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Ruling Compendium – TD 2011/22

This is a compendium of responses to the issues raised by external parties to draft Tax Determination TD 2011/D2 – Income tax: can Part IVA of the *Income Tax Assessment Act 1936* apply to a scheme designed to convert otherwise assessable interest income into non-assessable non-exempt dividends?

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	A Taxpayer Alert, rather than a Taxation Determination, is the appropriate publication in which the Commissioner is to outline his view policy concern as TD 2011/D2 currently provides no more than a generic list of facts and assumptions that collectively lead to the conclusion that Part IVA applies.	Disagree. The situation in the draft Determination is based on a matter examined by the General Anti Avoidance Rules Panel of the ATO. A Taxation Determination is an appropriate means of communicating the ATO view of how Part IVA applies to the facts in question. A Taxpayer Alert on the other hand would suggest the ATO did not have a concluded view on this issue.
2	It is unclear whether the Commissioner considers the relevant provisions are to have wider application to arrangements involving some, but not all, of the facts and assumptions outlined. If so, it is unclear which features are of most concern to the Commissioner and why. The draft Determination lists approximately 19 features that would collectively cause the Commissioner to conclude that Part IVA should apply to the arrangement then goes on to list only four ‘aspects’ of the current arrangement which, in the Commissioner’s view, supports the conclusion that there are only minimal commercial reasons for the interposition of OffshoreCo within the ownership chain.	The Determination is intended to deal with a particular fact pattern in the circumstances where there are no evident commercial factors for interposing a conduit entity. A conclusion as to whether Part IVA will apply to an arrangement involves a careful weighing of all the facts and circumstances. Judgement is required in assessing each arrangement and the relative importance of individual facts or groups of facts may vary from case to case. The facts of the arrangement in the Determination are all important in that they are used in defining the scheme, the tax benefit and ultimately to determine the dominant purpose. Any change to the facts identified may result in a different scheme, tax benefit or dominant purpose. Each arrangement must be considered on its merits.

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3	The draft Determination fails to acknowledge the policy intended by and application of certain statutory provisions such as sections 23AJ and 449 of the ITAA 1936 and section 25-90 of the ITAA 1997. These policy aspects were not considered by the Commissioner in his conclusion that the dominant purpose of the arrangement was tax driven.	The second reading speech to Income Tax Laws Amendment Bill (No. 2) 1981 sums up the policy behind Part IVA being <i>to give effect to a policy that such measures ought to strike down blatant, artificial or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayer legitimately take advantage of opportunities available for the arrangement of their affairs.</i> The presence of the section 23AJ exemption in the ITAA 1936 does not in itself mean that there cannot exist schemes the entry into which is for the dominant purpose of accessing that exemption (see for example., <i>FC of T v Spotless Services Ltd</i> (1996) 186 CLR 404).
4	The arrangement described in TD 2011/D2 (when compared with the Commissioner's counterfactual) produces a tax detriment to AusCo under the Thin Capitalisation rules contained in Division 820 of the ITAA 1997.	The tax benefit identified in the draft Determination is the amount of interest received by OffshoreCo on the loan to ForCo which was not included in the assessable income of AusCo because of the scheme. The tax benefit identified did not relate to any interest expenses that may have been allowed under section 25-90 of the ITAA 1997 and consequently the tax detriment (or potential tax detriment) under the thin capitalisation rules was not particularly relevant for the Determination.
5	Further guidance should be given on the meaning of 'has not contemplated future lending activities' in paragraphs 6 and 11 of the draft Determination. In particular, what time frame would the ATO look at in assessing whether future lending activities are contemplated and will the ATO seek to invoke Part IVA if a larger 'loan book' does not eventuate within a certain time frame?	The Determination is intended to deal with a particular fact pattern in the circumstances where there are no evident commercial factors for interposing a conduit entity. See further the response to Issue 2.