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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

INCOME TAX ASSESSMENT AMENDMENT BILL (NO. 4) 1979

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Hon. John Howard, M.P.)

Introductory note

This supplementary memorandum, which is to be read in conjunction with the Explanatory Memorandum previously circulated, explains amendments that are proposed to be made to the Income Tax Assessment Amendment Bill (No. 4) 1979 as introduced into the House of Representatives. The amendments take into account certain views received since introduction of the Bill, propose some technical changes found, on review, to be desirable, and omit a restricted "no-carry-forward loss" provision that will be replaced by a more general provision in the Income Tax Assessment Amendment Bill (No. 5) 1979.

Amendment (1)

As introduced, the Income Tax Assessment Amendment Bill (No. 4) 1979 would (by sub-clause 3(3)) deny deductions in 1979-80 and later income years for carry-forward losses of prior years generated through "Curran"-type schemes. As subsequently announced by the Treasurer on 24 May 1979, carry-forward losses generated not only by "Curran"-type schemes but also by trading stock schemes, prepayment schemes and expenditure recoupment schemes, entered into in the 1977-78 or a prior year of income before the generally applicable operative date of remedial legislation, are not to be deductible against income of the 1978-79 or subsequent income years. Correspondingly, such losses, if arising under schemes entered into in the 1978-79 year of income, are not to be deductible as carry-forward losses against income of 1979-80 or subsequent income years.

As these changes are to be given effect by clauses 3 to 5 of the Income Tax Assessment Amendment Bill (No. 5) 1979, sub-clause 3(3) of the (No. 4) Bill will not be required.

Amendments (2) to (5)

These amendments relate to notices as to the transfer value of trading stock that may be given to the Commissioner of Taxation under sub-section 36A(2) by persons where there is a change in interests in the stock, e.g., on the formation or dissolution of a partnership or on a variation in the constitution of a partnership or in the interests of the partners.

Anti-avoidance measures contained in sub-section 36A(5), and that are being supplemented by further measures proposed by clause 5 of the (No. 4) Bill, contain proscriptions on the making of notices under sub-section (2) in respect of certain property.

The amendments proposed by amendments (2) to (5) concern notices under sub-section 36A(2) that relate both to such proscribed property and other property. The amendments are designed to make it clear that a notice given under section 36A of the Principal Act in relation to a change in ownership or interests in property to which the section applies can be read distributively. This will ensure that where a notice is lodged with the Commissioner under section 36A that refers to both eligible and proscribed property, the notice is to remain valid as to the former, and is to be invalid only to the extent to which it is in respect of the proscribed property.

Amendment (2) will also have the further effect of making sub-section 36A(5) continue to apply as at present (subject only to the clarification noted above) to a notice given on or after 24 May 1977. Proposed sub-section 36A(6), which is to the same general effect as sub-section (5), will apply to a notice given after 10 May 1979 in respect of a chose in action not being one that is already covered by sub-section (5).

This amendment is necessary to remove a technical weakness in the amendments to section 36A proposed by the Income Tax Assessment Amendment Act (No. 4) 1979 which would have operated in certain limited circumstances to render the existing anti-avoidance provisions of sub-section (5) ineffective.

Amendments (6), (9) and (10)

One test for the application of the "expenditure recoupment" provisions contained in clauses 7 and 9 of the (No.4) Bill is that the scheme be entered into for a purpose of reducing liability to taxation in a year of income (see existing sub-section 82KH(1) (definition of "tax avoidance agreement") and sub-section 82KH(1F) and section 82KL being inserted by clauses 7 and 9). The intention of sub-section 82KH(1A) as proposed by the original clause 7 of the Bill was to exclude from the scope of the provisions, arrangements entered into with a merely incidental tax avoidance purpose.

It is now proposed to re-express proposed sub-section 82KH(1A) to state more directly its intended application to a merely incidental purpose of tax avoidance and also so that it will apply for purposes of section 82KJ (dealing with "prepayment" schemes) as well as for proposed section 82KL (dealing with "expenditure recoupment" schemes).

Amendment (6) will do this by making sub-section 82KH(1A) apply for the whole of the relevant Subdivision, while amendment (9) will make the sub-section, insofar as it relates to section 82KJ, applicable from the date of effect of that section.

A related amendment is, by amendment (10), being made to section 82KK of the Principal Act which applies to schemes under which transactions are made between associated persons to postpone tax liability. Here, too, a purpose of tax deferral that is merely incidental will not cause the arrangement to be caught by section 82KK.

Amendment (7)

This is a technical amendment to proposed sub-section 82KH(1J) to make it clear that the provision applies both in relation to a debt that becomes owing by a taxpayer (or an associate) to another person after the taxpayer has incurred relevant expenditure under a tax avoidance agreement, and to a debt that becomes so owing before the relevant expenditure is incurred. Sub-section (1J) applies where it is reasonable to expect that the taxpayer (or associate) will not be called on to re-pay the debt and, for purposes of the "expenditure recoupment" provisions of proposed section 82KL, treats the debt as in those circumstances giving rise to a benefit in the hands of the taxpayer.

Amendment (8)

This is a drafting measure to achieve consistency of language in paragraph (e) of proposed sub-section 82KH(1L) with the other paragraphs of the sub-section.

Amendments (11) to (13)

The purpose of these amendments is to extend the benefit of the ordinary objection and appeal provisions to a taxpayer who is dissatisfied with a refusal by the Commissioner of Taxation to agree to the taxpayer's contention that, in the circumstances, the provisions of proposed sub-sections 82KL(3) or (5) should be applied in the taxpayer's favour.

Those sub-sections apply where an assessment has been raised in the expectation that conditions necessary for the application of the "expenditure recoupment" provisions are applicable, and enable the Commissioner to amend the assessment when, on facts later emerging, it eventuates that those conditions are not satisfied.

Amendments (11) to (13) are directed to the problem that, as proposed section 82KL stands in the Bill, a taxpayer is not able to test the issue whether sub-sections (3) or (5) apply in his favour, if the Commissioner takes the view that they do not. The amendments will allow a taxpayer to have the issue tested.

Accordingly - amendments (11) and (12) having set the scene - amendment (13) will enable a taxpayer to have the matter tested. Under proposed sub-section 82KL(7) being inserted by amendment (13), a taxpayer who considers that sub-section 82KL(3) or (5) is applicable may ask the Commissioner for an

amended assessment. By sub-section (8) the Commissioner is to consider the request and give written notice of his decision. If the taxpayer is dissatisfied with the decision he may, under sub-section (9), lodge a formal objection with the Commissioner. By sub-section (10) the objection and appeal provisions of the income tax law are to apply in relation to such an objection.