1980-81-82

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INCOME TAX ASSESSMENT AMENDMENT BILL (NO. 4) 1982

EXPLANATORY MEMORANDUM

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

13415/82—L Cat. No. 824736 1 Recommended retail price 20c

Printed by Authority by the Commonwealth Government Printer

General outline

The Bill will amend the income tax law to :

- allow the provision of additional information on employment to the Australian Statistician and remove a restriction on the purposes for which such information may be used;

- exempt from tax income derived by the Phosphate Mining Company of Christmas Island Limited;

- give effect to the proposal announced on 3 March 1982 to exempt from income tax certain pensions related to war-time persecution or disablement received by Australian residents from the Federal Republic of Germany and from the Netherlands;

- exempt from income tax profits made on the sale or redemption of securities purchased or acquired at a discount on or before 30 June 1982, other than profits made by traders or dealers and profits to which section 26AAA, section 26C or paragraph 26(a) of the Income Tax Assessment Act refers (proposal announced on 23 July 1982);

- grant income tax deductions for gifts of the value of $2 or more:

  - made after 31 May 1982 to the Connellan Airways Trust (proposal announced on 31 May 1982);

  - made after 30 June 1982 to the Queensland Cultural Centre Trust (proposal announced on 16 June 1982);

  - made during the 1981-82 and 1982-83 financial years to a public fund in Australia established and maintained exclusively for the relief of Falkland Islanders, British servicemen or the families of Islanders or servicemen affected by the Falkland Islands dispute (proposal announced on 21 June 1982);

- made during the 1981-82 financial year to a public fund in Australia established and maintained exclusively for the relief of victims of the Tongan cyclone disaster (proposal announced on 29 June 1982);

- made during the 1981-82 financial year to a public fund in Australia established and maintained exclusively or principally for the relief of persons in Poland (proposal announced on 29 June 1982);

. counter further tax avoidance schemes of the "expenditure recoupment" type (proposal announced on 9 February 1982);

. make it clear that certain dividends that are satisfied by a bona fide issue of shares or debentuures can be taken into account as part of a sufficient distribution of profits by a private company (proposal announced on 20 January 1982).

Main features

The main features of the Income Tax Assessment Amendment Bill (No. 4) 1982 are as follows :

Disclosure of information to Australian Statistician (Clause 3)

The Bill will amend the secrecy provisions of the Income Tax Assessment Act to authorise the Commissioner of Taxation to disclose additional information to the Australian Statistician for the purposes of the Census and Statistics Act - that is, information as to the numbers of male and female employees of an employer. The amendment will also remove the limitation that information may be provided to the Australian Statistician only for purposes of the Census and Statistics Act in relation to statistics as to employment.

Exemption of the Phosphate Mining Company of Christmas Island Limited (Clause 4)

The Bill also provides for exemption from tax of income derived by the Phosphate Mining Company of Christmas Island Limited. Under proposed new arrangements for the mining of Christmas Island phosphate that company is to replace the Christmas Island Phosphate Commission, which is itself exempt from income tax, and become responsible for the mining operation. The Commission is then to be wound-up.

The proposed exemption will be effective from a date to be notified in the Gazette - which is intended to be the time that the Christmas Island Phosphate Commission is wound-up.

Foreign pensions related to war-time persecution (Clause 4)

The Bill will give effect to the proposal announced on 3 March 1982 to exempt from Australian tax certain foreign pensions that are related to war-time persecution or disablement. The exemption is to apply to relevant pension payments derived on or after 3 March 1982.

Broadly, the Bill proposes that the following pensions, annuities and allowances be exempt from tax -

(a) those paid under a law of the Federal Republic of Germany, where the entitlement arises wholly or partly from the treatment of periods of National Socialist persecution, or of flight from that persecution, as periods of contribution to the Republic's pension scheme;

(b) those paid under a law of the Kingdom of the Netherlands as compensation in respect of persecution during the Second World War by enemy forces occupying the Netherlands or the former Dutch East Indies, or in respect of disablement arising from participation in the Dutch resistance movement in the Netherlands during its occupation during the Second World War; and

(c) any other pensions, annuities and allowances paid under a foreign law that are related to or take into account enemy persecution (or flight from such persecution) during the Second World War or disability arising from participation in a resistance movement against enemy forces during that War.

Sale of securities purchased at a discount
(Clause 5)

The Bill will also give effect to the proposal announced on 23 July 1982 to exempt from income tax profits made from the sale or redemption of debt securities purchased at a discount on or before 30 June 1982, other than profits made by traders or dealers in securities and profits to which section 26AAA, section 26C or paragraph 26(a) of the Income Tax Assessment Act refers.

Under the existing law, profits of this kind are assessable under section 25 of the Act or one of the provisions mentioned above. The proposed exemption will apply to the relevant profits only to the extent that they are represented by the discount. Any part of the amount received on the sale or redemption of securities that represents accrued interest as such will continue to be assessable income.

Gifts
(Clause 6)

Amendments proposed by clause 6 will extend the gift provisions of the income tax law under which deductions for gifts of the value of $2 or more are available where gifts are made to specified funds, authorities or institutions in Australia.

Amendments proposed by this clause will make tax deductible gifts made after 31 May 1982 to the Connellan Airways Trust or made after 30 June 1982 to the Queensland Cultural Centre Trust.

Further amendments will authorise deductions for gifts to certain overseas relief funds. The first of these amendments will extend the existing provisions authorising deductions for gifts made during the 1981-82 financial year to the Help Poland Live Appeal and the Polish relief appeals conducted by Australian Red Cross and World Vision of Australia to gifts made during that period to all public funds established and maintained exclusively or principally for the relief of persons in Poland. The second will authorise deductions for gifts made during the 1981-82 financial year to a public fund established and maintained exclusively for the relief of persons in Tonga affected by the cyclone disaster in that country; while the final amendment to the gift provisions proposed by clause 6 will authorise deductions for gifts made during the 1981-82 and 1982-83 financial years to a public fund established and maintained exclusively for the relief of Falkland (and South Georgian) Islanders, British servicemen (and associated personnel) or the families of Islanders or servicemen affected by the Falkland Islands dispute.

Expenditure recoupment schemes of tax avoidance
(Clauses 7, 8, 10 and 11)

Anti-tax avoidance provisions of the Income Tax Assessment Act that apply to "expenditure recoupment" schemes of avoidance are to be extended to counter further variants of those schemes involving effective recoupment of expenditure formally incurred by way of calls paid on shares in an afforestation company or by way of moneys paid on shares in a petroleum exploration company.

The proposed amendments will extend the operation of the existing law so that a deduction or rebate will not be available for expenditure of those kinds where the expenditure is incurred after 24 September 1978 as part of a tax avoidance agreement entered into after that date that involves the receipt by the taxpayer (or an associate) of a compensatory benefit, the value of which, when added to the tax saving sought in respect of the expenditure, effectively recoups the taxpayer for the expenditure so that no real loss or outgoing is suffered. The amendments will not apply in relation to deductions for calls paid on shares in an afforestation company where the calls are paid under a scheme entered into after 27 May 1981, as those deductions are within the scope of Part IVA of the Act.

In addition, taxpayers who claim a rebate in respect of expenditure incurred under an expenditure recoupment scheme entered into after 9 February 1982 will be statutorily liable to pay an amount of additional tax equal to double the tax sought to be avoided under the scheme. The additional tax will be subject to a power of remission by the Commissioner of Taxation and subject also to a power of review by a Taxation Board of Review.

Sufficient distribution
(Clause 9)

A private company that does not make a sufficient distribution of its after-tax income to its shareholders is liable to pay a 50 per cent undistributed income tax on the shortfall in its dividend payments. The sufficient distribution requirements are not satisfied if arrangements under which a dividend is paid result in a substantial benefit flowing back to the company, with the practical effect that the whole of the dividend is not really distributed.

Where dividends are satisfied by an issue of shares or debentures with a market value appreciably less than their face value, and the dividends are effectively subject to tax in the hands of the shareholders, there is no tax avoidance. The amendments will make it clear that after 20 January 1982 dividends satisfied in this manner may qualify as part of a sufficient distribution.

The Bill is explained in more detail 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 Income Tax Assessment Amendment Act (No. 4) 1982.

Sub-clause (2) facilitates references to the Income Tax Assessment Act 1936 which, in the Bill, is referred to as "the Principal Act".

Clause 2 : Commencement

Under this clause the amending Act is to come into operation on the day on which it receives the Royal Assent. But for this 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.

Clause 3 : Officers to observe secrecy

Clause 3 of the Bill proposes an amendment to the secrecy provisions of the income tax law by the omission of paragraph 16(4)(ga) of the Principal Act and the substitution of a revised paragraph 16(4)(ga). The purpose of the amendment is to broaden the provisions authorising the supply by the Commissioner of Taxation of certain taxation data to the Australian Statistician for purposes of the Census and Statistics Act 1905.

Under existing paragraph 16(4)(ga), information available to the Commissioner concerning names, addresses and industry classifications of employers can be provided to the Australian Statistician, but only for purposes of the Census and Statistics Act 1905 "in relation to statistics as to employment". Provision of this information has enabled the establishment of a comprehensive population of units for the compilation of employment statistics by the Statistician. Removal of the limitation will enable the use of this information for a number of other statistical purposes. New paragraph 16(4)(ga) does, however, retain the proviso that the information concerning employers shall only be communicated to the Statistician for purposes of the Census and Statistics Act 1905.

Sub-paragraphs (i) and (ii) of new paragraph 16(4)(ga) are the same as those of the paragraph which it replaces.

Sub-paragraph (iii) of new paragraph 16(4)(ga) will authorise communication to the Australian Statistician of certain additional employment information, namely the number of male and female employees of each person who is an employer for PAYE purposes. This additional information will enable the design, by the Statistician, of smaller more accurate samples, stratified by employment size, for the collection of business information by sampling methods. This will reduce the present burden on businesses of separately supplying the information to the Statistician.

The new paragraph also updates the references to the Australian Statistician and the Census and Statistics Act 1905.

Clause 4 : Exemptions

This clause proposes two separate amendments to section 23 of the Principal Act, which exempts certain income from income tax.

The first amendment will exempt from tax income derived by the Phosphate Mining Company of Christmas Island Limited which was incorporated in the Australian Capital Territory on 25 June 1981. The company is owned and controlled by the Australian Government and, since July 1981, has been the managing agent for the Christmas Island Phosphate Commission, the Island mining operator. Under proposed new arrangements for the mining of Christmas Island Phosphate, the company is to assume responsibility for the mining operation upon the winding-up of the Christmas Island Phosphate Commission - which is itself exempt from income tax under the Christmas Island Agreement Act 1958. Income derived by the company from that time will be exempt from tax in terms of the proposed amendment.

The second amendment will exempt from income tax certain Federal Republic of Germany and Netherlands' pensions that are related to enemy persecution and disablement resulting from service in a resistance movement in the Second World War, and thus will give effect to the proposal announced on 3 March 1982 to exempt pensions concerned, derived as from that date. The exemption will also apply to other pensions, annuities and allowances paid under laws of countries outside Australia, including laws of the Federal Republic of Germany and the Kingdom of the Netherlands, that in the opinion of the Commissioner of Taxation are related to or take into account such Second World War persecution or disablement.

By paragraph (a) of sub-clause (1), a new paragraph - paragraph 23(je) - will be inserted into the Principal Act which will exempt from tax the income of the Phosphate Mining Company of Christmas Island Limited.

Paragraph (b) of sub-clause (1) will insert a new paragraph - paragraph 23(kca) - to exempt from tax foreign pensions, annuities and allowances that are related to enemy persecution or disablement during the Second World War.

Sub-paragraph (i) of new paragraph 23(kca) will provide for the exemption of payments of pensions, annuities and allowances that are made under a law of the Federal Republic of Germany, where the entitlement to the payments stems wholly or partly from the treatment of periods of National Socialist persecution, or flight from that persecution, as being periods during which contributions were made to the Republic's pension scheme. The payments are to be exempt whether they are made to the persecutee or fugitive, or to his or her surviving dependants.

Sub-paragraph (ii)(A) of new paragraph 23(kca) will exempt from tax pensions, annuities and allowances paid under a law of the Kingdom of the Netherlands as compensation in respect of persecution by the enemy forces that occupied the Netherlands or the former Dutch East Indies during the Second World War. The exemption will cover payments that are made to the family of the persecutee, as well as those made to the person persecuted.

Sub-paragraph (ii)(B) will apply to payments of pensions, annuities and allowances made under a Netherlands law, such as its "Special Pensions Act", as compensation in respect of disablement arising from participation in the Dutch resistance movement in the Netherlands during its occupation by enemy forces during the Second World War. Payments made to dependants of members of the resistance movement are also to be exempt.

Sub-paragraph (iii) of new paragraph 23(kca) contains general provisions that will extend the exemption, without the need for further legislation, to pensions, annuities and allowances other than those covered by sub-paragraphs (i) and (ii) paid by foreign countries that are similar to those referred to in sub-paragraphs (i) and (ii).

Sub-sub-paragraph (A) of sub-paragraph (iii) will apply to exempt pensions, annuities and allowances not covered by sub-paragraph (i) or (ii) that are paid under a foreign law and, in the opinion of the Commissioner of Taxation, relate to or take into account persecution, or flight from persecution during the Second World War by forces of an enemy of the Commonwealth.

Sub-sub-paragraph (B) of sub-paragraph (iii) will exempt from tax pensions, annuities and allowances not covered by sub-paragraph (i) or (ii) that are paid under a foreign law that, in the Commissioner's opinion, relate to or take into account disability arising from participation in a resistance movement during the Second World War against forces of an enemy of the Commonwealth.

By sub-clause (2), the exemption provided by new paragraph 23(je) in respect of income derived by the Phosphate Mining Company of Christmas Island Limited is to apply to income derived on or after a date to be notified by the Treasurer in the Gazette. The date to be notified will be the date on which the Christmas Island Phosphate Commission is wound-up and replaced by the company as the Island's mining operator.

By sub-clause (3), new paragraph 23(kca), which exempts from tax certain pensions, annuities and allowances related to war-time persecution and disablement, will apply to relevant payments derived on or after 3 March 1982, being the date on which the proposed exemption was foreshadowed.

Clause 5 : Sale of securities purchased at a discount

This clause proposes to amend the Principal Act to insert a new section - section 23J - to exempt from income tax profits made on the sale or redemption of debt securities acquired at a discount on or before 30 June 1982, subject to certain exceptions. The exemption will apply to both securities that bear interest as such and those that do not. The tax treatment of securities acquired after 30 June 1982 will be unaffected by the new section.

Sub-section (1) of new section 23J will provide that an amount, other than such part of the amount as may be accrued interest, received on the sale or redemption of eligible securities purchased on or before 30 June 1982 will not be treated as income for income tax purposes unless the transaction is one to which proposed sub-section (2) or sub-section (3) refers.

Sub-section (2) is designed to ensure that sub-section (1) does not apply to prevent the taxing of profits on sales or redemptions of securities in the case of a person who is a dealer or trader in securities. Profits from dealing or trading in securities will continue to be brought to account as income under the existing law in determining the taxable income of such a taxpayer.

Sub-section (3) will ensure the continued operation in relation to profits on securities of the specific taxing provisions in sections 26AAA and 26C and in paragraph 26(a) of the Principal Act. Section 26AAA taxes profits arising from the purchase and sale of property within 12 months. Section 26C, broadly speaking, taxes gains made on disposals of Commonwealth securities that do not bear interest. Paragraph 26(a) includes in assessable income profits arising from the sale of property acquired for the purpose of profit-making by sale or from carrying on or carrying out a profit-making undertaking or scheme.

Sub-section (4) contains a definition of the term "eligible securities" as used in the section. Its effect is that any debt security which may be issued or bought at a price lower than the face value payable upon its maturity is within the scope of the section.

Clause 6 : Gifts, calls on afforestation shares, pensions, etc.

The purpose of clause 6 is to authorise income tax deductions for gifts to the Connellan Airways Trust, the Queensland Cultural Centre Trust, Polish relief appeals and relief appeals established in response to the cyclone disaster in Tonga and the Falkland Islands dispute.

Under section 78 of the Principal Act, gifts of the value of $2 or more of money or of property purchased within the preceding 12 months are deductible when made to a fund, authority or institution listed in paragraph 78(1)(a). The amount of the deduction available in respect of gifts of property other than money is generally limited by sub-section (2) to the lesser of the value of the peroperty at the time when the gift was made or the amount paid by the donor for the property.

Paragraph (a) of sub-clause 6(1) will extend the operation of sub-paragraph 78(1)(a)(lxvii) which, in conjunction with sub-section 78(6AD) of the Principal Act, operates to grant deductions for gifts made during the 1981-82 financial year to the Help Poland Live Appeal, the Australian Red Cross Poland Appeal and the World Vision of Australia Poland Appeal. By virtue of the amendment proposed by paragraph (a), gifts made during that period to all public funds established and maintained exclusively or principally for the relief of persons in Poland will qualify for deduction.

Paragraph (b) of sub-clause 9(1) will insert new sub-paragraphs (lxiii) to (lxxi) in paragraph 78(1)(a) of the Principal Act to extend further the list of organisations and funds to which the income tax deduction authorised by paragraph 78(1)(a) applies.

Proposed new sub-paragraph (lxiii) will authorise deductions for gifts to the Connellan Airways Trust. By the operation of sub-clause 6(2), gifts to the Trust will qualify where made after 31 May 1982.

Proposed new sub-paragraph (lxix) will extend the operation of paragraph 78(1)(a) to gifts made to the Queensland Cultural Centre Trust. By virtue of sub-clause 6(3), gifts to the Trust will qualify for deduction where made after 30 June 1982.

New sub-paragraph (lxx) will authorise deductions for gifts to a public fund established and maintained exclusively for the relief of persons in Tonga who were affected by the cyclone disaster in that country. By amendments to sub-section 78(6AD) of the Principal Act proposed by paragraph 6(1)(c), gifts to eligible Tongan relief appeals will qualify where made during the 1981-82 financial year.

New sub-paragraph (lxxi) will extend deductions to gifts made to a public fund established and maintained exclusively for the relief of certain persons affected by the Falkland Islands dispute. The specified persons are residents of the Falkland Islands and South Georgia or their families and British servicemen and associated personnel or their families. By virtue of amendments proposed by paragraph 6(1)(d), gifts to eligible appeals will qualify where made during the 1981-82 and 1982-83 financial years.

Paragraphs (c) and (d) of sub-clause 6(1) and sub-clauses (2) and (3) of clause 6 prescribe the various application dates for the extensions of the gift deduction authorised by paragraph 78(1)(a) which have been explained in the preceding notes. Broadly -

- paragraph 6(1)(c) specifies that gifts to eligible Tongan relief appeals qualify for deduction if made during the 1981-82 financial year;

- paragraph 6(1)(d) specifies that gifts to eligible Falklands relief appeals qualify for deduction if made during the 1981-82 and 1982-83 financial years;

- sub-clause 9(2) specifies that gifts to the Connellan Airways Trust qualify if made after 31 May 1982; and

- sub-clause 9(3) specifies that gifts to the Queensland Cultural Centre Trust qualify if made after 30 June 1982.

Sub-clause (4) of clause 6, which will not amend the Principal Act, will ensure that the Commissioner of Taxation has authority to re-open an assessment made before this Bill becomes law if that should be necessary in order to give effect to the extension of the gift deduction provisions of the Principal Act proposed by this clause.

Clause 7 : Interpretation

Clause 7 proposes amendments to section 82KH of the Principal Act which, together with the amendments to section 82KL proposed by clause 8, will extend the operation of the "expenditure recoupment" provisions of Subdivision D of Division 3 of Part III so that they will apply to schemes of tax avoidance that attempt to exploit the availability of rebates and deductions for calls paid on shares in afforestation companies and rebates for moneys paid on shares in petroleum exploration and mining companies.

Examples of recoupment schemes

Simplified examples of the expenditure recoupment schemes against which the amendments proposed by clauses 7 and 8 are directed are outlined below.

Afforestation shares scheme

The afforestation shares scheme seeks to obtain a rebate of tax under section 159N or a deduction under section 78 for amounts formally expended by way of calls paid on shares in an afforestation company.

One-third of the amount of calls paid on shares in a company whose principal business is afforestation in Australia, being calls for use by the company in that business, attracts a taxation concession. For a resident

individual the amount attracting the concession is treated under section 159W as a rebatable amount for the purposes of section 159N. Under section 159N a taxpayer is entitled to a rebate of tax equal to 32 per cent of the amount by which the total of rebatable amounts exceeds $1590. For a company taxpayer the amount attracting the concession is an allowable deduction under section 78.

One afforestation share call recoupment scheme that has come under notice involved the promoter of the scheme setting up numerous companies, each for the ostensible purpose of carrying on a business of afforestation. Each company had a nominal capital of $1,000,000 consisting of 1,000 shares having a nominal value of $1,000 each.

The remaining steps in the scheme were all executed on the same day. Firstly, a scheme participant applied for and was allotted a number of shares paid up to one cent each in one of the afforestation companies. That company then made two calls on the shares held by the participant. One call on a small number of shares was paid by the participant out of his or her own funds (this amount represented the promoter's fee). The second call of $999.99 per share was made on the balance of shares held by the participant and was financed by a loan from the promoter.

An agreement was then executed between the participant and an associate of the promoter under which the associate agreed to pay the participant an amount equal to the loan made by the promoter to the participant. This amount was used to repay that loan and was paid as consideration for the participant agreeing, at the option of the associate, to either sell his or her shares to the associate for one cent per share or to vote in favour of a resolution restricting the rights attaching to the shares to the right to be paid one cent per share on a winding-up. The consideration payable under the agreement effectively recouped the taxpayer for his or her formal outlay on calls.

Petroleum shares scheme

The petroleum shares scheme seeks to exploit section 160ACA which authorises a rebate (now of 27 cents in the dollar) for moneys paid by a shareholder on shares held in a petroleum exploration or mining company. To qualify for the rebate it is necessary for the petroleum company to declare to the Commissioner of Taxation that the moneys so obtained will be expended on specified petroleum exploration or mining operations.

The scheme participants were organised into several partnerships which were managed by a company associated with the promoter. On behalf of the partnerships, the company borrowed funds and invested the money by subscribing for shares in a petroleum exploration company. Under the terms of the loan, the borrower could not be required to repay the loan and if it failed to do so within 2 years, the shares were forfeited to the lender. This "non-recourse" loan effectively meant that the participants did not have to finance the bulk of the investment in the petroleum company for which a rebate of tax was sought under section 160ACA.

The whole of the capital subscribed to the petroleum exploration company was expended by way of a fee for exploration work carried out by a sub-contractor associated with the promoter. In a case that has come under notice this fee was $20,000,000, but the amount spent by the sub-contractor in effective exploration was $10,000. The balance of the $20,000,000 was passed through a series of trusts associated with the promoter and offset against losses created for the purpose.

General plan of the legislation

Broadly, the expenditure recoupment provisions deny a deduction for specified types of losses or outgoings where the loss or outgoing is incurred as part of a tax avoidance arrangement under which the taxpayer (or an associate) receives a compensatory benefit, the value of which together with the tax saving sought, effectively recoups the taxpayer for the loss or outgoing.

In meeting this objective the provisions require firstly that the particular loss or outgoing fits the description of "relevant expenditure". That term is defined in sub-section 82KH(1) and prescribes those types of losses or outgoings to which the expenditure recoupment provisions may apply.

As a second step it is required that the relevant expenditure be "eligible relevant expenditure" as defined in sub-section (1F). Relevant expenditure will fit that description if it is incurred under an agreement that has a purpose, other than a merely incidental purpose, of tax avoidance and under the tax avoidance agreement the taxpayer or an associate is to obtain a benefit in addition to the benefits that flow in the ordinary course of events from the incurrence of the loss or outgoing sought to be deducted.

If the additional benefit relating to the particular eligible relevant expenditure, when taken together with the "expected tax saving" in respect of that expenditure, is equal to or greater than the expenditure itself then, by sub-section 82KL(1), a deduction is not allowable for the expenditure. The "expected tax saving" is defined in sub-section 82KH(1) and is to be determined primarily under sub-section 82KH(1B). Broadly, the expected tax saving in respect of an amount of eligible relevant expenditure is the amount by which a person's liability to tax in any year of income would be decreased if deductions were allowable in respect of the eligible relevant expenditure. Where eligible relevant expenditure is incurred by a partnership, sub-section 82KL(1) looks to whether the sum of the additional benefits to the partnership, the partners or their associates and the total expected tax savings of the partners equals or exceeds the partnership expenditure.

The amendments proposed by clauses 7 and 8 to extend the operation of those provisions will ensure that expenditure of the kinds incurred under the latest variants of expenditure recoupment schemes can be taken as "relevant expenditure" to which the expenditure recoupment provisions can apply. The effect of the amendments will be that a deduction or rebate will not be available for expenditure of those kinds where the expenditure is incurred after 24 September 1978 as part of a tax avoidance agreement entered into after that date that involves the receipt by the taxpayer (or an associate) of a compensatory benefit, the value of which together with the amount of the tax saving sought in respect of the expenditure, is equal to or greater than the amount of the expenditure. The amendments, however, will not apply in relation to deductions for calls paid on shares in an afforestation company where the calls are paid under a scheme entered into after 27 May 1981, after which date the new general anti-avoidance provisions of Part IVA of the Principal Act would have application to such a scheme.

The measures proposed by clause 7 are explained in detail in the following notes.

Paragraph (a) of clause 7 will insert in sub-section 82KH(1) a definition of the term "moneys paid on shares" which is used in describing expenditure in respect of which a rebate would otherwise be allowable under section 160ACA. This definition adopts the definition contained in section 160ACA.

Paragraphs (b) and (c) of clause 7 will insert new paragraphs (s), (t) and (u) in the definition of relevant expenditure in sub-seciton 82KH(1). By virtue of those paragraphs the items of expenditure identified in them are to be taken to be "relevant expenditure".

Paragraph (s) - Expenditure that consists of calls paid by a taxpayer on shares owned by the taxpayer in respect of which a deduction would otherwise be allowable under section 78 is to be relevant expenditure.

Paragraph (t) - Calls paid by a taxpayer on shares owned by the taxpayer in respect of which an amount would otherwise be treated under section 159W as a rebatable amount for the purposes of section 159N will also be treated as relevant expenditure.

Paragraph (u) - Relevant expenditure will include moneys paid on shares by a taxpayer to a company in respect of which a rebate of tax would otherwise be allowable under section 160ACA. New paragraph (u) applies both in cases where a taxpayer (e.g., an individual) who paid moneys on shares would otherwise be entitled to a rebate under section 160ACA and also in cases where moneys are paid on shares by a partnership or a trustee of a trust estate and, by virtue of sub-section (26) or (27) of section 160ACA, a rebate would otherwise be allowable to a partner or a beneficiary.

Paragraph (d) of clause 7 proposes the omission of sub-section 82KH(1AD) and the substitution of a new sub-section (1AD).

The existing provisions of Subdivision D are framed on the basis that the tax saving to be taken into account is that which would result from the relevant expenditure being allowed as a deduction. Accordingly, the provisions in section 82KH dealing with the ascertainment of the "expected tax saving" in respect of relevant expenditure are directed to determining the amount of tax that would be saved if "deductions" were allowable in respect of the relevant expenditure while section 82KL correspondingly operates to deny "deductions" in respect of relevant expenditure incurred as part of an "expenditure recoupment" scheme.

To enable the provisions of Subdivision D to apply to expenditure recoupment schemes involving rebates under section 160ACA and rebatable amounts under section 159W, it is proposed to substitute, where appropriate, the term "tax benefit" for "deduction" in sections 82KH and 82KL.

Proposed new sub-section (1AD) is essentially a drafting measure which, broadly, will ensure that a reference in section 82KH or 82KL to a tax benefit being allowable or not allowable in respect of relevant expenditure will be construed as a reference to a deduction, a rebate under section 160ACA or a rebatable amount under section 159W being allowable or not allowable in respect of the relevant expenditure, according to the class of relevant expenditure under consideration.

Paragraph (a) of proposed new sub-section (1AD) re-drafts the terms of the existing sub-section (1AD) to reflect the substitution of the term "tax benefit" for "deduction" in sections 82KH and 82KL. By virtue of paragraph (a), a reference in section 82KH or 82KL to a tax benefit being allowable or not allowable in respect of relevant expenditure incurred by a taxpayer to which paragraph (h) or (n) of the definition of "relevant expenditure" applies will be construed

as a reference to a deduction being allowable or not being allowable to the taxpayer under section 124M or 124N of Division 10B in respect of the "residual value" of a unit of industrial property where that residual value would be calculated by reference to that relevant expenditure. The necessity for the existing sub-section (1AD) arose because deductions under Division 10B are formally allowable in respect of the residual value of a "unit of industrial property" and not the expenditure incurred in acquiring that unit.

By paragraph (b) of proposed new sub-section (1AD) a reference to a tax benefit being allowable or not allowable in respect of relevant expenditure incurred by a taxpayer to which paragraph (t) of the definition of relevant expenditure applies (i.e. calls paid on shares in an afforestation company) will be construed as a reference to an amount being treated or not being treated under section 159W as a rebatable amount for the purposes of the application of section 159N in relation to the taxpayer.

By paragraph (c) of proposed new sub-section (1AD) a reference to a tax benefit being allowable or not allowable in respect of relevant expenditure incurred by a taxpayer to which paragraph (u) of the definition of relevant expenditure applies (i.e. moneys paid on shares in a petroleum exploration or mining company) will be taken as a reference to a rebate under section 160ACA being allowable or not allowable in respect of the relevant expenditure to the taxpayer, to a partner in a partnership where the taxpayer is the partnership or to a beneficiary of a trust estate where the taxpayer is the trustee of the trust estate.

Paragraph (d) of proposed new sub-section (1AD) provides that a reference to a tax benefit being allowable or not allowable in respect of any other class of relevant expenditure incurred by a taxpayer is to be taken to be a reference to a deduction being allowable or not allowable to the taxpayer in respect of the relevant expenditure.

Paragraphs (e) and (f) of clause 7 will omit from sub-sections (1B), (1BA), (1C), (1D) and (1E) of section 82KH "deduction" and "deductions" (wherever occurring) and substitute "tax benefit" and "tax benefits" respectively.

The existing sub-sections (1B), (1BA), (1C), (1D) and (1E) set out how the amount of tax saving that would result if a deduction or deductions were allowable in respect of an amount of eligible relevant expenditure is to be calculated for the purposes of the application of the definition of "expected tax saving" in sub-section 82KH(1).

The substitution of the term "tax benefit" (see notes on paragraph (d) of clause 7) for "deduction" in sub-sections (1B), (1BA), (1C), (1D) and (1E) will have the effect that those sub-sections will operate to determine the amount of tax saving that would result if a deduction, a rebate under section 160ACA

or a rebatable amount under section 159W, as the case requires, were allowable in relation to an amount of eligible relevant expenditure incurred by a taxpayer. The tax saving attributable to the allowance of a tax benefit will be calculated in the same way as the tax saving attributable to the allowance of a deduction is calculated under the existing provisions.

Paragraph (g) of clause 7 proposes the omission from sub-section (1E) of section 82KH of the word "deductible" (wherever occurring) and the substitution of "allowable".

This is a drafting measure consequential upon the substitution of the term "tax benefit" for "deduction" and its only effect is that the amount presently referred to in the sub-section as the "deductible relevant expenditure" will now be referred to as the "allowable relevant expenditure".

Paragraphs (h) and (j) of clause 7 will insert new paragraph (c) in sub-section 82KH(1F) which defines the circumstances under which an amount of relevant expenditure incurred by a taxpayer will be taken to be an amount of "eligible relevant expenditure" for the purposes of section 82KL. As presently defined, relevant expenditure will fit that description if -

(a) the expenditure was incurred after 24 September 1978 as part of a tax avoidance agreement entered into after that date; and

(b) by reason of the operation of the tax avoidance agreement the taxpayer obtains, in relation to that relevant expenditure being incurred, a benefit or benefits additional to the benefit in respect of which the relevant expenditure was incurred and any other benefit that might reasonably by expected to result if the benefit in respect of which the relevant expenditure was incurred were obtained otherwise than by reason of a tax avoidance agreement.

Proposed new paragraph (c) will add a third requirement, in a case where paragraph (s) of the definition of relevant expenditure applies, that the relevant expenditure was incurred as part of a tax avoidance agreement entered into before 28 May 1981 i.e. the operative date of Part IVA of the Principal Act. The effect of new paragraph (c) is that section 82KL will not be applicable in relation to deductions under section 78 for calls paid on shares in an afforestation company where the calls are paid under a scheme entered into after 27 May 1981.

Paragraphs (k) and (m) of clause 7 will insert new paragraphs (s) and (t) in sub-section 82KH(1G) which identifies, for the purposes of sub-section 82KH(1F), the direct benefit in respect of which relevant expenditure is taken to have been incurred. The direct benefits identified by the new paragraphs are -

- in a case where the expenditure consists of calls paid on shares in an afforestation company - the satisfaction of any liability of the taxpayer to pay the calls and the taxpayer's continuing ownership of the shares (paragraph (s)); and

- in a case where the expenditure consists of moneys paid on shares in a petroleum mining or exploration company - the satisfaction of any liability of the taxpayer to pay the calls and the taxpayer's ownership or continuing ownership, as the case may be, of the shares.

Paragraph (n) of clause 7 will insert new sub-section (1JE) in section 82KH to ensure that the proposed amendments operate in circumstances such as those described in the example of the afforestation shares scheme outlined earlier.

Proposed new sub-section (1JE) will apply where, as part of a tax avoidance agreement, a taxpayer has incurred an amount of relevant expenditure consisting of calls paid on shares in an afforestation company or moneys paid on shares in a petroleum exploration or mining company and, in relation to the incurring of that expenditure, the taxpayer or an associate is paid or given consideration in respect of the acquisition by any person of those shares or of a right to purchase those shares or of a right to require a person to exercise his voting rights so as to vary the rights attached to those shares. In those circumstances the taxpayer is to be deemed, for the purposes of paragraph (1F)(b), to have obtained an additional benefit equal to the amount of the consideration received less the part (if any) of that consideration that, in the opinion of the Commissioner of Taxation, is not attributable to the relevant expenditure.

Paragraphs (o) and (p) of clause 7 will insert new paragraphs (s), (t) and (u) in sub-section 82KH(1L) which operates in conjunction with sub-section 82KH(1K).

Sub-section (1K) operates to ensure that, where 2 or more amounts of the same class of relevant expenditure are incurred by a taxpayer under the same tax avoidance agreement, and in respect of the same benefit, those amounts are to be treated as one amount of relevant expenditure. Sub-section (1L) specifies, for the purposes of sub-section (1K), circumstances in which 2 or more amounts of relevant expenditure are to be treated as being incurred in respect of the same benefit.

The new paragraphs in sub-section 82KH(1L) will specify that 2 or more amounts of relevant expenditure are to be treated as being incurred in respect of the same benefit in the following circumstances -

- in a case where 2 or more amounts consisted of calls paid on shares in an afforestation company that would otherwise be deductible under section 78 - if those amounts were paid on shares in the same company (paragraph (s));

- in a case where 2 or more amounts consisted of calls paid on shares in an afforestation company that would otherwise be rebatable under section 159W - if those amounts were paid on shares in the same company (paragraph (t)); and

- in a case where 2 or more amounts consisted of moneys paid on shares in a petroleum exploration or mining company - if those amounts were paid on shares in the same company (paragraph (u)).

Paragraph (q) of clause 7 will omit from sub-section (1N) the word "deduction" and substitute "tax benefit".

The effect of the existing sub-section (1N) is that, where it is necessary for the purposes of sub-section (1B) or (1D) to determine the tax that would be payable by a person in a year of income if no deduction were allowable in respect of an amount of eligible relevant expenditure incurred in respect of the acquisition of trading stock, that tax payable will be calculated as if the cost price of any of that trading stock that might be on hand at the end of a year of income is nil.

Paragraph (q) is a drafting measure made necessary by the fact that under sub-sections (1B) and (1D) as proposed to be amended by paragraphs (e) and (f) of clause 7 it will now be required to be assumed that a "tax benefit" rather than a "deduction" is not allowable in respect of the expenditure.

Clause 8 : Tax benefit not allowable in respect of certain recouped expenditure

Clause 8 proposes amendments to section 82KL of the Principal Act that are complementary to the amendments to section 82KH proposed by clause 7.

Section 82KL is the operative provision that denies a deduction for certain expenditure incurred as part of an "expenditure recoupment" scheme. The proposed amendments will extend the operation of section 82KL so that it also applies to deny a rebate under section 160ACA or a rebatable amount under section 159W in respect of expenditure incurred as part of an expenditure recoupment scheme.

Notes on each of the amendments proposed by clause 8 follow.

Paragraphs (a) and (b) of clause 8 will amend sub-section (1) by substituting the expression "tax benefit" for "deduction" and omitting "to the taxpayer".

Under existing sub-section (1) a "deduction" is not allowable "to the taxpayer" in respect of an amount of eligible relevant expenditure incurred by the taxpayer where the conditions specified in the sub-section are satisfied, namely, where the sum of the amount or value of the additional benefit received in relation to that amount of eligible relevant expenditure and the expected tax saving in relation to that expenditure is equal to or greater than the amount of the eligible relevant expenditure.

Under sub-section (1), as proposed to be amended by paragraphs (a) and (b), a "tax benefit" will not be allowable in respect of an amount of eligible relevant expenditure incurred by a taxpayer where the abovementioned conditions are satisfied. By virtue of proposed new sub-section (1AD) (see the notes on paragraph (d) of clause 7) the reference to a tax benefit not being allowable in respect of relevant expenditure incurred by a taxpayer is, according to the class of relevant expenditure under consideration, to be taken as a reference to a deduction not being allowable to the taxpayer, a rebatable amount under section 159W not being allowable to the taxpayer or a rebate under section 160ACA not being allowable to the taxpayer or a partner in a partnership (where the taxpayer is the partnership) or a beneficiary of a trust estate (where the taxpayer is the trustee of a trust estate), in respect of the relevant expenditure.

Paragraphs (c), (d), (e) and (f) of clause 8 will amend sub-section (2) so that the sub-section will operate to deny "tax benefits" rather than "deductions".

Under existing sub-section (2) a deduction is not allowable to a taxpayer in respect of expenditure incurred by the taxpayer where the Commissioner of Taxation concludes that sub-section 82KL(1) might reasonably be expected, at a later time, to operate with respect to that amount of expenditure.

The amendments proposed by paragraphs (c), (d), (e) and (f) will mean that a "tax benefit" will not be allowable in respect of expenditure incurred by a taxpayer where the Commissioner reaches the conclusion that sub-section 82KL(1) might reasonably be expected, at a later time, to operate to deem a tax benefit not to be allowable in respect of that expenditure. As already mentioned, a reference to a tax benefit not being allowable is to be construed in accordance with proposed new sub-section (1AD).

Paragraphs (g) and (h) of clause 8 will omit from sub-sections (4) and (6) respectively the word "deduction" (wherever occurring) and substitute "tax benefit".

The existing sub-section (4) operates to deny a "deduction" for expenditure incurred by a partnership where the Commissioner of Taxation is satisfied that any partner has been introduced into the partnership to frustrate the operation of section 82KL.

The effect of the amendment proposed by paragraph (g) will be to extend this safeguard so that it operates to deny a "tax benefit" in respect of the expenditure incurred by the partnership.

The existing sub-section (6) ensures that where, by the operation of sub-section (1),(2) or (4), a "deduction" is not to be allowable in respect of a loss or outgoing incurred by a taxpayer in the acquisition of trading stock, the cost price of that trading stock for the purposes of the application of Subdivision B of Division 2 of Part III of the Principal Act (i.e. the trading stock provisions of the Principal Act) shall be taken to be nil.

Paragraph (h) is a drafting measure made necessary by the fact that sub-sections (1), (2) and (4) will now formally operate to deny "tax benefits" and not "deductions".

Clause 9 : Sufficient distribution

Section 105A of the Principal Act treats a private company as having made a sufficient distribution in relation to a year of income if it has, within a prescribed period of twelve months ending ten months after the end of that income year, paid in dividends at least the amount by which the distributable income of the year (broadly, its after-tax income) exceeds the proportion of its income specified as the retention allowance under section 105B of the PrincipalAct (at present 70 per cent in the case of trading income and 10 per cent in the case of property income other than private company dividends). A private company which fails to make a sufficient distribution is liable to pay additional tax on the undistributed amount at the rate of 50 per cent.

Anti-avoidance provisions inserted in section 105A in 1978 safeguard against arrangements that, in broad substance, have the practical effect that a dividend is not effectively distributed by the company. Those provisions preclude a dividend from being taken into account as part of a sufficient distribution if, broadly stated, the arrangement under which it is paid results in a substantial benefit flowing back to the company or to an associate, or if the company secures an effective reimbursement of the dividend paid.

The 1978 amendments to the law to deal with these arrangements could, however, in some cases disqualify certain kinds of private company dividends from being taken into account as part of a sufficient distribution even though there is no tax avoidance of the kind at which the amendments were directed and the dividends in question are subject to tax in the hands of

the shareholders. This could occur in situations where a company issues shares or debentures in satisfaction of a dividend but the market value of those shares or debentures is appreciably less than their face value - situations which may attract application of the 1978 amendments. A lower market value may arise in such cases because of factors such as lack of security, lack of ready marketability or uncertainty as to the date of redemption for the debentures or redeemable shares. It was not intended that the effect of the anti-avoidance provisions in such cases should be that companies be in all cases restricted to paying dividends in cash.

To correct the position, clause 10 will insert a new sub-section, sub-section (3A), in section 105A to permit dividends that are satisfied by the issue of company shares or debentures to be taken into account for sufficient distribution purposes where the Commissioner of Taxation considers that it would be unreasonable to apply the safeguarding provisions of sub-section (3) of section 105A.

Clause 10 : Additional tax in certain cases

This clause proposes the omission of sub-section 226(2) of the Principal Act and the insertion of two new sub-sections - sub-sections 226(2) and (2AA).

The proposed amendments will mean that statutory additional tax equal to double the tax sought to be avoided will be imposed where section 82KL operates to deny a taxpayer a rebate in respect of expenditure incurred after 9 February 1982 as part of a tax avoidance agreement entered into after that date.

This additional tax will, by reason of existing sub-section 226(3), be subject to remission by the Commissioner of Taxation and his exercise of this power will, by virtue of existing sub-section 193(2), be subject to review by an independent Taxation Board of Review where the additional tax payable, after any remission, exceeds an amount calculated at 10 per cent per annum of the tax avoided.

Existing sub-section 226(2) provides that statutory additional tax (of double the amount avoided) will be imposed in cases of omission of income, claims for deductions or rebates in excess of expenditure incurred, or inclusion of false information in relation to claims for specified rebates.

The re-drafted sub-section (2) will extend the existing provision so that additional tax will also be imposed in cases where a taxpayer in his return claims to be entitled to a rebate in respect of "recouped expenditure".

Under proposed sub-section (2AA) "recouped expenditure", in relation to a taxpayer, will be defined to mean relevant expenditure incurred after 9 February 1982 under a tax avoidance agreement entered into after that date in respect of which section 82KL operates to deem a tax benefit not to be allowable to the taxpayer.

Clause 11 : Application of amendments made by sections 7 and 8

Sub-clause (1) of clause 11 has the effect that the extension of the expenditure recoupment provisions proposed by clauses 7 and 8 to counter the latest variants of recoupment schemes, involving calls paid on shares in afforestation companies and moneys paid on shares in petroleum exploration and mining companies, will apply with effect from 24 September 1978.

By reason of sub-clause 11(1) and of sub-section 82KH(1F), the expenditure recoupment provisions will apply to relevant expenditure of the kinds incurred under schemes to which clauses 7 and 8 apply where the expenditure is incurred after 24 September 1978 under a tax avoidance agreement entered into after that date.

By sub-clause (2) of clause 11, a taxpayer will, in specified circumstances, be given the right to extend the grounds of an objection which he has previously lodged against an assessment to include the ground that section 82KL does not apply to deem a tax benefit not to be allowable to the taxpayer.

The amendments proposed by clauses 7 and 8 to counter the additional identified kinds of expenditure recoupment schemes apply to relevant expenditure incurred by a taxpayer after 24 September 1978. Consequently, once the amending Act comes into operation, section 82KL may deny tax benefits claimed in respect of relevant expenditure incurred under these schemes in the 1978-79 to 1981-82 income years as well as in 1982-83 and subsequent years.

The enactment of the proposed amendments will provide a basis for denying a tax benefit sought as a result of participation in these latest identified recoupment schemes should the existing law be found not to do so. However, by virtue of the operation of sections 185 and 190 of the Principal Act, which limit a taxpayer's grounds for contesting an assessment to those stated in a valid objection, it is possible that a taxpayer could be precluded from contesting the application of section 82KL to the particular tax benefit claimed.

To prevent this possibility, sub-clause 11(2) will give a taxpayer who has previously lodged a valid objection against the disallowance of a tax benefit in respect of expenditure of a kind now proposed to be brought within the scope of section 82KL, the right to apply to the Commissioner to amend the objection to include the ground that section 82KL does not apply to deny a tax benefit in respect of that expenditure. An application for this purpose must be in respect of an objection lodged on or before the date on which the amending Act receives Royal Assent and must be lodged within 60 days of that date.