

BBlood Enterprises Decision - Ordinary Dealing Exceptions

1. The decision in *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 includes clearly articulated reasoning, in respect of the ordinary family or commercial dealing exceptions to section 100A, of which taxpayers and the ATO should take particular note.

2. While the taxpayer in the case was unsuccessful, it is suggested the specific reasoning adopted by Thawley J in respect of the exclusion from an agreement under section 100A(13) of "an agreement, arrangement or understanding entered into in the course of ordinary family or commercial dealing" will be relevant to:

- taxpayers generally – and particularly in the (remaining largely untested) area of ordinary family dealing; and
- the ATO – especially in finalising draft ruling TR2022/D1.

3. The specific "ordinary family or commercial dealing" question is dealt with, as Issue 2(2), in paragraphs 91 to 104 of the *BBlood Enterprises* decision.

4. Firstly, Thawley J directs attention (at paragraph 91) to the relevant statutory question as being whether:

- **the agreement was entered into in the course of** ordinary family or commercial dealing. He stresses that it is **not whether individual steps carried out in implementing the agreement**, viewed in isolation, could be characterised as steps entered into in the course of ordinary family or commercial dealing; and
- **the agreement was entered into in the course of** ordinary family or commercial dealing, **not whether the agreement was an ordinary family or commercial dealing**.

Tax types

- Income tax

Tax practice areas

- tax advisory services
- tax audits and reviews
- tax objections

5. It is made clear (at paragraph 92) that individual steps might be considered – but the statutory question is different.

6. Secondly, Thawley J acknowledges (at paragraph 94) that this statutory question "is distinct to the inquiry about purpose required by s 100A(8) and (9)" and then explains (at paragraphs 94 to 96) some matters that may be looked at in determining the statutory question.

7. Those matters include:

- what is "said to be" the object to be achieved by a dealing - in the course of which the relevant agreement was entered into;
- the relevance, to the claimed object, of particular steps under the agreement;
- whether particular steps might be explained by objectives different to the objectives "said to be" behind the ordinary or commercial dealing;
- that a dealing might not be an ordinary family or commercial dealing if it is overly contrived, or artificial; and
- that a dealing might not be an ordinary family or commercial dealing if it involves more than is required to achieve the relevant objective – such as additional steps not necessary to achieving the (claimed) objective.

8. It is noteworthy that no mention of the decision in *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 is made by Thawley J in relation to section 100A(13).
9. This is unlike the ATO approach in TR2022/D1, which relies heavily (e.g. paragraphs 79, 162 and 163) on a view that the meaning of "ordinary family and commercial dealing" in section 100(13) is derived from *Newton*.
10. This leads the ATO to an approach in TR2022/D1 that imports the predication test from *Newton* (paragraph 79) and to generally elevate the tax purposes of an agreement to be the dominant consideration in applying (practically, in limiting) the ordinary dealing exclusions under section 100A(13) (e.g. paragraphs 93 and 94).
11. Such reasoning is not present in the *BBlood Enterprises* decision.
12. Thirdly, consistent with these observations about tax purpose, in explaining (at paragraph 97) the relevance of the decision in *Commissioner of Taxation v Prestige Motors Pty Ltd* (1998) 82 FCR 195 to determining the relevant statutory question under section 100A(13), Thawley J is careful not to refer to tax purpose as the determining factor but to instead cite the references made in *Prestige Motors* to an absence of:
 - "commercial motivation" for one transaction: *Prestige Motors* at 222F-G;
 - "commercial justification", leaving "the only explanation for the entry into the agreement as the elimination or reduction of tax liabilities": *Prestige Motors* at 223C; and
 - "commercial necessity or justification for the transaction" or "commercial reason to raise capital from outside the group": *Prestige Motors* at 223E-F.
13. This understanding of *Prestige Motors* differs from the ATO approach in TR2022/D1, which is heavily focussed on an assessment of tax avoidance purpose as drawn from *Newton* and leads the ATO to claim in footnote 54 to paragraph 93 that "Rather, the Court in *Prestige Motors*

concluded both transactions were the consequence of an agreement entered into only for tax avoidance purposes".

14. Tax purpose was no doubt a background factor to the agreement(s) considered in *Prestige Motors* but the reasoning from *Newton* around tax avoidance purpose and "ordinary business or family dealing" was not part of the *ratio decidendi* applied in *Prestige Motors*.
15. It is respectfully submitted that the decision in *BBlood Enterprises* provides valuable guidance to the correct approach to determining the relevant statutory question under section 100A(13) (i.e. of whether "an agreement, arrangement or understanding [was] entered into in the course of ordinary family or commercial dealing") by maintaining careful attention to the exact words of the section and to the exact comments made in *Prestige Motors*.

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