



Australian Government
Australian Taxation Office

Part IVA: the general anti-avoidance rule for income tax

Basic principles about how and when it applies.



For more information refer
to practice statement
PS LA 2005/24.

OUR COMMITMENT TO YOU

The information in this publication is current at December 2005.

In the taxpayers' charter we commit to giving you information and advice you can rely on.

If you try to follow the information contained in our written general advice and publications, and in doing so you make an honest mistake, you won't be subject to a penalty. However, as well as the underpaid tax, we may ask you to pay an interest charge.

We make every effort to ensure that this information and advice is accurate. If you follow our advice, which subsequently turns out to be incorrect, or our advice is misleading and you make a mistake as a result, you won't be subject to a penalty or interest charge although you'll be required to pay any underpaid tax.

If you feel this publication does not fully cover your circumstances, please seek help from the Tax Office or a professional adviser. Since we regularly revise our publications to take account of any changes to the law, you should make sure this edition is the latest. The easiest way to do this is by checking for a more recent version on our website at www.ato.gov.au

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COMMISSIONER'S FOREWORD

We have published this guide for anyone concerned that the anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* (the Income Tax Act) may apply to an arrangement they have entered into, or are considering entering into.

Part IVA of the Income Tax Act is the general anti-avoidance rule for income tax. It protects the integrity of our income tax system by ensuring that arrangements that have been contrived to obtain tax benefits will fail.

Part IVA is applied in a practical way. It focuses on the substance of what has been done.

This guide outlines the steps the Tax Office takes when determining whether or not Part IVA applies to a particular arrangement.

The Tax Office currently has six years to apply Part IVA to an arrangement and amend a taxpayer's assessment however, there is legislation before Parliament which will reduce this to four years. Where Part IVA is applied a taxpayer will be liable to pay penalties and interest charges as well as the increase in tax.

We are conscious of the need to ensure we apply Part IVA only after the facts have been carefully considered. This is why we have established a panel of experts from inside and outside the Tax Office to advise on the application of Part IVA to particular arrangements. Generally, the taxpayer will be given the opportunity to put their position to the panel.

If after reading this guide you feel uneasy about an arrangement, you could consider getting advice from your tax adviser, or you could apply for a ruling on the arrangement from the Tax Office.

We have also published a practice statement (PS LA 2005/24) containing extensive detail on the operation of the general anti-avoidance provisions in our various tax laws.



A handwritten signature in black ink that reads "Michael Carmody". The signature is written in a cursive style with a long horizontal stroke underneath.

Michael Carmody Commissioner of Taxation

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Generally speaking, Part IVA will only apply to an arrangement if the answer is yes to both of the following questions:

- 1 Did you obtain a tax benefit from a scheme – a benefit that would not have been available if the scheme had not been entered into?
- 2 Having regard to the eight matters specified in Part IVA would it be objectively concluded that you or any other person entered into or carried out the scheme, or any part of it, for the sole or dominant purpose of obtaining the tax benefit?

There are a number of factors to consider when answering these questions. These factors are explained in the sections following.

FACTORS TO CONSIDER

Did you obtain a tax benefit in connection with a scheme that would not otherwise have been available?

There are two elements to consider in answering this question:

- was there a scheme, and
- did you obtain a tax benefit that would not otherwise have been available?

The definition of a scheme is very broad. It encompasses not only a series of steps which together constitute a scheme or 'plan', but also (by reference to 'action') the taking of just one step.

Because the term scheme can cover so much, it is usually more important to work out if a 'tax benefit' was obtained.

A tax benefit is something that affects the amount of income tax someone has to pay under the tax law, now or in the future.

The main kinds of tax benefit are an amount not being included as assessable income, or a deduction, capital loss or foreign tax credit being allowed.

To determine whether that tax benefit would not otherwise have been available, it is necessary to identify what might reasonably have been expected to happen if the scheme had not been entered into.

The matters that would need to be considered in determining this include:

- the overall practical financial consequences of the scheme and other outcomes of the scheme, and
- whether the same outcomes (other than the tax advantage) could be achieved in a more straightforward, ordinary or convenient way than the way in which they were achieved by the scheme.

In some cases, it may be that nothing would have been done by the taxpayer if the scheme had not been carried out. This is particularly likely to be true if the scheme mainly results in a taxpayer artificially obtaining a tax deduction.

➔ Refer to paragraphs 54 to 78 of PS LA 2005/24 for more information about schemes and tax benefits.

Having regard to the eight matters specified in Part IVA, would it be objectively concluded that you or any other person entered into the scheme or carried out the scheme, or any part of it, for the sole or dominant purpose of obtaining the tax benefit?

The eight matters are:

- 1 the manner in which the scheme was entered into or carried out
- 2 the form and substance of the scheme
- 3 the time at which the scheme was entered into and the length of the period during which the scheme was carried out
- 4 the result achieved by the scheme under the income tax law if Part IVA did not apply
- 5 any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result from the scheme
- 6 any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, that has resulted, will result, or may reasonably be expected to result, from the scheme
- 7 any other consequences for the relevant taxpayer, or for any person referred to in matter 6 (above) of the scheme having been entered into or carried out, and
- 8 the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in matter 6.

Answering this purpose question will generally be the most critical step in determining whether Part IVA applies.

This question is not concerned with any person's actual purpose. In other words, the 'purpose test' is not concerned with what a participant actually (or subjectively) thought or intended. It requires an objective conclusion to be reached about the purpose of a relevant person, and is determined after considering the eight specified matters.

In applying the purpose test, it is important to understand the relationship between each of the eight matters, and to consider and weigh them together in a practical and common sense way to get at the substance of what is really going on.

The eight matters embrace three overlapping sets of tests.

The first is about how the scheme was implemented: how its results were obtained. That is, its manner, form and substance, and timing.

Secondly, the effects of the scheme are considered – the tax results, financial changes, and other consequences of the scheme. In other words, what changed?

Finally, the nature of any connection between the parties to the scheme is considered, and whether this sheds light on what might have occurred if there had not been such a connection.

The following sections explore in more detail what things you need to consider for each of these three tests.

1 How the scheme was implemented

The manner of implementation

It is important to consider whether the way the scheme was formed or implemented can be seen to be 'contrived' to obtain the tax benefit.

For example, it would be relevant if there are steps in the transaction or arrangement that would not be expected to be found in a more straightforward method of achieving the outcome. The presence of these steps adds weight to the view that the purpose of the transaction or arrangement was to obtain the tax benefit.

This is illustrated in a number of Part IVA cases that have been decided by the courts, including the:

- Consolidated Press case which involved an interposed company which lacked any reason for being, other than to create a tax benefit
- Hart case, where there was an election to split a loan, and
- Sleight case, where there was a round-robin finance arrangement that was about generating tax benefits rather than providing funds for a business activity.

Form and substance

This looks past the form of a scheme to consider the substance of what is being done. A discrepancy between the business and practical effect of a scheme, on the one hand, and its legal form on the other may indicate the scheme has been implemented in a particular form to obtain the tax benefit. This will be the case particularly if the substance of the scheme may be achieved in a more straightforward or commercial way.

Timing issues

Issues such as the time a scheme was entered into and the length of the period during which it was carried out also need to be considered.

The question to be addressed is, do the timing and duration of the scheme contribute towards delivering the related tax benefit, or are they related to commercial opportunities or requirements?

The fact that a scheme is entered into shortly before the end of a financial year (or other tax sensitive date such as the date of a change in the rate of tax) and carried out for a brief period may point to the purpose of obtaining a tax benefit. Similarly, the fact that the timing of the scheme is not related to a commercial opportunity may add weight to such a conclusion.

2 The effects of the scheme

It is important to consider the tax result, financial changes and other consequences of a scheme for you and related parties.

The mere fact that a tax benefit exists does not mean Part IVA will apply. However, the effects of the scheme can contribute to a determination of the purpose of a person in entering into the scheme. The absence of any genuine change in a person's overall financial, legal or economic position is likely to add weight to the dominance of the tax purpose.

Any enquiry into the effects of the scheme is not limited to the taxpayer who obtained the tax benefit. It also includes the practical outcome for all related parties.

For example, a scheme may benefit one of your associates, such as your spouse or a wholly-owned company.

Similarly, a loss-making transaction for you may not result in a loss in substance if one of your associates makes a corresponding (but non-taxable) gain as a result of the scheme.

3 The connection between parties to the scheme

This factor makes it necessary to look at connections between you and other parties to the scheme in any assessment of manner, form and substance, tax result, financial change and other consequences.

The fact that parties are not dealing at arm's length – for example, transactions between spouses or associated companies – would be taken into account.

However, this may assist you in applying the purpose test. For example, many dealings which would be decidedly odd between strangers may be entirely explicable between family members.

For example, a business person giving assets to strangers for less than their value would be subject to enquiry, but a gift to a family member could be seen in a different light.

➤ Refer to paragraphs 79 to 112 of PS LA 2005/24 for more information about the eight matters.

➤ CASE STUDIES

The Hart case

The High Court's decision in the Hart case tells us that consideration of the manner in which the scheme was entered into or carried out is important where that involves unusual features designed to confer a tax benefit not otherwise available.

In this case, the taxpayers borrowed money through a split loan to purchase a residence and investment property. At the taxpayers' request, all payments were to be used to reduce the private part of the loan until it was repaid in full, while interest on the rental property part of the loan was to be capitalised.

In their tax returns for the relevant years of income, each of the taxpayers claimed a greater tax deduction for interest on the investment component of the loan than would be the case if two separate conventional loans, one for private purposes and the other for income producing purposes, had been taken out.

When posing the question what was the dominant purpose for using the split loan facility – that is, why borrow money on the terms of the particular scheme entered into by the taxpayers – the conclusion was that it was to obtain the additional tax benefit said to be generated by the use of that facility.

The High Court found that the extra interest expense allocated under a split loan facility to finance the purchase of a rental property is not deductible.

The Sleight case

The Full Federal Court's decision in the Sleight case shows the importance of looking at the substance of arrangements when considering the application of Part IVA. In this case the round robin financing arrangement had the effect that the funds were not, in practice, available to the business.

The Court decided that the taxpayer was carrying on a business of farming tea tree oil, even though the farming activities were undertaken on behalf of the taxpayer by a company associated with the promoter of the tea tree arrangement. However, the Court also decided Part IVA applied to cancel the taxpayer's deduction for management fees and other kinds of fees payable in relation to his tea tree oil allotment.

The amount of the management fees was borrowed by the taxpayer under an arrangement with the following features.

- A loan was made to the taxpayer by a finance company related to the promoter and operator of the scheme. The loan funds were never provided to the taxpayer. Instead, the loan was made on the taxpayer's behalf by the finance company using a 'round robin' arrangement. This round robin involved the finance company drawing a cheque in favour of a related trustee company, the trustee company then drawing a cheque for the amount of the management fee in favour of the operator company, and the operator company then drawing a cheque which went back to the finance company.

- The funds represented by this round robin loan were not actually expended by the operator in the business operations.
- The loan had 'non-recourse' features. This meant that as long as the taxpayer repaid a small proportion of this loan, and entered into a separate loan indemnity agreement with the operator company, he was personally indemnified against repayment of the majority of the loan – it could only be repaid out of any future profits attributable to his tea tree oil allotment.

The Federal Court decided that the dominant purpose for entering into the arrangement involving this funding device was to enable the taxpayer to obtain a deduction for the fees. It was relevant that the 'internal loans provided no funds for the establishment or operation of the plantation scheme' and that the taxpayer's actual cash payments were funded out of the tax refund resulting from his deductions.

The Pridecraft case

The Full Federal Court's decision in the Pridecraft case shows the importance of timing, as well as the commercial and financial substance of arrangements when applying Part IVA.

In this case the Court decided that Part IVA applied to cancel a deduction for funds contributed to a trust that was involved with paying bonuses to employees of the Spotlight Stores.

The funds were contributed to the trust under an arrangement with the following features.

- Spotlight Stores Pty Ltd, which carried on the Spotlight Stores business, contributed \$15 million to the trust on 30 June 1997.
- On 30 June 1997 the trust lent back \$14.8 million of the \$15 million to Spotlight Stores Pty Ltd at interest.
- The stated purpose of the \$15 million payment was to fund the payment by the trust of future bonuses to employees under a new incentive scheme. However, the actual payments of bonuses to employees were made by Spotlight Stores Pty Ltd, with the payments reducing the amount owing by it on the loan from the trust.
- The amount of bonuses actually paid to the employees in the first five years after the trust was established was about \$9.7 million, \$3 million being paid in 1997–1998.

The Federal Court decided that although there were commercial reasons for Spotlight Stores Pty Ltd making the \$15 million contribution to the trust, the dominant purpose for entering into this arrangement with the above features was to enable Spotlight Stores Pty Ltd to obtain a tax deduction of \$15 million in 1996–1997. The court said that 'Spotlight was able to obtain a very large and immediate tax benefit... without having to part with any more than \$200,000 in the 1996–1997 year of income and relatively modest amounts in the succeeding years'.

EXAMPLE OF WHERE PART IVA DOES NOT APPLY

Part IVA would not apply to a typical husband and wife partnership arrangement where there are no unusual features.

Under such an arrangement, a husband and wife conduct a business in partnership and, as the relevant Partnership Act provides, share equally in profits and losses, notwithstanding that only one party performs the main bulk of the work. This arrangement has the effect of dividing income equally notwithstanding that only one of the partners is the main generator of the income of the partnership. However, the arrangement also has the very real financial consequence of exposing each partner to full liability for the debts of the partnership.

When regard is had to the eight matters in Part IVA, it would not be objectively concluded that the dominant purpose of the partnership arrangement was to obtain a tax benefit through the equal division of profits and losses.

Entering into a partnership is an ordinary means for a husband and wife to conduct a business together. There is nothing contrived about the manner of sharing profits and losses because that is what the Partnership Act prescribes as the normal consequence of forming a partnership.

The arrangement is a partnership in form and in substance and it is a way of the husband and wife conducting business over the longer term.

In the absence of unusual features, therefore, Part IVA would not apply to such husband and wife partnerships. The sort of unusual features that could see Part IVA apply include where the:

- income generating activity was in reality a disguised employment arrangement, or
- use of the partnership is prohibited by regulatory or other laws.

In employee-like arrangements, provisions in the income tax law which specifically deal with the alienation of personal services income may apply in any event. This would mean that the partner performing the main bulk of the work is taxed on all of the partnership income. In such cases, Part IVA would have no application.

A QUICK GUIDE TO IDENTIFYING WHETHER PART IVA MAY APPLY

The following questions are designed to help you determine whether there is a risk that Part IVA will apply to an arrangement. If you answer yes to any of these questions, it may indicate there is a risk that Part IVA will apply.

- Is the arrangement (or any part of the arrangement) out of step with ordinary family dealings or the sort of arrangements ordinarily used to achieve the relevant commercial objective?
- Does the arrangement seem more complex than is necessary to achieve the relevant family or commercial objective? Is there a step or a series of steps involved in the arrangement that appear to serve no real purpose other than to gain a tax advantage? For example:
 - transactions which interpose an entity to access a tax benefit
 - intra-group or related party dealings that merely produce a tax result, or
 - arrangements involving a circularity of funds or no real money.
- Does the tax result appear at odds with the commercial or economic result? For example, a tax loss is claimed for what was a profitable commercial venture or transaction.
- Is there little or no risk in circumstances where significant risks would normally be expected? For example:
 - use of non-recourse or limited recourse loans which limit the parties' risk or actual detriment in relation to debts/investments, or
 - arrangements where the taxpayer's risk is significantly limited because of the existence of, for example, a 'put' option (a put option exists when you have the right to make someone else acquire something you have at an agreed price).
- Are the parties to the arrangement operating on non-commercial terms or in a non-arm's length manner? For example:
 - financial arrangements made on unusual terms, such as interest rates above or below market rates, insufficient security or deferment of repayment of the loan until the end of a lengthy repayment period, or
 - transactions which do not occur at market rates/value.
- Is there a gap between the substance of what is being achieved under the arrangement (or any part of it) and the legal form it takes? For example, arrangements where a series of transactions taken together produce no economic gain or loss, such as where the whole scheme is self-cancelling.

If after reading this guide you feel uneasy about an arrangement, you could consider getting advice from your tax adviser, or you could apply for a ruling on the arrangement from the Tax Office.

HOW TO APPLY FOR A RULING

You can apply for a ruling on an arrangement from the Tax Office if you are unsure whether Part IVA applies to the arrangement. You can apply for a private ruling either before or after entering into the arrangement.

To apply for a private ruling you should:

- complete a private ruling application form, and
- send the application (including supporting documentation and other information) to us using the fax number or postal address listed on the application form, or through a tax agent or the Business Portal.

You should include a full and complete description of the facts of the arrangement in your application.

➤ For more information about applying for a private ruling and to download the private ruling application form, visit www.ato.gov.au and select For Tax Professionals – Tax Professionals home page – Rulings, law and objections – Applying for a ruling – Private ruling.

The Tax Office has in place special procedures for ruling applications which are associated with a transaction or arrangement that has characteristics including:

- being time sensitive
- having major commercial significance and requiring consideration at corporate board level
- where the tax outcome is a critical element of the transaction, and
- complex law and facts need to be analysed.

These ruling applications are given priority treatment to assist corporate boards to identify and manage taxation risks associated with major transactions and arrangements.

➤ More information about priority private binding rulings can be found in the practice statement PS LA 2005/10.

In addition to private rulings, the Tax Office also issues, upon application, class rulings and product rulings. The publication of class and product rulings enables the Tax Office to provide binding advice in response to a request from an entity for advice about the application of a tax law to a specified class of persons in relation to a particular arrangement. The purpose of class and product rulings is to provide certainty to participants in arrangements while minimising the need for individual participants to seek private rulings.

Reliance on a ruling

A private ruling only applies to the taxpayer named in the ruling and to the particular arrangement described in the ruling. You cannot rely on a private ruling that is given to someone else.

If the Tax Office has published a class ruling or product ruling about the way a tax law applies to an arrangement you entered into, you can rely on that ruling if you fall within the class of persons to which the ruling applies.

You will not be able to rely on a Tax Office ruling if it turns out that there are material differences between the way in which the arrangement was described in the ruling and the way in which the arrangement was entered into or carried out. This may occur when the ruling application does not include a full description of the facts with supporting documentation.

02

HOW DOES THE TAX OFFICE APPLY PART IVA?

IF THE TAX OFFICE HAS INVESTIGATED YOUR ARRANGEMENT

The steps that will usually occur if the Tax Office applies Part IVA to a tax benefit you obtained under a scheme are as follows.

Step 1

The Tax Office will send you or your adviser a position paper setting out the Tax Office's preliminary position based on what is known at that time.



Step 2

The Tax Office considers any responses you or your adviser have to the position paper. This can be responses to the Tax Office's knowledge and understanding of the facts about the arrangement or to how it applies the law to the arrangement.



Step 3

If the Tax Office auditors still consider that Part IVA applies after considering your responses, they will refer the matter to a senior officer in the Tax Office's tax counsel area. If the tax counsel officer supports the auditor's view, the case is then referred to the Tax Office's General Anti-Avoidance Rules Panel (the panel). The referral rules that have to be followed by tax officers and the role of the panel are explained on page 8.



Step 4

After considering the advice of the panel, the auditor makes a decision on whether to apply Part IVA to your arrangement. If it is decided to apply Part IVA, the auditor makes a determination to cancel the tax benefit it is considered you obtained. The determination is made in writing and is sent to you.



Step 5

The Tax Office will issue you with an amended assessment for the relevant year to reflect the cancellation of the tax benefit and the applicable penalties and interest charges.



Step 6

If you do not agree with the Tax Office's decision, you can exercise your right to object against the assessment.



Step 7

The Tax Office will consider your objection and decide whether or not to allow the objection. If the Tax Office disallows your objection, you can appeal against this decision to the Administrative Appeals Tribunal or the Federal Court.

IF YOU ASK THE TAX OFFICE TO CONSIDER YOUR ARRANGEMENT

You can apply for a ruling from the Tax Office about how specific tax laws apply to an arrangement you have entered into or propose to enter into. If you ask for a ruling about how Part IVA applies, the usual steps are as follows.

Step 1

You complete a ruling application in the approved form for the arrangement which requests a ruling on whether Part IVA applies.



Step 2

The Tax Office has to request from you any information about the arrangement which it needs to consider in order to determine if Part IVA applies to the arrangement.



Step 3

If the tax officer considering your ruling request thinks Part IVA applies to the arrangement, they must refer the matter to a senior officer in the Tax Office's tax counsel area. You can request that your case be referred to the General Anti-Avoidance Rules Panel for its consideration and advice before the ruling is issued.



Step 4

The Tax Office will then give a ruling about the application of Part IVA to your arrangement.



Step 5

You can exercise your right to object to any ruling applying Part IVA to an arrangement. If the case has not previously been referred to the Tax Office's General Anti-Avoidance Rules Panel, you can request that it be referred to the panel for its consideration and advice either before or after you lodge an objection.



Step 6

If the Tax Office disallows your objection, you can appeal against the ruling to the Administrative Appeals Tribunal or the Federal Court.

**REFERRAL OF PART IVA MATTERS TO THE
TAX COUNSEL AND GENERAL ANTI-AVOIDANCE
RULES PANEL**

Before tax officers apply Part IVA by making a determination to cancel a tax benefit and amend an assessment accordingly, they must refer the matter to the Tax Office's tax counsel area for consideration. This area is made up of senior Tax Office staff who have specialist expertise in Part IVA matters.

If the tax counsel officer agrees that Part IVA may apply, the case is then referred to the General Anti-Avoidance Rules Panel (the panel) for advice before a final decision is made. However, a case is not ordinarily referred to the panel where the particular arrangement has already been considered by the panel.

Similarly a ruling advising that Part IVA applies to the arrangement that is the subject of the ruling request can only be made following consideration by a tax counsel officer. Taxpayers can request that their case is referred to the panel either before or after the ruling is issued.

The panel, which generally meets on a monthly basis, is made up of:

- business and professional people – chosen for their ability to provide expert advice, and
- senior tax officers.

**THE GENERAL ANTI-AVOIDANCE RULES PANEL'S
ROLE AND PROCESSES**

The purpose of the panel is to assist the Tax Office in its administration of Part IVA and other general anti-avoidance provisions to ensure that decisions on the application of these provisions are objectively based and consistent. The panel's role is advisory. The relevant decision under Part IVA is made by the appropriate tax officer having taken into account the panel's advice.

Matters are generally referred to the panel after the Tax Office has issued a position paper and considered the taxpayer's response to the position paper.

To assist the panel in providing advice to the Tax Office, you or your representative will usually be invited to attend the panel meeting and address the panel. Before attending a panel meeting, you will be asked to provide a written submission to the panel.

If attending a panel meeting, you or your representative should be prepared to respond to questions from the panel, particularly questions relating to the tax benefit and the eight matters in the purpose test.

➤ Refer to paragraphs 17 to 40 of PS LA 2005/24 for more information about the role and processes of the panel.

MORE INFORMATION

For a copy of the Part IVA practice statement (PS LA 2005/24), other publications, or for other information:

- visit our website at **www.ato.gov.au**
- phone:
 - **13 28 61** for personal tax enquiries
 - **13 72 66** for general business enquiries
 - **13 72 86** for tax agent enquiries, or
 - **1800 060 062** to report information about tax evasion
- obtain a fax by phoning **13 28 60**, or
- write to us at **PO Box 9935** in your capital city.

If you do not speak English well and want to talk to a tax officer, phone the Translating and Interpreting Service on **13 14 50** for help with your call.

If you have a hearing or speech impairment and have access to appropriate TTY or modem equipment, phone **13 36 77**. If you do not have access to TTY or modem equipment, phone the Speech to Speech Relay Service on **1300 555 727**.

