1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

TAXATION (UNPAID COMPANY TAX) ASSESSMENT AMENDMENT BILL 1983

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Hon. P.J. Keating, M.P.)

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GENERAL OUTLINE

This Bill will amend the company tax recoupment law to:

- ensure that liability for recoupment tax will not be escaped by reason of an ultimately unsuccessful post-sale or pre-sale tax avoidance scheme;
- authorise the Commissioner of Taxation to name in his annual report persons who fail to pay an assessed recoupment tax liability in respect of unpaid company tax;
- remove the test which requires that an arrangement which rendered a company unable to pay its tax must be identified before a recoupment tax liability can be established;
- provide relief from liability to vendors recoupment tax in certain anomalous public company cases;
- vary the evidentiary provision to ensure constitutional validity of the legislation; and
- correct minor technical defects.

MAIN FEATURES

Post-sale tax avoidance schemes
(Clause 3)

There is a specific provision in the recoupment tax legislation (sub-section 3(12)) to the effect that if the target company was the subject of an unsuccessful post-sale avoidance scheme which could at the time it was entered into reasonably have been expected to be effective of its tax avoidance purpose and the scheme was not connected with the arrangement which rendered the company unable to pay its tax, there will be no recoupment tax liability, provided that latter arrangement was not entered into for a purpose of securing the company's inability to pay the tax.

Paragraph (c) of clause 3 will repeal this provision. This will mean that a person will not escape liability for recoupment tax by reason of a post-sale tax avoidance scheme that ultimately is established to be ineffective.

Pre-sale tax avoidance schemes
(Clause 5)

Before the recoupment tax legislation applies to the sale of shares in a company or group of companies the sale price of the shares must exceed the net worth of the company or group after taking into account any potential tax liability on profits earned up to the date of sale. In a case where no assessment has issued as at the date of sale, the legislation provides that the potential tax liability of the company will be ascertained on the basis of what (objectively viewed) might reasonably have been expected to be the company tax payable on certain hypotheses set out in the legislation.

The proposed amendment will require the further hypothesis that any pre-sale tax avoidance scheme which is ultimately found to be unsuccessful of its tax avoidance purpose will in fact be unsuccessful in ascertaining the amount of tax which could reasonably be expected to be payable at the date of sale. Accordingly, it will no longer be open for a person to argue that no liability for recoupment tax exists by reason of an unsuccessful pre-sale tax avoidance scheme that, at the time it was entered into, has reasonable prospects of succeeding.

Annual report
(Clause 4)

The Bill will, in conformity with the existing law requiring the Commissioner of Taxation to report on breaches or evasions of the income tax law, specifically authorise the Commissioner to name in his annual report to the Parliament, persons who do not pay recoupment tax payable by them in respect of company tax evaded by a stripped company.

Stripping arrangement
(Clauses 4, 5, 7, 8, 9)

One of the tests which must be satisfied before a liability for recoupment tax can arise requires the identification of the particular arrangement (the "stripping arrangement") which rendered the target company unable to pay all its company tax. This test accompanies other tests in the legislation that effectively limit the scope of the legislation to those cases where the company has been stripped of its pre-tax profits.

Associated with the stripping arrangement test, a provision in the law enables a person with a liability or potential liability for recoupment tax to require the Commissioner of Taxation to disclose all known information about the stripping arrangement.

The Bill will abolish both the stripping test and the associated disclosure provisions.

Relief in certain anomalous public company cases
(Clause 10)

The Bill will provide an avenue which will enable complete or partial relief from recoupment tax to be granted to a person who would otherwise be liable to the tax by reason of his or her interest in a public company.

By way of background, where a public company sold a subsidiary which was stripped of pre-tax profits, the liability to recoup the subsidiary's unpaid company tax would, under the existing legislation, initially be allocated to the vendor public company. However, under existing section 6, that liability will in certain circumstances be traced to those persons who were the owners of the vendor public company at the time it sold its subsidiary to the stripper.

Should the application of these tracing rules result in the allocation of a recoupment tax liability to a shareholder in the vendor public company who derived no direct or indirect benefit from the evasion, the Commissioner of Taxation is empowered (sub-section 6(18)) to free that person from liability. However, the Commissioner has no authority under sub-section 6(18) to grant partial relief where the person concerned derived some benefit as a result of the evasion but the benefit gained was less than the recoupment tax liability allocated to the person.

To overcome anomalies of this kind, the Bill proposes to provide a mechanism whereby complete or partial relief from the tax may, in appropriate cases, be granted to a person who, by reason of his or her interest in a public company, has either had a liability to vendors recoupment tax traced to him or her or has paid part of the evaded company tax. In the first instance, the question of whether or not relief should be granted will be considered by the Commissioner who may determine it without the necessity of a formal application by the person concerned.

If, on the basis of the guidelines specified in the Bill, the Commissioner considers that it would be unreasonable that a person should pay the whole or part of the vendors recoupment tax otherwise payable by him or her, there is to be a remission of that part of the tax that it would be unreasonable for the person to pay. In a case where the person concerned has paid part of the evaded company tax, the relief granted will be effected by means of an amount being paid to, or applied against another tax liability of, the person.

Should the Commissioner not grant the relief a person believes he or she is entitled to, the person will be able to exercise rights of objection, review and appeal against the Commissioner's decision. In this context, when an independent Taxation Board of Review is reviewing the Commissioner's decision it is to sit as a Recoupment Tax Anomalies Tribunal.

Evidence

(Clauses 11, 12)

The existing legislation is to the broad effect that except for purposes of the provisions governing objections and appeal against the company assessment, a certificate by the Commissioner, a Second Commissioner or a Deputy Commissioner specifying that an amount of company tax is due and payable and remains unpaid is to be taken as conclusive evidence, i.e. the certificate is conclusive insofar as an assessment to recoupment tax is concerned.

Arising from doubts about the constitutional validity of this conclusive evidence provision, the Bill proposes to replace the "conclusive" evidence rule with a "prima facie" rule. The new rule will apply in relation to both the amount of company tax that became due and payable and the amount that remains unpaid. However, the Bill also proposes that, insofar as the new prima facie rule relates to the amount of company tax that became due and payable, the rule may, by Proclamation, be made to revert to a conclusive evidence rule.

More detailed explanations of the clauses of the Bill are contained in the notes that follow.

Clause 1 : Short title, etc

By sub-clause (1) of this clause the amending Act is to be cited as the Taxation (Unpaid Company Tax) Assessment Amendment Act 1983.

Sub-clause (2) facilitates references to the Taxation (Unpaid Company Tax) Assessment Act 1982 which, in the Bill, is referred to as "the Principal Act".

Clause 2 : Commencement

Under sub-clause (1) the amending Act (apart from clause 12) is to come into operation on the day on which it receives the Royal Assent. But for this sub-clause the amending Act would, by reason of sub-section 5(1A) of the Acts Interpretation Act 1901, come into operation on the twenty-eighth day after the date of Assent.

By sub-clause (2) the amendment of new section 23 of the Principal Act proposed by clause 12 is to come into operation on a date to be fixed by Proclamation. New section 23 (proposed to be inserted by clause 11) will provide for a prima facie evidence rule in respect of the company tax liability underlying a recoupment tax assessment, instead of the existing conclusive rule. Clause 12 proposes to modify the new provision with effect from a date to be proclaimed so that, in part, it reverts to a conclusive evidence rule. Notes on clauses 11 and 12 explain these changes.

Clause 3 : Interpretation

Clause 3 proposes a number of amendments to section 3 of the Principal Act which contains definitions of certain expressions used in the Principal Act and a number of other measures to assist in its interpretation.

Paragraph (a) of clause 3 proposes the omission of the definition of "promoters recoupment tax" in sub-section 3(1) and the substitution of a new definition.

The term is presently defined to mean tax assessed under the Principal Act on a promoters taxable amount and imposed by the associated "Rates" Act. The re-drafted definition will ensure that the definition also includes related additional tax imposed for failure to furnish requested information.

An effect of this revised definition will be that, as is currently the case with income tax, additional tax for late payment will apply in relation to both the "basic" tax assessed and associated penalty tax under sub-section 226(1) of the Income Tax Assessment Act.

Paragraph (b) of clause 3 proposes the omission of the definition of "vendors recoupment tax" in sub-section 3(1) and the substitution of a new definition.

Under the new definition "vendors recoupment tax" will mean tax assessed under the Principal Act on a vendors taxable amount and imposed by the associated "Rates" Act together with any related additional tax imposed for failure to duly furnish requested information.

Paragraph (c) of clause 3 proposes the omission of sub-section 3(12).

This sub-section applies where, after the stripped company was sold to the promoter, it entered into a scheme which, though ultimately found to be unsuccessful, could at the time it was entered into reasonably have been expected to be effective of its tax avoidance purpose. In that case, provided the scheme was not connected with the arrangement which rendered the company unable to pay its tax and the arrangement which had that effect had not been entered into for that purpose, liability to recoupment tax is ascertained as if the scheme had been effective in reducing or eliminating the amount of company tax payable.

The repeal of sub-section 3(12) will mean that an unsuccessful post-sale tax avoidance scheme will no longer operate to relieve a person from liability to recoupment tax or to reduce such a liability.

Clause 4 : Application of Assessment Act

Clause 4 proposes amendments of section 4 of the Principal Act which operates to adapt and apply for purposes of the recoupment tax, various machinery provisions of the income tax law.

Paragraph (a) of clause 4 will insert a new sub-section - sub-section (3A) - in section 4. By virtue of sub-section 4(3) of the Principal Act the Commissioner of Taxation is required to report to Parliament on the working of that Act in the annual report he is required to make under section 14 of the Income Tax Assessment Act. Against the background of the Commissioner's obligation to draw attention to any breaches or evasions of the Income Tax Assessment Act, the new sub-section (3A) will specifically authorise him to name in his annual report persons who fail to pay vendors or promoters recoupment tax (or late payment penalty on such tax) that is due and payable by them in relation to evaded company tax.

Paragraph (b) of clause 4 proposes the omission of paragraph 4(4)(a) of the Principal Act and the substitution of a new paragraph 4(4)(a).

The existing paragraph 4(4)(a) permits the disclosure, without breach of tax secrecy provisions, to a former owner or promoter who is, or is likely to become, liable to pay recoupment tax, of information concerning the affairs of a company or other person that is relevant to an assessment of the liability of the former owner or promoter.

The re-drafted paragraph 4(4)(a) will extend the existing provision so that it will permit the disclosure of information to a person who is, or is likely to become, liable to pay income tax by virtue of being deemed under existing section 16 or 17 to have been paid a dividend by the stripped company.

Paragraph (c) of clause 4 proposes the omission of sub-section 4(5) of the Principal Act.

Under sub-section 4(5) the Commissioner of Taxation is required to disclose to a former owner who makes a request in writing all the information in his possession which relates to an arrangement which has the effect of rendering a company unable to pay its tax and is relevant to that person's liability to pay vendors recoupment tax. The existence of such an arrangement is, by virtue of the tests in paragraphs 5(1)(h) and 5(2)(h), a formal element in a vendor-shareholder being made liable for recoupment tax.

In consequence of the omission of paragraphs 5(1)(h) and 5(2)(h) proposed by clause 5 (see notes on that clause), information concerning the stripping arrangement will no longer be relevant to a person's liability to pay vendors recoupment tax and, accordingly, paragraph (c) proposes that sub-section 4(5) be omitted.

Paragraph (d) of clause 4 proposes the insertion of two new sub-sections - sub-sections (6A) and (6B).

Proposed sub-section (6A) is set against the background that, since the company tax recoupment measures were first foreshadowed by Ministerial Statement on 25 July 1982, the former owners of some stripped companies have paid the company tax payable by those companies (for example, under penalty-free instalment arrangments permitted by section 21) before vendors recoupment tax assessments have been made. Situations may arise where, after the company tax has been paid by the former owners, the company's assessment is amended by decreasing the company's liability. The amendment of the stripped company's assessment will result in an entitlement to a refund of the amount overpaid.

The basic purpose of the new sub-section 4(6A) is to remove any doubts that the Commissioner of Taxation is entitled to refund the amount overpaid to the persons who in fact paid the company tax.

Sub-section (6A) will apply where the company tax payable by a stripped company in relation to the year of income in which the shares were sold or a preceding year of income is reduced by reason of an amended assessment being made. In those circumstances, the Commissioner is to be empowered to refund the amount overpaid to the person or persons who in fact paid the company tax. Alternatively, the Commissioner may apply the potential refund against any income tax or recoupment tax liability of the person who paid the company tax. This would occur where the person or persons who paid the company tax are personally liable to pay income tax on an imputed dividend from the stripped company by virtue of an election under existing section 16 or 17 or recoupment tax in connection with other unpaid company tax.

Proposed sub-section (6B) will ensure that any entitlement to interest under the Taxation (Interest on Overpayments) Act 1983 as a result of an overpayment of company tax which by virtue of new sub-section (6A) is refunded to, or applied against a liability of, the person who in fact paid the company tax will be conferred on that person.

Sub-section 9(4) of the Taxation (Interest on Overpayments) Act 1983 provides that where an amount paid by one person is applied against the tax liability of another person that second person is deemed to have made the payment for the purposes of that Act. The effect of new sub-section (6B) is to override sub-section 9(4) of the Taxation (Interest on Overpayments) Act so that it does not operate to deem a stripped company to have paid company tax that was in fact paid by a former owner. This will mean that a former owner who in fact paid the company tax will be entitled to any interest that would otherwise be payable as a result of a successful objection or appeal against the company assessment.

Clause 5 : Primary taxable amounts

Clause 5 proposes amendments to section 5 of the Principal Act which sets out the tests which must be satisfied before a liability for vendors recoupment tax can arise. Where these tests are satisfied, section 5 provides that a "primary taxable amount" (i.e. a proportion of the unpaid company tax) is to exist in relation to each vendor-shareholder.

Nine tests for determining whether a "primary taxable amount" will be taken to exist in relation to a vendor-shareholder are set out in paragraphs (a) to (j) of sub-sections 5(1) and (2). Sub-section (1) deals with the simple case where the shares were sold in a single target company while sub-section (2) deals with schemes involving the disposal of more than one company under the same scheme.

Paragraphs (a), (b), (c) and (d) of clause 5 propose the omission of one of the nine tests, namely that set out in paragraphs 5(1)(h) and 5(2)(h) which require the identification of the particular arrangement (the "stripping arrangement") which rendered the target company unable to pay all its company tax. The test being omitted is one which overlaps the remaining tests which cumulatively ensure that the relevant sub-section can only apply where a company was stripped of its pre-tax profits.

Paragraphs (e) and (f) of clause 5 will amend sub-section 5(9) of the Principal Act to ensure that a person will not escape liability for vendors recoupment tax by reason of an unsuccessful pre-sale tax avoidance scheme.

Under the "excess consideration" test set out in paragraphs 5(1)(d) and 5(2)(d) the total consideration received for shares sold under a scheme must exceed the value of the net assets of the company (or group of companies) after making allowance for any actual or contingent company tax liability in respect of income derived up to the time of sale.

A company's contingent (unassessed) tax liability at the time of sale is dealt with by existing paragraph (7)(c) and sub-section (9). By sub-paragraph (7)(c)(ii) the contingent tax liability is defined as the amount of company tax that, at the time of sale, might reasonably have been expected to become payable and sub-section (9) requires that this objective test be applied on the basis of the various hypotheses set out in the sub-section.

A possible effect of these provisions is that where, prior to the time of sale, the stripped company entered into a scheme which, though ultimately found to be unsuccessful, could at the time of sale have reasonably been expected to be effective in eliminating the company's tax liability on pre-sale profits, the "excess consideration" test would not be satisfied and thus a liability for vendors recoupment tax would not arise.

The proposed amendment of sub-section 5(9) will ensure that such a result cannot occur by requiring that a further assumption be made for the purpose of determining the company's contingent tax liability at the time of sale. The additional assumption is that, in a case where a company entered into a pre-sale tax avoidance scheme which is ultimately found to be unsuccessful of its tax avoidance purpose, it is to be assumed that the amount of tax which could reasonably be expected to be payable at the time of sale would be ascertained on the basis that the tax avoidance scheme was not in fact entered into. Accordingly, any possible effect of the scheme will be disregarded for the purpose of applying sub-paragraph (7)(c)(ii).

Paragraph (g) of clause 5 proposes the omission of sub-section 5(15) which relates to the expression "arrangement or transaction" used in paragraphs 5(1)(h) and 5(2)(h) which are to be omitted by paragraphs (a), (b), (c) and (d) of this clause. Sub-section 5(15) will become redundant and is accordingly also to be omitted.

Clause 6 : Secondary taxable amounts

This clause proposes amendments to section 6 of the Principal Act to correct a number of minor technical errors.

Paragraph (a) of clause 6 will amend sub-sections (1) to (6) and (8) to (10) (inclusive) by substituting the expression "at the relevant distribution time" for "immediately before the relevant distribution time". This correction is made necessary by the fact that those sub-sections postulate a capital distribution by a company or trust taking place "immediately before the relevant distribution time" and by existing paragraph 6(13)(a) this time in relation to a company or trust that did not exist at the time the shares in the target company were sold is the time when the company or trust commenced to exist. As presently drafted this would require the company or trust to make a capital distribution immediately before it commenced to exist and this is being altered to require the capital distribution to have been made at the time the company or trust commenced to exist.

Paragraph (b) of clause 6 will correct a drafting error in sub-section 6(8) by substituting the word "vendors" for "eligible".

Paragraph (c) of clause 6 proposes the omission of paragraph 6(12)(a) and the substitution of a new paragraph 6(12)(a).

Existing sub-section 6(12) defines the expression "distribution amount" in relation to a vendors taxable amount. This expression is used in section 6 to refer to the amount of a notional capital distribution by the company or trust in relation to which the vendors taxable amount exists.

Paragraph (a) of sub-section 6(12) deals with the situation where a primary taxable amount exists in relation to a company or trust. In that case, the existing paragraph defines the distribution amount as being the consideration received by the company or trust for the sale of its shares or interest in shares in the target company. That definition is appropriate where the company or trust was a vendor-shareholder. However, it is not appropriate

where the company or trust was a beneficial owner of shares sold by a nominee (bare trust) because, in such a case, the share proceeds received by the nominee would be received on behalf of the beneficiaries under the bare trust of whom there may be more than one.

Paragraph 6(12)(a) has been re-drafted to correct this defect. Sub-paragraph (i) applies where the company or trust was a vendor-shareholder and in its present form defines the distribution amount as the consideration it received for the sale of its shares or interest in shares in the target company. Sub-paragraph (ii) applies where the company or trust was a beneficiary under a bare trust. In this case, the distribution amount will be a proportion of the consideration received by the bare trustee, that proprotion being the beneficiary's proportionate interest in the bare trust.

Paragraph (d) of clause 6 proposes the omission of paragraph 6(13)(b) and the substitution of a new paragraph 6(13)(b).

By virtue of the existing paragraph 6(13)(b) the relevant distribution time is generally defined as the time of sale of the shares in the target company. As a consequence of the amendment proposed by paragraph (a) of this clause the re-drafted paragraph 6(13)(b) will define the relevant distribution time as the time "immediately before" the time of sale of the shares.

Clause 7 : Promoters taxable amounts

Clause 7 proposes amendments of section 7 of the Principal Act which sets out the tests which are to be satisfied before a liability for promoters recoupment tax arises.

Paragraphs (a), (b), (c) and (d) of clause 7 propose the omission of the tests set out in paragraphs 7(1)(g) and 7(2)(g) which require the identification of the particular arrangement (the "stripping arrangement") which rendered the target company unable to pay all its company tax. This omission is consistent with the proposed omission of the stripping arrangement test from the provisions relating to vendors (see notes on clause 5).

In consequence of the omission of the stripping arrangement test, paragraph (e) of clause 7 proposes to delete references to that arrangement in sub-section 7(8) and paragraph (f) proposes the deletion of sub-section 7(17) which defines the expression "arrangement or transaction" as used in paragraphs 7(1)(g) and 7(2)(g).

Clause 8 : Right of contribution and apportionment of liability

In consequence of the omission by clause 7 of the "stripping arrangement" test set out in paragraphs 7(1)(g) and 7(2)(g) clause 8 will make a formal amendment to omit the reference to that arrangement in section 10.

Clause 9 : Declaration excluding person from eligible promoters class

This clause will also make a formal amendment to omit the reference to the "stripping arrangement" in section 11 as a consequence of the omission of the stripping arrangement test proposed by clause 7.

Clause 10 : Vendors recoupment tax or company tax not payable in certain anomalous public company cases

By this clause, it is proposed to insert a new section - section 19A - into the Principal Act.

In broad terms, the new section will apply to persons who, by reason of their interest in a public company, would otherwise be liable to recoup a share of evaded company tax. In such a case, the Commissioner of Taxation is to have the power to grant the persons concerned total or partial relief from the tax. The Commissioner's decision will be made on the basis of the guidelines specified in proposed paragraph 19A(1)(e) and will be subject to rights of objection, review by an independent Recoupment Tax Anomalies Tribunal and appeal to a Court.

Sub-section (1) is the operative sub-section. It contains the conditions which must exist for relief to be granted and the results which flow where those conditions are met.

Paragraph (a) identifies the evaded company tax to which the section applies. It is that company tax in respect of which a primary taxable amount (and therefore a liability for vendors recoupment tax) exists or, disregarding any payments of company tax made after 25 July 1982 (the date on which the recoupment tax proposals were first announced), would exist.

Paragraphs (b) to (e) set out tests for determining whether a particular person (the "relevant person") is entitled to relief in respect of his or her share of the evaded company tax referred to in paragraph (a). A person who was a vendor-shareholder (i.e. a direct owner of shares - see notes on proposed sub-section (2)) is not to be eligible for relief.

By paragraph (b) it is necessary that the relevant person -

- has paid part of the company tax (for example, under an instalment arrangement authorised by existing section 21);
- is liable to pay vendors recoupment tax in relation to the company tax; or
- was liable to pay such vendors recoupment tax and has paid that tax.

Paragraph (c) applies where the relevant person paid part of the evaded company tax. In such a case, it is condition that the person would have been liable for vendors recoupment tax if both payments of company tax and the possibility that he or she may have been relieved from liability by virtue of the Commissioner exercising his existing relieving power under sub-section 5(4) or 6(18) were disregarded. This condition means, for example, that a scheme promoter who has paid some or all of the company tax would not be eligible for relief.

Paragraph (d) requires that the relevant person's potential liability (in a case where he or she paid part of the company tax) or actual liability for vendors recoupment tax, as the case may be, arose by reason of a public company having sold shares in a stripped company or in a situation where a public company was interposed in the chain of ownership between the stripped company and the person.

Paragraph (e) makes it a final condition that the Commissioner of Taxation considers it unreasonable that the relevant person should have paid or been liable to recoup, as the case may be, the whole or a part of the share of evaded company tax that was paid, or liable to be recouped, by him or her. Such whole or part of the tax is referred to in the sub-section as the "relevant tax". In deciding whether or not it is unreasonable that the relevant person pay the relevant tax the Commissioner is to have regard to the following matters:-

- any improvement in the financial position of the relevant person or an "associate" (defined according to existing section 3) of the relevant person resulting from the scheme under which the shares were sold;
- any liability of the relevant person for vendors recoupment tax under the scheme;
- any payment by the relevant person of company tax evaded by reason of the scheme;

- the nature and degree of any connection between the relevant person (or an associate) and a person responsible for the sale of shares under the scheme;

- the nature and extent of any participation by the relevant person (or an associate) in the scheme; and

- the object of the recoupment tax legislation.

Where conditions (a) to (e) are met, the Commissioner is required to make a determination to the effect that the relevant person should not have paid or been liable to pay the relevant tax.

A person who is dissatisfied with the Commissioner's determination will have rights of objection, review and appeal (see notes on sub-sections 19A(13) and (14)).

Paragraphs (f) and (g) specify the results which flow from a determination.

Paragraph (f) will apply in a case where the relevant person paid part of the evaded company tax. In this case, the Commissioner is required to pay to the person, or apply against any income tax or recoupment tax liability of the person, an amount equal to the relief granted.

Paragraph (g) applies in a case where the relevant person is or was liable to pay vendors recoupment tax. In this situation, so much of the vendors recoupment tax as is equal to the relief granted is to be statutorily remitted. If the vendors recoupment tax has already been paid, the relevant person would be entitled to a refund of the amount overpaid.

Sub-sections (2) and (3) define a number of expressions used in sub-section (1).

Under paragraph (2)(a) a person will be regarded as a "vendor shareholder" in relation to a scheme if a primary taxable amount exists or, but for any payments of company tax made after 25 July 1982, would exist in relation to a sale of shares by the person (or by a nominee of a bare trust in which the person was a beneficiary) under the scheme.

By paragraph (2)(b) a "corporate vendor shareholder" will mean a "vendor shareholder" that is a company.

By virtue of paragraph 2(c) and sub-section (3) a company is a holding company of another company if it has a controlling interest in that company either directly or through other companies in which it has a controlling interest.

Sub-sections (4) to (6) deal with the amendment of determinations made under sub-section (1).

Sub-section (4) provides that the general powers of amendment of an income tax assessment contained in section 170 of the Income Tax Assessment Act are to apply, with appropriate variations, in relation to an amendment of a determination. Subject to sub-section (5), this will mean, for example, that if a full and true disclosure of material facts is made by the person concerned, an amendment of a determination reducing the relief granted under sub-section (1) may only be made within 3 years of the making of the determination.

By sub-section (5) the Commissioner is to be authorised to amend a determination at any time for the purpose of giving effect to a circumstance specified in the sub-section which has occurred after the original determination was made. In broad terms, the circumstances which are specified are those which may result in either the person becoming entitled to a refund of company tax paid by him or her (for example, by reason of the company tax being recovered from the scheme promoter) or having his or her liability to recoupment tax varied. Such subsequent events affect the comparison called for by paragraph (1)(e) between the magnitude of the benefit obtained by a person and that person's payments of company tax or liability for vendors recoupment tax and will usually be required to be reflected in an amended determination.

Sub-section (6) is a drafting measure to ensure that an amended determination will be taken to be a determination and thus itself subject to amendment and rights of objection and appeal.

Sub-sections (7) and (8) concern the service of notices of determination.

By sub-section (7) the Commisioner is required to serve notice of a determination on a person who requests such notice. If no request is made, the Commissioner may decide whether to serve notice of the determination on the person concerned.

Under sub-section (8) a notice of determination may be included in a notice of assessment.

Sub-section (9) is a provision customary in taxation Acts and provides that production of a copy of a notice of determination is to constitute conclusive evidence of the due making of the determination and (except in proceedings on appeal) that the determination is correct. The effect of the provision is to ensure that a person can contest the correctness or otherwise of a determination only through the established appeal procedures.

Sub-sections (10) to (13) are designed to extend the benefit of the usual objection and appeal provisions to a person in circumstances where he or she believes that a determination should be made under sub-section (1) and the Commissioner of Taxation takes a different view.

To this end, a person who considers that a determination should be made under sub-section (1) is to be given a statutory right by sub-section (10) to ask the Commissioner for a determination. By sub-section (11), the Commissioner is to consider the request and give written notice of his decision and if the person is dissatisfied with the decision he or she may, under sub-section (12), lodge a formal objection with the Commissioner. Sub-section (13) provides that the objection and appeal provisions of the income tax law are to apply in relation to such an objection. This will mean that a refusal by the Commissioner to accede to the making of a determination will be reviewable by a Board of Review sitting as a Recoupment Tax Anomalies Tribunal (see notes on sub-section (15)).

Sub-section (14) is designed to extend the benefit of the usual objection and appeal provisions to a person in circumstances where he or she is dissatisifed with a determination made under sub-section (1) and notice of that determination is served on the person otherwise then by inclusion in a notice of assessment. This could occur, for example, where the Commissioner has made a determination granting partial relief in respect of company tax paid by the person concerned. In a case where notice of determination is included in a notice of assessment of vendors recoupment tax, the person would have rights of objection and appeal against that assessment (including the determination) by virtue of existing sub-section 4(1) of the Principal Act.

Sub-section (15) provides that when an independent Taxation Board of Review reviews a decision of the Commissioner of Taxation in relation to an objection against a determination or the failure to make a determination the Board is to sit as a Recoupment Tax Anomalies Tribunal. The Board continues, however, to have the powers and functions as it has as a Board of Review and thus may concurrently deal with other aspects of any decision of the Commissioner it is reviewing.

Sub-section (16) provides that, consistent with existing provisions of the income tax law, tax payable under an assessment may be recovered by the Commissioner of Taxation notwithstanding that a reference to a Board of Review or an appeal to a Court in respect of a determination is pending.

Sub-section (17) will apply where an amended determination is made in relation to evaded company tax paid by a person and that amended determination is less favourable to the person than the determination that was amended. In this situation, the amount by which the relief granted is reduced is to be recoverable as if it were arrears of income tax.

Sub-section (18) provides that payments in relation to relief granted under paragraph (1)(f) will be made out of the Consolidated Revenue Fund.

Sub-section (19) is a technical measure which provides that where the amount of relief granted is offset against a liability of the person concerned, the person will be taken to have paid that amount in reduction of the liability at the time of the application.

Clauses 11 and 12 : Evidence

Clause 11 proposes the repeal of section 23 of the Principal Act and the substitution of a new section 23 which is itself to be subject, by clause 12, to amendment from a date to be fixed by Proclamation.

The existing section 23 is designed to facilitate recoupment tax procedures that depend, among other things, on company tax being due and payable and remaining unpaid. It provides that an official certificate to the effect that an amount of company tax is due and payable and remains unpaid is to be taken as conclusive evidence, except in proceedings which have been instituted in relation to an objection against the company's assessment. This reflects the settled policy of the income tax law that an assessment should be open to challenge through normal procedures of objection, review and appeal against the assessment, and not otherwise.

In the light of some doubt of a constitutional kind that has arisen about the legislation, and of technical deficiencies in the existing section 23, the section is to be replaced. A feature of the new section will be that the certificate for which it provides will in all circumstances be prima facie, rather than conclusive, evidence.

The new section will mean that an official certificate as to the amount of company tax that became due and payable is to be taken as prima facie evidence in an objection or appeal proceeding against a related assessment of either recoupment tax or income tax payable on a deemed dividend (paragraph 23(1)(a)). Similarly, a certificate as to the amount of the company tax that remains unpaid at a particular time is also to be taken as prima facie evidence in such a proceeding (paragraph 23(1)(b)).

Proposed sub-section 23(3) will make clear that section 23 is not to disturb the operation that, by reason of sub-section 4(1) of the Principal Act, section 177 of the Income Tax Assessment Act has for certain recoupment tax purposes. Under section 177, production of a copy of a notice of assessment is to constitute conclusive evidence of the due making of the assessment and (except in proceedings on appeal) that the assessment is correct. Again the background of the effect that section 23 itself has, sub-section 23(3) will mean that a section 177 document is -

- in appeal procedings against a company assessment conclusive evidence of the due making of the assessment (but not of the correctness of the assessment); and

- in proceedings for the recovery of recoupment tax or of income tax in respect of an imputed dividend, conclusive evidence of both the due making and the correctness of the relevant assessment/s (the correctness of the assessment will have been open to objection and appeal).

Sub-sections (2) and (4) are re-enactments of existing sub-sections (2) and (3) respectively.

Clause 12 proposes to amend, with effect from date of proclamation (see notes on clause 2), the new section 23 so that the prima facie evidence rule insofar as it relates to the amount of company tax that became due and payable would revert to a conclusive evidence rule.

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