Australian Government
Australian Taxation Office

Decision impact statement

Mylan Australia Holding Pty Ltd v Commissioner of Taxation (No 2) [2024] FCA 253

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Venue:	Federal Court of Australia
Venue reference No:	VID 770/2021
	VID 526/2022
Judgment date:	20 March 2024

Summary of decision

1. This Decision impact statement outlines the ATO's response to this case. It concerned the application of the general anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936* to a scheme under which Mylan Australia Holding Pty Ltd (MAHPL) claimed deductions for interest incurred on intra-group debt and for consequential carry forward losses. That debt was used to acquire an Australian subsidiary of Merck KgaA (Merck) as part of the Mylan group's acquisition of a pharmaceutical business from Merck. While a tax benefit was identified as having been obtained in connection with a scheme, Part IVA was found *not* to apply as MAHPL had discharged its onus of proving that it could *not* objectively be concluded that the scheme was entered into by a person for the dominant purpose of obtaining a tax benefit.

2. All legislative references in this decision impact statement are to the *Income Tax Assessment Act 1936,* unless otherwise indicated.

3. All judgment references in this Decision impact statement are to the decision of Button J in *Mylan Australia Holding Pty Ltd v Commissioner of Taxation (No 2)* [2024] FCA 253, unless otherwise indicated.

Overview of facts

4. Mylan Inc (Mylan) was the ultimate holding company of the Mylan Group, of which MAHPL, the Applicant in the proceeding, was a member. The Mylan Group carries on a business of pharmaceutical manufacturing.

5. In October 2007, the Mylan Group acquired at a cost of US$7 billion various operating subsidiaries of Merck KgaA which carried on a generics pharmaceutical business (Merck Generics). The acquisition of Merck Generics was pursuant to a share purchase agreement (SPA) which was executed on 12 May 2007. The SPA allowed for Mylan to substitute one of its affiliates to directly acquire the interests in any of Merck's subsidiaries.

6. In September and October 2007, Mylan entered into a Senior Credit Agreement (SCA) with a syndicate of lenders to fund the acquisition. At around the same time, the SPA was amended. These amendments enabled the sale of Merck Generics' subsidiaries in Australia, Canada and France in exchange for promissory notes from members of the Mylan Group prior to Mylan's global acquisition of Merck Generics. The separate sales of the Australian, Canadian and French subsidiaries did not alter the purchase price for the global acquisition.

7. As part of that acquisition, MAHPL and its subsidiary, Mylan Australia Pty Ltd (MAPL), were incorporated, with MAHPL as the head of an Australian tax consolidated group. MAPL purchased the Australian arm of Merck Generics, Alphapharm Pty Ltd (Alphapharm), through a mixture of intragroup interest-bearing debt and equity at a ratio of 3:1. The debt instrument used to fund the purchase of Alphapharm was a promissory note (PN A2) issued by MAPL to a Luxembourg company in the Mylan Group ultimately held by Mylan Bermuda Limited for a principal amount equivalent to 502.5 million euros (approximately A$785 million), with the principal amount to be adjusted to 75% of the value of Alphapharm retroactively applied to the date of the instrument, being 2 October 2007. PN A2 also contemplated that the interest rate attaching to the debt would be determined within 90 days of 2 October 2007. PN A2 was formally amended on 8 January 2010, with the principal increased to A$923,205,336 and the interest rate fixed at 10.15% with retrospective effect from 2 October 2007.

8. The tax consequence of the debt arrangements put in place to fund the acquisition by MAPL of Alphapharm was to entitle MAHPL to interest deductions for the interest paid on PN A2 with the interest payments attracting withholding tax of 10%.

9. The Commissioner made Part IVA determinations denying MAHPL deductions for the interest incurred on the promissory note and consequential carry forward losses. MAHPL appealed to the Court following the disallowance by the Commissioner of its objection to the amended Notices of Assessment for the income years ending 31 December 2009 to 31 December 2020.

Issues decided

10. The Court (Button J) decided that Part IVA did not apply to either of the schemes identified by the Commissioner.

11. The key points from Button J's decision as to the topics of scheme, tax benefit and dominant purpose are discussed in the following paragraphs of this Decision impact statement.

Scheme

12. The Commissioner identified a wider scheme which involved the incorporation of MAHPL and MAPL (that is, the local Australian holding company structure). Had that scheme not been entered into or carried out, the Commissioner contended that Alphapharm would have been acquired as part of the global acquisition and not by MAPL (primary counterfactual).[1] As such, at the Australian level, no debt would have been taken on in connection with the Mylan group's purchase of Alphapharm, and therefore no liability to pay interest would have been incurred in Australia.[2]

13. The Commissioner also identified a narrower scheme focusing instead on the way in which MAPL was financed to acquire Alphapharm. The Commissioner contended that, but for the scheme, while MAPL and MAHPL would still have been incorporated and MAPL would still have borrowed moneys on terms consistent with the SCA to acquire Alphapharm, MAPL would have borrowed a lesser sum, funding the investment instead 54.6% debt and 45.4% equity. The borrowing would have been external (secondary counterfactual) or from a member of the Mylan group (tertiary counterfactual).[3]

14. The debt to equity ratio of 54.6% to 45.4% was the group-wide ratio that was derived at year end in December 2007.[4]

15. There was no dispute that the wider and narrower schemes were 'schemes' for the purposes of Part IVA.[5]

Tax benefit

16. At hearing, MAHPL contended that a 'tax benefit' could only be identified if MAHPL could have foreseen, at the time of entering into the scheme, that the scheme would be more advantageous from a tax perspective than an alternative course of action. MAHPL argued that whether a deduction might be expected not to have been allowable requires

[1] Specifically, Alphapharm would have come into the Mylan group by way of the group's acquisition of Merck Generics Group B.V. (MGGBV, the then Netherlands resident parent company of Alphapharm) via a Mylan company in Luxembourg. Note: consistent with the authorities, her Honour also refers to a counterfactual as an 'alternative postulate'.
[2] At [6] and [222–223].
[3] At [7] and [224–225]. While the secondary and tertiary counterfactuals advanced by the Commissioner initially contemplated that non-interest-bearing loans may have been used rather than equity, this point was not pressed.
[4] At [309].
[5] At [231].

assessment of the expectation at the time of entry into the scheme.[6] The Court did not accept this submission finding that subsection 177C(1) did not require 'the specific advantage gained through entry into the scheme … be anticipated and expected at the time of entry into the scheme' rather the reference to reasonable expectation in subsection 177C(1) 'directs attention to the qualitative likelihood of the prediction put forward as a counterfactual'.[7]

17. The Court rejected the Commissioner's primary counterfactual as not being a reasonable prediction of the events that may have taken place. The Court reached this conclusion for what it described as 'two principal reasons'.[8] The Court considered that equity funding the acquisition of Alphapharm would have inflexibly 'tied up funds … when debt is significantly more flexible than equity and a mix of debt and equity is generally the preferred means of funding subsidiaries'.[9] Furthermore, due to Mylan's expected overall foreign loss (OFL) position in the United States of America (US), it would have been unable to claim any foreign tax credits for income tax paid in Australia, which would have exposed it to a worldwide tax rate of 65% on Australian-generated income.[10]

18. Her Honour rejected the debt to equity split of 54.6% to 45.4% postulated by the Commissioner observing the group gearing after the equity raising could not have been anticipated in October 2007[11] and Mylan's anticipated aggregate acquisition funding mix for the acquisition as a whole, as projected by the MAHPL's experts, was a debt to equity split of 74.8% to 25.2% which was consistent with the funding mix for the Alphapharm acquisition's being a 75% to 25% debt to equity split.[12]

19. The Court observed that[13]:

> … it is open to the court to consider counterfactuals that depart from the precise bounds of the counterfactuals put up by the parties (subject to procedural fairness being afforded to the parties to address any further counterfactual).

20. That is, the Court is not bound by the counterfactuals put forward by the parties.[14] In the event, the Court adopted its own counterfactual as a sufficiently reliable prediction of what would have occurred but for the scheme such as to be reasonable (the 'preferred counterfactual') which was similar to the Commissioner's secondary counterfactual.[15]

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[6] At [241].
[7] At [246].
[8] At [252].
[9] At [252]. Later in her reasons, her Honour remarked on the 'flexibility attendant upon intra-group financing' and how such financing facilitated the evidenced objective of repatriation of cash: at [438–439].
[10] At [252]. See also [264] and [290]. As explained by her Honour at [158], OFL is a US tax law concept that limits the availability of foreign tax credits to be applied against taxable US income. Her Honour also noted at [467] that she did 'not accept that seeking to avoid suffering the consequences of Mylan's substantial OFL is properly to be characterised as a strategy to reduce Australian tax'. See also [560–561].
[11] At [315].
[12] At [311].
[13] At [297].
[14] At [299] leading to the Court adopting the preferred counterfactual at [394–396].
[15] More specifically, her Honour explained at [250]:
> … I do not consider that the primary counterfactual advanced by the Commissioner is a satisfactory counterfactual. There are also elements of the other counterfactuals advanced by the parties that I reject. However, in addressing the principal elements that must be addressed in any counterfactual — debt to equity ratio, and the amount and terms of any borrowing, as well as the identity of the lender — I have arrived at a counterfactual that departs in some respects from the specifics of the counterfactuals put forward by the parties, but does not go beyond the elements that were debated by the parties during the trial.

21. The preferred counterfactual was for an external borrowing in which MAPL would become an additional borrower under the SCA.[16] The features of that counterfactual were[17]:

(i) MAPL would have borrowed [approximately A$785 million (the face value of PN A2)[18]] on 7 year terms under the SCA … at a floating rate consistent with the rates specified in the SCA;

(ii) MAPL would otherwise have been equity funded to the extent necessary to fund the initial purchase of Alphapharm and to stay within the thin capitalisation safe harbour ratio from time to time;

(iii) Mylan would have guaranteed MAPL's borrowing under the SCA;

(iv) Mylan would not have charged MAPL a guarantee fee;

(v) interest on the borrowing would not have been capitalised;

(vi) MAPL would have been required to pay down the principal on a schedule consistent with that specified in the SCA and would have made voluntary repayments to reduce its debt if necessary to stay within the thin capitalisation safe harbour, from time to time;

(vii) MAPL would not have taken out hedges to fix some or all of its interest rate expense;

(viii) MAPL would have taken out cross-currency swaps into AUD at an annual cost of 3.81% per annum over AUD 3 month BBSW [bank bill swap rate]; and

(ix) if MAPL's cashflow was insufficient to meet its interest or principal repayment obligations, Mylan would have had another group company loan MAPL the funds necessary to avoid it defaulting on its obligations, resulting in MAPL owing those funds to that related company lender by way of an intercompany loan, accruing interest at an arm's length rate;

22. Under the preferred counterfactual, the interest rate would not have been fixed, providing the benefit of changed economic conditions that resulted in lower interest rates following the global financial crisis. The debt to equity ratio would remain 3:1, though without a retrospective adjustment to the principal once the final value of Alphapharm was determined. In reaching this conclusion, her Honour took into account the desirability of having as much debt funding as possible within thin capitalisation limits, noting the adverse impacts of the Mylan's OFL position on being able to claim foreign tax credits in respect of any dividends paid.[19] Her Honour also observed that '[t]here was ample evidence to support MAHPL's contention that Mylan's target level of debt related to the acquisition was approximately 75%'[20] and further that[21]:

> The 3:1 gearing ratio that Mylan implemented for MAPL was also supported by the expert evidence [adduced by MAHPL from a financial markets expert and expert in corporate treasury functions] that the funding structure, and the level of debt, were not excessive from a group treasury perspective, and constituted a reasonable funding mix that was broadly consistent with Mylan's anticipated funding mix for the Acquisition as a whole, reflecting Mylan's overall risk appetite.

23. In articulating the preferred counterfactual, her Honour observed that while the posited counterfactual for the purposes of Part IVA cannot be the same as the scheme, it can share features in common with the scheme and identified the amount of debt as one

[16] See also [337].
[17] At [10] and [394].
[18] Compare [338].
[19] At [313].
[20] At [460].
[21] At [462].

such feature in the present case.[22] Importantly, her Honour also observed that she could see no basis on which it could be concluded the preferred counterfactual was itself a Part IVA scheme.[23]

24. Under the preferred counterfactual, MAHPL received a tax benefit in the form of increased deductions of an unquantified amount.[24]

Dominant purpose

25. The Court concluded that MAHPL had discharged its onus of demonstrating that it could not be objectively concluded, having regard to the 8 identified matters in section 177D, that a person had entered into the scheme for the dominant purpose of obtaining a tax benefit.[25]

26. Her Honour explained that[26]:

> The case [had not been] run on the basis that there was any need to examine the conclusions that would be drawn as to the purpose of MAPL, MAHPL or Lux 1 (being the lending entity under PN A2) as distinct from the purpose of Mylan. It was not disputed that the financing and structuring arrangements were decided at the parent company level.

27. Her Honour's reasons therefore focused on the purpose of Mylan.

28. The Court found that MAPL's decision not to refinance to take advantage of falling interest rates weighed in favour of finding that there was a dominant purpose to obtain a tax benefit when considering the manner in which the scheme was carried out.[27] The Court specifically rejected MAHPL's contention that the decision not to refinance was a commercial judgment that is not relevant to Part IVA.[28] However, the Court found that overall, the considerations relevant to the manner in which the scheme was carried out supported finding that there was no requisite dominant tax purpose.[29] The Court notably found that the commercial reasons for funding the acquisition through debt meant that the tracking of the thin capitalisation limits in Australia did not support a finding that there was a dominant purpose to obtain a tax benefit.[30]

29. Of the remaining 7 factors, the Court was satisfied that these were either neutral or weighed against a finding that there was a dominant purpose to obtain a tax benefit.[31]

Observations concerning the operation of Part IVA

30. Having decided the case in the taxpayer's favour, there was no need for the Court to conclude a view on various matters that were raised during the proceeding. Nevertheless, the Court made some observations.

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[22] At [314]. See also [316].
[23] At [401].
[24] At [397]. Her Honour observed at [398] that:
> … if it were necessary to decide the point, I would conclude that the fact that the precise amount of a tax benefit has to be calculated once the Court has determined the relevant counterfactual to be used, does not mean that the taxpayer, for that reason alone, has succeeded in showing that the assessments are excessive and its appeals against the objection decisions should be allowed in full.

[25] At [572].
[26] At [422].
[27] At [517–520].
[28] At [516].
[29] At [531].
[30] At [467–468].
[31] At [572–573].

Need to amend determinations or assessments to give effect to Court's decision on a Part IVA matter

31. The issue was raised during the hearing as to what the Commissioner would have needed to do to give effect to the Court's decision, if the Court were to have found that Part IVA applied but by reference to the secondary or tertiary counterfactuals identified by the Commissioner. Submissions were made as to the effectiveness of the Part IVA determinations made by the Commissioner to cancel the tax benefit. The context in which the issue arose was explained by her Honour[32]:

> Nothing was said in any determination regarding the conceptual basis upon which the Commissioner had determined a tax benefit capable of being disallowed by the exercise of the Commissioner's powers under s 177F(1)(b). Nothing was required to be said about such matters (in particular, the "scheme" identified by the Commissioner, and the counterfactual that was applied in calculating the tax benefit for the determinations). Nevertheless, as it was common ground that the Commissioner's secondary and tertiary counterfactuals were only developed after MAHPL put forward alternatives to the Commissioner's primary counterfactual when the Commissioner was determining MAHPL's objections to the amended assessments, it is clear enough that the Commissioner issued those determinations having devised the primary scheme and having calculated the tax benefit by reference to the primary counterfactual.

32. The question was whether, in that eventuality, the matter would have needed to be remitted to the Commissioner to amend the Part IVA determinations, and indeed whether the Commissioner would have the power to so amend. Her Honour noted that she did not need to decide the issue given her ultimate conclusion that Part IVA was not engaged. Nonetheless, her Honour remarked that it was not 'immediately apparent' to her why section 14ZZQ of the *Taxation Administration Act 1953* would not allow the Commissioner to amend the determinations to give effect to the Court's decision but also added 'if amendment be necessary at all'.[33]

Channel Pastoral issue

33. A further argument emerged in respect of the proposition that Part IVA determinations must be 'consistent, in all material respects, with the postulate upon which that determination is predicated' as per *Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation* [2015] FCAFC 57 (*Channel Pastoral*) at [81].[34] Button J explained that MAHPL had sought to argue that the Part IVA determinations made by the Commissioner failed on this account from the perspective of all of the counterfactuals advanced by the Commissioner.

34. While noting that she did not need to reach a concluded view on this argument, her Honour made 2 observations. The first was that whereas the primary counterfactual postulated that neither MAPL nor MAHPL would have been incorporated, that is not so with the secondary and tertiary counterfactuals.[35]

[32] At [580].
[33] At [592]. Note: there is no suggestion that the Commissioner would not have the power to amend assessments as necessary to give effect to the Court's decision.
[34] At [594].
[35] At [599].

35. Secondly, the Court observed that[36]:

> … to the extent that the determinations were issued on the basis of calculations of the tax benefit which assumed no debt financing of the acquisition of Alphapharm, whereas the secondary and tertiary counterfactuals assumed significant debt financing, it is not obvious that that is an issue of the kind referred to in *Channel Pastoral*, cf being a matter of detail or calculation within the ambit of *Trail Bros* [*Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd* [2010] FCAFC 94].

36. Consistent with the decision in *Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation* [2024] FCAFC 29 at [292], her Honour observed that *Channel Pastoral* does not have the effect of binding the Commissioner to the approach taken in calculating the relevant tax benefit in the determination. Rather, the determinations only disallow deductions in the stated amounts. The determinations themselves do not incorporate by reference the detail of the analytical path taken by which those amounts have been identified by the Commissioner as tax benefits liable to be disallowed in accordance with Part IVA.[37]

37. Her Honour concluded this aspect of her reasons with the remark that[38]:

> While there are cases — *Channel Pastoral* is one such case — where the assessment has no coherent relationship with the anterior determination, I am not persuaded that this is such a case, insofar as the secondary and tertiary counterfactuals (and any variations of them) are concerned.

ATO view of this decision

38. We observe that the scheme in this case predates the introduction of section 177CB (that is, this matter was determined under the old Part IVA[39]). This case was thus decided against the background of the case law that determined that identification of an alternative postulate of what would have happened but for a scheme invites an enquiry into what is the most probable counterfactual, rather than simply what is a reasonable counterfactual.[40] Further, paragraph 177CB(4)(b) now requires the Court to disregard the tax implications under Australian income tax law when determining a reasonable counterfactual. Whether the same result would have followed had this case fallen for consideration under the new Part IVA[41] is an open question.

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[36] At [600].
[37] At [602–603].
[38] At [603].
[39] Part IVA as it was prior to the amendments effected by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profits Shifting) Act 2013*.
[40] *RCI Pty Limited v Commissioner of Taxation* [2011] FCAFC 104. Compare this with paragraph 1.85 of the Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profits Shifting) Bill 2013 that states:

> A decision that a tax effect 'might reasonably be expected to have' occurred if a scheme had not been entered into or carried out must be made on the basis of a postulate that is a reasonable alternative to the scheme.

Thus, subsection 177CB(3) now specifies that a 'decision that a tax effect might reasonably be expected to have occurred if the scheme had not been entered into or carried out must be based on a postulate that is a reasonable alternative to entering into or carrying out the scheme'. In determining whether a postulate is a reasonable alternative, paragraph 177CB(4)(a) requires 'particular regard' to be had to the substance of the scheme. The amendments made by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profits Shifting) Act 2013* apply to all schemes except schemes that were entered into, or that were commenced to be carried out, on or before 15 November 2012 (see Item 10 of Schedule 1 to that Act).
[41] Part IVA as it is after the amendments effected by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profits Shifting) Act 2013*.

39. This decision does not disturb our view that, depending on the relevant facts and circumstances, Part IVA may apply to 'debt push-down' schemes[41A].

40. While the Court found that Part IVA did not apply, that conclusion was reached against the background of important findings of fact on a variety of issues including those highlighted in the following points.

- The arrangement was part of a global acquisition by the Mylan group notable for its size. As observed by her Honour[42]:

  > I accept that, as MAHPL submitted, the acquisition of the Merck Generics group was an "enormous and highly geared global acquisition for the Mylan Group".
  >
  > … the Mylan group pre-acquisition was dwarfed by the scale of the Mylan group post-acquisition.

- There was a demonstrated need to be able to repatriate funds from Australia to the US to allow the overseas parent to satisfy its own financial obligations.[43]

- The tax consequences of an inability of the Mylan group to offset foreign tax credits for tax paid in Australia against US tax as a function of the US OFL rules was 'so extreme as to be intolerable'.[44] While accepting that the 100% equity counterfactual was straightforward and simple, her Honour remarked it was 'inconceivable that Mylan would have been willing to accept the significant downsides of the 100% equity scenario for the acquisition of Alphapharm for the sake of simplicity'.[45] Put differently, given Mylan's OFL position 'the effects of 100% equity funding would have been unacceptable to Mylan'.[46]

- As her Honour observed, it was[47]:

  > … clear from the evidence that, when Mylan considered having local acquisition entities take on debt to acquire relevant Merck subsidiaries, the debt level it projected tracked the applicable thin capitalisation limits in various jurisdictions

  Further[48]:

  > … given the inability to claim foreign tax credits given its OFL position, there is no reason to think that, had it not proceeded with either of the secondary or tertiary schemes, Mylan would have had MAPL take on less debt than in fact it did take on.

[41A] As described by her Honour at [39], the Commissioner had characterised the scheme in this case as involving a debt pushdown, namely creation of intercompany debt at the MAPL level.

[42] At [433–434].

[43] See at [265] where her Honour accepted that as at October 2007 'it was expected that funds would need to be repatriated to service and reduce the very substantial external debt assumed under the SCA' (see also [288]) and, at [270], that '[t]he Commissioner's contention that there was no intention to repatriate free cash flow is not consistent with the basis upon which the experts … proceeded'. See also at [438] where her Honour observed there was substantial evidence to support the contention that repatriation of cash was a commercial objective and [286] where her Honour remarked that:

> The terms of the SCA, and the terms sheets that preceded execution of the formal agreement, support a conclusion that Mylan did in fact intend to remit substantial free cash flow to service its debt and reduce its leverage.

[44] At [290].

[45] At [257].

[46] At [296].

[47] At [312].

[48] At [313].

- As her Honour additionally observed[49]:

> … It is not surprising that Mylan, as the parent company of a group with global treasury functions, would not be concerned to closely analyse the debt carrying capacity of a holding company subsidiary such as MAPL.

41. While it was the case that the original SPA provided for Mylan as purchaser to acquire 5 target entities including Merck Generics Group B.V. (MGGBV), her Honour found that[50]:

> … the evidence is overwhelming that there was no intention for the final acquisition structure to be simply constituted by Mylan acquiring [those] entities. …
>
> The structure provided for by the original SPA is readily explained by the fact that Mylan's advisers recognised that there would be "no time to come up with a fully agreed upon acquisition structure" by the time the original SPA was signed …
>
> … it was always on the cards that the acquisition structure would be settled after the original SPA was signed.

42. Also critical to the decision of the Court was the evidence of the various experts adduced by the parties and their agreement on key points[50A], in particular that:

- Mylan subsidiaries were expected to distribute available cash to Mylan and that such cash distributions were essential to Mylan meeting its debt service obligations.[51]
- What was actually done was a far superior outcome for Mylan when compared with all of the 3 counterfactuals proposed by the Commissioner.[52]
- An international company such as Mylan would commonly manage its currency risk in a centralised manner at the group or treasury level (and not at the level of operating subsidiaries).[53]
- If MAPL were to borrow externally, its borrowing would be supported by a guarantee from Mylan, such that MAPL could borrow at an interest rate reflecting Mylan's credit rating.[54]
- Intra-group financing brings with it attendant flexibility contrasting with equity financing.[55]

Part IVA and transfer pricing

43. The Court confirmed that whether or not the Commissioner pursues a transfer pricing case in a particular matter, the Commissioner is not precluded, where appropriate, from making submissions about an interest rate being excessive as part of a case under Part IVA. This is because the excessiveness of an interest rate can be a factor that falls into the consideration when assessing purpose under section 177D.[56] An excessive interest rate may also be relevant when considering whether there is a reasonable alternative postulate to the scheme under section 177CB.

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[49] At [474].
[50] At [258–260] and [442].
[50A] Only limited lay evidence was led by MAHPL; the factual dimensions of the case were entirely documentary: at [12] and [34].
[51] At [270].
[52] At [296].
[53] At [306] and [370].
[54] As her Honour observed at [307], this point was assumed by the relevant experts in giving their evidence on the quantum of the debt.
[55] At [439].
[56] At [506].

44. We will consider on a case by case basis whether to pursue either, or both, a transfer pricing case and Part IVA case in challenging a debt push-down scheme. The considerations relevant to the application of the transfer pricing provisions in Subdivision 815-B of the *Income Tax Assessment Act 1997* are economically-based and invite different considerations to the analysis demanded by Part IVA.

Other matters

45. Her Honour remarked at [410] that:

> It is accepted on the authorities that tax is a cost and it is rational for a taxpayer to take into account total costs (including taxation costs) in deciding how to proceed …

46. We observe that under the new Part IVA, the Australian income tax law consequences of a counterfactual for any person are to be ignored in considering the reasonableness of that counterfactual.[57] Her Honour also remarked that it follows that 'where a particular commercial transaction is chosen from a number of alternative courses of action because of the tax benefit associated with its adoption'[58] that will not 'of itself' expose a dominant tax purpose. The Commissioner agrees this is a correct formulation of the test.[58A] Whether there is something more that bespeaks a dominant tax purpose requires a close and careful examination of the facts.

47. We also note the remarks by the Court regarding the administrative complexity associated with the payment of dividends to shareholders that is magnified where dividends flow through a multi-level structure.[59] We observe that the significance to be attached to this observation in any particular case will vary from case to case and, in particular cases, may assume little weight.

48. Having regard to the facts and circumstances of the case, we will continue to present arguments as to the appropriate split between debt and equity in identification of a reasonable alternative postulate of what might be expected to have been done but for the scheme.

Implications for affected advice or guidance

49. We are reviewing the impact of this decision on related advice or guidance, including Law Administration Practice Statement PS LA 2005/24 *Application of General Anti-Avoidance Rules* which provides guidance to tax officers who are contemplating the application of Part IVA or other general anti-avoidance rules to an arrangement.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

> Contact officer details have been removed as the comments period has ended.

Commissioner of Taxation
28 February 2025

[57] Refer paragraph 177CB(4)(b).
[58] At [410].
[58A] See also *Commissioner of Taxation v Hart* [2004] HCA 26 at [3] and [15], per Gleeson CJ and McHugh J.
[59] At [438] and [524]. These comments were made in this case in the context of contrasting the scheme entered into, which contained significant debt funding, with a possible counterfactual involving only equity funding.

Amendment history

9 May 2025

Part	Comment
Paragraphs 8, 10, 13, 16, 18, 20, 21, 23, 30, 32, 38, 43, 46 and 48	Wording clarified.
Footnotes 1, 40 and 59	Additions made to footnotes to provide additional context.
Footnote 41A, 50A and 58A	Case citations added to support positions stated.

References

Legislative references:

- ITAA 1997 Subdiv 815-B
- ITAA 1936 Pt IVA
- ITAA 1936 177C(1)
- ITAA 1936 177CB
- ITAA 1936 177CB(4)
- ITAA 1936 177CB(4)(b)
- ITAA 1936 177D
- ITAA 1936 177F(1)(b)
- TAA 1953 14ZZQ
- Tax Laws Amendment (Countering Tax Avoidance and Multinational Profits Shifting) Act 2013

Cases relied on:

- Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation [2015] FCAFC 57; 232 FCR 162; 2015 ATC 20-503; 321 ALR 261
- Commissioner of Taxation v Hart [2004] HCA 26
- Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd [2010] FCAFC 94; 186 FCR 410; 2010 ATC 20-198; 79 ATR 780
- Mylan Australia Holding Pty Ltd v Commissioner of Taxation (No 2) [2024] FCA 253; 2024 ATC 20-900; 118 ATR 460
- RCI Pty Limited v Commissioner of Taxation [2011] FCAFC 104; ATC 20-275; 84 ATR 785
- Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation [2024] FCAFC 29; 302 FCR 192; 2022 ATC 20-897; 118 ATR 323

Other references:

- PS LA 2005/24
- Explanatory Memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profits Shifting) Bill 2013

ATO references

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