# A RE-INTERPRETATION OF SECTION 51(1) OF THE INCOME TAX ASSESSMENT ACT AND THE DEDUCTIBILITY OF INFLATED EXPENSES

JAGINDER SINGH-PASRICHA*

## INTRODUCTION

The formalistic approach the Australian courts have hitherto adopted in relation to the *Income Tax Assessment Act* (Cth.) has led to a growth in tax avoidance and to a proliferation of complex legislation to outlaw tax avoidance schemes. To date such piecemeal anti-avoidance legislation has not been successful. The problems inherent in this narrow formalistic approach are well illustrated by the exploitation by taxpayers of s. 51(1) of the *Income Tax Assessment Act* for tax avoidance purposes. Section 51(1) provides that:

> "all losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income."

The provision embodies two limbs, viz., losses and outgoings incurred in gaining or producing assessable income and losses and outgoings incurred in carrying on a business for that purpose.

The first limb of s. 51(1) finds its ancestry in s. 23(1)(a) of the *Income Tax Assessment Act* 1922-1936. The crucial phrase in this limb, namely "in gaining or producing" assessable income has been widely interpreted to mean that the expense must be "incidental and relevant" to that end. That is to say "that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income".[1] The enquiry under this interpretation of the phrase is directed not to the state of mind of the taxpayer in incurring the loss or outgoing but to the nexus of the benefit secured to the expense which produces income.

The second limb was added when s. 51(1) was drafted to take into account cases where money had been outlaid by a business to improve

* Formerly known as Jaginder Singh, LL.M. (Lond.); Lecturer, Faculty of Law, University of Melbourne, Barrister-at-Law, Victoria.

1 *Ronpibon Tin N.L.* v. *F.C. of T.* (1949) 78 C.L.R. 47, 57.

efficiency or to reduce losses in future or when it was simply commercially expedient to do so.

In *Ronpibon Tin N.L.* v. *Federal Commissioner of Taxation (F.C. of T.)*[2] the High Court in a joint judgment said that although the alternative contained in the second limb of s. 51(1) covers a wide description of activities, nevertheless its actual working adds little to the first limb. The words "in gaining or producing" in the first limb cover almost all the ground covered by the second limb. The second limb, however, eliminates any doubt as to the deductibility of an expense incurred not to attain or increase revenue but to avoid or reduce expenditure.[3]

What has occurred in relation to s. 51(1) is that taxpayers have artificially inflated expenses and because of their narrow, literal approach the courts have refused to disallow such deductions in tax avoidance schemes. Such schemes are widespread and include the use of professional service trusts to supply services at a higher cost which the taxpayer would otherwise have performed for himself and the payment of rent under leases which are designed to enable the taxpayer or an associate of the taxpayer to acquire a reversion at a reduced price thus enabling the taxpayer to acquire a capital asset by way of a revenue outgoing. There is also a range of other types of expenses which are incurred on the pretext of being business expenses but in fact are incurred only because a deduction is available, e.g. attendance at overseas conferences where the conference has only a marginal connection with the taxpayer's income producing activities and which is held overseas by local organisers as it in effect enables delegates to go on a taxfree holiday.

## The Problem

A typical example of tax avoidance through inflated expenses is found in *Cecil Bros. Pty Ltd* v. *F.C. of T.*[4] The taxpayer company was a shoe retailer. In the year of assessment in question, instead of acquiring all its stocks of shoes from its usual suppliers it acquired some of them through an interposed company, Breckler Pty Ltd. Breckler Pty Ltd bought the stocks required by the taxpayer from the taxpayer's usual suppliers at a price at which the taxpayer would have obtained the goods if the orders had been placed directly with those suppliers. Breckler Pty Ltd then resold the same shoes to the taxpayer with a small mark-up. The Commissioner sought to reduce the amount the taxpayer company claimed as a deduction for acquiring trading stock by the amount of profit claimed by Breckler Pty Ltd. On the evidence it was found that (a) Breckler Pty Ltd had been formed to make financial provision for the next generation of the families of the principal shareholders of the taxpayer company; (b) the registered

[2] Ibid.
[3] Ibid. 56.
[4] (1964) 111 C.L.R. 430. Such a scheme is now covered by s. 31C.

office of Breckler Pty Ltd was at the same address as the place of the business of the taxpayer company; (c) Breckler Pty Ltd employed no staff, all the clerical functions being performed by employees of the taxpayer company and (d) Breckler Pty Ltd did not supply goods to anybody other than the taxpayer.

In most situations where a person carrying on a business acquires goods or services through an associated body at a cost which exceeds the price at which the same goods or services could have been acquired on an open market, the profit realised by the associated person finds its way back to the taxpayer or his family through family trusts or by relieving the taxpayer of a liability or responsibility he would have otherwise had to bear himself. Where the facts indicate that the taxpayer is not at arms length with his supplier and the price exceeds market price it is not unreasonable to draw the inference that the purpose of the expenditure is not to produce assessable income. If the taxpayer can obtain a full deduction for the whole of the larger outgoing he has incurred he, in effect, obtains a subsidy from the Treasury.

The aim of this article is to advance an alternative approach to the interpretation of s. 51(1) which, if adopted, would remove the need for much anti-avoidance legislation. This approach centres on the ascertainment of the "purpose" of the taxpayer in incurring an expense. It will be argued that by applying a test of purpose in the interpretation of the whole of s. 51(1) the courts will be able to disallow deductions in tax avoidance schemes which artificially inflate expenses. Further, it will be argued that existing authorities leave this interpretation open.

## THE "PURPOSE" APPROACH

The word "purpose" appears in numerous sections scattered throughout the *Income Tax Assessment Act*. The major difficulty that arises in interpreting the word is whether it expounds an objective or subjective test. The Shorter Oxford Dictionary states a number of meanings for it, including:

"1. the object one has in view.
2. the action or fact of intending or meaning to do something; intention, resolution, determination.
3. the object for which anything is done, or made, or for which it exists; and, aim.
4. to place before oneself as a thing to be done or attained."

All of these meanings ascribe to the word "purpose" a subjective meaning. It will be argued in this article that the word "purpose" should be interpreted to mean the subjective state of mind of the taxpayer. This state of mind under the *Income Tax Assessment Act* must be taken to mean, prima facie, the natural consequences that arise from the taxpayer's conduct. In this "modified" subjective test the court has regard to the

surrounding circumstances in arriving at a conclusion as to what inferences may be drawn in deciding the subjective state of mind of the relevant person. The taxpayer's own testimony will be only one of the factors taken into account by the courts in determining his purpose.

Under s. 51(1) the ascertainment of the purposes of the taxpayer in incurring an expense would enable the court to establish whether any part of the expense was incurred for unauthorised purposes and if so, to apportion the outgoing accordingly.

In what follows it is proposed first to discuss the meaning of purpose under the traditional interpretation of s. 51(1), secondly, to examine the meaning of purpose in other sections of the *Income Tax Assessment Act*, thirdly, to attempt a rationalisation of the purpose concept, fourthly, to propose an alternative interpretation of s. 51(1) in the light of this rationalisation and finally to reappraise some recent cases utilising this alternative interpretation.

## 1. Purpose Under the Traditional Interpretation of Section 51(1)

Purpose was often relied on as a test in applying s. 23(1)(a) of the 1922 Act even though the word did not appear in that provision. Thus, for example, in *W. Nevill & Co. Ltd* v. *F.C. of T.*[5] Latham C.J. said that an item of expenditure was deductible where it "was made for the purpose of increasing the efficiency of the company, and therefore increasing its income producing capacity".[6] His Honour went on to explain:

> "If the actual object is the conduct of the business on a profitable basis with due regard to economy which is essential in any well-conducted business, then the expenditure is an expenditure incurred in gaining or producing the assessable income."[7]

It seems that his Honour was having regard to what went on in the minds of those who ran the business in order to ascertain whether there was the required relationship between the outgoing and the income producing activity. Where there is no obvious or immediate connection between the outgoing and the production of income it becomes necessary to establish the purpose for which the expense was incurred and the relevance of that purpose to the business and the gaining or production of assessable income. The result of the test suggested by Latham C.J. would therefore seem to be that regard must be had to the motives of those who run the business in incurring the expense and the consequences thereof in ascertaining the connection of the expense with the gaining or production of assessable income.

Some degree of caution must, however, be exercised in relying on purpose as a test for determining deductibility of losses and outgoings.

5 (1937) 56 C.L.R. 290.
6 Ibid. 300-301.
7 Ibid.

> ". . . in matters of income tax, purpose is an elusive and indefinite criterion. The purpose of a payment when a deduction is claimed for it becomes an attribute of the transaction rather than a state of mind in some actual person . . . [W]hen it is said that gaining or producing of assessable income must be the purpose of the expenditure if its deduction is to be allowed, no more can be meant than that the circumstances of the transaction must give it the complexion of money laid out in furtherance of gaining income."[8]

It can be deduced therefore that purpose had come to be relied on as a criterion in determining the deductibility of an expense under s. 23(1)(a) of the 1922 Act. The notions of the subjective state of mind of the taxpayer in incurring the expense and the natural consequences of the expense in its connection with the production of assessable income are sought to be separated in the above statement. The true meaning of the above treatment is that the deductibility of an expense ought not to be determined by reference only to the ultimate goal or motives of the taxpayer. Instead regard must be had to the natural consequences of the outgoing and the relationship of those natural consequences with the gaining or production of assessable income. Although the motive of the taxpayer may be an indecisive and indefinite criterion in determining the deductibility of an expense on its own, it can surely assist in determining what the natural consequences of the expense are and whether those consequences were intended.

Of the two limbs of s. 51(1) of the 1936 Act, it is only the second limb which contains in it the word "purpose". The context in which the word appears there indicates that the object in view of the business carried on by the taxpayer must be the gaining or production of assessable income.[9] The context in which the "purpose" is used requires the ascertainment of the purpose of an inanimate object, a business, which cannot have a mind of its own and can only do that which those who direct it want it to. A purpose can therefore only be ascribed to a business by having regard to the means employed by it in achieving a given result, the natural consequences of the conduct of the business and the ultimate goal of those individuals who run it. It would be artificial to take the same view of "purpose" in the second limb of s. 51(1) as has been adopted by s. 260 in *Newton* v. *F.C. of T.*[10]

[8] Per Dixon J. in *R.G. Nall Ltd* v. *F.C. of T.* (1937) 57 C.L.R. 695, 711-712.

[9] In *Patcorp Investments Ltd* v. *F.C. of T.* (1976) 76 A.T.C. 4225 McTiernan J. (dissenting) at 4228 suggested that outgoings cannot be said to have been incurred as an incident of a business where the transaction in respect of which they arose was carried out to produce a loss. In *London Australia Investment Co. Ltd* v. *F.C. of T.* (1977) 77 A.T.C. 4398 Jacobs J., at 4409-4410 said that an *indicia* of the carrying on the business of buying and selling is the intention or expectation of selling at a profit. It may be deduced, therefore, that there cannot be the carrying on of a business where an activity is carried on to produce a loss.

[10] (1958) 98 C.L.R. 1. See further infra 85.

Despite the fact that there are two limbs to s. 51(1), the second limb would rarely apply to allow the deduction of an outgoing which is not also deductible under the first limb. The result of this is that the courts often fail to distinguish between which of the two limbs they are applying in deciding a given case. In spite of the words of caution sounded by Dixon J. in the *R.G. Nall* case the courts still rely on purpose as a criterion in determining the deductibility of an expense, and it is not clear whether that criterion is being used under the first or second limb of s. 51(1). What is confusing, however, is that the courts sometimes use the word purpose as relating to the subjective state of mind whilst at other times it relates to the taxpayer's end in view as determined objectively. Thus in *F.C. of T.* v. *Phillips*[11] Fisher J., in the Federal Court said:[12]

> ". . . from the firm's point of view the only purpose of the expenditure was the acquiring of assessable income or the carrying on of business for that purpose. There was no secondary purpose of benefiting the families of the partners, rather the benefits which accrued to these families was the incentive for the acquisition of the services from the management company rather than from elsewhere."

His Honour continued:[13]

> ". . . the firm, whilst under no obligation, was doubtless motivated to engage the management company in the knowledge that it was thereby indirectly benefiting the relatives of the partners . . . However, motive and incentive are not synonymous with purpose . . ."

In the first passage above, Fisher J. uses the word purpose in relation to a different point of reference each of the three times it is used. First it refers to the first limb of s. 51(1) to mean that the end result in view by the firm was the acquisition of assessable income. The question then arises, how do you ascertain what it is that the firm had in view? Once again the firm can but have the collective end in view of the individual members that comprise it. In *Phillip's* case itself the Federal Court concluded that the end in view of the firm was the gaining of assessable income by having regard to the benefit the expense brought in to the firm and the relevance of that benefit to the gaining or producing of assessable income. In a word, the court had regard to objective criteria in ascertaining whether or not the purpose of the expense was to gain or produce assessable income.

Secondly the word is used in its context in the second limb. Here the court need only satisfy itself that the business was carried on with a view to making a profit. With a business which regularly produces a profit it can hardly be argued that the business was not being carried on to produce assessable income.

The real difficulty arises in ascribing the word a correct meaning in the context in which it is used the third time. On both the first two occasions

[11] (1978) 78 A.T.C. 4361.
[12] Ibid. 4368.
[13] Ibid. 4369.

the word is used, it is apparent that the court is really concerned with ascertaining purpose as an objective matter in the same way as under s. 260. However in its third context it would seem that Fisher J. is really concerned with the end in view of the taxpayer. This end in view is to be determined in the light of the subjective state of mind of the partners in the firm.

His Honour is quite correct in pointing out in the second passage that purpose and motive are not the same thing and that although the motive of the taxpayer may inspire him to embark on a given course of conduct, nevertheless what the court must ascertain is his purpose. As indicated, the caution sounded by Dixon J. in the *R.G. Nall* case can be explained and confined to reliance on motive as the sole or principal criterion in determining the deductibility of an expense. In *Phillip's* case Fisher J. carefully separated the matters pertaining to motive from those relating to purpose and made his decision entirely on the basis of the latter. However this does not overcome the difficulties raised by that word and the notions underlying it in its various contexts.

## 2. Purpose Under Other Provisions

### *(a) "Purpose" under s. 26(a)*

Section 26(a) reads as follows:

> "The assessable income of a taxpayer shall include—
> (a) [Sale of property, profit-making scheme] profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale. . . ."

The word "purpose" in s. 26(a) therefore refers to the object that the taxpayer had in view at the time he acquired the property in question. "When I speak of purpose I mean, of course, the main or dominant purpose actuating the acquisition."[14] One matter on which the judgments on s.26(a) reflect any degree of consistency is that "purpose" in s. 26(a) relates to the subjective state of mind of the taxpayer. The taxpayer must have acquired the property with the intention to sell it at a profit under the first limb.

The real difficulty under s. 26(a) is how the subjective state of mind of the taxpayer is to be established. Is it only evidence by the taxpayer of his own state of mind that may be relied upon? Can inferences about such state of mind be drawn from the surrounding circumstances at the time the property was acquired and disposed of or used in a scheme? Must the taxpayer take the stand and show himself to be of unquestionable honesty? Must his evidence that he did not have the requisite purpose be therefore accepted? In the alternative can he rely on circumstantial evidence to show that he could not have had the intention of acquiring the property to

[14] Per Gibbs J. in *McCormack* v. *F.C. of T.* (1979) 79 A.T.C. 4111, 4121.

re-sell at a profit? These questions arose for consideration in *McCormack* v. *F.C. of T.*[15] A number of conclusions can be drawn from the judgments delivered by the Full High Court:

1. Where the issue involves the purpose of the taxpayer in acquiring property the best evidence for establishing or denying the existence of the requisite purpose is the evidence of the taxpayer. The Court must make its own evaluation of the veracity of the taxpayer.
2. Evidence of the surrounding circumstances in support of the taxpayer may also be adduced. If the taxpayer's evidence of his intention is accepted then the taxpayer is likely to succeed. But evidence of the surrounding circumstances may show that the taxpayer's evidence is not acceptable even though such a finding does not mean that the taxpayer is disbelieved.
3. The majority, comprising Gibbs, Stephen and Murphy JJ., took the view that s. 190(b) of the Act placed the onus of disproving "purpose" in s. 26(a) on the taxpayer in order to show that the assessment was excessive.

> "The taxpayer bears the burden of proving that the assessment was excessive. To discharge that burden in a case such as the present he must prove affirmatively, on the balance of probabilities, that the property was not acquired for the purpose of profit-making by sale. The burden may be discharged by drawing inferences from the evidence. In some cases in which all the relevant facts are known, and there is no material upon which it might properly be concluded that the property was acquired for the relevant purpose, the inference may properly be drawn that the property was not acquired for the relevant purpose. But it is not enough, even when all the facts are known, that there is no material upon which it may be concluded that the property was acquired for the purpose mentioned in sec. 26(a)."[16]

From the foregoing it can be deduced that the taxpayer, apart from giving evidence himself, will seek to produce corroborative evidence such as statements he made contemporaneously with the acquisition of the property in question, his financial position and personal circumstances at the time, the circumstances in which he came to acquire the property, what he did with the property after he acquired it, the time lapse between acquisition and disposal and the circumstances in which he sold the property. Such evidence will become even more important when the court entertains any doubt as to the veracity of the taxpayer as a witness. The Commissioner, on the other hand, will adduce evidence that challenges the taxpayer's veracity and which shows that the taxpayer did have a s. 26(a) purpose. The evidence that the Commissioner can adduce to show that the taxpayer carried out the transaction in question with the requisite state of

[15] (1979) 79 A.T.C. 4111.
[16] Gibbs J. ibid. 4121.

mind will of necessity be of surrounding circumstances and of the history of the taxpayer in carrying out transactions of that nature.

In effect, therefore, the Commissioner is seeking to establish the existence of a subjective intention as a natural inference to be drawn from the surrounding circumstances. This is therefore an objective enquiry. The Commissioner can only succeed in this if the court is less than 100 per cent satisfied of the truthfulness of the taxpayer as a witness. If there is any doubt as to the truthfulness of the taxpayer's evidence of his intention, the inferences that the court will then draw from evidence of surrounding circumstances in deciding whether or not the taxpayer has discharged the onus placed on him under s. 190(b) of the *Income Tax Assessment Act* depends on the view that the court is prepared to take of the evidence in question. This in turn depends on the attitude of each individual judge. This is substantiated from the fact that cases heard on appeal on s. 26(a) by the Federal Court or the Full High Court are rarely decided unanimously.[17]

*(b) "Purpose" under s. 260*

S. 260 of the Act, insofar as relevant, provides:

> "Every contract, agreement, or arrangement made or entered into, . . ., shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly (avoiding tax) be absolutely void . . ."

The word "purpose" here appears in conjunction with the phrase "every contract, agreement, or arrangement". Therefore under s. 260 it is necessary to establish the intention of the contract, agreement or arrangement (hereinafter referred to as arrangement). An arrangement cannot possess a subjective state of mind. It merely reflects the state of mind of its architects. The provision, however, is not concerned with the state of mind of the parties to the arrangement. The purpose of the arrangement as being the avoidance of tax must be ascertained from the interpretation of its terms. The leading statement of the meaning of purpose under s. 260 is contained in the judgment of Lord Denning in *Newton* v. *F.C. of T.*[18]

> "The answer to the problem seems to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only the means which they employ to do it. It affects every 'contract, agreement or arrangement' (which their Lordships will henceforward refer to compendiously as 'arrangement') which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement *itself* and see which is *its* effect—which *it* does—irrespective of the motives of the persons who made it. Williams J. put it well when he said 'The purpose of a contract,

[17] Of the more recent cases on s. 26(a) see e.g., *F.C. of T.* v. *Bidencope* (1978) 78 A.T.C. 4222; *Whitfords Beach Pty Ltd* v. *F.C. of T.* (1979) 79 A.T.C. 4648; *Macmine Pty Ltd* v. *F.C. of T.* (1979) 79 A.T.C. 4133, all of which were decided by the High Court.

[18] (1958) 98 C.L.R. 1, 8 (P.C.).

agreement or arrangement must be what *it* is intended to effect and that intention must be ascertained from its terms. These terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect.'

In order to bring the arrangement within the section you must be able to predicate—by looking at the overt acts by which it was implemented —that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section."

In spite of the emasculation of s. 260 by the High Court in the last decade, the meaning ascribed to "purpose" in *Newton's* case by Lord Denning has remained unchallenged. The question remains, however, how realistic is it to seek to establish the purpose of an arrangement without having regard to the intentions of its participants? The purpose of the arrangement itself must necessarily be gauged from its language and the surrounding circumstances. One of these surrounding circumstances must necessarily include the conduct of the parties involved in carrying it out. The action of the parties in carrying out the arrangement must surely be pursuant to the intentions the parties must have had for entering into the arrangement in the first place. Yet evidence of their subjective intentions was not regarded as being instructive by Lord Denning under s. 260. It is submitted that this is an artificial position. Such a view also departs from the established rules of construction of contracts which apply in ascertaining the intentions of the parties to a contract. Admittedly s. 260 applies to transactions which are not necessarily contractual in nature. In fact the vast majority of tax avoidance schemes are implemented through contracts. It is no doubt true that the courts do in fact have regard to the intentions of the taxpayer in ascertaining the purpose of the arrangement. Indeed the situation can often develop that it is difficult to distinguish between the intention or purpose of the taxpayer and the purpose of the arrangement. For example, the purposes of the arrangement enumerated by the Privy Council in *Newton's* case are no different from the intentions of the parties to the arrangement.[19] On the other hand, for example in a dividend stripping operation, the intention of the shareholder might be to obtain the liquid assets of the company whilst attracting the least possible tax liability. The question for the court then is whether the purpose of the arrangements entered into by the taxpayer to achieve that end is a purpose of tax avoidance. It is submitted that that conclusion must necessarily follow. Equally, if a taxpayer embarked on a dividend stripping scheme solely with the intention of realising his investment and acted entirely in accordance with the instructions of his advisors, then although it cannot

[19] Ibid. 9.

be said the taxpayer himself had the intention of avoiding tax, nevertheless that would be the purpose of the arrangements entered into.

Finally, it is to be noted that the motive of the taxpayer in wanting to avoid tax under s. 260 is said to be irrelevant. The motive of the taxpayer would be his personal reasons for wanting to avoid tax. Under the test in *Newton's* case all that matters is the manner in which that motive is given effect. The more blatant the device used the more likely it is to be struck down. But it is submitted that evidence of the motive of the taxpayer is most useful in assisting the court in ascertaining the purpose of the arrangement.

*(c) "Purpose" in some other provisions of the Income Tax Assessment Act*

There are provisions scattered throughout the Act containing the word "purpose" in different contexts. It is therefore instructive to examine briefly the manner in which the courts have approached the interpretation of the word under some of these provisions.

(i) Section 80B(5)(c)

Section 80B(5), broadly speaking, gives the Commissioner a discretion to deny the deduction of losses carried forward by a company even though it may appear to satisfy the continuity of beneficial ownership test contained in s. 80A where the shareholders have entered into arrangements that deprive them of some of their rights as registered shareholders in relation to those shares. However, the Commissioner's discretion only applies where paragraph (c) of s. 80B(5) is satisfied. Section 80B(5)(c) provides:

> "(c) the agreement was entered into, or the right, power or option was granted or acquired, for the purpose, or for purposes that included the purpose, of enabling the company to take into account for the purposes of section 80 or section 80AA a loss that the company had incurred in a year before the year in which the agreement was entered into or the right, power or option was granted or a loss that the company might incur in that last-mentioned year."

The phrase "for the purpose, or for the purposes that included the purpose, of enabling the company . . ." arose for consideration by the Full High Court in *F.C. of T.* v. *Students World (Australia) Pty Ltd.*[20]

Although Mason J. dissented on the outcome of the case his Honour's views on the meaning of the phrase in question were in accord with those of Aickin J. The third judge, Jacobs J. did not discuss the matter. Mason and Aickin JJ. said that the phrase in question refers to the subjective purposes of the continuing shareholder, i.e., the intention of the shareholder in entering into the transaction. The provision was not concerned with the objective effect of the transaction or with the purpose of the transaction in itself.

[20] (1978) 78 A.T.C. 4040.

The interpretation of the word "purpose" in this provision therefore is in line with its meaning in s. 26(a). It would accordingly be up to the individual whose intention is in question to prove that he did not possess the relevant purpose. In accordance with the interpretation of s. 190(b) by the majority in *McCormack's* case and *Macmine's* case the court could draw the relevant inferences from the surrounding circumstances that the continuing shareholder possessed the requisite purpose and it would then be up to the shareholder to overcome that inference. It is interesting to note that Mason J. was of the view that "the inference is irresistible", that the continuing shareholder in that case was aware of the intention of the purchaser of the shares on the basis that "on no other hypothesis could the purchase of the apparently worthless shares be explained".[21] On the other hand, Aickin J. was able to conclude that on the evidence no inference could be drawn that the shareholder had the purpose specified in s. 80B(5)(c).[22] All this goes to demonstrate the difficulty in seeking to establish what goes on in the mind of a person. Different views can be adopted on precisely the same evidence. In such cases it is always a matter of degree as to the weight a judge will attach to evidence of surrounding circumstances and to the direct evidence of a witness as to his own purposes.

(ii) Section 44(2D)(b)

This provision defines the circumstances in which the issue of bonus shares will not be regarded as being non-redeemable and hence fail to qualify as a non-assessable dividend under s. 44(2). The provision itself is a highly technical one. For present purposes only the relevant phrase, in s. 44(2D)(b), ". . . that had the purpose, or purposes that included the purpose, of enabling the company . . ." need be considered. The phrase was the subject of discussion in the Full High Court in *F.C. of T.* v. *Lutovi Investments Pty Ltd.*[23] Gibbs and Mason JJ., in a joint judgment, took the view that s. 44(2D) "speaks of the objective purpose of the agreement".[24] Stephen J., whilst not expressly dealing with the matter, appears to suggest that the provision deals with the purpose of the arrangement, i.e., an objective purpose.[25] On the other hand Aickin J. takes the view that "purpose" in s. 44(2D) refers to:

> ". . . the end in view, i.e. the end which those who were parties to the arrangement had in view. In that sense it requires consideration, not of the motive, but of the object sought to be achieved by those who entered into the arrangement. If the legislature had intended to refer only to

[21] Ibid. 4049.
[22] Ibid. 4054.
[23] (1978) 78 A.T.C. 4708.
[24] Ibid. 4713.
[25] See ibid. 4715-16 and 4717.

the objective result it would have used the familiar word 'effect' which has this precise meaning."[26]

Irrespective of which of the two diverging views in the context of s. 44(2D) is correct, the different meanings ascribed to the same word in the one provision demonstrate the difficulties to which the word gives rise.

(iii) Section 82KH(1)

Section 82KH(1) is the definition section of the recently enacted anti-avoidance provisions in the new Sub-division D of Part III, Division 3 of the Act. The particular definition relevant at present is that of "tax avoidance agreement".

> " . . . 'tax avoidance agreement' means an agreement that was entered into or carried out for the purpose, or for purposes that included the purpose, of securing that a person who, if the agreement had not been entered into or carried out, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into or carried out."

The provision has not yet been the subject of judicial interpretation. In the context in which the word "purpose" appears it seems to refer to the subjective purpose or intention of the person concerned. The language of the provision is in line with that used in s. 80B(5)(c) and in relation to that provision the unanimous view is that the subjective purpose of the relevant person must be ascertained. It may be noted that by virtue of s. 82KH(1A), the purpose in question must be more than an incidental purpose and that, by virtue of s. 82KH(4) it is enough if only one of the parties to the transactions had the requisite purpose.

3. A Rationalization of the Interpretation of Purpose

The objective interpretation of the word "purpose" requires that regard is had only to the end result of the transaction as such without regard to the consequences of that result on the tax position of the taxpayer and associated persons. All the courts need to consider is the documentation and other evidence relating to the means of implementing the transaction and to decide on that basis, whether the result achieved or sought to be achieved, is caught by the provision. This decision will have to be made on the basis of the proper interpretation of the terms of the arrangement that are proved in evidence. In keeping with the statement in *Newton's* case, the motive of the taxpayer is irrelevant and indeed the intention of the taxpayer in carrying out the transaction, i.e., the result the taxpayer himself sought to achieve, is irrelevant.

[26] Ibid. 4726. Note, Stephen and Aickin JJ. formed the minority on the outcome of the case.

The point has already been made that this is a highly artificial position. The documentation and other arrangements are merely the vehicle adopted by the parties to a transaction to achieve a result they have in mind. To ascertain the result of the transaction without having regard to the purposes of the parties to the transaction but by having regard only to the documentation, for example, might well give rise to the drawing of inaccurate inferences. The documentation could be contrived to conceal the result the parties intended whilst actually giving effect to the underlying purpose. Perhaps the most pragmatic solution of the problem regarding how the purpose of the transaction is to be established and the role that the motive of the taxpayer has to play is provided by analogy with cases decided under s. 45D of the *Trade Practices Act* 1971-1977.[27] In *Tillman's Butcheries Pty Ltd* v. *Australian Meat Industry Employees' Union and Ors*,[28] the issue before the Full Court of the Federal Court was whether the defendant Union and its named officials and members were in breach of s. 45D of the *Trade Practices Act* (T.P.A.) by virtue of their conduct in placing a black ban on the plaintiff company. Deane J. said that purpose in s. 45D(1) referred to "the operative subjective purpose of those engaging in the relevant conduct in concert". His Honour, after comparing the use of the word "purpose" in s. 260 of the Act as interpreted in *Newton's* case, continued:[29]

> ". . . the question to be answered in determining whether conduct was engaged in for a 'purpose' mentioned in s. 45D(1) of the Act is . . . to be answered not by reference to whether it was appreciated that the relevant conduct might have the specified effect but by reference to the real reason or reasons for, or the real purpose or purposes of, the conduct and to what was in truth the object in the minds of the relevant persons when they engaged in the conduct in concert."

His Honour then proceeded to identify the purposes of the conduct of the defendants.

> "No doubt, the respondents hoped that the appellant, in order to avoid the loss or damage to its business that could be expected to flow from the black ban, would accede to the Union's demands . . .
>
> The black ban was plainly imposed as a means of bringing pressure to bear upon the appellant to accede to Union demands in relation to

[27] Section 45D(1) provides: "Subject to this section, a person shall not, in concert with another person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a corporation (not being an employer of the first-mentioned person), or the acquisition of goods or services by a third person from a corporation (not being an employer of the first-mentioned person), where the conduct is engaged in for the purpose and would have or be likely to have the effect, of causing—

(a) substantial loss or damage to the business of the corporation or of a body corporate that is related to the corporation; or

(b) a substantial lessening of competition in any market in which the corporation or a body corporate that is related to the corporation supplies or acquires goods or services."

[28] (1979) 27 A.L.R. 367.

[29] Ibid. 383.

Union membership of the appellant's employees. The point and purpose of the respondents' imposing and procuring observance of the black ban was that it would cause substantial loss or damage to the appellant's business while it remained operative."[30]

It will be observed from the analysis by Deane J. of "purpose" in s. 45D(1) that the search for the real reason or reasons for the conduct goes no further than ascertaining the means employed in order to achieve the ultimate end in mind. The means employed will produce certain consequences and it is the production of those consequences which it is hoped will bring to fruition the ultimate end in mind. If this analysis is correct then it would appear that although the court has set itself the task of ascertaining the subjective state of mind of the persons engaging in the conduct in question, it does this by reference to the natural consequences that will arise from such conduct. It is probably true that where s. 45D of the T.P.A. applies the natural consequences of the conduct of the parties acting in concert will invariably be what the parties intended to be the means of achieving the ultimate end. It would seem therefore that the court is really having regard to the surrounding circumstances and arriving at an objective conclusion as to what inferences may be drawn in deciding what was the subjective state of mind of the relevant persons.

If the foregoing analysis is applied in the income tax context in interpreting the word "purpose", then it would at least provide a consistent interpretation in all the provisions in which it is used. Under s. 44(2D) where the context suggests that an approach similar to that adopted in *Newton's* case might have been more apposite, Aickin J. in *Lutovi Investments* was able to give the word a subjective content. It is submitted that the word can be given a subjective interpretation even under s. 260 if the analysis in *Tillman's* case is adopted. An arrangement of itself cannot have a mind of its own. It is no more than the means employed by individuals behind it to achieve an ultimate goal. If the view is accepted that the purpose of the individuals in embarking on that arrangement must be the natural consequences of carrying out that arrangement then this satisfies both subjective and objective requirements. Such a view would enable the courts to have regard to evidence of surrounding circumstances and recognise that an arrangement cannot have a mind of its own.

The income tax cases have consistently maintained that the motive of the taxpayer in engaging in a given transaction is not conclusive in ascertaining his purpose. Nevertheless, as *Tillman's* case illustrates the ascertainment of the "real reasons" or the ultimate goal for undertaking a given course makes it that much easier and probably leads to a more accurate result in establishing the natural consequences of the means

[30] Ibid. 384. The same view as to meaning and scope of purpose is expounded by Smithers J. in the Federal Court in *Wribass Pty Ltd* v. *Swallow and Australian Meat Industry Employees' Union* (1979) A.T.P.R. 17,998, 18,006-18,007.

adopted as being the purpose of the person concerned. It is considered that there is no difference between motive and the phrase "real reasons" or "ultimate goal". In an industrial dispute the motive of the union in black banning an employer might be to pressurize him into accepting union demands. The purpose of the union is to achieve this through putting financial pressure on the employer. Under a tax avoidance scheme the motive of a taxpayer might be the furtherance of the free enterprise system i.e. his desire to re-invest the money thereby saved. Yet the natural consequences of the transactions he embarks upon might be the purpose specified under a given provision of the Act.

The attribution of a given motive to an individual would normally be the result of drawing inferences from evidence of surrounding circumstances, which the taxpayer could seek to traverse. The ascertainment of the natural consequences of the acts of the individual concerned would also be established through drawing the appropriate inferences from the evidence of the surrounding circumstances in the light of the evidence of the ultimate goal of the taxpayer. The effect of this would be to attribute a heavier weight to those inferences. There is nothing objectionable in establishing the subjective purpose of the taxpayer in this way. The taxpayer is the only one who knows what really went on in his mind at the time he embarked on the transaction. If he is denying that he had a purpose specified in a provision of the Act then surely he must be able to point to something more than merely his own testimony as to his state of mind. Placing the taxpayer in such a position goes no further than the position he is already in by virtue of s. 190(b) of the Act, as interpreted by the majority of the Full High Court in *McCormack's* case and *Macmine's* case.

4. The Tests for Ascertaining Purpose

In summary the following points can be made about the approach suggested for the ascertainment of the purpose of the taxpayer wherever that is called for under the Act.

1. Purpose, necessarily, must ultimately be that of an individual.
2. It is the subjective purpose or the particular state of mind of the taxpayer that must be ascertained.
3. The manner in which this state of mind is to be established is by ascertaining the natural consequences of the conduct of the taxpayer.
4. The natural consequences of the conduct of the taxpayer are to be established by interpreting the documentation, if any, and by drawing the relevant inferences from evidence of surrounding circumstances. The process of interpreting the documentation should be no different from that embarked on by the courts when construing a contract.
5. The ascertainment of the ultimate goal or motive of the taxpayer is

a circumstance to be taken into account in establishing the natural consequences of his conduct.

6. The burden of proof for rebutting the conclusion that his purpose can be inferred from the natural consequences of his conduct rests on the taxpayer.
7. That burden of proof ought to be regarded as being discharged only if the taxpayer can, in effect, produce corroborative evidence of his direct testimony, if any, or by explaining away the inferences that arise from the evidence of the natural consequences.[31]

The view expounded above overcomes the difficulty the courts are inevitably confronted with when they have to search into the mind of an individual. Many of the provisions in which the court is required to ascertain whether or not a given purpose exists are anti-avoidance provisions. Even s. 26(a) of the Act can be regarded as an anti-avoidance provision in the light of the circumstances in which it was enacted. Specific anti-avoidance legislation "should be given the wide meaning evidently intended; it should not be cut down in the interest of precision".[32] It is argued in some quarters that very wide or general anti-avoidance provisions e.g., s. 82KJ and s. 260 should be interpreted strictly. It is contended, however, that if the provision is interpreted so strictly that, in effect, it is no more than a paper tiger, then that surely cannot also be the intention of the legislature in enacting such a provision. It is suggested that the approach to the interpretation of purpose urged above enables a more realistic interpretation of an anti-avoidance provision, giving both the Commissioner and the taxpayer a fair go.

It is further suggested that even though a provision does not contain a direct reference to the purposes of the taxpayer in adopting a particular course of action, then the provision, if it lends itself to be so interpreted, should be applied in the light of the purposes of the taxpayer. If the manifest purpose of the taxpayer is, for example, income-splitting, then the provision should be applied as if it is an anti-avoidance provision and if appropriate the purposes of the taxpayer should be taken into account. These purposes of the taxpayer should be ascertained as suggested above. One provision which does lend itself to be interpreted in this manner is s. 51 of the Act.

## AN ALTERNATIVE INTERPRETATION OF SECTION 51(1)

It will be recalled that s. 51 of the *Income Tax Assessment Act* allows the deduction of "all losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily

[31] The taxpayer succeeded in doing this at the rehearing in *McCormack* v. *F.C. of T.* (1980) 80 A.T.C. 4179.

[32] Per Mason J. in *F.C. of T.* v. *Students World (Australia) Pty Ltd* (1978) 78 A.T.C. 4040, 4048.

incurred in carrying on a business for the purpose of gaining or producing such income".

In the light of the foregoing analysis an alternative interpretation of s. 51(1) is advanced which will remove the need for much anti-avoidance legislation. This interpretation is based on the following propositions:

(a) The precise nature of the income producing activity of the taxpayer must be established. The activity in question must be undertaken by the taxpayer in order to produce income and not merely to generate losses. Such an interpretation is clearly warranted under both limbs of s. 51(1). The production or the purpose of producing assessable income must be established before a deduction is permitted. Indeed, it is arguable that if the taxpayer embarks on a course of conduct designed to produce losses then he cannot be said to be carrying on a business.

(b) There must be a clear connection between the income producing activity and the amount of the outgoing. Whilst it is appreciated that in the normal case the taxpayer himself is the best judge of how much he should spend in gaining assessable income, nevertheless it is submitted that if the amount incurred by the taxpayer in gaining the benefit in question is excessive, that is a prima facie reason for the court to explore the matter further.

(c) In the event that the amount of the outgoing is excessive in relation to the market or commercial value of the benefit secured in exchange for the outgoing then the court must ascertain:

(i) what is the purpose of the taxpayer? This purpose may well be different from his motives. For example his motive may be to minimise tax liability by income splitting whereas his purposes may be to secure a benefit which improves the efficiency of his business.

(ii) what is the additional benefit that the excessive expense has secured and whether the securing of this additional benefit brings to fruition his motive and purpose.

The submission that the courts should have regard to the motives and purposes of the taxpayer is justified by the fact that s. 51(1) of the Act expressly authorises the apportionment of an expense claimed as a deduction. The motives and purposes of the taxpayer in incurring the expense assist in deciding if the whole of the outgoing or only a part should be allowed as a deduction. The purpose of the taxpayer should be ascertained in the manner suggested above.[33]

(d) In ascertaining whether or not the additional benefit resulting from the extra expense flows on to the taxpayer the courts must be prepared to trace the transaction right through to its conclusion even if it means lifting the veil of incorporation of interposed companies, trusts or individuals who

[33] See supra 92.

are ultimately controlled by the taxpayer or who control the taxpayer or someone associated with the taxpayer.[34]

(e) In determining the additional benefit flowing from the extra expense the courts must be concerned with the practical and business point of view and give effect to the realities of the situation rather than to the legal form of the transaction.[35]

The interpretation of s. 51(1) along these lines takes the consideration of the deductibility of an expense away from the formalistic and legalistic norms that the courts have tended to adopt more recently. The suggestion that the courts must have regard to these factors is not unsupported by judicial authority. The question the legislature has asked the courts to answer in applying s. 51(1) is whether the expense was incurred in gaining or producing assessable income or in the course of carrying on a business for that purpose. In order to answer the question the courts must have regard to the purposes of the taxpayer in the manner stated above. No proper enquiry to establish the facts of the case can be made unless the purposes of the taxpayer are established by having regard to both the subjective and objective factors moving the taxpayer. The courts have sometimes failed to perform this task. They have come to limit their enquiry under s. 51(1) within a set of legal strictures not warranted by the words of the provision.

The application of s. 51(1) in the manner advocated will protect both the revenue and the taxpayer. The ascertainment of the purposes of the taxpayer in incurring the expense would enable the courts to establish whether any part of the expense was incurred for unauthorised purposes and hence enable the making of an apportionment. Under s. 51(1) the possibility of an apportionment should arise every time the taxpayer has incurred an excessive or an inflated expense. Obviously if he has made a bad business deal at arm's length then, even though the expense would be categorised as being excessive, nevertheless, part of the outgoing should not be disallowed. The distinguishing feature where an excessive expense has been incurred in a non-arm's length transaction is that it will reveal a purpose of the taxpayer which is extraneous to s. 51(1).

The view that the courts are ill-equipped and cannot deal with the task of determining how much a taxpayer ought to spend in earning his assessable income is without substance. In such a situation the Commissioner can adduce evidence to show the arm's length consideration for the transaction. As it is, a number of provisions in the Act already allow the Commissioner to substitute a commercial or market value for the amount that the taxpayer claims he has disbursed.[36] This view of course, does not

[34] The Commissioner has a very wide power under the definition of "associated person" under s. 82KH(1) of the Act for the purposes of, inter alia, s. 82KJ.
[35] See infra 99.
[36] See e.g. s. 31C and s. 82KJ.

preclude the taxpayer from spending as much as he likes, prudently or otherwise, on arm's length transactions in gaining or producing assessable income or in the course of carrying on a business for that purpose, so long as the transaction does not conceal an extraneous purpose which results in some benefit flowing back to him or his associates.[37]

## THE REAPPRAISAL OF SOME RECENT CASES

In the following cases the Commissioner has argued that the taxpayer has spent more than he needed to in earning his income. A portion of the expense was therefore attributable to some additional non-deductible benefit. The object of the following analysis is to point out fallacies underlying the reasoning of the courts, to discuss the wide ranging implications of unqualified acceptance of some of the principles propounded by the court and to determine whether or not the case in question would be decided differently under the mode of interpretation suggested in this article.

### 1. The Basis for Making an Apportionment

The leading case dealing with the basis on which an apportionment should be made is *Ronpibon Tin N.L.* v. *F.C. of T.*[38] In a joint judgment the Full High Court said that there are at least two kinds of expenses requiring apportionment. First, expenditure in respect of items of which distinct and divisible parts relate to the production of assessable income and distinct and divisible parts to some other cause. In such a situation the expenditure may simply be divided into its deductible and non-deductible components. Secondly, there may be a single outlay which serves both a deductible and non-deductible object indifferently. In such a situation there must be some fair and reasonable assessment of the extent of the relation of the outlay to the production of assessable income. The apportionment must depend on findings of fact on the basis of which a fair apportionment should be made.

Difficulties in making an apportionment are most common in the second situation. The fact that no identifiable portion of the sum in question can be earmarked to the deductible or non-deductible objects does not entitle the courts to allow or disallow the whole of the sum. The courts must make a fair and reasonable apportionment on the basis of the facts. One fact that will undoubtedly assist the court in making a fair and reasonable apportionment is the purpose of the expense and the taxpayer's motive in incurring it. The purpose of the taxpayer may be inferred from the natural consequences of the manner in which the transaction producing the expense is carried out. If the taxpayer has incurred an excessive expense and the natural consequence of the transaction is to benefit an associate or reduce

[37] *Ure* v. *F.C. of T.* (1980) 80 A.T.C. 4264 amply demonstrates the ability of the courts to decide a case along the lines suggested here.
[38] (1949) 78 C.L.R. 47, 59.

his own overall tax liability then it may be inferred that the purpose of the taxpayer was not only to obtain a benefit in respect of which an outgoing is deductible, but also to secure some additional benefit. In such a situation the court must make an apportionment.

On superficial reading, this view apparently conflicts with a number of propositions that can be extracted from the cases on the interpretation of s. 51 of the Act.

(1) The courts will not dictate to taxpayers how much they must spend in earning their assessable income.[39]

(2) Subject to express statutory provisions (ss. 31C, 82KH to 82KL, 65 and 109 of the Act) the quantum of expenses in transactions between associated persons cannot be impugned except when the outgoing secures the taxpayer some quantifiable benefit which is additional to that which gains or produces assessable income.[40]

(3) In determining the additional benefit, the court will have regard to the form of the transaction as opposed to its substance and seek to establish the legal consequences of that transaction.[41]

(4) Where the associated persons are companies the courts are loath to lift the veil of incorporation.[42]

In fact, each one of these so-called principles has in the past been circumvented by the courts or can easily be side-stepped by relying on established judicial authority. Some of these principles were never really intended to be applied in the sweeping manner in which they have come to be applied in subsequent cases.

2. The Quantum of the Outgoing

Two principles emerge when the question of apportionment arises because the taxpayer has incurred an excessive outgoing. First, the courts say that they will not question the amount the taxpayer incurs in gaining or producing assessable income. Secondly, they suggest that a commercially realistic outgoing raises the presumption that the sum falls within s. 51(1). In either case the problem remains whether the sum can be apportioned because it secures some additional non-deductible benefit.

The so-called principle that the court will not dictate to the taxpayer how much he must spend in earning his assessable income so long as the expense otherwise falls within s. 51(1) can be traced back to *obiter dicta* in *Ronpibon's* case.

> "It is important not to confuse the question how much of the actual expenditure of the taxpayer is attributable to the gaining of assessable income with the question how much would a prudent investor have

[39] Ibid.
[40] *F.C. of T.* v. *South Australian Battery Makers Pty Ltd* (1978) 78 A.T.C. 4412.
[41] *Europa Oil (N.Z.) Ltd (No. 2)* v. *Commr of I.R. (N.Z.)* (1976) 76 A.T.C. 6001.
[42] Supra fn. 40.

> expended in gaining the assessable income. The actual expenditure in gaining the assessable income, if and when ascertained, must be accepted. The problem is to ascertain it by an apportionment. It is not for the Court or the commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent: see per Ferguson J. in *Tooheys Ltd* v. *Commissioner of Taxation*,[43] per Williams J. in *Tweddle* v. *Federal Commissioner of Taxation*.[44"45]

This *obiter dictum*, and that is what it really is,[46] was elevated to a principle of law in *Cecil Bros. Pty Ltd* v. *F.C. of T.*[47] Seemingly, out of deference to the High Court, the Privy Council in *Commr of I.R. (N.Z.)* v. *Europa Oil (N.Z.) Ltd (No. 1)*[48] approved the *Cecil Bros.* case but carefully circumscribed its approval to acquisitions of trading stock. It is respectfully submitted that the view expressed in the *Cecil Bros.* case on the basis of the *dicta* in *Ronpibon* is fallacious. The requirement under s. 51(1) in every case is to decide the extent to which the outgoing in issue has been incurred in gaining or producing assessable income or in the course of carrying on a business for that purpose. The court must have regard and give due weight to the relevant evidence including evidence of the purposes of the taxpayer. If that evidence reveals that the taxpayer intended to obtain and did obtain some benefit for himself or an associate then the whole of the outgoing cannot have been incurred for the purposes specified in s. 51(1). The fact that the outgoing is incurred under a transaction with an associate and not at arm's length will reinforce the view that some additional benefit is sought to be obtained.

In both *Cecil Bros.* and *Europa Oil (No. 1)* the amount paid for the trading stock was regarded as being commercially realistic although in both cases the taxpayer had chosen not to acquire the stock at a specially low price. This implicit limitation on the scope of the *dicta* in the *Ronpibon* case was developed more fully by Fisher J. in *F.C. of T.* v. *Phillips*.[49] A partnership of accountants entered into a professional service trust arrangement. The effect of entering into the arrangement was that the partnership continued to have the use of all the same staff and office equipment but instead of being the employer in the case of the staff and the proprietor in the case of the office equipment, it simply hired these facilities from the trust at a charge. The charges paid by the partnership under the arrangement exceeded the amount the partnership would have incurred if the original position prevailed. The effect of this, therefore, was to increase the deductible expenses of the partnership, and the profit made by the

[43] (1922) S.R. (N.S.W.) 432, 440.
[44] (1942) 7 A.T.D. 186, 190.
[45] Supra fn. 38, 60.
[46] See Jaginder Singh, *The Apportionment of Expenses Under s. 51*, in *Recent Developments In Taxation, Series B*, Faculty of Law, Monash University 1979.
[47] (1964) 111 C.L.R. 430.
[48] (1970) 70 A.T.C. 6012.
[49] (1978) 78 A.T.C. 4361.

trust could be distributed to the trust holders with the result that the partners could split some of their income from the partnership. Fisher J. said that the fact that commercially realistic charges were paid raises the presumption that they constitute a real and genuine cost of earning the firm's income and nothing else. Conversely, if an outgoing is grossly excessive then it raises the presumption that it was not wholly incurred for earning assessable income but for some other purpose as well.[50]

Although the outgoing in *Phillips'* case was admittedly commercially realistic, nevertheless the natural consequences of the manner in which the transaction was carried out was to increase the partnership's overall deductions and thereby enable the partners to split their income through the entity from which the services were acquired. This is surely a benefit which is outside the scope of s. 51(1). The whole of these amounts were not incurred for purposes specified in s. 51(1). It is to take *Ronpibon* out of context when the whole of the amount is allowed to be deducted simply because it is commercially realistic and otherwise meets the requirements of s. 51(1). Such a view is unsupported by the words of the provision. For the whole amount to be deductible the entire sum must be shown to fall within s. 51(1) independently of the fact that the sum is commercially realistic.

To summarize the position: (i) the *dictum* in *Ronpibon* has been wrongly elevated to a proposition of law; (ii) the limitation of that *dictum* to situations where a commercially realistic amount is paid is welcome but still does not allow full scope for the operation of s. 51(1); (iii) real justice can only be done to s. 51(1) where it is applied to disallow any portion of an outgoing which can be identified as not bearing any relation to the gaining or production of assessable income either because the outgoing brings in to an associate of the taxpayer or to the taxpayer himself some additional benefit; (iv) there is no reason to believe that the courts cannot make an evaluation of the amount that has in fact been incurred wholly for s. 51(1) purposes. The courts have in the past reduced the deductibility of grossly excessive amounts to commercially realistic sums. If the sum before the court is already commercially realistic the evidence itself will reveal if any portion is nevertheless attributable to purposes outside s. 51(1).

3. Ascertainment of Additional Benefits

The making of an apportionment is facilitated by the ascertainment of some additional benefit secured by the taxpayer or by an associate of the taxpayer in return for the outlay. The ascertainment of some additional benefit is not strictly required under s. 51(1). The enquiry under that provision is whether the whole or only a part of an amount claimed as a

[50] See ibid. 4369. For an example of the apportionment of grossly excessive outgoings see *R.G. Nall Ltd* v. *F.C. of T.* (1937) 57 C.L.R. 695.

deduction was in fact incurred for the purposes specified. But if it can be shown that any portion of the expense was incurred for some other purpose by the taxpayer then an apportionment must be made. The problem is how is this additional benefit to be ascertained? The courts have advanced two conflicting tests for doing this. Under one view regard may be made only to the legalities of the transaction. Under a second view the matter must be looked at from the commercial and practical standpoint. The distinction between the two views revolves around the continuing debate concerning "form versus substance".[51]

The classic statement that regard must be had to business and practical matters is to be found in the judgment of Dixon J. in *Hallstroms Pty Ltd* v. *F.C. of T.*[52]

> "What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured employed or exhausted in the process."

This statement was cited with approval by the Privy Council on appeal from Australia in *B.P. Australia Ltd* v. *F.C. of T.*[53]

The opposing view formed the ratio of the opinion of the Privy Council on appeal from New Zealand in *Europa Oil (N.Z.) Ltd (No. 2)* v. *Commr of I.R. (N.Z.).*[54] Lord Diplock, delivering the judgment of the majority, said:[55]

> ". . . it is not the economic results sought to be obtained by making the expenditure that is determinative of whether the expenditure is deductible or not; it is the legal rights enforceable by the taxpayer that he acquires in return for making it."

The implications of adopting the *Europa Oil (No. 2)* test to the exclusion of the business and practical realities test are far-reaching. On the one hand it would open the way to the most blatant tax avoidance schemes under which the taxpayer ensures that he obtains a legally enforceable benefit which falls within the scope of s. 51 for a consideration which includes some other benefit the outgoing in respect of which would not otherwise be deductible. The whole of the outgoing will be allowed as a deduction so long as the taxpayer has no legally enforceable right in relation to the second benefit. The only restriction on this may be that the overall outgoing must be commercially realistic. Conversely, if deductions are available only in respect of legally enforceable benefits then no deduction will be available in respect of an expense incurred by reason of commercial expediency even though the outgoing has an unquestionable

[51] See *I.R.C.* v. *Duke of Westminster* [1936] A.C. 1.
[52] (1946) 72 C.L.R. 634, 648.
[53] (1965) 112 C.L.R. 386, 397.
[54] [1976] 1 All E.R. 503.
[55] Ibid. 508.

connection with the production of assessable income. Surely the majority in *Europa Oil (No. 2)* could not have intended such a result. To ask the question, "What did the other party legally bind himself to pay or do? is to confine the cases where no deduction is allowed to one special case: to substitute a legalistic test for a commercial test".[56] Further, to adopt the legally enforceable benefits test in *Europa Oil (No. 2)* fails to recognize the true purport of s. 51(1).

> "The majority subverted the enquiry about the purposes of the expenditure demanded by section 111 into a debate about the mere forms used by the taxpayer. In this way they allowed the taxpayer to undermine the clear purpose of the Legislation. The question raised by the New Zealand equivalent of section 51 is a question of fact. Was the expenditure incurred to buy petroleum? Plainly it was not; only part of it was and the part which was not so incurred was severable. It was not a question of choosing between 'legal effects' and 'economic realities'. That is a pervasive polarisation among tax lawyers which is a red herring.... The Legislature has not asked whether the rights are enforceable or whether the benefit gets to the taxpayer or to some company with de jure rather than de facto identity of interest. It asks about the purpose of the expenditure. . . . The reason for the expenditure must be inferred from all the facts."[57]

### (a) *Reconciliation Between "Business and Practical" Approach and "Legally Enforceable Benefits" Approach*

It is plain, therefore, that some attempt to contain the conflict between the two tests must be developed. At the outset it may be observed that the decision of the Privy Council in *Europa Oil (No. 2)* is not binding on the Australian High Court whereas Dixon's J. *dictum* in *Hallstrom's* case was enunciated in a High Court case.[58] Nevertheless it is important to establish the status of the test propounded in *Europa Oil (No. 2)* in Australia, in part because one of the majority judges in that case was the Chief Justice of the High Court of Australia, Sir Garfield Barwick.

The matter came up for consideration in *Phillip's* case. Of the three judges who sat in the Federal Court Bowen C.J. and Deane J., in a joint judgment did not think it necessary to consider *Europa Oil (No. 2)* in order to decide the case before them. The third judge, Fisher J. expressly relied on the majority view in *Europa Oil (No. 2)* as one of his grounds of decision.[59] The problem also arose for consideration before the High Court at about the same time in *F.C. of T.* v. *South Australian Battery*

[56] Per Lord Wilberforce (dissenting) in *Europa Oil (No. 2)* ibid. 516.
[57] Dr Yuri Grbich, "The Duke of Westminster's Graven Idol on Extending Property Authorities into Tax and Back Again" (1978) 9 *F.L. Rev.* 185, 213-214.
[58] Privy Council decisions even on appeal from Australia are no longer binding on the High Court since the passing of the *Privy Council (Appeals from the High Court) Act* 1975 whether the appeal was decided before or after 1975. See *Viro* v. *R.* (1978) 18 A.L.R. 257.
[59] See (1978) 78 A.T.C. 4361, 4368.

*Makers Pty Ltd.*[60] The facts of the case squarely threw up for consideration the two approaches. On the face of it, the outgoing, rent for premises, was clearly deductible. In fact the cash payment of rent contained a component for the amortization of the capital value of the land and buildings the freehold of which could be acquired by a sister subsidiary of the taxpayer, Property Options, under an option granted to it by the lessor. The Commissioner accordingly argued that the rent paid should be apportioned and the amount attributable to amortizing the capital value be excluded from deduction. Gibbs A.C.J. delivering the principal majority judgment and on this issue Jacobs J. dissenting, was in substantial agreement, sought to reconcile the *Hallstrom's* approach and the *Europa Oil (No. 2)* approach as follows:

> "In *Hallstrom's* case, as in *B.P. Australia Limited* v. *F.C. of T.*, it was known what advantage was sought by the taxpayer from the expenditure, and the question was whether an expenditure made to secure an advantage of that kind had the character of capital or income. In other words, the question in dispute was not, 'What was the expenditure for?', but 'Was the advantage, known to be sought by the expenditure, of a capital or of a revenue nature?' It was held that in answering that question the nature of the advantage from a practical and business point of view had to be considered. In the *Europa* cases the question for decision was 'What was the expenditure for?', and it was held, at least in the second case, that it was only for benefits to which the taxpayer became legally entitled."[61]

Although this explanation throws some doubt on the *Europa Oil (No. 2)* case, it is not entirely convincing in its attempt to reconcile the two conflicting views. In order to establish the quality of a benefit as capital or income in nature, it is obviously necessary to identify that benefit. To apply a narrower, legalistic and formalistic test in discovering the benefit obtained in the first place is highly artificial. The enquiry must be directed to what the expenditure was intended to gain, directly or indirectly, and this can only be achieved by having regard to all relevant material which must include business and practical matters. Indeed, as Lord Wilberforce in his minority judgment in *Europa Oil (No. 2)* pointed out, the context in which Dixon J. in *Hallstrom's* case made his statement was analogous to the situation confronting the court in the *Europa Oil (No. 2)* case. The *Hallstrom's* case is also analogous to the *South Australian Battery Makers* case.[62]

It would seem that the explanation given by Gibbs A.C.J. of the majority test in *Europa Oil (No. 2)* is made out of deference to their Lordships in the Privy Council. His Honour makes it clear that payments made voluntarily on the grounds of commercial expediency are deductible

[60] (1978) 78 A.T.C. 4412.
[61] Ibid. 4419.
[62] Supra fn. 59, and Jacobs J., ibid. 4425.

even though the taxpayer does not obtain a legally enforceable right in return.

The problem arose before the High Court again in *Cliffs International Inc.* v. *F.C. of T.*[63] The significant feature of both the majority and minority judgments is that they both profess to apply the "business and practical point of view" and yet arrive at opposite conclusions. It is interesting to notice that although the facts of the case were apposite for the application of the two tier enquiry expounded by Gibbs A.C.J. in *South Australian Battery Makers*, none of their Honours embarked on such an inquiry. This case belies the distinction drawn by Gibbs A.C.J. in *South Australian Battery Makers.* The court in a given case decides for itself whether or not the advantage sought to be gained by the expense is already known. In the vast majority of situations it is quite clear what advantage the taxpayer is seeking to obtain so that the real issue is the characterisation of that advantage. In that way the application of *Europa Oil (No. 2)* can easily be skirted. In the most recent case in which the position of *Europa Oil (No. 2)* in Australia was discussed, *Foxwood (Tolga) Pty Ltd* v. *F.C. of T.*,[64] Deane J. said that, when properly understood, there was nothing in the *Europa Oil (No. 2)* case which prevented the court from identifying what the expenditure was calculated to effect from a practical and business point of view by having regard to the whole set of circumstances. His Honour confined the *Europa Oil (No. 2)* approach to New Zealand. "If I be in error . . . that general approach would, in my respectful view, be contrary to what has been long established by decisions of the High Court as appropriate to the Australian Act and should not be followed by this Court".[65] The Australian judiciary's reception of the majority view in *Europa Oil (No. 2)* can therefore be seen to be distinctly cool.

Furthermore, the manner in which their Lordships in *Europa Oil (No. 2)* received the facts and dealt with them in deciding the case is unsound. The function of a court in interpreting a contract to discover what are the legally enforceable rights of the parties is to give effect to the intention of the parties. That intention must be ascertained by having regard to all relevant evidence, including extrinsic evidence so long as it does not contravene the parol evidence rule and to all relevant documents, including any other contracts entered into by the parties to give effect to their intention.[66] This was not done by the majority in *Europa Oil (No. 2).* Their Lordships were concerned only with the legal rights of the taxpayer

[63] (1979) 79 A.T.C. 4059.
[64] (1980) 80 A.T.C. 4096.
[65] Ibid. 4099.
[66] This mode of interpretation was applied by the Privy Council on appeal from Victoria in *B.P. Refining Pty Ltd* v. *Hastings Shire Council* (1978) 52 A.L.J.R. 20. See also *Buckley & Young* v. *Commr of I.R. (N.Z.)* (1978) 78 A.T.C. 6019 for an example of reliance being placed on extrinsic evidence in ascertaining the legal consequences of the transaction.

under the contract for the supply of stock as each order was placed. This approach can be compared with the approach the majority adopted in *Europa Oil (No. 1)* in having regard to the whole set of circumstances and ancillary contracts.

In the case of both written and oral transactions which give rise to legal rights between the parties and transactions which are not legally enforceable but where the outgoing is incurred out of commercial expediency, in determining whether or not the whole or only a part of the outgoing is deductible, the court must have regard to the purposes of the taxpayer in incurring that expense as part of the whole set of circumstances. Where the transaction results in legally enforceable rights the purposes of the parties are part of the matrix of facts within which the agreement was made and will assist the court in determining the intention of the parties in the process of interpreting the agreements. Where the payment is made out of commercial expediency the purposes of the taxpayer will show the extent to which the expense was in fact incurred out of commercial expediency and the extent to which it had no relation with the gaining or producing of assessable income. This view is in fact supported by judicial authority.

> ". . . the taxpayer's entitlement to the benefit of the claimed deduction falls to be determined rather by reference to the calculated purpose and effect which were, for all practical purposes, realized than by reference to juristic rights and liabilities. . . ."[67]

(b) *By Whom Benefit was Obtained?*

In both *Phillip's* case and the *South Australian Battery Makers* case the court was concerned with deciding whether the taxpayer alone had secured an additional benefit. In both cases the additional benefit could only be traced to an associate of the taxpayer. The courts frequently have regard to the purposes of the taxpayer in incurring a given expense, but do not admit evidence of whether an associate has been benefited in order to construct that purpose. In *Phillip's* case Bowen C.J. and Deane J. recognised that "the purposes underlying the overall re-arrangement were, to no small extent, of a domestic or private nature".[68] Nevertheless their Honours took the view that the purpose of incurring the expense itself was the gaining or producing of assessable income because all the firm itself obtained was services and the use of furniture and other plant needed to carry on the business. Fisher J. took the matter further and said that the purposes of the firm setting up the complex structure through which the services etc. were acquired "was a separate and independent purpose without any necessary relevance to the purpose of the expenditure".[69]

It is submitted that this is an unrealistic view. If it is accepted that the proper manner of deciding whether an expense falls within s. 51(1) is to

[67] *Foxwood (Tolga) Pty Ltd* v. *F.C. of T.* (1980) 80 A.T.C. 4096, 4098.
[68] (1978) 78 A.T.C. 4361, 4362.
[69] Ibid. 4369.

consider its position from a business and practical point of view in the light of the whole set of circumstances, then to look purely at the causal connection between the expense and the benefit thereby secured for the business is to give effect to the legal consequences approach in *Europa Oil (No. 2)*. The court must give due weight to the purposes of the taxpayer in incurring the expense in that way, particularly where the services are provided by an associate. Undoubtedly some portion of the expense laid out by the business to the associate will bring the private or domestic purposes to fruition. That portion of the expense is not incurred in gaining or producing assessable income and must be disallowed. It makes no difference that the rates charged by the associate are commercially realistic. There is less reason in this case for the court to allow the entire outgoing as it has comparative figures of the firm's outgoings in relation to those services before the professional service trust was set up.

The same narrow view can be detected in the *South Australian Battery Makers* case. It was clear that the management of the taxpayer company knew

> "that the payments were made not only with the knowledge, but also with the purpose, that part might be treated as part of the price of a capital asset which Property Options would probably acquire".[70]

The evidence was unequivocal that the natural consequences of the arrangements between the lessors, the taxpayer company and Property Options was that Property Options would be able to acquire the leased premises at a price that would be proportionally reduced each year in accordance with the rent paid by the taxpayer company. In spite of this, Gibbs A.C.J. based his conclusion on the view that it is not permissible

> "to consider an advantage gained by another person as a result of the payment, when the taxpayer neither shares in that advantage, nor can secure its enforcement."[71]

Although his Honour was therefore prepared to enquire into the subjective state of mind of the taxpayer, nevertheless his Honour was not prepared to accede that a capital benefit intended by the taxpayer to be gained by an associate was a benefit to the taxpayer himself. The proposition that if the group of companies of which the taxpayer was a member derived a benefit from the making of the payments part of that benefit must accrue to the taxpayer was rejected.[72]

The view that the enquiry under s. 51(1) must be confined to whether it is the taxpayer alone who derives some additional benefit is not warranted by the provision. To repeat, the enquiry under s. 51(1) is to determine whether the whole or part of an outgoing is incurred by the

[70] (1978) 78 A.T.C. 4412, 4417-4418.
[71] Ibid. 4420.
[72] See ibid. 4417.

taxpayer in gaining or producing assessable income or is necessarily incurred in carrying on a business for the purpose of producing such income. If the outgoing results in a benefit to an associate then the whole of the outgoing by the taxpayer cannot have been laid out for the purposes specified in s. 51(1). The provision does not require the additional benefit or the person to whom it flows to be traced. The conclusion of the majority in *South Australian Battery Makers* is all the more difficult to accept in the light that part of it would amortize the cost of acquisition of the reversion by Property Options. That clearly shows that the whole of the sum was not incurred for the purposes specified in s. 51(1). Indeed the background of the negotiations between the parties lead strongly to this conclusion.

The approach adopted by Jacobs J. (dissenting) is preferable. His Honour accepts that the relevant enquiry should be directed to ascertaining the benefit sought to be secured, directly or indirectly, by the person who claims to have spent the money. But that additional benefit need not be secured as a legal right.[73] His Honour accordingly held against the taxpayer, first, on the ground that the taxpayer had failed to discharge the burden of proof imposed on it by s. 190(b) of the Act. The taxpayer had failed to show that it did not seek to secure the advantage in future of being able to use the premises rent-free after the option to purchase is exercised by Property Options. Secondly, his Honour concluded that on the evidence, regardless of s. 190(b) "a relevant advantage was sought by S.A.B.M. in respect of the time after expiry of the lease".[74]

Although Jacobs' J. approach is to be preferred to that of Gibbs A.C.J. and the majority, nevertheless, it is submitted that a more liberal attitude must be adopted. This liberal attitude could take the form advocated by Lord Wilberforce in his dissenting judgment in *Europa Oil (No. 2)* and as applied by him in *Europa Oil (No. 1)*. Under this approach all the circumstances of the case including all the contracts between the various parties to the transaction must be taken into account and the situation looked at as a whole. The courts must also be prepared to lift the veil of incorporation. The High Court has always been extremely reluctant to do this, particularly in tax cases.[75] In the *South Australian Battery Makers* case Gibbs A.C.J. rejected the view based on the decision of the Court of Appeal in England in *Littlewoods' Mail Order Stores Ltd* v. *I.R.C.*[76] that the veil of incorporation be lifted. The refusal of the High Court to lift the veil of incorporation in tax cases can perhaps be explained on the basis that since the Commissioner can rely on s. 260 of the Act to impugn a

[73] Ibid. 4425.
[74] Ibid. 4426. The evidence relied on for this conclusion is also discussed on this page.
[75] See e.g., *Esquire Nominees Ltd* v. *F.C. of T.* (1973) 73 A.T.C. 4114; *Federal Coke Co. Pty Ltd* v. *F.C. of T.* (1977) 77 A.T.C. 4036.
[76] [1969] 3 All E.R. 855.

transaction which has the purpose or effect of avoiding tax there is therefore no reason to regard separate and distinct legal entities as anything else. However, with the narrow scope of operation now left for the application of s. 260 by virtue of decisions of the High Court over the last decade and because the view has always been taken that s. 260 cannot apply to deny the deduction of an expense that otherwise qualifies under s. 51(1), it has now become imperative that the courts be prepared to lift the veil of incorporation in an appropriate tax case to counter in the very least the more exotic variety of tax avoidance schemes that create paper deductions. This lifting of the veil of incorporation must extend to tracing the final benefit through interposed family trusts as well. Indeed a glimmer of hope that the veil of incorporation may be lifted in a s. 51(1) case can be found in the judgment of Fisher J. in the Federal Court in *Foxwood (Tolga) Pty Ltd* v. *F.C. of T.*[77]

## CONCLUSION

The thrust of this article has been to urge the courts to give s. 51(1) of the Act a fair reading. The courts must be prepared to make apportionments of outgoings claimed as deductions where it is clear that the expenses have been deliberately inflated through a legal facade. Judicial authority as it stands allows enough room for the courts to be able to do this without causing a fundamental upheaval in the law. The route to a more constructive interpretation, it is submitted, is this:

(a) The "business and practical point of view" should be adopted as the main conceptual structure in deciding cases under s. 51(1). There is ample judicial authority supporting this proposition. All the other submissions follow from this.

(b) An aspect of the business and practical point of view relates to the evidence that the court will admit and the weight it will give to such evidence. This evidence must cover the whole set of circumstances in which the transaction, be it legally enforceable or not, was entered into. In particular this evidence must include the purpose of the taxpayer and much weight must be placed on that purpose. The purpose in question is the subjective state of mind of the taxpayer as is attributed to him by virtue of the natural consequences of the transaction. Evidence of the motive of the taxpayer must also be considered to assist in determining the purpose of the taxpayer. Of course, it would be open to the taxpayer to establish, on a balance of probabilities, that he did not have the purpose attributed to him from the inferences drawn from the natural consequences of his conduct.

[77] (1980) 80 A.T.C. 4096, 4105.

(c) In interpreting the legal documentation through which the transaction is carried out, the courts must take into account all the relevant documents between all the associated parties and not isolate the documentation through which the expense itself arises from its context. Failure to do so means that the court is preventing itself from ascertaining the real intention of the parties, nor can it give real effect to the business and practical point of view.

(d) The courts must be prepared to trace a benefit obtained from an expenditure into the hands of an associate of the taxpayer, even if that associate is a separate legal entity. This will assist the court in determining whether or not the whole of the outgoing is deductible under s. 51(1).

(e) The courts must take the final step to confine the so-called principle that they will not dictate to the taxpayer how much he may spend in earning his assessable income to the area of arm's length transactions. If the evidence shows that the taxpayer has inflated his outgoings which are otherwise deductible for the purpose of benefiting an associate, or relieving himself of a private or domestic financial responsibility or even simply to avoid tax, then the court must make an apportionment. This still allows an inefficient or an imprudent taxpayer to obtain a full deduction even though he pays more than he should for the benefit in question. The courts need not make detailed calculations for themselves as to the quantum of apportionment. The evidence before the court will normally reveal this. If the court adopts this course it is not really telling the taxpayer how much it can spend in earning its assessable income. It is merely using the inflated expenditure as a basis for drawing the inference that a portion of the amount claimed to have been spent by the taxpayer is not spent to earn his assessable income.

(f) Finally, the court must give full effect to s. 190(b) of the Act and call on the taxpayer to discharge the onus placed on him by the Commissioner's deduction of the outgoings claimed by him.

The High Court of Australia must take cognisance of the economic and social implications of its decisions in tax cases. The distributional effect of court decisions is highlighted in cases dealing with deductions. Unless the High Court is prepared to adopt a more positive attitude in the application of s. 51(1) it is inevitable that complex amending legislation will ensue from Parliament. The tendency is for anti-avoidance legislation to be ever widening in its scope and to vest greater discretionary powers in the Commissioner. This has already happened to a certain extent. Thus, under s. 31C, which was inserted into the Act in 1977, the Commissioner can substitute what he considers should be the market price in a non-arm's

length transaction for the price paid by the taxpayer. This provision would therefore cover the *Cecil Bros.* and *Europa Oil* cases. A further illustration of the complex and far-reaching legislation introduced to combat tax avoidance schemes taking advantage of s. 51(1) and which have succeeded in the courts is Subdivision D of Division 3 of Part III of the Act, sections 82KH to 82KL. Such legislation does not do anybody any good. It adds to the complexity of an already complex statute; it adds to the already wide powers of the Commissioner and the provisions enacted could deny deductions of expenses genuinely incurred for s. 51(1) purposes with no underlying motive or purpose of tax avoidance.