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Ruling Compendium – TD 2010/12

This is a compendium of responses to the issues raised by external parties to draft TD 2009/D12 – Income tax: can Part IVA of the *Income Tax Assessment Act 1936* apply to an asymmetric swap scheme?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	There is insufficient analysis of Part IVA of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) ¹ . Issues are not covered in sufficient detail. The application of the General Anti-Avoidance Rules to a particular taxpayer or transaction requires a detailed analysis of the facts and circumstances of each case – that is, a detailed analysis of the 8 factors.	The ATO has taken this into consideration and the final Determination now incorporates a more comprehensive analysis of the facts and circumstances in light of the 8 factors.
2.	There is a very limited description of facts. The conclusion that Part IVA applies is unhelpful without identification of the specific taxpayer to whom it applies and detailed facts of the transaction. Due to the very complex nature of the Asymmetric Swap, the Commissioner has not discharged the enquiry necessary to make a determination. There is no analysis of the drift – no basis for the conclusion that it is unsound. There appear to be some factual inaccuracies – particularly in relation to the description of the drift adjustment.	The Asymmetric Swap arrangements have a number of generic features that comprise the principle elements of the transaction. The Determination provides adequate detail of the generic features of the transaction. The ATO does not accept that for the purposes of the Determination, it is required to identify and consider specific circumstances of each taxpayer when considering the application of Part IVA. The Determination has provided sufficient detail and analysis of the generic features of the arrangement, particularly in relation to the description of the drift, to form a conclusion as to the application of Part IVA.

¹ All legislative references are to the ITAA 1936 unless otherwise indicated.

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3.	The Determination may be inconsistent with previous private binding rulings (PBRs). In these cases, the Commissioner should explain his rationale for his change in view. Taxpayers should be able to rely on PBRs and there should be limited circumstances when the Commissioner can alter his view.	The ATO does not consider it necessary to discuss the rules in relation to inconsistent rulings. The law is clear on this point (section 357-75(1) of Schedule 1 to the <i>Taxation Administration Act 1953</i>).
4.	The ATO should distinguish the transactions or explain the change of view. The ATO's change of view seems to be driven by hindsight-based revenue protection considerations.	The ATO has not changed its view on these transactions due to hind-sight based revenue protection considerations. It is incorrect to suggest that the Commissioner is concerned about the way the index has moved. The Determination makes it clear that the concern is centred predominately on the commercial objectives of the transactions and the pricing of the transaction at the time when it is entered into.
5.	The variant structure is the most common structure and the ATO was aware these structures were being used.	The Determination has now addressed this issue. The variant structure, which involves the insertion of a subsidiary company (SPV), does appear to be the most common structure. The ATO acknowledges that the purpose of the insertion of an SPV was to ensure that the long swap was not inadvertently 'linked' to the OBU business of the bank. The structure is designed to ensure the swaps can be fragmented to different business units of the bank on the basis that each swap is commercially independent of the other.

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6.	The Determination should make it clear that the Australian Resident bank would typically have had positive income. Emphasis is placed on the fact that substantial income could have been derived (after the Fee).	The Determination clarifies the ATO's concern in relation to this issue. The ATO acknowledges that substantial amount was received by the Australian resident bank in agreeing to enter into these arrangements (described as 'fee' income). However, the 'fee' is sourced from the obligation assumed by the Australian Resident company to make a drift adjustment. The drift adjustment is fully funded by the tax benefit obtained through the asymmetric tax structure. In other words, the fee is (for all practical purposes) sourced from the tax benefit obtained from the structure.
7.	The Determination needs to draw distinctions between acceptable and unacceptable drifts. The TD draws the inference through the use 'purports' that the ATO does not accept that the drift does was it purports to do. There is no basis for the ATO's assertion that the drift is commercially unsound – there is no basis in fact or logic. The commerciality of the drift was an important element of the transaction, as these transactions were hedged on an after tax basis, and the drift is designed to create a neutral expectation of profits on either swap. It is not correct to suggest that the drift is commercially unsound. The Commissioner needs to assess and determine what should be an appropriate drift in the circumstances.	The Determination now clearly articulates the basis why the Commissioner does not accept the drift is commercially justified.

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8.	The Determination is a blunt instrument that puts all transactions into the same basket. Just because a possibility exists for it to be uncommercial is no basis to impugn all transactions of a particular type.	The Determination appropriately applies to all transactions which contain the generic features described in the Determination. The Commissioner does not agree that the Determination should be limited to a specific transaction. The features of the arrangement (as outlined in the Determination) are sufficient to assist taxpayers to identify and distinguish the type of transactions that will be caught by the Determination.
9.	The Determination should not have retrospective application - previously ATO view in PBRs was that Part IVA did not apply.	The ATO has never previously expressed a public view on these transactions.
10.	The Determination should not be issued as a final – A ruling must provide sufficient detail and analysis of the transaction. For something like asymmetric swaps it necessitates a more detailed Determination. A Taxpayer Alert may be more appropriate. Recommend that the Determination be withdrawn as it is not up to standard.	The ATO disagrees that the Determination should be withdrawn. The Determination provides further detail and analysis of the transaction to ensure application of Part IVA has been appropriately considered and clearly communicated. The objective of the Determination is to provide taxpayers with certainty as to the Commissioner's approach to applying Part IVA to these types of transactions. Withdrawal of the Determination will create greater uncertainty in the market.