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Contents

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Division 35 non-commercial losses — one tax rule for those whose taxable income is under $250,000 and no tax rule for those whose taxable income equals or exceeds $250,000

Part I of II: the application of Div 35 to individuals whose adjusted income equals or exceeds $250,000

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Introduction

Division 35 within the Income Tax Assessment Act 1997 (Cth) (the 1997 Act) was inserted into the 1997 Act in 2000 with the intention of placing restrictions on the ability of individuals and partnerships who carried out businesses to deduct business losses against their other income where those business losses were considered too hobby-like in nature.

As originally inserted into the 1997 Act in 2000, there were four "commerciality" tests prescribed, one or more of which needed to be satisfied before a taxpayer could apply the losses from their "business activity" against other income. Broadly, if none of the four commerciality tests were satisfied, tax losses generated by a business activity were quarantined and were not available for use until such time as that same business activity generated a profit.

However, in 2009 a new subsection was inserted into the 1997 Act, subs (2E) of s 35-10, which made it such that individuals with adjusted taxable incomes equal to or exceeding $250,000 could not avail themselves of one of the four commerciality tests and would need to apply to the Commissioner of Taxation (the Commissioner) for the exercise of his discretion before such individuals could apply the losses from a loss making business activity against other income. The Commissioner's "discretion" power in Div 35 is outlined in s 35-55 in three separate tests. In 2009 a specific test was included for such individuals in s 35-55(1)(c).

In this article, the first of two on this topic, I will discuss the application of Div 35 in relation to individuals with an adjusted taxable income that equals or exceeds $250,000. Next month I will consider the application of these provisions in the recent Tribunal cases of *HVZZ v Commissioner of Taxation*[1] *(HVZZ), Bentivoglio v Commissioner of Taxation*[2] *(Bentivoglio)* and *Heaney v Commissioner of Taxation*[3] *(Heaney)*.

Put in its most simple of terms, the effect of s 35-10(2E) is that for individuals whose adjusted taxable incomes equal or exceed $250,000, as far as Div 35 is applicable, the rule of law no longer applies to such individuals. Instead, such individuals are now subject to the arbitrary discretion of the Commissioner (so long as the Commissioner's decision is exercised within the law as contained within s 35-55; it being the author's contention, as examined below that the law in s 35-55(1)(c) is so complex, with its four separate, complex elements that the taxpayer has the burden of satisfying the Commissioner, as to make it extremely difficult for a taxpayer to convince a court otherwise). If the reader was to identify the aforementioned wording to the petition to James I of England in 1610 which has been said to be the foundation of the modern concept known as the "Rule of Law", where it was petitioned that subjects of England should be "guided and governed by the certain rule of the law which giveth both to the head and members" rather than "any uncertain or arbitrary form of government", then the reader is not mistaken. In the author's opinion, the only certainty that can be remarked about s 35-10(2E) is that it deprives individuals earning $250,000 or more from the "rule of law" as set out in the four commerciality tests in Div 35.

By way of example of the potential harshness of this rule, if a taxpayer with an initial $250,000 taxable income makes a $150,000 taxable loss on their business activity which is quarantined by Div 35 and the Commissioner does not exercise his s 35-55 discretion, the taxpayer will still have to pay tax on that income, such

that a taxpayer who has made $250,000 taxable income for the year but for his business activity loss, may have a tax bill of approximately $86,000 leaving a remaining disposable income of $14,000.

In this article, the s 35-55 discretion as it applies to individuals whose adjusted incomes equal or exceed $250,000 is examined. Where exceptional circumstances do not exist such taxpayers only have recourse to the test of the Commissioner's discretion in s 35-55(1)(c). As noted above, the s 35-55(1)(c) discretion has four separate, complex, elements that the taxpayer has the burden of establishing in order to seek the Commissioner's discretion. In any application before the Administrative Appeals Tribunal (the Tribunal) or the Federal Court of Australia, that burden is clearly upon the taxpayer applicant to establish.[4] However, before examining the application of the s 35-55 discretion it is worth revisiting some of the history of Div 35.

Division 35 — history prior to 2009

Very broadly, over the history of income taxation in the Commonwealth of Australia, where an individual taxpayer could satisfy the Commissioner or failing that, the courts, that they were carrying on business (notwithstanding those business activities were carried out on a very small scale), the individual taxpayer could then apply those business losses against their other more productive activities (such as employment income). In the two seminal cases of *Ferguson v FCT*[5] (business of 5 Charolais heifers) and *FCT v Walker*[6] (business of 5 Angora Goats), it was established in Australian tax law that taxpayers conducting businesses on the smallest of scales in a part time capacity were nevertheless still carrying on a business for the purposes of the taxation law and entitled to deduct their expenses pursuant to s 8-1 of the 1997 Act and its predecessors.

When the Ralph Report entitled *Review of Business Taxation: A tax system redesigned* was published in 1999 (the RBT Review), the RBT Review considered the issues arising from this aspect of the law. The RBT Review concluded that there was significant revenue leakage from such small activities:[7]

> There is a significant revenue leakage from unprofitable activities carried out by individual taxpayers, either acting alone or in partnership with another individual. Concerns regarding these practices were raised in A Platform for Consultation (pages 57–58). Many of these activities are no more than hobbies and/or lifestyle choices but even those that have business like characteristics (according to existing law) are often unlikely to ever make a profit and do not have a significant commercial purpose or character. They continue in a net loss position year after year, offsetting so-called business losses against other income, notably salary and wages. On average they make little or no contribution to the revenue raising task but gain a significant tax advantage.

Following the RBT Review, Div 35 was inserted into the 1997 Act with the broad effect of denying the ability for individual taxpayers to offset losses from loss making activities against other income earning activities *unless* one of four commerciality tests were satisfied. Relevantly, Div 35 looks at each "business activity", a term which is undefined in Div 35 and which is considered further in Pt II. Broadly, for the purposes of this article, these four commerciality tests are currently as follows, only one of which needed to be satisfied:

1. the *assessable income test*, which broadly requires that the assessable income from the relevant "business activity" be at least $20,000 (s 35-30);
2. the *profits test*, which broadly requires that in at least 3 of the past 5 income years the relevant "business activity" has generated a taxable profit (s 35-35);
3. the *real property test*, which broadly requires that the business activity use real property for which the reduced cost base is at least $500,000 (s 35-40); and
4. the *other assets test*, which broadly requires that "other assets" excluding real property such as plant and equipment, trading stock or intellectual property used in the business have cost at least $100,000 (s 35-45).

Prior to the 2009 insertion of s 35-10(2E), broadly, when one of the above four commerciality tests was satisfied, taxpayers (regardless of whether or not their adjusted taxable income was $250,000 or more) were able to utilise the tax losses from the relevant business activity to offset their other income. As can be seen from the above, the moment a "business activity" achieved any significant degree of scale whatsoever — in terms of income or capital deployed — that business activity would invariably pass one or more of the four commerciality tests and Div 35 would cease to have any application to the relevant business activity.

Additionally, where a taxpayer did not satisfy one of the four tests, taxpayers could apply to the Commissioner for exercise of his discretion.

History and background — the 2009 amendments

In 2009, the Rudd Government, as it then was, formed the view that certain individuals whom they termed "high wealth individuals" were availing themselves of a "loophole" in the tax legislation because they were able to pass one or more of the four tests and utilise their tax losses from their loss making "business activity" to offset such tax losses against other income activities. The Rudd Government noted through its Treasurer and Assistant Treasurer, in a joint press release on 12 May 2009:[8]

> [T]he Rudd Government will close a *tax loophole* that allows a relatively small number — around 11,000 — of mostly *high wealth individuals* to exploit parts of the tax system to unfairly minimise or avoid their tax obligations. Specifically, the Government will remove the ability for *high income individuals* to deduct losses from unprofitable business activities against their own income.
> …
> This can mean that unfair personal income tax deductions can be claimed against salary, wage and other income for activities like running hobby farms that don't have a commercial purpose and may not ever make a profit.
> To address this loophole, from 1 July 2009, taxpayers with adjusted taxable incomes of over *$250,000* will only be able to deduct those expenses against the income from the non-commercial business activity. [Emphasis Added.]

Relevantly, according to the Rudd Government, such individuals were more able to satisfy one or more of the four commerciality tests because this merely required those taxpayers to invest the necessary capital in the business (so satisfying either the real property test or the other assets test) and because of this, such individuals could avail themselves of a "loophole".[9]

As has been noted above, the Rudd Government believed that $250,000 of adjusted taxable income equated the individuals concerned to being "high wealth individuals" and "high income individuals". As an aside, it is noted that even if that were true in 2009 (due to the impact of continued inflation in the Australian economy), it becomes certain that this belief (hard-coded into the legislation) will cease to be true at some point in the future. The Senate Economics Legislation Committee noted in its report in respect of the amendment that it had been set by the Rudd Government itself and not by Treasury:[10]

> When questioned as to how this threshold amount was determined, the Treasury advised that it was a policy choice of government. They have since provided further information detailing that in the 2009–10 income year an estimated 130,000 taxpayers will have an adjusted taxable income of $250,000 or more and that modelling suggests 8.5% (11,000) of those taxpayers would otherwise have claimed non-commercial losses against non-farm income in 2009–10.

Interestingly, one would have imagined that such a measure, which exposed approximately 11,000 taxpayers to a regime where the Commissioner's discretion was required, might have been opposed by the conservative side of politics given the interference of the Commissioner in the affairs of some 11,000 taxpayers in what is otherwise regarded as a self-assessment tax system. Denying access to tax losses by such taxpayers could be construed as being bad law for one or more of the following reasons:

1. for the abundance of "red-tape" it would generate as a result of such applications for the Commissioner's discretion;
2. for being a departure from the rule of law for those taxpayers with adjusted taxable incomes of over $250,000; or
3. for the problems it would cause over time due to the $250,000 not being indexed.

Despite these obvious flaws with the policy, the present Abbott Government has not suggested that it intends to review or change the measure. This was despite a member of the present Abbott Government, Mr Anthony Smith MP, member for Casey and at the time, Shadow Assistant Treasurer,[11] remarking in the House of Representatives in respect of the proposed amendments:[12]

> We will have a sceptical eye on the government's plans and the tax commissioner's administration of this. Obviously, the government is assuming that those 11,000 taxpayers will not be applying in large measure for decisions from the tax commissioner. The government is assuming that the Taxation Office is nimble, prepared and able to process these in a timely fashion. The government is on notice — we are not opposing the measure — that it is responsible for the administration of this measure. This government has to realise that just announcing measures and putting out a press release and having a news conference is not policy implementation. Across the board, when it comes to policy implementation, that is where this government is falling down.

As is discussed below, it is suggested by the author that the very problems identified in 2009 by Mr Anthony Smith MP have proven to have been with at least a substantial degree of merit.

The 2009 amendments

Section 35-10 was amended so that the aforementioned four commerciality tests were only available for a taxpayer who satisfied s 35-10(2E).[13] Section 35-10(2E) duly provided that: "You satisfy this subsection for an income year if the sum of the following is less than $250,000…".[14]

Thus, with the insertion of s 35-10(2E) the four commerciality tests which had previously been available to those earning adjustable taxable incomes of $250,000 or more were no longer available. Rather, such taxpayers were for all years beginning on or after 1 July 2009 were either:

1) forced to quarantine their tax losses from the business activity where such losses would only be available to offset future profits from the same business activity; or
2) apply to the Commissioner for the exercise of the Commissioner's discretion under s 35-55, which is discussed below.

It must be recalled from the above four commerciality tests that Div 35 had always ceased to apply as soon as any significant degree of scale was achieved — in

terms of income or capital deployed. This was the previously intended effect of Div 35, as it was only ever intended when it was introduced in 2000 that Div 35 would apply to hobby-like businesses. As such, the effect of s 35-10(2E) was to bring business activities of a larger scale and sophistication within Div 35 which had never been contemplated as being within the Div 35 framework.

The discretion test in Div 35, which had previously been available to taxpayers who had not satisfied one of the four commerciality tests was amended to include a new test at s 35-55(1)(c) for affected taxpayers to seek the Commissioner's discretion. Section 35-55(1)(c) as inserted in 2009, currently provides:

> The Commissioner may, on application, decide that the rule in subsection 35-10(2) does not apply to a *business activity for one or more income years (the excluded years) if the Commissioner is satisfied that it would be unreasonable to apply that rule because:
> …
> (c) for an applicant who carries on the business activity who does not satisfy subsection 35-10(2E) (income requirement) for the most recent income year ending before the application is made — the business activity has started to be carried on and, for the excluded years:
> (i) because of its nature, it has not produced, or will not produce, assessable income greater than the deductions attributable to it; and
> (ii) (there is an objective expectation, based on evidence from independent sources (where available) that, within a period that is commercially viable for the industry concerned, the activity will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).

Arguably nothing turns on the words "unreasonable to apply", although it is noted that the Tribunal recently in *Bentivoglio* (at [50]) indicated that where the necessary elements are present, the discretion should be arbitrarily denied by the Commissioner:

> The task is therefore to consider whether one of the sets of circumstances in paragraphs (a), (b) and (c) has been established, and if so, whether, because of the existence of that set of circumstances, it would be unreasonable to apply the rule in s 35-10(2). If satisfied that it would be unreasonable to apply the rule, the decision-maker may decide that the rule does not apply — although, in context, it would seem a perverse outcome, and probably an improper exercise of the power, if the discretion were enlivened and yet not exercised in a taxpayer's favour.

As can be seen above, the s 35-55(1)(c) test of the Commissioner's discretion is rather unwieldy. It is suggested that in order to ascertain whether the discretion should be exercised, the test can be viewed as having four separate, complex elements (the four elements), all of which must be identified and satisfied:

1) identification of when the relevant "business activity" commenced (s 35-55(1)(c));
2) identification of the "commercial viability period" for that business activity to become profitable (s 35-55(1)(c);
3) establishing as a fact that the tax losses of the relevant taxpayer in her business activity are due to the "nature" of the business activity (s 35-55(1)(c)(i)); and
4) establishing as a matter of fact an objective expectation that the business activity will be profitable before the expiry of the commercial viability period (s 35-55(1)(c)(ii)).

As can be seen from the above, s 35-55(1)(c) calls upon the Commissioner in exercising his discretion to be an "expert" in the relevant business activity where he is required to form a view on when the business activity commenced, what is the commercial viability period for that business activity to become profitable, whether the actual tax losses in the business activity are due to the "nature" of the business activity or some other reason and finally whether, objectively speaking, the business forecasts a profit before the expiry of the commercial viability period. This puts the Commissioner under a significant burden of becoming an "expert" across a wide range of businesses — possibly some 11,000 different businesses, as noted above. While such "expertise" may be considered to be not dissimilar from the "expertise" required by the Commissioner when applying the transfer-pricing provisions, it is suggested that because self-assessment still largely operates within the operation of the transfer-pricing provisions, the same impediment to good tax administration is not created. Each of these four elements are considered in Pt II.

Exceptional circumstances — s 35-55(1)(a)

It is also important to note that affected taxpayers may also be able, together with taxpayers whose adjusted taxable income is less than $250,000, seek a discretion to utilise the business activity losses through showing exceptional circumstances as provided for in s 35-55(1)(a). Notably, s 35-55(1)(a) provides that, broadly, the s 35-55 discretion may be exercised where it is:

> … unreasonable to apply that rule because: (a) the business activity was or will be affected … by special circumstances outside the control of the operators of the business activity, including drought, flood, bushfire or some other natural disaster[.]

It is noted that the courts and tribunals have viewed this exception narrowly.

In *Bentivoglio* the Tribunal considered s 35-55(1)(a) in quite some detail and found that for a taxpayer whose adjusted taxable income exceeded $250,000, s 35-55(1)(a) was available. Notably, the Tribunal found that

there is no per-se requirement to demonstrate a profit would have been derived absent the special circumstances, which results in greatly decreased application complexity for taxpayers:[15]

> Although I have concluded that, on the proper construction of s 35-55(1)(a), the failure to show that a tax profit would have been generated in the absence of the special circumstances is not a necessary disqualifier to the exercise of the discretion in s 35-55(1)(a), it is nevertheless a relevant consideration.

Although a detailed analysis of s 35-55(1)(a) is beyond this article, it is noted that the Tribunal in *Bentivoglio* considered this provision, noting that special circumstances are as follows at [54]:

> Special circumstances are circumstances that *are unusual, uncommon, or out of the ordinary*: *Minister of Community Services and Health v Chee Keong Thoo* [1998] FCA 54; *Groth v Secretary, Department of Social Security* [1995] FCA 1708; (1995) 40 ALD 541. [Emphasis added.]

The Tribunal went on to find, in the context of an olive tree farm business activity, that an olive lace bug infestation affecting the taxpayer was a special circumstance, the drought affecting the taxpayer was a special circumstance and the illness of the taxpayer's wife was a special circumstance.[16] Overall, the Tribunal found that the discretion in s 35-55(1)(a) should be exercised for part of the period claimed by the taxpayer in *Bentivoglio*. The case is a reminder that applicant taxpayers should consider their potential availability of both the ss 35-55(1)(c) and 35-55(1)(a) discretions.

The method of application for the discretion and difficulties arising

When s 35-55(1)(c) was introduced, and to this day, the Commissioner requests that taxpayers, in the first instance, seek the exercise of the s 35-55(1)(c) discretion by way of applying for a private ruling using an application provided by the Commissioner.

Taxpayers who do not obtain a favourable private ruling can then object against the adverse private ruling and appeal to the Tribunal or the Federal Court. Alternatively, taxpayers who do not obtain a favourable private ruling can obtain an assessment without the discretion being exercised and then object against their own assessment so as to seek the exercise of the Commissioner's discretion on objection, also appealing any adverse objection outcome to the Tribunal or the Federal Court. As a general broad rule, relating to an area of law which is beyond the scope of this article, taxpayers cannot do both, and as such should obtain specialist advice prior to objecting against an adverse private ruling.[17]

More is discussed in Pt II regarding the Commissioner's questions asked of taxpayers in the s 35-55(1)(c) application and the effect that these questions have on the exercise of the discretion. However, it is important to note the law with respect to private rulings. In a private ruling, the Commissioner sets out a "scheme" or the "relevant facts and circumstances" as he understands them and then applies the law to the scheme. As was noted in the Tribunal in *Public Servant and Commissioner of Taxation* an appeal against an adverse private ruling is then limited to the information contained in the scheme:[18]

> The Tribunal's role with respect to the review of an objection decision regarding a private ruling is confined to reviewing the correctness of the ruling premised on the "specified scheme" in the private ruling and it has no role whatsoever in fact finding.

It was further noted in *Cooper Bros Holdings Pty Ltd t/as Triple R Waste Management v Commissioner of Taxation* that only limited additional information could be considered on appeal before the Tribunal where that information did not interfere with the description of the scheme:[19]

> [T]he Tribunal may only consider additional material pursuant to s 359-65(1) to the extent that it bears upon the correctness of the ruling in issue. … the word "materially" in s 359-65(3) cannot properly be read as permitting additional information to be considered by the Commissioner or the Tribunal pursuant to s 359-65(1) so as to interfere with the description of the scheme in the ruling in any way.

The implication is that if the Commissioner does not include a material aspect pertaining to an application for a s 35-55(1)(c) discretion in the description of the scheme, then it is difficult to have a court or tribunal subsequently consider that information.

In two recent cases, the Tribunal has observed that the scheme adopted by the Commissioner in the underlying private ruling being appealed was less than ideal.

In the recent *Tribunal case of HVZZ v Commissioner of Taxation*,[20] relating to a s 35-55(1)(c) application via private ruling in relation to the applicant taxpayer's horse breeding business where a key issue was when the relevant "business activity" commenced, the entire scheme was set out in some six paragraphs and pertaining to the question of when the actual business activity commenced, the Commissioner limited what was set out to two paragraphs of the scheme. Notably, the scheme was silent on the question of "international marketing" and the nature of the "expensive international Arabian horse bloodstock" which had been utilised by the taxpayer.[21] Some of the information that had been omitted by the Commissioner in formulating the scheme could have been found in a document previously written by the Commissioner summarising the Commissioner's reasons in conclusion to a previous objection raised by the

taxpayer.[22] The taxpayer in *HVZZ* sought to argue that this document should have been "read into" the scheme by virtue of the indirect but clear reference to the previous objection contained within the scheme, a contention ultimately rejected by the Tribunal.[23] The taxpayer also sought to adduce additional material, pursuant to s 359-65(1), to explain certain paragraphs of the scheme, a contention which was accepted by the Tribunal at law, but ultimately, based on the Tribunal's treatment of the additional material, was of little assistance:[24]

> It follows, in the Tribunal's view, that s 359-65(1) of Schedule 1 to the TAA may permit the Tribunal to consider the witness statements as additional information to the extent those documents are informative, that: (i) the Applicant owns and operates a horse breeding business and has done so since the 1999-2000 financial year; and (ii) the Applicant "decided to make an investment of significant capital to introduce stock into her business in 2007-2008 and employ an expert farm manager", but to that extent only.

Ultimately, the Tribunal noted with respect to the scheme in *HVZZ* that the scheme was inadequate and that the scheme that had been adopted in *Bentivoglio* was "unwieldy" (at [35]):

> The difficulties posed by the Commissioner's formulation of the scheme in this case are in stark contrast to those posed by the Commissioner's formulation of the scheme in Bentivoglio. In Bentivoglio, the Commissioner's broad formulation of the relevant "scheme" was, as described DP Frost (at [23]), "unwieldy". There, the scheme was described followed by the statement that the "description is based on the following documents", comprising over 200 pages of content, which are to "form part of and are to be read with" the description: see Bentivoglio at [20]–f[25]. Whereas, here the Scheme is formulated in 6 brief paragraphs (only 5 of which contain statements of fact). The Scheme in this case is the opposite of unwieldy, it is inadequate. Both of these approaches taken by the Commissioner to identifying the scheme are unhelpful and unsatisfactory.

The experience arising from litigation of the s 35-55 discretion in *HVZZ* and *Bentivoglio* are a timely reminder to taxpayers that any application for discretion of s 35-55(1)(c) requires that the scheme be appropriately formulated. Taxpayer applicants would be well-advised to propose a scheme to the Commissioner which is sufficiently detailed to address each of the four elements of s 35-55(1)(c) and actively engage with the Commissioner during the formulation of the scheme to ensure that the scheme is comprehensive. Where necessary, taxpayer applicants should ensure such a scheme clearly and overtly refers to external documents from which the taxpayer applicant will rely on.

It is also notable that the Tribunal in *Bentivoglio* recommended applications for the s 35-55(1)(c) discretion to be taken out of the private ruling regime, a recommendation which the author understands has not been acted upon in any way by the Commissioner.[25]

Part II — next edition

Part II, for publication in the next edition, discusses the application of the Div 35 discretions in s 35-55 as they apply to individuals whose adjusted taxable income equals or exceeds $250,000, with a particular focus on the four elements of s 35-55(1)(c), is discussed in the context of the recent Tribunal cases of *HVZZ*, *Bentivoglio* and *Heaney*.

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Footnotes

1. *HVZZ v Commissioner of Taxation* [2015] AATA 133; BC201580119.
2. *Bentivoglio v Commissioner of Taxation* [2014] AATA 620 (2 September 2014)
3. *Heaney v Commissioner of Taxation* (2013) 138 ALD 144; 60 AAR 59; [2013] AATA 331; BC201309819.
4. See, inter alia, s 14ZZK of the Taxation Administration Act 1953 (Cth).
5. *Ferguson v FCT* (1979) 26 ALR 307; 37 FLR 310; 79 ATC 4261; 9 ATR 873.
6. *FCT v Walker* (1985) 79 FLR 161; 85 ATC 4179; 16 ATR 331.
7. See John Ralph, Rick Allert and Bob Joss *Review of Business Taxation: A tax system redesigned* (July 1999) www.rbt-.treasury.gov.au at Ch 7.5 Non-commercial activities.
8. The Hon Wayne Swan MP, Treasurer of the Commonwealth of Australia and the Hon Chris Bowen MP, Assistant Treasurer, and Minister for Competition Policy and Corporate Law of the Commonwealth of Australia "Improving fairness and integrity in the tax system" media release (12 May 2009).
9. See also Senate Economics Legislation Committee *Report to the Tax Laws Amendment (2009 Budget Measures No 2) Bill 2009 [Provisions] and Income Tax (TFN Withholding Tax (ESS)) Bill 2009* (November 2009) para 3.11.
10. Above n 9, para 3.8.
11. See Parliament of Australia, *The Hon Tony Smith MP*, May 2015, www.aph.gov.au. Mr Anthony Smith MP was Shadow Minister for Education, Apprenticeships and Training from 6 December 2007 to 22 September 2008; Shadow Assistant Treasurer from 22 September 2008 to 8 December 2009.
12. Hansard Tax Laws Amendment (2009 Budget Measures No 2) Bill 2009; Income Tax (TFN Withholding Tax (ESS)) Bill 2009 (16 November 2009) p 11735–11736.
13. See ITAA 1997, s 31-10(1)(a).

14. Specifically, s 35-10(2E) effectively calculates an "adjusted" taxable income so as to add into the taxable income calculation reportable fringe benefits, reportable superannuation contributions and total net investment losses (arising from passive activities) for a given income year.
15. Above n 2, at [89].
16. Above n 2, at [82], [85] and [87].
17. See s 14ZVA of the Taxation Administration Act 1953 (Cth). Taxpayers who have objected, unsuccessfully against an adverse private ruling should seek the advice of expert counsel prior to seeking to object against their underlying income tax assessment.
18. *Public Servant and Commissioner of Taxation* [2014] AATA 247; BC201481221 at [53].
19. *Cooper Bros Holdings Pty Ltd t/as Triple R Waste Management v Commissioner of Taxation* (2013) 59 AAR 165; [2013] AATA 99; BC201309038 at [36] and [38].
20. In *HVZZ*, the author appeared as counsel for the taxpayer instructed by a national accounting firm. All commentary in this article is based on publicly available information contained in the published decision of *HVZZ*. Relevant paragraphs from *HVZZ* have been cited when matters pertaining to the anonymised taxpayer in *HVZZ* has been referred to. Any opinions expressed within this article are those of the author and do not necessarily reflect the opinion of my instructors, the taxpayer or any other party.
21. Above n 1, at [60].
22. Above n 1, at [27].
23. Above n 1, at [39].
24. Above n 1, at [40].
25. Above n 1, at [105].

Div 35 non-commercial losses — one tax rule for those whose taxable income is under $250,000 and no tax rule for those whose taxable income equals or exceeds $250,000

Part II of II: HVZZ, Bentivoglio and Heaney: the application of the Div 35 discretion

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In Part I of this article published previously, I discussed the application of Div 35 to taxpayers with an adjusted taxable income of more than $250,000 and the requirement that the Commissioner exercise his discretion to allow such taxpayers to claim losses under Div 35. I set out four elements (the four elements) to determine and satisfy before the Commissioner should exercise the discretion in s 35-55(1)(c) as:

1) identification of when the relevant "business activity" commenced (s 35–55(1)(c));
2) identification of the "commercial viability period" for that business activity to become profitable (s 35–55(1)(c);
3) establishing as a fact that the tax losses of the relevant taxpayer in his/her business activity are due to the "nature" of the business activity (s 35–55(1)(c)(i)); and
4) establishing as a matter of fact an objective expectation that the business activity will be profitable before the expiry of the commercial viability period (s 35–55(1)(c)(ii)).

Part II of this article follows on to discuss the first element in detail and then considers the remaining three elements in the context of the recent tribunal cases of *HVZZ v Commissioner of Taxation*[1] (*HVZZ*), *Bentivoglio v Commissioner of Taxation*[2] *(Bentivoglio)* and *Heaney v Commissioner of Taxation*[3] (Heaney) where taxpayer's have appealed adverse decisions by the Commissioner in respect of s 35–55 to the tribunal. The author appeared as counsel for the taxpayer in *HVZZ*, instructed by a national accounting firm.[4]

The first element — when does the business activity commence?

As is suggested above, the first task in any application for discretion under s 35–55(1)(c) is to satisfy the Commissioner, or alternatively the tribunal or a court, as to when the relevant "business activity" commenced. This is because if a taxpayer can demonstrate the relevant "business activity" commenced at a later point in time, the taxpayer applicant will have a smaller number of years where they must demonstrate they are within the "commercial viability" period. "Business activity" is not defined in Div 35 and, I would suggest, two key issues arise in different circumstances:

1) when two activities are carried on side-by-side at the same time (the second often having been commenced at a later point in time), will there be one or two discrete "business activities" for the purpose of Div 35 (the "concurrent issue"); and
2) when one activity is carried on up until point in time X and then very significant changes are made as to how the activity is carried out after point in time X, will the activity carried out thereafter be the same "business activity" as was carried out as previously (the "consecutive issue").

In respect of the *contemporaneous issue*, the tribunal in *Heaney* considered the case of two simultaneous activities, one of which had been commenced at a later time, and found that two discrete business activities could exist at the same time. The tribunal reached this conclusion having regard to s 35-10(3) which allows for the grouping of separate business activities by taxpayers, Taxation Ruling TR 2001/14[5] and the Explanatory Memorandum to the New Business Tax System (Integrity Measures) Bill 2000 (Cth) (the 2000 Bill) which introduced Div 35 in 2000:[6]

> There was a dispute between the parties as to whether Dr Heaney conducted a single farming business at two discrete locations, with some differences in the nature of activities conducted at each location, or whether the farming activities at each location should be described as a

> business activity in its own right for the purposes of Div 35 of ITAA 1997. Dr Heaney contended that the two farms, known as Big Springs and Humula, are two separate business activities. He submitted that Big Springs was affected by special circumstances outside his control in the 2010 income year. Therefore, the Commissioner should have exercised his discretion under s 35-55(1)(a) in respect of the losses incurred in farming that property. As for the Humula property, Dr Heaney contended that the Commissioner should have exercised the discretion in s 35-55(1)(c) because the business conducted on that property was newly commenced primary production and, because of its nature, had not produced a profit for the 2010 income year.
> …
> I have come to that conclusion because the evidence in this case points to two discrete business activities in the course of primary production. While it is correct to say that Dr Heaney commenced cattle production at Big Springs, following the purchase of the Humula property, the cattle at Big Springs were moved to that property and Dr Heaney acquired a substantially greater number of cattle. His evidence was that he then ceased any cattle production activities at Big Springs, focusing solely on sheep and cropping on that property. While I accept that there are similarities and possibly overlap between the activities conducted on each property, the activities themselves and the expenses incurred in each of those business activities is not necessarily the same. For example, Dr Heaney referred to shearing sheep at Big Springs. The rearing of beef cattle at the Humula property obviously involves no such activity. Nor does it require the equipment or expenditure to conduct that business activity. Cropping on the Big Springs property also requires different equipment and no doubt expenditure for that particular activity. Furthermore, in the 2010 income year, the properties themselves were at very different stages of development. Much of the infrastructure for the conduct of the business activities at Big Springs was already in place while Humula required substantial capital investment to enable the cattle breeding activities to take place. Dr Heaney's evidence was that the fencing at Humula was damaged when he purchased the property and the pasture was of poor quality due to overstocking by the previous owner. He testified that there was drought in the years prior to his purchase of the property and that he was required to establish the farm at Humula from bare paddocks caused by the drought.

In respect of the "consecutive issue", prior to *HVZZ*, no Australian court or tribunal had considered this issue in the context of Div 35. Relevantly, before the tribunal in *HVZZ*, was the question whether the changes to the taxpayer's business outlined in para 5 of the scheme before the tribunal (noting that it was brief as set out in Pt I of this article), gave rise to a new "business activity":[7]

> [5.] You commenced your business in 2000 on a very small scale however in the 2007-08 financial year you decided to make an investment of significant capital to introduce new stock and employ an expert farm manager.

It is suggested that even on the basis of what was set out in the scheme at para 5, there were three fundamental differences:

i) the commercial scale difference;
ii) the new stock difference; and
iii) the professional management difference.

In particular, in respect of the new stock difference, the term "introduce new stock" is clearly understood in agricultural circles and by the Full Federal Court[8] as introducing a new type of animal (as distinct from more of the same animals). It was also submitted that the tribunal had relevant informative material (in the form of witness statements) explaining what was meant by "an investment of significant capital" and that, in the author's opinion, could be taken into account without materially altering the scheme.[9]

Despite extensive submissions being advanced by the taxpayer before the tribunal as to when a new business activity could be seen to arise to address a "consecutive issue", the tribunal disposed of the issue by finding that there was insufficient information contained in the scheme:[10]

> It follows, HVZZ asserts, that the threshold for changes in a "business activity" which give rise to a new "business activity" should be less than the threshold for changes in a "business" which amount to a new "business". In support of HVZZ's contention that, as a result of: (i) an investment of significant capital; (ii) the introduction of new stock (ie international bloodline Arabian horses); and (iii) the employment of an expert farm manager, HVZZ has a "new discrete business activity" from the 2007/2008 financial year….
> Based on the brief Scheme identified in the PBR (as HVZZ contends to which the Tribunal is confined in its review function), it cannot be concluded that HVZZ commenced a new or discrete "business activity" in the 2007/2008 year. In such circumstances, it is unnecessary for the Tribunal to speculate upon what the legislature intended the undefined expression "business activity" to mean for the purposes of Div 35 of the ITAA 1997, in contrast to the defined term "business", in light of the legislative history of Div 35 and relevant case law.

Regrettably, it is suggested that the tribunal did not properly consider or attempt to apply principles used in working out whether the same business continues in the Same Business Test to Div 35 as submitted by the taxpayer. It is suggested where two consecutive business activities are contended (the "consecutive issue"), a second and "new" discrete "business activity" may arise after substantial or fundamental changes have occurred. It is suggested that there are three alternative tests the tribunal should have considered to assist it in determining whether a new "business activity" arose:

1. First, through applying the test derived from the case of Walton J in *Rolls-Royce Motors Ltd v Bamford*[11] (*Rolls-Royce*) which asks whether a person in the street would view the pre- and post-business activities as the "same business". *Rolls-Royce* was adopted by the Commissioner in

TR 1999/9 in his ruling on the application of the Same Business Test, where the Commissioner quoted *Rolls-Royce*, and it is suggested also has application to determining whether a new business activity arises[12] through applying the test derived from the case:

> There is all the difference in the world between an organic growth of trade and a sudden and dramatic change brought about by either the acquisition or loss of activities on a considerable scale.

2. Second, Pagone J's test from *Griffiths & Beerens Pty Ltd v Duggan*[13] (*Griffiths*) that asks whether the pre- and post- business activities would compete against each other, adopting the test of Lindley J in *Drew v Guy*[14] which is suggested to also have application in determining whether a new business activity arises:

> I do not think that the question of similarity is to be determined by considering whether both of the establishments sell ale, or whether the houses in which they are carried on are similar in appearance, but by the consideration whether the Defendant's restaurant *is so like that of Raven as seriously to compete with it*. [Emphasis added.]

3. Third, through the application of the "discrete" business activity test established by the tribunal in *Heaney* (in the case of the "concurrent issue"), as referred to above, wherein the tribunal referred to, inter-alia, the remarks of Gummow J in *Allied Mills Industries Pty Ltd v Commissioner of Taxation*[15] wherein his Honour noted:

> It may be that the activities of a taxpayer are so disparate in character and so discrete in the manner they are conducted, that one properly asks questions of the type posed by the facts of this case by reference to some but not the whole of those activities….

Also the Explanatory Memorandum to the 2000 Bill which stated at para 1.19:

> If the activity is not a part of another business activity it should be viewed in isolation and treated as a separate business activity. Whether or not an activity is simply a part of a particular business activity, or a separate business activity in its own right, will depend on the circumstances of each case.

Having regard to the above, it is difficult to comprehend why the tribunal did not consider the above mentioned tests,[16] particularly given that the respondent's submissions on the point were broadly limited to the following: that the horse breeding business commenced in 2000 and the horse breeding business continued in the 2007/08 financial year. The aforementioned Commissioner's submission seems to be clearly at odds at least with *Griffiths* which criticised labelling two businesses as ale houses. Not dissimilar criticism was directed at the Commissioner in *Heaney*:[17]

> There was neither analysis of the taxpayer's claimed nature of the discrete activities nor any reason why the Commissioner's view of the activities should simply be accepted without question. Frankly, it is unhelpful.

From helpful discussions I have had with tax advisors practising in the area, I have been made aware that the Commissioner is understood to regularly take the view, in concurrent issue cases being negotiated before the Commissioner (not yet in the tribunal or the courts) that significant changes in a business do not give rise to a new business activity. I am further informed that the Commissioner also regularly takes this view when a business is originally commenced, then at time X, a new purchaser purchases the business and makes significant changes.

In this respect, in publicly available Private Ruling Extract 25998,[18] the Commissioner after considering his ruling TR 1999/9, as referred to above, in relation to the Same Business Test, concluded that in the case of a purchaser of an existing horse business who had made significant changes after acquiring the business, the date of the commencement of the original business was the date when the "business activity" was taken to commence:

> 19. The factors in favour of the current activity being a different activity include the new location of the activity, changes in your management of the activity in terms of not using other people to manage certain aspects of the activity and having sole ownership of your breeding stock. The factors in favour of the activity being the same as was previously conducted include the product of the activity is the same, that is a particular breed of horse. The product of the activity is the same albeit that, due to having sole control, you now ensure only strict line breeding takes place as opposed to what could be described as ad hoc use of the stallion by the other part owner. Other factors that indicate that the same business is being conducted are that you have not commenced any other activities in relation to the breeding and training of horses; the activities are the same in that they are based on the use of broodmares of a particular breed or lineage even though you are now able to ensure only certain stallions are used; your potential customers are the same in that they are people who want a particular breed of horse, and; the knowledge and skills used by you in conducting the activities are similar.
>
> …
>
> 23. As stated previously, when considering the factors listed above in both TR 1999/9 and TR 2001/14 and the facts of your case, it is considered that the same activity is being conducted now as was being conducted previously. Although there has been a change in the location of where the activity is conducted and how the activity is managed or controlled, there has not been any change in the essential nature of the business which is the breeding of a specific breed of horses.

I have been made aware in my discussions with tax advisors that the conclusion in Private Ruling Extract 25998 was overturned by the Commissioner in the objection stage.

In addition to the treatment adopted in the above extract, I note that I have also been made aware of a matter presently before the tribunal in which the Commissioner is taking the view that the relevant "business activity" commenced when the previous owner commenced the business, also despite significant changes said to have been instituted by the current owner.

In the author's view, the lack of clarity on the "consecutive issue" which has been outlined here represents a significant impediment to the good administration of s 35-55(1)(c). It is an issue which arises purely from the 2009 amendments which resulted in keeping business activities within Div 35 which had a commercial scale despite the mechanics of Div 35 only ever being intended, as drafted in 2000, to hobby-like businesses. This is an issue which would benefit from proper consideration by the Federal Court or a presidential member of the tribunal. In the author's opinion, any taxpayer facing a similar issue would be well advised to seek the advice of expert counsel as to the resolution of the issue and, in the case of a taxpayer before the tribunal, the taxpayer would be advised to seek that the hearing be conducted by a presidential member of the tribunal.

The remaining three elements of s 35–55(1)(c)

In respect of the remaining three elements of s 35–55(1)(c):

1. **The second element — the commercial viability period**. The second element in seeking the Commissioner's discretion in s 35-55(1)(c) is that the taxpayer applicant must satisfy the Commissioner, or the tribunal standing in the shoes of the Commissioner, as to the commercial viability period of the industry concerned. This will require producing evidence from an independent expert as to the length of time it would take for a business in the industry concerned, run on a commercial basis, to become profitable. This can place an onerous burden on some taxpayer applicants to ascertain expert data where none may exist, a possibility noted by the Commissioner in his ruling TR 2007/6[19] at para 98. In unique or bespoke businesses, applicant taxpayers may need to look internationally to obtain such expert data and this may involve significant cost. In *HVZZ*, the taxpayer had the benefit of the Commissioner accepting in the scheme a commercial viability period of 10–15 years of "commencement" ("You have supplied a letter from an independent source that specifies that when breeding horses a profit could be expected in 10–15 years of commencement"), a period far longer than has been observed elsewhere by the Commissioner (eg in Private Ruling Extract 25998 where a period of 6 years was adopted). Notwithstanding, before the tribunal the Commissioner argued "commencement" should be read as not being the commencement of the relevant "business activity", but commencement of the "business", a submission which the tribunal adopted without reference to contrary submissions of the taxpayer without comment and attribution, notwithstanding that s 35–55(1)(c) applies to a "business activity". It is also noted that the Commissioner considers the question of what is the "commercial viability" period to be ascertained at the commencement of the business activity and does not vary thereafter, a contention of the Commissioner which may not be entirely without doubt. Taxpayer applicants seeking the exercise of the s 35–55(1)(c) discretion should turn their minds, early in the application process, to obtaining solid evidence of the commercial viability period for the relevant industry — a question which involves asking what is the relevant "industry"; it may well be the case that the taxpayer wishes to contend, for instance, that their business is not "horse breeding" but "Arabian horse breeding" and the relevant market may not be Australian but "international".[20] This question will be specific to each application for discretion under s 35-55(1)(c).
2. **The third element — challenges arising from "in the nature of"**. The third element requires applicant taxpayers to survive any challenge brought by the Commissioner that the losses are due to some way in which the taxpayer carries on the business activity rather than in a commercial manner. In *Commissioner of Taxation v Eskandari*[21] at [32], Stone J remarked:

> In my view, the phrase "because of its nature" in s 35–55 indicates that the failure must be a result of some inherent feature that the taxpayer's business activity has in common with business activities of that type.

From discussions with taxation advisors I have been made aware that the Commissioner not infrequently claims a taxpayer applicant has "gold plated" the business and say that the losses are therefore not "in the nature of" the commercial nature of the relevant industry. The Commissioner quite clearly states in his ruling at TR 2007/6 that he will treat this element as being satisfied, unless he observes indications to the contrary:

> 80. … It is only where it is clear that the reason the activity is unable to satisfy a test is not because of any inherent characteristic, but because of some other factor, that this requirement will not be met.
> …
> 82. However, cases may arise where this initial period has passed, and yet a particular business activity of this type is continuing to not satisfy any of the tests. In this situation it will be appropriate to enquire whether this is the result, not of any inherent characteristic but because of the way in which the operator has chosen to carry on their business activity.

In *HVZZ*, despite the scheme being silent as to any factor indicating that "in the nature was not satisfied" as per the Commissioner's ruling TR 2007/6 at [80], indicating that the requirement should have been considered as satisfied by the tribunal, the Commissioner submitted that the scheme's silence on the point indicated failure of the element, a submission which the tribunal adopted without reference to contrary submissions of the taxpayer without comment and attribution.[22] The tribunal's decision in this area indicates that applicant taxpayers should insist upon the Commissioner expressing a clear statement in the scheme that the "in the nature of" requirement is satisfied.

3. **The fourth element — converting forecasts to "objective expectations"**. The fourth element requires that the taxpayer produce an "objective expectation" valid for each year that the business activity will make a loss and that his business activity will be profitable before the end of the commercially viable period. In the author's view, this element requires taxpayer applicants to produce forecasts from an independent party (or forecasts reviewed by an independent party). For this element, there is a risk that taxpayer applicants could accidentally form the view that the Commissioner will determine whether the objective expectation is satisfied on the basis of the taxpayer's own forecasts, due to the wording of the Commissioner's application form:

> Attach details of your past income and expenditure and projected income and expenditure *to enable the Commissioner to determine you eligibility*. Supply these details from when your activity commenced to when it is expected to become commercially viable. Explain the basis of your projected income and expenditure.
> Explain the basis of your projected income and expenditure. [Emphasis added.]

The Commissioner in his ruling TR 2007/6 then notes at [85], indicating to applicant taxpayers that the objective expectation may be formed by the Commissioner:

> The objective expectation does not have to be held by, or attributed to, a particular person. *The Commissioner need only be satisfied that, based on the available supporting material, an objective expectation exists*. [Emphasis added.]

However, it is suggested that taxpayers should not expect the Commissioner to correctly express such an objective expectation in the scheme of a private ruling — for instance in *HVZZ* the Commissioner's scheme stated, "You expect your business to make a tax profit in the 2017–18 financial year" (at [10]), and in *Bentivoglio* the Commissioner's scheme stated (at [18]), "You expect to make a profit in the 2014–15 financial year". However, despite this choice of wording having been chosen by the Commissioner in the scheme in two such cases which have come before the tribunal, the Commissioner submitted that wording did not fulfil the fourth element of "objective expectation" as the wording was only the taxpayer's expectation, a submission which the tribunal adopted without reference to contrary submissions of the taxpayer without comment and attribution.[23] It is noted that this wording of the Commissioner was criticised in *Bentivoglio* at [23]:

> … Bearing in mind that in the context of a private ruling, the scheme is "but a complex of assumed or identified facts" (McMahon's case at 132), and that the Commissioner in identifying the scheme does not engage in any fact-finding, it is not helpful for the Commissioner to include in the scheme an assumed or identified fact expressed as "You submit that Bentivoglio Olives was plagued by the Olive Lace bug from 2000 onwards". If a reference to the issue of the olive lace bug is to be included in the scheme, it should be included as a positive statement: "Bentivoglio Olives was plagued by the Olive Lace bug from 2000 onwards". …

It is somewhat regrettable that the Commissioner sought this finding in his submissions, and even more regrettable that the tribunal adopted it without attribution, given that the Commissioner has been shown in two separate tribunal cases to have used the same wording and to have (it is suggested by the wording of the relevant application form and para 85 of TR 2007/6) encouraged reliance by the applicant taxpayer that the Commissioner would form the necessary objective expectation. Consequently, it is suggested that applicant taxpayers would be well advised to provide third-party prepared forecasts, or forecasts which have been objectively reviewed by a third party to the Commissioner and insist in negotiations with the Commissioner that such forecasts are directly incorporated by reference into the scheme of a private ruling application. Applicant

taxpayers may also consider different scenarios which may arise in the future, including the possibility of disposing of trading stock or plant and equipment at a given point in time before the end of the commercial viability period, as different scenarios may produce different results.

The future?

As was envisaged by the remarks of Mr Anthony Smith MP cited in Pt I of this article on the introduction of the 2009 amendments, one wonders whether the Commissioner has been "nimble, prepared and able" to process applications for the exercise of the s 35–55(1)(c) discretion. The formulation of the schemes in *HVZZ* and *Bentivoglio*, as the tribunal has noted, has been wanting. The uncertain "concurrent issue" arising when one business activity ceases and another one commences have plagued a number of taxpayers. It is suggested that s 35–55(1)(c) in the immediate future requires proper interpretation by a presidential member of the tribunal or the Federal Court. However, even if properly interpreted, one wonders whether the hard-coded limit of $250,000, with the impact of continued inflation, will result in a burden of requiring the Commissioner's individual discretion on a complex test that effectively results in a prohibition on most taxpayers being able to offset losses from a particular business activity from any other income. Having regard to the example provided in the introduction to Pt I of this article, at some point it may be helpful for policy makers to ask if the closing of the so-called "loophole" by the previous Rudd Government has the unintended consequence of making entrepreneurial activity (which by its nature often generates losses) by individuals in Australia, which has the not infrequent side benefit of generating new employment (and consequential tax on wages) far more difficult than it needs to be.

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Footnotes

1. *HVZZ v Commissioner of Taxation* [2015] AATA 133; BC201580119.
2. *Bentivoglio v Commissioner of Taxation* [2014] AATA 620 (2 September 2014).
3. *Heaney v Commissioner of Taxation* (2013) 138 ALD 144; 60 AAR 59; [2013] AATA 331; BC201309819.
4. All commentary in this article is based on publicly available information contained in the published decision of *HVZZ*. Relevant paragraphs from *HVZZ* have been cited when matters pertaining to the anonymised taxpayer in *HVZZ* has been referred to. Any opinions expressed within this article are those of the author and do not necessarily reflect the opinion of the instructors, the taxpayer or any other party.
5. TR 2001/14 Income tax: Division 35 — non-commercial business losses (19 December 2001).
6. Above n 3, at [27] and [55].
7. Above n 1, at [10].
8. See *Parker v Minister for Sustainability, Environment, Water, Population and Communities* (2012) 205 FCR 415; 187 LGERA 107; [2012] FCAFC 94; BC201204702 at [31].
9. See Pt I of this article and s 359-65(1) of Sch 1 of the Taxation Administration Act 1953 (Cth)which allows the consideration of additional information where that information does not materially alter the scheme.
10. Above n 1, at [75].
11. *Rolls Royce Motors Ltd v Bamford* [1976] STC 162; (1976) 51 TC 319.
12. TR 1999/9 Income tax: the operation of ss 165–13 and 165–210, p 165–35(b), s 165–126 and s 165–132 (23 June 1999) at [40].
13. *Griffiths & Beerens Pty Ltd v Duggan* (2008) 66 ACSR 472; [2008] VSC 201; BC200804298.
14. *Drew v Guy* [1894] 3 Ch 25.
15. *Allied Mills Industries Pty Ltd v Commissioner of Taxation* (1989) 20 FCR 288 at 304.
16. It is nevertheless noted, with respect to the tribunal, that the facts pertaining to what was the relevant "business activity" were well set out in quite some detail and although it is not possible to speculate as to the intentions of the tribunal in its decision in *HVZZ*, in the author's opinion, it does appear that the tribunal was mindful, if not supportive of a potential appeal of the decision in *HVZZ* to the Federal Court of Australia to resolve the issue.
17. Above n 3, at [48].
18. I would thank Mr Paul Carrazzo of Carrazzo Consulting CPAs for his helpful comments and observations in respect of the application of Div 35 to horse breeders and his observations in respect of Private Ruling Extract 25998. Mr Paul Carrazzo has also authored a helpful article on the decision in *HVZZ*, which contains industry specific observations: Paul Carrazzo, *Another horse loss rejected by ATO*, 13 April 2015, www.breednet.com.
19. TR 2007/6 Income tax: non-commercial business losses: Commissioner's discretion (25 July 2007).
20. See above n 1, at [6] and [60].
21. *Commissioner of Taxation v Eskandari* (2004) 134 FCR 569; 54 ATR 695; [2004] FCA 8; BC200400074.
22. Above n 1, at [77].
23. Above n 1, at [79].