



Generalists' duty to refer to specialists

The High Court of England & Wales has recently held that a firm of high street chartered accountants that advised in general tax matters, had an obligation to refer a tax "mitigation" matter to a specialist, and found them negligent to the tune of £1.4M as a result of having not done so.

Arguably the position in Australia would be the same, notwithstanding the existence in Australia of a General Anti-Avoidance Rule (GAAR) in Part IVA, and of a Promoter Penalty regime.

In *Hossein Mehjoo v Harber Barker (A Firm)* [2013] EWHC 1500 (QB), Mr Mehjoo was found to be a non-domicile of the UK, and therefore potentially able to implement UK tax planning which would not be available to a UK domicile. The chartered accountants knew Mr Mehjoo was likely to be regarded as a non-domicile, but did not have particular expertise in advising such persons. It was found that they failed to advise Mr Mehjoo that he could use a scheme to transfer shares in his company to an offshore trust, so that the offshore trust could sell the shares free of

capital gains tax. This was found to be the advice which Mr Mehjoo would have received had he been referred to a specialist in non-domiciles' tax planning. The particular scheme has now been prevented by specific legislative provision. Not surprisingly, the accountants have lodged an appeal.

The case has caused dismay in the UK where there is now considerable pressure on tax advisers to ensure clients pay their "fair share" of tax. The UK is also implementing a GAAR and also has a Disclosure Regime to bring planning schemes to the attention of the Revenue.

However, in Australia, as long as the planning was not likely to offend Part IVA, and as long as a firm of the same status failed to refer the matter to specialists for advice, the same result might follow. Indeed, it is somewhat of a co-incidence that the duty to advise as to how legally to avoid UK tax by a UK non-domicile was recognised in the Australian case of *Bayer & Anor v Balkin & Anor* 95 ATC 4609 at 4617 (and not commented on adversely on appeal, reported as *Balkin & Anor v Peck & Anor* 98 ATC 4842 at 4849).



POINTONpartners

Lawyers & Trademark Attorneys

www.pointonpartners.com.au

Take for example where a firm of accountants that had general expertise in tax matters for Australian residents carrying on activities in Australia, is confronted with a resident who wishes to expand his company's business overseas, not being an area where they had any particular expertise.

Pointon Partners has significant specialist expertise in several areas, including Trade Marks, Employment Law, Gaming Law, Domestic and International Tax.



Written by: Robert Gordon- Consultant
rmg@pointonpartners.com.au

Reviewed by: Tony Pointon- Chairman
adp@pointonpartners.com.au

Direct your enquiries to the above or your contact at **Pointon Partners:** www.pointonpartners.com.au

If you find this article of interest, feel free to forward to a colleague.