TAX BRIEF

16 February 2017

Diverted Profits Tax

It is almost impossible these days to get bipartisan policy on anything in Australia – from marriage equality to energy – with the significant exception of the taxation of multinational corporations (MNCs). The latest measure directed at MNCs, the Diverted Profits Tax (DPT), was introduced into Parliament last week. It is a companion piece to the 2015 Multinational Anti-Avoidance Law (commonly called the MAAL) but is more widely directed and subject to special stringent administrative procedures.

The MAAL was effectively targeted at foreign MNCs, but the DPT applies to Australian MNCs as well, and it is well-known that the intended targets include some of Australia's largest companies (and biggest payers of income tax). The MAAL was concerned mainly with a foreign MNC avoiding tax, by seeking to ensure it did not have a permanent establishment (PE) in Australia.

The DPT by contrast is concerned first with the case where an Australian resident's tax is reduced by diverting income to a non-resident, largely by the non-resident deriving an amount of income that otherwise the Australian resident would derive. Secondly, the DPT may apply where an Australian resident makes a deductible payment to a non-resident, which reduces Australian tax of the resident but is income of the non-resident that is not taxed in Australia as it does not have an Australian source or is low taxed in Australia such as at 10% for interest withholding tax. Under both the MAAL and the DPT, though in different ways, Australian tax will generally only be triggered where the foreign tax, if any, on the foreign resident is lower than the Australian tax that otherwise would be paid.

This Tax Brief analyses the details of the DPT as set out in the Bill and then comments on its broader significance.

In the interests of brevity, this Tax Brief does not restate all of the fundamental issues and problems with the DPT that were set out in some detail in our June 2016 submission on the original May 2016 DPT Consultation Paper, Implementing a Diverted Profits Tax (CP) and in our December 2016 submission on the November 2016 Exposure Draft (ED) of the legislation and draft Explanatory Memorandum (EM).

Diverted Profits Tax at a glance

The DPT will apply to a scheme, in relation to a tax benefit if:

- a taxpayer has obtained a tax benefit in connection with the scheme;
- it would be concluded that the person, or one of the persons, who entered into the scheme did so for a principal purpose of enabling the taxpayer to obtain a tax benefit, or both to obtain a tax benefit and reduce a foreign tax liability;

- the taxpayer is a significant global entity for the income year;
- a foreign entity that is an associate of the taxpayer is connected with the scheme;
- the relevant taxpayer is not a specified kind of collective investment vehicle;
- it is reasonable to conclude that the taxpayer does not satisfy the $25 million income test, the sufficient foreign tax test or the sufficient economic substance test.

If the DPT applies to a scheme, the Commissioner has seven years to issue a DPT assessment imposing tax on the tax benefit at a penalty rate of 40 per cent, which the taxpayer will have 21 days to pay.

Following the issue of a notice of the DPT assessment, the taxpayer will be able to provide the Commissioner with further information disclosing reasons why the DPT assessment should be reduced during a 12 month period of review after which the taxpayer will have 60 days to challenge the assessment by appealing to the Federal Court. However, the taxpayer will generally be restricted on appeal to adducing evidence that was provided to the Commissioner before the end of the period of review.

Diverted Profits Tax analysed

After submissions were received on the ED, a limited revised consultation draft of the legislation was circulated in mid-January 2017. The analysis here focusses particularly on changes and additions that have occurred in the process since the release of the ED and draft EM – in the case of the relevant parts of the EM, the new material is more than double the size of the draft and so repays close study.

Objectives

The Bill has an objects clause, unlike the ED, which states three objectives for the DPT: aligning taxable income with economic substance (essentially a backup to transfer pricing enforcement); preventing the diversion of profits by contrived arrangements; and “encouraging significant global entities to provide sufficient information to the Commissioner to allow for the timely resolution of disputes”, a euphemism for the expected but draconian administration procedures in the Bill.

The most important of these objects is the second, in the sense that it indicates that the DPT can restructure the transactions actually entered into, without the constraints on such an exercise under domestic transfer pricing law and the OECD Transfer Pricing Guidelines (TPG) after the 2016 revisions flowing from the G20/OECD project on Base Erosion and Profit Shifting (BEPS). In other words, the DPT is about more than transfer pricing, which was evident in the CP, especially the leasing example in Appendix B.2, but much less so in the ED.

Basic tests

The DPT is to be housed in Part IVA, which contains Australia’s general rules aimed at tax avoidance. Its language is based on a purpose test of getting a tax benefit, supplemented with some of the paraphernalia that came with the MAAL (such as adopting the low standard of “a principal purpose” rather than “the sole or dominant purpose” and the purpose relating to both Australian tax and foreign tax). While the Bill has moved the borrowed language even closer to the rest of Part IVA, the borrowing raises some questions.

First, there is the common reference to a tax benefit that “would but for section 177F be obtained”. Yet section 177F is turned off for the DPT, except in relation to consequential adjustments in favour of the taxpayer or third party. Elsewhere the DPT provisions make clear that the DPT does not limit, and is not limited by, the rest of Part IVA. The relationship between the DPT and the rest of Part IVA, which is important as different kinds of assessments are issued for each as explained below, is not made clear and the final EM does not assist though it is indicated that double (Australian) taxation of the same scheme is not intended. Thus the ATO can simultaneously issue a “normal” Part IVA determination and assessment at the 30% corporate tax rate and a DPT assessment essentially covering the same scheme at a 40% tax rate but there is no indication of how the different collection procedures then operate.

On the other hand, the EM does state that the MAAL language in relation to foreign tax reductions will cover a DPT case where one (usually Australian) taxpayer gets an Australian tax benefit and another (usually foreign) taxpayer gets a foreign tax benefit but it is difficult to extract this result from the language. In the case of the MAAL the taxpayer is foreign and the reductions in Australian tax and foreign tax usually arise for a common taxpayer. If the language is deficient to achieve the EM claim it will only matter for the DPT in the perhaps unusual case where on its own the reduction of Australian tax does not amount to “a principal purpose” of the scheme but it does when combined with the reduction in foreign tax.

The specific elements of the DPT (subject to the qualification and exceptions below), apart from the purpose test and the normal concept of a tax benefit, are that a foreign associate of the taxpayer subject to DPT is connected to the scheme and that the taxpayer is a “significant global entity” (i.e. a multinational enterprise or part of a multinational group with global income of A$1 billion or more).

Criteria for determining purpose

The criteria used for determining the purpose of obtaining a tax benefit are the normal ones for Part IVA (form and substance, etc) together with three additions:

- the extent of “non-tax financial benefits” from the scheme;
- the result of the scheme under foreign tax law; and
- the amount of the tax benefit.

The EM suggests that at least one comparison is involved in these criteria: whether the non-tax financial benefits are greater than the tax benefit. Assume a business process is moved offshore to a related company located in a low labour cost location, as part of centralising group services. If significant non-tax financial benefits can be demonstrated relative to the tax saving in Australia resulting from any fee paid to the related company, there is unlikely to be a principal purpose of obtaining the Australian tax benefit.

The reference to foreign tax law among the criteria is explained in the EM by the fact that the purpose test also relates to reducing foreign tax liabilities. There is more explanation in the EM compared to the MAAL where this criterion originated, and the elaboration suggests a second comparison in the criteria that, if significant foreign tax is being paid under a scheme compared to the Australian tax benefit, the principal purpose test may not be fulfilled.

Although the implicit reference to transfer pricing comes first among the objectives of the DPT in the Bill, the main operative provision setting out the tests and the criteria for the operation of the DPT are not generally expressed in transfer pricing type language. The application of the DPT to transfer pricing issues has to be justified by reference to the relevant criteria. The EM has a lengthy discussion of transfer pricing in the context of one of the exceptions to the DPT concerning sufficient economic substance, from which it is implicit that the general Part IVA form and substance criterion is likely to be the one relied on in DPT cases concerning transfer pricing.

Qualifications

The Bill introduces two qualifications to the operation of the basic test for applying the DPT.

The first qualification concerns thin capitalisation rules and is to the same effect as the relationship between thin capitalisation and transfer pricing now identified in the tax legislation: the thin capitalisation rules set the amount of debt on which interest deductions may be allowed while transfer pricing rules (and now the DPT) can only be applied to the interest rate to be applied to the debt. This prevents the DPT being used to effectively override the safe harbours permitted by the thin capitalisation rules.

While the qualification is important, its implications are concerning. Consider the *Chevron* case now before the Full Federal Court in the context of the DPT. That case involved 19 expert witnesses and 45 expert reports. Chevron's debt was within the thin capitalisation safe harbours and the transfer pricing issue was the interest rate. If the DPT had been applied it is possible that all of the expert evidence relied on by Chevron could be eliminated unless it had been disclosed to the ATO within 12 months of the issue of the assessment (which seems unlikely). Yet the ATO's expert evidence would be unaffected.

The second qualification concerns cases where the DPT is being applied to an Australian company which has effectively diverted profits to a controlled foreign company (CFC) offshore. To the extent that the diverted income is attributed under CFC rules back to the taxpayer from which it was diverted, or to an Australian associate of the taxpayer, the tax benefit is reduced, which affects not only the basic operation of the DPT but also the sufficient tax test exception discussed below. The amount of the reduction seems, however, to be limited to the amounts attributed and so does not encompass deductions incurred by the CFC relating to the diverted income which otherwise would have been incurred by the Australian taxpayer or associate.

Exceptions

The Bill has added additional exceptions to those found in the ED. The three other exceptions in the ED have been modified.

Investment vehicles

The additions relate to certain investment vehicles, on the basis that they "carry on predominantly passive activities". The relevant provision identifies the excluded entities by cross referring to other parts of the tax legislation dealing with widely-held, sovereign-owned and pension investment vehicles. The entities covered by exceptions are:

- managed investment trusts;
- foreign collective investment vehicles with wide membership;
- foreign entities owned by a foreign government;
- complying superannuation entities;
- foreign pension funds.

Sufficient foreign tax test

This exception requires that the increase in foreign tax as a result of the diversion of income offshore is 80% or more of the reduced Australian tax liability. There are two significant modifications to this exception in the Bill: regulations may be made to modify the meaning of foreign tax liability and any reduction in Australian tax liability is itself reduced to the extent that Australian withholding tax is paid on the diverted income.

The final EM gives little indication of why regulations are necessary in relation to calculation of foreign tax, except to say that it may be complex and uncertain. It may be that earlier indications in the CP that foreign losses would be taken into account in adjusting the calculation are intended, but the discussion of foreign losses in the EM, such as it is, seems more concerned with tax planning to use losses rather than recognising that real foreign losses are a justifiable reason as to why foreign tax is not being paid.

In relation to withholding tax, it is recognised that account should be taken of the tax if Australia collects tax on the other side of the diversion of income. The limitation to withholding tax does not, however, cover the various other ways in which Australia could be collecting tax from the recipient of the diverted income. The EM provides no guidance on how other Australian tax by the recipient is handled in the DPT.

Moreover, in the case of consolidated groups, the withholding tax adjustment will often miscarry because the diversion will be from the head company of a consolidated or MEC group, whereas the relevant interest or royalty withholding tax will often be paid by a subsidiary member of the group as the head company may be a holding vehicle. Under the Bill the adjustment only applies if the entity subject to the DPT assessment (which will be the head company except in very unusual cases) itself withholds the withholding tax. The consolidation single entity rule does not apply in this situation.

The EM on the sufficient foreign tax test provides some comments on how to apply it when the entity to which income is diverted is tax transparent under foreign law (and so not taxed) even if it is not regarded as tax transparent by Australian tax law. It is up to the taxpayer to obtain and present the evidence necessary to prove payment of foreign tax by itself and associates connected with the scheme.

Sufficient economic substance test

The sufficient economic substance exception which will in practice often be the key battleground with the DPT, has been elaborated to expressly rely on the TPG in determining substance and as noted above the final EM has a significant addition to explain what parts of the TPG are relevant to this issue. The implication of the material is that for DPT purposes the transfer pricing analysis will need to be two-sided, even if the only two sided transfer pricing methodology, the profit split, is not used for transfer pricing purposes. It is thus likely that the DPT will add even more to transfer pricing compliance costs for MNCs operating in Australia.

On the face of the legislation at least the test is applied to every foreign associate entity connected to the scheme, though an exception has been added to exclude an entity whose role is minor or ancillary. While this is an improvement, it does not solve one of the fundamental concerns about the ED that the test is failed if **any** of the relevant entities overseas lacks economic substance. It is quite common for holding entities and special purpose vehicles to be involved in existing international structures without tax planning implications and it is not evident that they will be covered by the exception.

For other concerns and comments on the sufficient economic substance test, see our December 2016 submission referenced earlier.

$25 million income test

The A$25 million *de minimis* threshold to eliminate small operations of foreign multinationals will have little relevance in practice, given that the ATO is unlikely to pursue foreign multinationals with small Australian operations.

Levy of tax

If the DPT threshold test is satisfied and none of the exceptions apply, then the DPT is levied at 40% (under a separate imposition Bill) on the tax benefit. This is one of the major problems of the Bill, as it is likely to overshoot the amount on which tax should be appropriately levied.

“Tax benefit” is defined in Part IVA in terms of the amount not included in assessable income as a result of the scheme, or the amount claimed as a deduction which would not be deductible but for the scheme (these being the two common tax benefits that will be subject to the DPT identified in the EM).

Frequently in the application of Part IVA aside from the DPT, the ATO will determine that a lesser amount than the tax benefit will be made subject to Part IVA as the real tax saving is reflected in that lesser amount. The ATO has publicly indicated this particularly in the tax consolidation context, but takes the same approach more generally. This approach is supported by an express power in the legislation to make a Part IVA determination in relation to all or part of the tax benefit. Since that power is expressly excluded from the DPT and instead the tax is levied by the legislation directly on the tax benefit, there is no apparent scope for ensuring that the appropriate amount is targeted.

The EM does try to explain another result of the method of separately levying the DPT, which was indicated as the policy without explanation in the CP but not dealt with in the ED, being the denial of relief for foreign tax in the form of a foreign income tax offset (FITO). The explanation is that the FITO applies to the "basic income tax liability" and the levy of the DPT under a separate mechanism means that it is not part of that liability. Which is true as far as it goes, but it ignores the fact that treaties create an obligation to give foreign tax credits which are not limited to the basic income tax liability as the ATO has publicly acknowledged in relation to the Medicare levy. It also ignores the fact that in many cases the FITO would not apply in any event, as the foreign tax is on a different company to the taxpayer being subjected to the DPT, but that international double taxation would result which it is the primary goal of the international tax system to ameliorate. The double tax relief position is a complex issue as the UK realised in implementing its DPT and properly went out of its way to deal with, far beyond its treaty obligations.

Administrative and dispute procedures

The Bill continues the vices of the CP and ED when it comes to administrative and dispute procedures.

The EM makes the objective of the administrative arrangements plain: the combination of the upfront payment and the greater disclosure is expected to both expedite the resolution of disputes and the consequential tax payment, and to capture taxable income that would otherwise have been diverted.

The payment and disclosure rules are thus sticks. There do not appear to be any carrots. The key features are:

- The Commissioner can issue a DPT assessment within 7 years of an income tax assessment.
- Where the Commissioner makes a DPT assessment, the taxpayer will have 21 days to pay the amount set out in the DPT assessment.
- Following the issue of the notice of a DPT assessment, the taxpayer will be able to provide the Commissioner with further information disclosing reasons why the DPT assessment should be reduced during the period of review (generally 12 months, unless reduced/extended by interaction between the ATO, the taxpayer and the Federal Court).
- It is anticipated that by the end of the review period, one of the following will occur:
  - the ATO adhering to its original DPT assessment, or increasing it; or
  - the ATO reducing the DPT assessment, either based on further information, or because further income tax is assessed or paid, for example due to a taxpayer amending its return.
- At the end of that period of review, if the taxpayer is dissatisfied with the DPT assessment, or the amended DPT assessment, the taxpayer will have 60 days to challenge the assessment by making an appeal to the Federal Court.
- In Court, the taxpayer will generally be restricted to relying on evidence that the Commissioner had, or was provided to the Commissioner, before the end of the period of review. There is an exception if:

- the Commissioner consents to its admission;
- with leave of the court if the court considers that its admission is in the interests of justice; or
- the restricted DPT evidence is expert evidence that comes into existence after the period of review and is based on evidence that the Commissioner had at any time in the period of review.

On safeguards, the EM states:

> *"The Australian Taxation Office (ATO) will ensure a rigorous framework is introduced for the DPT that encompasses several levels of oversight, senior executive sign-off and additional safeguards so as to provide assurance around the DPT process. This is to ensure that the DPT will only be applied in very limited circumstances and is focused on tax avoidance arrangements by related parties to divert profits offshore. The Commissioner will establish a Panel (similar to the existing General Anti-avoidance Rule Panel) relating to DPT that will include at least one external member. Except in very limited circumstances, the Commissioner will seek endorsement from the Panel to make a DPT assessment. The Commissioner will outline the ATO's administrative processes through guidance."*

If experience with Part IVA is any guide, this guidance will not be binding.

Further, the context of the introduction of the DPT reinforces the view that the DPT is likely to be on the table whenever the ATO is conducting a review or an audit of a taxpayer which has part of its value chain located in a jurisdiction with a tax rate of less than 24%. For large taxpayers, the key audit issues will be, does that part of the value chain have economic substance in the eyes of the ATO, and if not, how would the Australian tax position be different?

Transition

It is intended that the Bills be passed in the current sittings to commence for income years starting on or after 1 July 2017 and are to apply to schemes already in existence at that date.

Comment

First resort, last resort or in-between

Part IVA, where the DPT is housed, is traditionally regarded as a provision of last resort[1] and the DPT has been criticised for likely being a provision of first resort for the ATO. The EM seeks to finesse this issue as follows:

> *"Although the DPT is not a provision of last resort, consistent with the operation of Part IVA, it is expected that the DPT will be applied only in very limited circumstances. It is intended that the Commissioner would apply the DPT only after he or she has given consideration to the operation of the ordinary provisions in the income tax law."*

There is, of course, nothing in the legislation that gives legal force to this intention, so only time will tell. In our view, whether or not utilised, the DPT is likely to be on the table in audits of multinationals for the reasons discussed above and so will contribute to foreign multinationals being very cautious about investing in Australia.

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[1] Explanatory Memorandum to *Income Tax Laws Amendment Bill (No. 2) 1981* which introduced Part IVA, notes on clause 7 in relation to s. 177B, PS LA 2005/24 Application of General Anti-Avoidance Rules para 50.

International implications

The DPT is also likely to make foreign governments wary of Australia. The DPT has been constantly linked by the Government to the OECD BEPS project and a significant part of the relatively lengthy Second Reading Speech is taken up with reinforcing this claim.

In reality, the Australian DPT is the antithesis of the cooperative approach being adopted in BEPS and has already attracted criticism from other governments. When they see how far the rules and procedures of the DPT depart from the international norms set by the TPG and the BEPS project, it would not surprise if Australian officials come in for some hard words at international gatherings. Australia will also be subject to peer review on its BEPS implementation including international dispute resolution measures. It is unlikely that other countries will give approval to a measure deliberately designed to produce international double taxation and not to be subject to international dispute resolution mechanisms (see our Tax Brief on the Multilateral Instrument for discussion of dispute resolution).

In relation to double taxation we contrasted above the Australian DPT and its original model, the UK DPT. In case it be thought that the Australian version is the same as the UK's, we note here some, though by no means all, further differences:

- no financial transactions exception;
- no allowance for foreign losses;
- no allowance for exempt entities such as charities and pension funds legitimately on the other side of transactions; and
- incomplete coverage of other Australian income tax.

The Australian DPT continues to be tougher than its UK counterpart.

Administrative and dispute procedures

The stated policy behind the DPT from an administrative point of view is avoiding delays in current international tax audits arising from difficulties in obtaining information from offshore, and perceived lack of pressure on those companies to engage with the ATO. In response, the DPT's pressure points are:

- early payment of tax;
- taxpayers needing to be forthcoming with information during the review period or run the risk that they cannot later introduce that information into evidence; and
- scrutiny of tax positions through potential litigation in the Federal Court.

The Bill relies on the ATO to exercise its discretion in raising and relying upon the DPT. The best guidance on how the ATO would be likely to apply the DPT lies in the evidence of the Commissioner to Senate Estimates Committee hearings in February 2016:

> *"Some of these cases have been going on for 12 months or more now – people have come to the table, said all the right things, made promises, but when push comes to shove, they don't deliver. We continue to negotiate back and forth with requests for information and more detail bit by bit.*
>
> *…*
>
> *These companies have pushed the envelope on reasonableness – they play games, they string us along, they believe we can be stooged. Enough is enough. No more. We will be*

> *reasonable with those that genuinely cooperate, but we will now take a much harder stance on those who do not.*
>
> *We will not be rolling over and giving further extensions of time. We are ruling the line under these protracted negotiations and proceeding immediately to raise assessments and create liabilities on these cases – potentially taking them all the way to court if necessary."*

Of course, the irony is that the Commissioner was referring to measures that the ATO could take under existing law, rather than the need for any new law.

In essence therefore, the DPT is the Parliament effectively authorising the ATO to exercise the powers it already has. In that regard, the law itself contains many measures which already feature in income tax legislation, such as:

- the ATO being able to issue assessments at any time, with payments due shortly after an assessment (subject to any 50/50 type payment arrangement);
- the Commissioner being able to further consider information after an assessment, presently through the objection procedure (albeit the period of review for the DPT is longer);
- appeals to the Federal Court (although the DPT does not permit review by the AAT); and
- restriction of evidence not provided in response to an offshore information notice under section 264A, albeit that notice procedure at least tells the taxpayer the information/documents required, a safeguard which is not reflected in the DPT Bill.

It is not so much that the DPT effects a radical change in audit procedures contemplated by the statute – rather, the key issue will be the impact that the passage of this legislation has for how the ATO acts in practice.

In that regard, there are 2 key questions:

- When the ATO raises a DPT assessment, how aggressive will it be on the amount raised: will it be at the higher end of a range to apply pressure, or will applying a higher amount make it difficult to defend (legally and administratively) later on?
- How will the ATO and the Courts apply "the restricted DPT evidence" stick?

The latter question will likely result in all manner of practical problems. Taxpayers only rely on evidence which is helpful to their cases – but in an adversarial system, that evidence can either be to strengthen their own case, or weaken the ATO's. In terms of dealing with the latter, the current system has a range of safeguards to ensure taxpayers know the case which they need to meet:

- the ATO's offshore information notice specifies information or documents sought by the ATO;
- at the time of assessments and objections, the ATO typically furnishes reasons for its decisions; and
- the Federal Court requires the Commissioner to file an Appeal Statement.

The essential legal basis for this process has been recognised by the High Court for almost 40 years.[2] A key question for both taxpayers and the ATO will be, what will the Federal Court do in practice if

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[2] In *Bailey v Federal Commissioner of Taxation* [1977] HCA 11; (1977) 136 CLR 214, Gibbs J said:

"*Particulars fulfil an important function in the conduct of litigation. They define the issues to be tried and enable the parties to know what evidence it will be necessary to have available and to avoid taking up* confronted by a case where a taxpayer is seeking to rely on evidence not previously provided to the ATO where no doubt the taxpayer will be contending that the evidence was not previously considered relevant based on the position articulated (or not articulated) by the ATO during the review period.

The issue is made even more problematic since the DPT combines two underlying tax rules, general Part IVA (focussing on tax benefit, i.e. reasonable alternative postulates, and purpose) and transfer pricing (focussing on the arm's length principle) where experience shows that the evidentiary requirements are very significant and the cases typically take some years to prepare. The DPT allows 12 months.

A careful eye will therefore need to be had on the flagged ATO guidance, and how in fact the ATO applies the DPT in practice.

Unseemly haste

The DPT Bill and the EM contain signs of being produced without proper consideration of technical issues, let alone the broader policy, a sure sign of the triumph of political expediency over principle. At the policy level the CD indicated that FITOs would not be allowed but it is only in the EM that an explanation is given that this follows as a matter of course from the structure of the DPT without the need for specific provisions. The explanation is doubtful technically and somewhat misleading as explained above, but most significantly at no point has it been explained why the DPT which is intended to prevent international double non-taxation deliberately produces international double taxation.

At the technical level in our view the levying of tax directly on the tax benefit is flawed and will produce over-taxation. Similarly the treatment of withholding tax in the sufficient foreign tax test will often miss the mark in the consolidation context where it will usually arise. An effort has been made to give more guidance on certain issues in the final EM but it remains insufficient.

It is left to the ATO to sort the problems out, but as the DPT is clearly designed as a release valve for ATO frustrations, how much administrative repair can be expected?

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time with questions that are not in dispute. On the one hand they prevent the injustice that may occur when a party is taken by surprise; on the other they save expense by keeping the conduct of the case within due bounds. These considerations are no less important in revenue cases than in other cases. A taxpayer who comes to court in a case in which it is suggested that s. 260 applies is, as a matter of justice, entitled to know what case it is that the Commissioner intends to raise against him. The circumstance that s. 260 must be applied to the facts whether or not the Commissioner holds any opinion on the subject provides no reason why the issues of fact arising in the case should not be defined. The fact that the taxpayer bears the onus of proving that the assessment is excessive makes it all the more necessary that he should be given particulars of the basis of the assessment - … . The Commissioner is not likely to be disadvantaged by supplying particulars. …"

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