

**PROMOTER PENALTIES - ADVISER EXCEPTION**

**12 OCTOBER 2006**

**CHRIS BRANSON QC**

## PROMOTER PENALTIES - ADVISER EXCEPTION

### INDEX

1.	Overview	2
2.	Statutory Context	3
3.	Who is an Adviser	7
4.	What is Advice	8
5.	Merely – Squib Word	9
6.	Marketing	10
7.	Encouraging the Growth of a Scheme or Interest In It	11
8.	Consideration	12
9.	Substantial Role	13
10.	Advice Resulting In Promotion	15
11.	Leary v FC of T	17
12.	Relationship Between Adviser and Client	18
13.	What Steps Should a Prudent Adviser Take	19
14.	Conclusions	21
ANNEXURE		
	Examples for Discussion	22

## 1. Overview

- 1.1 The promoter penalties legislation will have potentially far-reaching consequences for the community of tax professionals by reason of the broad and ambiguous terminology used in the statute. There is a significant risk that many who advise as to the merits and fiscal consequences of a proposed scheme will be found to be promoters of tax exploitation schemes and thus be the subject of civil penalties consisting of considerable fines and suffer the consequent reputational damage.
- 1.2 Identifying precisely when an adviser may become a promoter is an elusive and challenging task when both the structure and language of the statute are examined. Nowhere is there a definition of who is an adviser or what may constitute advice. The proscribed conduct is the promotion of a tax exploitation scheme and section 290-60(2) provides aphoristically that merely because an entity provides advice about a scheme it is not a promoter of a tax exploitation scheme. Certain categories of advice or work performed in relation to providing advice may satisfy the definition of who is a promoter and the purported exception of “mere advice” is somewhat illusory.
- 1.3 The risk to advisers being caught by this legislation is made clear by paragraph 3.127 of the Explanatory Memorandum which enjoins advisers “to familiarise themselves with the new law to ensure that they do not cross the line from advice to promotion.”

- 1.4 The definition of “tax exploitation scheme” focuses attention upon the time when the proscribed conduct namely, promotion occurs and the Court must consider at that time whether the sole or dominant purpose of the scheme is to obtain a tax benefit and whether it is reasonably arguable that such a benefit is available at law. This gives rise to a situation whereby when the advice is provided the adviser’s conduct is relevant to whether there is “promotion” and the adviser’s subjective purpose which may be attributed to the taxpayer when considering Part IVA may be influential in deciding whether there is a “tax exploitation scheme”.
- 1.5 This paper is concerned only with how advice may constitute promotion and not with how the adviser’s purpose may determine the existence of a tax exploitation scheme.

## **2 Statutory Context**

- 2.1 The *Tax Laws Amendment (2006) Measures No. 1 Act* introduced certain measures to deter the promotion of tax avoidance schemes and tax evasion schemes and the implementation of schemes promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling: section 290-5. These measures are contained in Division 290 entitled Promotion and Implementation of Schemes in Schedule 1 of the *Taxation Administration Act 1953*.
- 2.2 An Explanatory Memorandum (“EM”) was circulated by the Treasurer on 16 February 2006 when these measures were introduced to the Parliament

in Bill form. Chapter 3 of the EM contains 149 paragraphs of comment and discussion which purport to flesh out and develop the statutory language. It should be observed that particularly in relation to the subject of advice the commentary in the EM goes considerably beyond the words of the statute and is not wholly compatible therewith.

2.3 In any event the statutory language is of paramount importance and extrinsic materials such as an EM are merely background material which may evidence context and purpose but do not control the meaning of the text. A useful reminder of this canon of statutory interpretation is to be found in *A F Mason, "Global Challenges in Tax Administration"*, *Taxation in Australia*, Issue 40, No. 4, October 2005 at page 199.

2.4 Sub division 290-B is entitled Civil Penalties and section 290-50 (1) provides as follows:

*(1) "An entity must not engage in conduct that results in that or another entity being a \*promoter of a \*tax exploitation scheme".*

2.5 It must be steadfastly borne in mind that this first type of proscribed conduct includes both the conduct of the relevant entity and that of some other entity which involves the promotion of a tax exploitation scheme. That is to say there may be more than one promoter of a particular scheme. Furthermore the giving of advice whilst not being promotional conduct per se may result in another entity becoming a promoter.

2.6 The second type of proscribed conduct is that which results in a scheme that has been promoted on the basis of conformity with a product ruling

being implemented in a way that is materially different from that described in the product ruling: section 290-50 (2). This is not relevant to the present discussion because the relevant conduct is not related to nor predicated upon the provision of any advice.

2.7 By virtue of section 290-60 (1) “*promoter*” is defined as follows:

(1) *An entity is a promoter of a tax exploitation scheme if:*

- (a) *The entity markets the scheme or otherwise encourages the growth of the scheme or interest in it; and*
- (b) *The entity or an associate of the entity receives (directly or indirectly) consideration in respect of that marketing or encouragement; and*
- (c) *Having regard to all relevant matters, it is reasonable to conclude that the entity has had a substantial role in respect of that marketing or encouragement.*

2.8 Section 298-85 provides that the Federal Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a civil penalty. Thus in order to attract the civil penalty regime it is incumbent upon the ATO to prove, on the balance of probabilities, that each of the three limbs (a), (b) and (c) are satisfied. It follows that any conduct of an adviser which is asserted to be the promotion of a tax exploitation scheme will be exculpated if any one of those three limbs are not established.

2.9 Section 290-60 (2) provides:

*“However, an entity is not a promoter of a tax exploitation scheme merely because the entity provides advice about the scheme.”*

2.10 A threshold question which arises is whether the use of the word “However” in section 290-60 (2) creates a true exception or proviso. Militating against this proposition is the language of section 290-55 headed “Exceptions” which relate to reasonable mistake or taking reasonable precautions (for conduct due to the act or default of another entity) and reliance on advice from the Commissioner. This may be regarded as not decisive because it is contained in a provision dealing with different subject matter.

2.11 It should be noted that paragraph 3.50 of the EM refers to the advice *exception* as do paragraphs 3.115 and 3.116.

2.12 The evident intention of section 290-60 (2) is to stipulate that merely advising about a scheme does not constitute conduct being the promotion of a tax exploitation scheme but the subsection does not refer at all to the criteria enumerated in section 290-60 (1). The negative stipulation does not specify whether advice is not to be regarded as “marketing” or “encouraging” a scheme nor does it indicate the significance of the type of consideration received by an adviser or the extent of the adviser’s role in the marketing or encouraging of a scheme.

2.13 If section 290-60 (2) is truly an exception then the entity has the burden of proving that it has provided advice and nothing more than that. If it does

not create an exception then it is incumbent upon the ATO to establish inter alia that the adviser has marketed or encouraged the scheme, has received consideration and has played a substantial role in the promotion.

2.14 The use of the phrase “advice about the scheme” is not particularly helpful. Questions which arise include the extent to which the adviser has been briefed about all integers of the scheme and whether the advice is provided as to some only of such integers. The use of the preposition “about” may mean “in connection with” or “as to the effects of ” the scheme or indeed something much wider.

2.15 In section 290-60 (1) (c) the notion of it being reasonable to conclude that the entity has had a substantial role is introduced. It is not clear why importing this objective criterion has been confined to one only of the three limbs constituting the contravening conduct.

### **3 Who is an Adviser**

3.1 Paragraph 3.127 of the EM contemplates that advisers include financial planners, accountants, tax agents and lawyers. Needless to say others such as investment bankers and indeed anyone engaged in providing advice of any kind about a scheme which may create tax benefits seems to be at risk of attracting the civil penalty regime.

3.2 Does any special consideration need to be given to the position of lawyers, whether a barrister or solicitor, who have certain ethical and fiduciary

obligations to their clients. The Victorian Bar Rules (Rule 109(d)) prohibit barristers being involved in suggesting or preparing methods of breaching the law including methods of evading revenue laws.

- 3.3 Whilst accountants are not under the same ethical and fiduciary constraints as lawyers nevertheless in order to discharge their professional duties it is necessary that they provide cogent and detailed advice about the merits of any proposal of their clients which contains taxation features. The Institute of Chartered Accountants issued Risk Management Guidelines in April 1996 and CPA Australia issued similar guidelines in October 2003 and August 2004.

#### **4. What is Advice**

- 4.1 Paragraph 3.49 of the EM states that advice providing alternative ways to structure a transaction or which sets out the tax risks of the alternatives would qualify for the adviser exception. This may not be so and overstates the realities of the provision of advice in this area.
- 4.2 Paragraph 3.50 of the EM refers to the provision of independent and objective tax advice including advice regarding tax planning. It is confidently stated therein that those who advise on tax planning arrangements, even those who advise favourably on a scheme later found to be a tax exploitation scheme, are not at risk of civil penalty. It would be very unwise to rely upon this extrapolation of the statutory language in a manner which is essentially inconsistent with what is contained in sections

290-50 and 260-60. Indeed paragraph 3.50 of the EM is erroneous and misleading.

- 4.3 It should be assumed that advice is the provision of an opinion or the expression of a view as to whether an entity obtains a taxation benefit from a scheme.

## 5. Merely – Squib Word

- 5.1 The use of the word “merely” in section 290-60 (2) is both curious and confusing. There is no such concept as mere advice nor indeed mere silence. The use of the words “merely” or “mere” have the effect of downplaying a fact which exists whilst excluding other facts which the user chooses to ignore so as to avoid their analysis or publication. In *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, Black CJ stated at 32:

*To speak of “mere” silence or a duty of disclosure can divert attention from the primary question. Although “mere” silence is a convenient way of describing some fact situations, there is in truth no such thing as “mere silence” because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable explanation, in the circumstances of the case, that if particular matters exist they will be disclosed”.*

- 5.2 Reasoning by analogy the use of the word “merely” and the concept of mere advice have to be considered in the context of the factual matrix and by reference to the three criteria enumerated in section 290-60 (1) in order to determine whether there has been any promotional conduct. Regrettably the parliamentary draftsman chose to ignore those criteria and

has confused the issue by use of the words “merely because the entity provides advice...”.

## **6. Marketing a Scheme**

- 6.1 It is tolerably clear that marketing involves the dissemination to one or more parties of information about a scheme that is not confined to selling, advertising or distributing a scheme to persons at large or to members of the public.
- 6.2 Absent any statutory definition of “markets” in section 290-60(1) and any guidance in the EM it is likely that the Court will characterise as marketing a wide range of conduct that has the effect of bringing to the attention of a third party the existence of a scheme including its taxation benefits. There is no requirement that there be any intention to do so and any voluntary action even without advertence to the benefits contained in a scheme would suffice.
- 6.3 Ordinarily it may be thought that marketing is associated with reward received by a promoter however the reference to receipt of consideration by an associate indirectly extends that notion significantly (Section 290-60(1)(b)). It is pertinent to consider the definition of “associate” in section 318 of the *ITAA 1936* which includes relatives, partners, trusts that benefit the primary entity and companies influenced by the primary entity.

## 7. Encouraging the Growth of a Scheme or Interest in it

7.1 Paragraph 3.116 of the EM states that if tax advisers encourage their clients to enter a particular scheme, and receive consideration in respect of that encouragement, they will not be covered by the adviser exception. It seems to follow that encouragement and advice may overlap and are not mutually exclusive concepts.

7.2 Paragraph 3.41 of the EM contains two important propositions:

- (1) the verb “encourages” ordinarily includes most forms of marketing (without saying what marketing is); and,
- (2) the use of the broader phrase (referring to “encourages”) makes it clear that the civil penalty regime is not restricted to schemes that are directly marketed in a conventional sense.

7.3 It is difficult to understand the use of “the growth” of a scheme except perhaps in the sense that promotional activity attracts more participants.

7.4 As discussed above “markets” has a broad connotation and absent a definition of “encourages” it seems that a wide range of benign steps or activities undertaken by an adviser may satisfy this requirement without an adviser having made a specific recommendation that a particular taxpayer participate in a scheme.

7.5 “Encourages” may include discussing a scheme with a client or a group of clients or persons attending a seminar or meeting convened to consider the merits of a scheme. The identification of other action or steps as amounting to the encouragement of a scheme or interest in it is an excruciatingly difficult task. It is notable that in *Leary v. FC of T* (1980) 11 ATR 145, Brennan J, when distinguishing professional advice from entrepreneurial activities referred to activities whereby “taxpayers will be encouraged to participate” as falling outside the field of professional activity. One strongly suspects that reliance upon this dictum influenced the statutory definition of “promoter”.

## **8. What is consideration**

8.1 Consideration is not defined as a concept by the *TAA 1953* or the *ITAA 1997* however it would include anything of value whether in monetary form or not.

8.2 Lawyers and accountants are accustomed to billing for advice either on an hourly basis or a lump sum which reflects the complexity and significance of the task and the time expended. However it is not uncommon for a fee say 50% of the billable hourly rate to be charged in any event and the balance of the fee that is the remaining 50% and/or a premium say an additional 50% above the billable hourly rate to be charged in the event that the scheme is implemented. All of these scenarios would be consideration although advice provided on a pro bono basis would not be.

- 8.3 The statute does not mandate that there be any temporal nexus between the asserted promotional conduct and the receipt of consideration which means that any contingency fee arrangement would be caught.
- 8.4 The way in which fees are payable to an adviser may be relevant to considering whether the adviser has encouraged participation in a scheme. It can be plausibly contended that if an adviser has an interest in the intended outcome that is, whether the scheme the subject of the advice is implemented, whatever recommendation is made to the participant is more likely to constitute “encouragement” in the sense discussed in *Leary*. Thus the concept of consideration is not to be judged in splendid isolation.
- 8.5 It should be noted that consideration may be both direct and indirect such as in kind payments and payments to third party associates as contemplated by paragraph 3.27 of the EM. In the usual case professional advisers receive remuneration from the client obtaining the advice.
- 8.6 In practice it will be necessary to examine all aspects of the scheme and its implementation to determine whether there is a connection between the conduct of the adviser and any emolument whatsoever that has been received.

## **9. What is a Substantial Role**

- 9.1 It is to be borne in mind that numerous entities may contribute to the promotion of a tax exploitation scheme and one or more such entities may

play a substantial role. Paragraph 3.47 of the EM helpfully states that substantial means “considerable or large” and that the extent of the promotion or conduct turns on the facts of the case.

9.2 The term “entity” is defined in section 995-1 of the *ITAA 1997* to include an individual, a trustee, a company, a partnership, an unincorporated association, a trust or a superannuation fund. Thus there is potential for a very broad range of legal persons to be characterised as promoters.

9.3 Paragraph 3.48 of the EM enumerates, by reference to the subject matter, scope and purpose of the provisions a number of factors from which it is reasonable to conclude that the entity has played a substantial role:

- “(a) the degree of involvement of the relevant entity in the activities whereby the scheme was marketed or encouraged,*
- (b) the significance of that entity’s role compared to the role played by others in those activities (i.e. someone who plays a key role in devising the scheme and giving instructions to others in the course of its establishment and implementation will have a more significant role than someone who merely acts in accordance with those instructions),*
- (c) the nature and level of the consideration received by the entity in respect of the scheme, and*
- (d) the degree of the entity’s participation in the management of the marketing or encouraging the scheme.”*

9.4 The first factor is self evident and adds little or nothing of substance.

9.5 Clearly enough someone who devises a scheme and gives instruction as to its establishment and implementation is playing a substantial role as

opposed to someone acting in accordance with instructions. It is questionable whether a comparison of roles is necessary because the inquiry should be focused upon the conduct of a particular entity.

9.6 As already noted the nature and level of consideration received is relevant to whether there has been marketing or encouragement.

9.7 Ordinarily professional advisers do not manage or administer participation of persons in a scheme and any such role would be beyond the scope of a usual retainer.

9.8 The professional adviser is most at risk where he or she has devised the essential integers of the scheme including the tax benefits obtainable thereby.

## **10. Can the Provision of Advice Result in Another Entity Being a Promoter**

10.1 The most likely example of this occurring is where a lawyer or accountant provides advice to a financial planner or an investment bank about a financial product as to whether the proposed scheme is tax effective and the nature and context of such advice is passed on to their clients. This may be effected by way of an information package referring to the advice and making a recommendation that the clients participate in the scheme.

10.2 Even though there has been no direct contact between the adviser and the clients of the financial planner or the bank it is arguable that the conduct of the adviser in providing the advice has resulted in another entity

promoting a scheme which is found ultimately to be a tax exploitation scheme. The statute does not stipulate that there be any intention to achieve such a result in the sense that the adviser should advert to and foresee the consequences of giving the advice.

10.3 It is not clear whether “results in” means causation as a matter of fact and degree or is to be determined on a “but for” basis. If it is the former then there may be many cases where lawyers and accountants are held to have contravened the first prohibition even though they themselves are not promoters. Nevertheless if the Court is satisfied that there has been a contravention of section 290-50(1) the adviser may be ordered to pay a civil penalty.

10.4 Paragraph 3.20 of the EM states that conduct which is merely peripheral to the conduct that makes a second party a promoter is not a contravention and that the first party must have a degree of active engagement.

10.5 The main purpose of the extension to conduct “resulting in” another entity promoting a scheme appears to relate to the use by individuals of other entities such as trusts or corporations to perform the “active” promotion. Regrettably the breadth of Section 290-50(1) will catch advisers in many cases.

## 11. Leary v FC of T

11.1 In *Leary* MTS procured donations to the order of St. John of Australia which donations were to be allowable deductions pursuant to section 78 (1) (a) of the *ITAA 1936*. MTS was to receive a fee of 98.8% of the donations procured. The legal issues included the following:

- Whether the gift was voluntary and not as a result of a contractual obligation;
- Whether any material advantage was received in return for the gift;
- Whether the payment was made by way of benefaction.

11.2 The Full Court of the Federal Court of Australia (Bowen CJ and Brennan and Deane JJ) held on the facts that the payments were not allowable deductions.

11.3 At pages 161 and 162 of the report Brennan J considered the respective functions of professional advisers and entrepreneurs. He advanced a number of propositions as follows:

- Upon the facts none of the entrepreneurs assumed the functions of professional adviser nor did any professional adviser assume the role of an entrepreneur;
- It was necessary to consider whether it is possible for the role of a professional adviser and the role of an entrepreneur to coincide or overlap;
- There are significant differences between the two functions which do not depend upon any judicial view as to the lawfulness or morality of tax avoidance;
- The field of professional activities is coextensive with a lawyer's professional duty which is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of a client's interests within the terms of the retainer;

- It is a duty which is cast upon a lawyer, as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of a contract, charges under the criminal law or any other of the varied fields of professional concern;
- It is a duty which arises out of the relationship of lawyer and client;
- The activities of an entrepreneur in the promotion of a scheme in which taxpayers are *encouraged to participate* falls outside the field of professional activity and those activities are not pursued and discharged because of some antecedent professional duty;
- Entrepreneurial activity does not attract the same privilege nor the same protection as professional activity and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty.

11.4 These propositions are both sensible and coherent and assist in drawing a distinction between advice per se and promotional activity.

## **12. Relationship Between Adviser and Client**

12.1 Conflicts of interest between advisers and their clients may arise because a claim for legal professional privilege which can undoubtedly be in the interests of the taxpayer could prevent a promoter utilising the advice to resist or mitigate the imposition or quantum of civil penalties.

12.2 The imposition of civil penalties upon promoters is discretionary although certain principles are set forth in section 290-50(5). In deciding what penalty is appropriate the Court may have regard to all matters that it considers relevant including the degree of the promoter's cooperation with the Commissioner. Clearly this would involve a promoter seeking to rely

upon sensitive and privileged information about a taxpayer's personal affairs and the reasons for a taxpayer's participation in a scheme.

12.3 Thus there is tension between the interests of the adviser and the client which will be exacerbated once the threat of enforcement is on the table.

### **13. What Steps Should a Prudent Adviser Take**

13.1 The role of an adviser may consist of inter alia:

- Devising a concept to create a taxation benefit;
- Amending or refining a concept devised by another to create a taxation benefit;
- Drafting and preparing documents to implement the concept;
- Expressing an opinion as to whether the concept will create taxation benefits;
- Expressing an opinion as to the application of any anti-avoidance provisions;
- Making a recommendation as to whether or not the client should participate in the scheme;
- Warning the client that notwithstanding the adviser's opinion that the scheme will create a tax benefit and not be struck down by Part IVA or any other anti-avoidance provision there is a not insignificant risk that the concept will not be fiscally effective.

13.2 It is trite to observe that the objective, scope and extent of the retainer will be critical. In particular it will be necessary for the adviser to undertake an information gathering exercise so as to be completely satisfied before providing any advice relating to a scheme that has taxation benefits that there is an awareness of the following:

- All facts and circumstances relating to the putative taxpayer;

- All documentation relating directly or indirectly to the scheme;
- The potential for the advice to be disseminated to third parties;
- Whether a recommendation as to participation is required;
- The commercial and practical integers of the arrangements;
- Whether advice is being sought as to the nature and quality of the investment.

13.3 Where an adviser is retained to express an opinion about all or any aspects of a proposed scheme and/or to comment generally a prudent course would be to request that specific questions be formulated and answers provided thereto.

13.4 There arises the vexing question as to whether a lawyer or an accountant has a duty of care not only to advise upon the merits of the particular scheme but also to consider and formulate other means of carrying out the objective as suggested by McHugh J in an article appearing in *1989 Australian Bar Review* at page 4. The short answer is to define the scope of the retainer to exclude any obligation to provide advice about alternative scenarios. Most clients would not want the advice so circumscribed.

13.5 It is suggested that in order to escape the risk of civil penalties being imposed any advice provided as to the tax effective features of a scheme ought expressly disavow any encouragement or recommendation that the client proceed with the transaction. In the real world such a course is bound to provoke angst and dissatisfaction.

## **14. Conclusions**

- 14.1 The protection afforded to advisers by section 290-60(2) is ill-defined and ambiguous.
- 14.2 In order to determine whether advice is proscribed promotional conduct there must be a detailed examination of the role of the adviser and of all others involved in the marketing or encouragement of the scheme.
- 14.3 It may be that any activity other than providing plain vanilla independent and objective advice will be subject to sanction.

12 October 2006

CC Branson QC

## ANNEXURE

### Examples for Discussion

#### Example 1: Based on example 3.4 of the Explanatory Memorandum.

- 1.1 A large wholesaling operation is advised by Naomi, who is a partner in a firm of accountants, on a method of valuing trading stock that will considerably reduce the company's tax liability. Naomi, in order to confirm her views, approaches a respected tax silk (Rona Silk SC) to obtain her opinion. Rona suggests some amendments to a scheme proposed by Naomi which she believes will assist in the objective of reducing tax and based on that revised scheme provides a favourable legal opinion. The company's CFO (Gavin) approaches the tax manager (Mike) who approves the use of the scheme. Mike gets a bonus based on the extent to which the company's effective tax rate is reduced below 30%. Gavin recommends to the Board the adoption of the trading stock proposal and it is implemented. The company's financial position improves significantly because of the tax savings from the trading stock arrangement and Gavin receives a bonus based on the company's good financial performance. Naomi gets remuneration based on the tax savings from the scheme she has prepared for the company. Rona received a professional fee based on her normal billing rate.
- 1.2 Some years later the Commissioner disallows the tax benefits, the company challenges the Part IVA determination and loses in a unanimous decision of the

- Federal Court. The company takes action against Rona for negligence but is unsuccessful.
- 1.3 On the assumption that no reasonably arguable position exists a number of issues arise for discussion. Is Naomi's firm and are partners of Naomi's firm subject to penalties where Naomi's actions fall within the tax promoter rules?
  - 1.4 Rona Silk SC makes suggestions in relation to the scheme as part of her advisory brief. Does the delivery of the suggestions in her advice cause her to potentially fall outside any defence that she is a mere adviser?
  - 1.5 Mike makes the scheme possible by omitting to take action. Gavin recommends the scheme to the Board of directors. Can Gavin and Mike be promoters of the scheme to their own employer.
  - 1.6 On the question of a reasonably arguable position is it sufficient to obtain a legal opinion from a reputable silk? Does it matter that the Federal Court decision is by majority and not unanimous?

### **Example 2: Tax Structuring of a Transaction**

- 2.1 Caroline operates a business, Solo Enterprises, with a long standing tax adviser Luke, an accountant in a major accounting firm. Caroline intends to acquire a new business to increase the scale of Solo Enterprises. Caroline asks Luke for advice on how to structure and finance the arrangement to achieve the best possible outcome. Luke asks his senior associate Hans to prepare the advice. Hans is an experienced tax professional, as is Luke. Luke provides advice about

the impact of consolidation, holding entity structures in Australia and overseas, the tax losses and the tax profile of the target company GrowthCo Pty Ltd. Luke advises on a particular tax arrangement whereby Solo Enterprises might acquire GrowthCo Pty Ltd with beneficial tax outcomes for tax consolidation purposes. Luke is prepared to provide the advice at his normal billing rates. However Caroline, concerned about the potential professional fees and other costs inherent in the overall acquisition transaction, negotiates an arrangement whereby if the acquisition does not proceed then Luke will be paid 50% of his normal fee whereas, if the acquisition goes ahead, Luke will receive 150% of his normal fee. The advice provided by Luke sets out the tax analysis, the risks and issues involved, and an alternative course of action which might be adopted. Caroline advises Luke that she is not an expert in these specialist tax issues, and asks Luke to recommend the preferred course of action. Luke makes no recommendation but rather explains the advantages and risks of the particular option selected. Caroline is insistent on receiving a recommendation and Luke provides one, highlighting the advantages and risks. The acquisition transaction occurs, using the structure on which Luke advised.

- 2.2 On later examination by the ATO it is clear that Luke's advice was incorrect because he did not properly consider the implications of the consolidation law and therefore the tax benefits claimed by Solo Enterprises cannot be sustained. It should be assumed that the tax advice was not reasonably arguable due to Luke misunderstanding a particular provision in the tax legislation.

### **Example 3: Investment Bank and its Adviser**

- 3.1 Paul is employed by an investment bank, Taxfin Limited. Paul identifies an opportunity, emerging from a new tax measure, which can be used to structure a cross border financial security to achieve a tax benefit for a user of funds in Australia. This security requires a specialist funding package which Taxfin can offer. Paul and Taxfin offer this arrangement, by way of a marketing presentation, to three companies for an advisory fee and other fees in relation to the financing transaction. Taxfin has not dealt with two of the three companies previously and the third company is one where Taxfin had previously provided banking services in an unrelated area. Assume that the tax benefit sought is disputed by the ATO, and proceeds to litigation. In the judicial process the tax benefit sought is disallowed under Part IVA.
- 3.2 Taxfin sought advice from a well known tax adviser, Anna who is a partner in an accounting firm, in relation to this arrangement. Anna produced an advice letter which set out the risks and issues fully, including the risk of application of Part IVA to the arrangement . Her advice was that Part IVA did not apply to the transaction. The fee charged by the tax accounting firm to Taxfin was set in line with the normal billing rates for significant tax advice and was not coloured by the potential tax benefit to be achieved from the arrangement.
- 3.3 Does Anna’s conduct constitute promotion because it results in Taxfin being a promoter?

\* \* \* \* \*