(i)) and (ii) the purpose is tax avoidance (s 165(1)(c)(ii)). However, under s 165-5(1) the “*principle*” effect of entering into the scheme must be to obtain the GST benefit. By contrast under s 76(2) it just has to be one of the effects. Equally in regard to the strength of the purpose, echoing the ITAA 1936 GAAR, particularly s 177D, s 165-5(1) requires that the purpose of tax avoidance be the “sole or dominant” purpose. By contrast s 76(2) merely requires that one of the purposes be tax avoidance as long as it is not merely incidental. In the context of s 177D ITAA 1936, the Australian courts have said that the “dominant” purpose is the “most influential and prevailing or ruling” purpose.⁶⁷ Thus there is an important difference in the thresholds that must be met under ss 165-5(1) and s 76(2).

The relationship between the two limbs in s 165-5(1) is a little uncertain. It would have been thought that the introduction of a “principal effect” test, in addition to the “sole or dominant purpose” test, meant that as long as the principal effect of the scheme was the obtaining of a GST benefit the GST GAAR can be applied, even if that was not the taxpayer’s purpose. Some doubt has been cast on this issue by one of the few Australian cases, *Re VCE v FCT*.⁶⁸ In this case the AAT read the two limbs ((s 165-5(1)(c)(i) and (ii)) together, requiring reference to the purpose when determining the effect of the scheme.⁶⁹ The AAT stated that “a scheme will only have the principal effect of enabling a person ... to obtain a GST benefit where the relevant dominant purpose was to produce the proscribed principal effect.”⁷⁰ While the author disagrees with the AAT and suggests these are alternative limbs, the point may be nugatory as the final requirement in Div 165 is that it is reasonable to conclude that the purpose of the scheme was to obtain the GST benefit (ss 165-5(1)(c) and 165-15). Thus even if the principal effect test in s 165-5(1)(c)(i) is met, the purpose of the scheme will still be considered in the context of the s 165-15 factors, discussed below.

The AAT also added that “Parliament could not have intended to deny GST benefits and to impose substantial penalties as a result of participation in certain schemes where the circumstances are

66 Thus unlike the *ITAA 1936* GAAR, particularly s 177D, s 165-5(1) a prima facie includes an additional limb that extends to cases where the “effect” of the scheme is tax avoidance.

67 *Federal Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34; (1996) 96 ATC 5201 at 5206 and 5210. See also *Hart v Federal Commissioner of Taxation* [2004] HCA 26; (2004) 2004 ATC 4599 at 4613; *Pridecraft v Federal Commissioner of Taxation*; *Federal Commissioner of Taxation v Spotlight Stores Pty Ltd* [2004] FCAFC 339; (2005) 2005 ATC 4001 at 4015.

68 (2006) 63 ATR 1249; [2006] AATA 821.

69 (2006) 63 ATR 1249; [2006] AATA 821 at [44]

70 (2006) 63 ATR 1249; [2006] AATA 821 at [44].

such that the relevant taxpayer obtained a GST benefit unintentionally or fortuitously.⁷¹ The comment not only provides that both purpose and effect is required, but also suggests a subjective element to the question of the sole or dominant purpose. As noted above, s 76(2) is purely objective in nature. Equally, with respect to Part IVA ITAA 1936 the Australian courts have said that the dominant purpose is to be determined objectively⁷² and the taxpayer's "actual subjective purpose ... is not a matter to which regard may be had in drawing the conclusion."⁷³ This is because s 177D requires an "objective conclusion to be drawn, having regard to the matters referred to in para (b) of the section, but no other matters."⁷⁴ As discussed immediately below, s 165-15 also includes a list of factors that must be considered when asking whether it is reasonable to conclude that the purpose of the scheme was to obtain the GST benefit. Logic would dictate that equally Div 165 entails an objective test.

As noted above, under s 165-5(1)(c) it must be reasonable to conclude that the purpose of the scheme was to obtain the GST benefit having regard to the factors specified in s 165-15. Thus in stark contrast to s 76 GSTA 1985, Div 165 includes an express directive to the courts to consider certain factors when answering the ultimate question whether the purpose of the scheme was tax avoidance. The factors set out in s 165-15(1) are as follows:

- (a) the manner in which the scheme was entered into or carried out;
- (b) the form and substance of the scheme;
- (c) the purpose or object of the *GST Act 1999*
- (d) the timing of the scheme;
- (e) the period over which the scheme was entered into and carried out;
- (f) the effect that this Act would have in relation to the scheme apart from this Division;
- (g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme;

71 (2006) 63 ATR 1249; [2006] AATA 821 at [44].

72 *Peabody v Federal Commissioner of Taxation* (1993) 93 ATC 4104 (FCA) at 4113–4114; *Spotless Services Ltd v Federal Commissioner of Taxation* (1993) 93 ATC 4397 (FCA) at 4417, (1995) 95 ATC 4775 (FCA) at 4810; [1996] HCA 34, 96 ATC 5201 at 5210; *HD & HO Wills (Australia) Pty Ltd v Federal Commissioner of Taxation* (1996) 96 ATC 4223 (FCA) at 4252–4255; *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd (No 1)* [1999] FCA 1199, 99 ATC 4945 at 4970–4973; *Eastern Nitrogen v Federal Commissioner of Taxation* [2001] FCA 366, 2001 ATC 4164 at 4177; *Vincent v Federal Commissioner of Taxation* [2002] FCA 656, 2002 ATC 4490 at 4517–4518; *Federal Commissioner of Taxation v Mochkin* [2003] FCAFC 15, 2003 ATC 4272 at 4278 and 4281–4283; *Federal Commissioner of Taxation v Cooke* [2004] FCAFC 75, 2004 ATC 4268 at 4298; *Hart v Federal Commissioner of Taxation* [2002] FCAFC 222, 2002 ATC 4608 at 4621, 4623–4624 and 4626; [2004] HCA 26, 2004 ATC 4599 at 4608, 4609, 4610, 4614, 4621 and 4626; *Macquarie Finance Ltd v Federal Commissioner of Taxation* [2004] FCA 1170, 2004 ATC 4866 at 4885, 4889 and 4891; *Federal Commissioner of Taxation v Sleight* [2004] FCAFC 94, 2004 ATC 4477 at 4491–4492, 4509, 4510 and 4513, 2005 ATC 4829 at 4872–4873; *Pridecraft Federal Commissioner of Taxation*; *Federal Commissioner of Taxation v Spotlight Stores Pty Ltd* [2004] FCAFC 339, 2005 ATC 4001 at 4014, 4015, 4016, 4023 and 4024; *Calderv Federal Commissioner of Taxation* [2005] FCA 911, 2005 ATC 4760 at 4768; *Iddles v Federal Commissioner of Taxation* [2005] AATA 787, 2005 ATC 2254 at 2274 and 2284.

73 *Peabody v Federal Commissioner of Taxation* (1993) 93 ATC 4104 (FCA) at 4113–4114.

74 *Peabody v Federal Commissioner of Taxation* (1993) 93 ATC 4104 (FCA) at 4113–4114.

- (h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;
- (i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;
- (j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length;
- (k) the circumstances surrounding the scheme;
- (l) any other relevant circumstances.

As noted above, all factors must be considered by the court when concluding whether under s 165-5(1)(c) it is reasonable to conclude that the purpose of the scheme was to obtain the GST benefit. These factors largely echo the factors stated in s 177D in regard to the ITAA 1936 GAAR and reinforce the objective nature of the court's conclusion as to the purpose of the scheme.

If all the above elements are satisfied, under s 165-40 the Commissioner may make a declaration that negates the whole or part of GST benefits stemming from the scheme. Effectively the declaration increases the net tax payable for the relevant period(s). As stated in s 165-50, the cancellation of the GST benefits is effected through this declaration, not an assessment. Under s 165-45 the Commissioner is also empowered to make a compensatory adjustment where it is considered "fair and reasonable". This is designed to deal with situations where the Commissioner has made a declaration that has countered the GST tax benefits obtained by the tax avoider from the scheme, but as a consequence of the counteraction another 'innocent' party (labelled the "loser") has suffered a disadvantaged.

B Leading case

As noted above, there have only been two cases on the GST GAAR in Australia.⁷⁵ Until relatively recently, the only determination was that of the AAT in *VCE v FCT*,⁷⁶ briefly noted above. In 2013 the High Court of Australia had its first opportunity to consider the GST GAAR in *FCT v Unit Trend Services Pty Ltd*.⁷⁷

Unit Trend Services Pty Ltd ('Unit Trend') is the representative member of a GST group of companies.⁷⁸ The group of companies included Simnat Pty Ltd ('Simnat'), Blesford Pty Ltd ('Blesford') and Mooreville Investments Pty Ltd ('Mooreville'). Each of these companies were wholly owned subsidiaries of Raptis Group Limited ('Raptis'). Simnat purchased land on the Gold Coast and obtained development approval from the City Council to construct three towers with residential apartments. Simnat contracted another Raptis company, Rapticvic Contractors Pty Ltd ('Rapticvic'), to construct tower I. Simnat sold the apartments in tower I to the general public. When

⁷⁵ *VCE v FCT* [2006] AATA 821; *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16.

⁷⁶ *VCE v FCT* [2006] AATA 821.

⁷⁷ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16.

⁷⁸ Approved by the Commissioner under s 48-5 *GST Act 1999*.

Tower II was in an advanced stage, Simnat entered into a contract with Blesford, selling Tower II as a GST-free going concern. Similarly, Tower III was sold as a going concern to Mooreville. The complete apartments were sold to end purchasers using a reduced ‘margin’ under Div 75 of the *GST Act 1999*.⁷⁹ Unit Trend, as the representative of the GST group, reported in its monthly BAS returns GST payable on the sales of the apartment units on the basis of the margin scheme.

Unit Trends sought to exploit three aspects of the *GST Act 1999*. Ordinarily, the amount of GST payable under ss 7-1 and 9-70 *GST Act 1999* on a taxable supply is 10% of the total value of the taxable supply. However, if the margin scheme applied, under s 75-10 *GST Act 1999* the GST was calculated by reference to the increase in value post acquisition to the point of supply, not the total value of the supply. Second, s 38-325 *GST Act 1999* provides relief from GST in the case of a supply of a going concern. Third, the arrangement for the residential property development that was entered into among the companies within the group to take advantage of the GST free transfers within a GST corporate group.

The Commissioner issued a declaration under s 165-40(a) of the *GST Act 1999* negating that GST benefit, which were in excess of \$21m. Ultimately, the issue was quite specific, was the GST benefit attributable to making a choice, election, application or agreement provided for under *GST Act 1999*? Initially, the question concerning the interpretation of s 165-5(1)(b) was resolved by the Administrative Appeals Tribunal (AAT) in favour of the Commissioner.⁸⁰ Subsequently, Unit Trend appealed to the Full Federal Court, who then decided the case in favour of Unit Trend.⁸¹ The Commissioner made a special leave application to appeal against the decision of the Full Federal Court, which was granted in full by the High Court of Australia.

In regard to the above analysis of the GST GAAR, the High Court noted that the key question under s 165(1)(a) is whether “an entity ... gets or got a GST benefit from the scheme.”⁸² The inquiry then is whether the entity received a GST benefit within s 165-10(1). As discussed above this includes the case where the GST payable by Unit Trend is smaller than it would have been but for the scheme, here specifically the intermediate sales from Simnat to Blesford and Mooreville.⁸³ Thus the focus of the GST benefit was that which stemmed from the intra-group sales.⁸⁴ The key question then became, was the GST benefit from the scheme “not attributable” to the making a choice expressly provided by the Act within s 165-5(1)(b).⁸⁵ The High Court stressed that the question was whether it was “not attributable”, rather than “attributable”, to the choice.⁸⁶ According to the High Court this is where the majority of the Full Federal Court erred in their approach.⁸⁷ Ultimately the High Court found that the GST benefit was not attributable to making a statutory choice provided for by the Act.⁸⁸ While the taxpayer’s arrangements involved a series of choices provided for under the *GST Act 1999*, the GST benefits obtained by Unit Trend were

⁷⁹ The transactions took place prior to 17 March 2005 and therefore were governed by the Div 75 GST margin scheme provisions that were in place at that time.

⁸⁰ *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497.

⁸¹ *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29.

⁸² *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [48].

⁸³ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [48].

⁸⁴ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [48].

⁸⁵ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [49].

⁸⁶ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [48]-[51].

⁸⁷ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [33]-[35].

⁸⁸ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [57].

“not attributable to” these choices but to the wider arrangement that included all the steps in the scheme.⁸⁹ The GST benefit was a consequence of the companies becoming members of the GST group and the transferring of the properties (towers II and III) to associated entities in that GST group as going concerns and at the agreed consideration to effect the margin scheme.⁹⁰ Note, s 165-5(3) was not part of the *GST Act 1999* at the time of the relevant scheme. The High Court concluded that s 165-5(3) was not necessary to bring the subject scheme and consequent GST benefit within the scope of Div 165.⁹¹

The GST benefit was, therefore, nullified by the GST GAAR in Div 165 *GST Act 1999*.

Particularly given the divergence of views between the AAT and Full Federal Court, the High Court determination provides useful clarification of Div 165, specifically the interplay between ss 165-5 and 165-10.

IV CONCLUSION

The above discussion has shown that while GST is a transaction tax, there are a number of ways taxpayers can exploit the GST regime(s) to create artificial tax advantages. Consequently it is important for the GST legislation to have robust anti-avoidance rules. The limited cases indicate that these provisions have proven to be effective. However, as noted above, the dearth of case law is problematic as absent such jurisprudence one must lament the task of taxpayers and their advisors when considering where the line is drawn between legitimate commercial arrangements and tax avoidance.

The comparative analysis above has identified a number of similarities between the New Zealand GST GAAR (s 76 *GSTA 1985*) and the Australian GST GAAR (Division 165 *GST Act 1999*). Both broadly define an arrangement/scheme. Both broadly define tax avoidance/GST benefit. However, the Australian GST, not only includes certain safeguards, such as s 165-5(1)(b), but is also more prescriptive. This is particularly important in the context of the ultimate question whether it is reasonable to conclude that the sole or dominant purpose of the scheme (or part of the scheme) was to obtain a GST benefit. As discussed above, this is determined by a number of factors stated in s 165-15, all of which must be considered by a court. By contrast, there is no legislative guidance in s 76 to assist the courts in determining whether obtaining the GST benefit was one of the purposes or effects of the arrangement. Particularly in light of the dearth of authority in both jurisdictions⁹², it is contended that the broad approach in the New Zealand legislation is too uncertain, particularly as it is based on judicial discretion. The prescriptive approach in the Australia GST Act gives taxpayers and their advisors greater guidance and also provides the courts with direction.

⁸⁹ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [58] and [64].

⁹⁰ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [58], [61] and [65].

⁹¹ *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 at [67].

⁹² There are only four cases in New Zealand (*Ch'elle Properties (NZ) Ltd v CIR* (2008) 2 NZLR 342 (CA), *Glenharrow Holdings Ltd v CIR* (2009) 2 NZLR 360 (SC), *Education Administration Ltd v CIR* (2010) 24 NZTC 24,238 and *Tale Holdings Ltd v CIR* (2016) 27 NZTC 22-048)) and in Australia only two cases (*VCE v FCT* [2006] AATA 821 and *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16).