SENATE ECONOMICS LEGISLATION COMMITTEE

TREASURY LAWS AMENDMENT (MAKING MULTINATIONALS PAY THEIR FAIR SHARE-INTEGRITY AND TRANSPARENCY) BILL 2023 [PROVISIONS]

ANSWERS TO QUESTIONS ON NOTICE

Agency: Australian Taxation Office
Topic: Cases before court
Senator: Senator Smith

Question:

Mr Kelly: Certainly. I think Mr Robinson spoke to this in an earlier part of his testimony. I will amplify the points Mr Robinson made around the OECD's recommended approach for interest limitation rules needing to have some targeted rules around specific risks associated with base erosion and profit shifting. Certainly the debt creation rules, in our view, fall within those parameters.
There is clearly, as I think Mr Robinson referred to earlier, when you have an earnings base test the opportunity with the fluctuation in earnings for debt creation to take place in a way that does increase deductions. I think in very broad terms that's the integrity risk that the debt creation rules are designed to address. Mr Manley might like to expand a little further on that, but it really does go to the point that, with the earnings base test as the basis now for I guess the proposed thin capitalisation regime under the proposal, that would be the risk that we're trying to address.

Mr Manley: The only thing I would add to that is that we are aware of views in the tax advisor community that the absence of the debt creation laws since 2001 actually allowed for debt creation schemes to take place in a way that we can't otherwise address without these rules, so there's evidence of it in the past.

Senator DEAN SMITH: Are there any matters before the courts that would demonstrate the point you've just made?

Mr Kelly: I'm certainly not aware of any, Senator Smith. I'm not sure whether Mr Manley is.

Mr Manley: I'd have to take that on notice. I believe there are, but I'll have to double-check.

Senator DEAN SMITH: If you could identify what they are, that would be—

Mr Manley: There may also be decided cases rather than cases before the courts.

Answer:

Examples of facts in decided cases that may be covered by the debt deduction creation rules include:

- *Singapore Telecom Australia Investments Pty Ltd v FC of T* 2021 ATC 20-811, which effectively involved vendor financing from an offshore related party for the purchase by an Australian entity of all of the shares in another related entity (case under appeal);

- *News Australia Holdings Pty Ltd v FCT* [2017] FCA 645, where a parent company borrowed funds from an offshore subsidiary to buy shares in that subsidiary;

- *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)* [2015] FCA 1092, where related party debt was partly used to finance the repayment of pre-existing related party debt;

- *Orica Limited v FCT* [2015] FCA 1399; 2015 ATC 20-547, which involved related party debt being used to fund payments to an offshore related party who in turn provided those funds back to other Australian members of the group;

- *FC of T v Consolidated Press Holdings Limited* (1999) 42 ATR 575, where funds were borrowed from an associate to purchase shares in an associate that did not produce foreign-sourced income;

- *FC of T v Total Holdings (Aust) Pty Ltd* (1979) 79 ATC 4279,9 ATR 885, where funds were borrowed from a parent to provide interest-free loans to an associate;

The Orica arrangement commenced in 2002 – one year after the former Division 16G of the Income Tax Assessment Act 1936 was repealed. The opportunity for entities to create debt after the repeal of former Division 16G was explicitly recognised by tax advisors at that time.

It also should be noted that while the general anti-avoidance rule in Part IVA of the ITAA 1936 can apply and in some cases have applied to such transactions, Part IVA is a provision of last resort and is not suited to addressing specific areas of tax minimisation considered undesirable from a policy perspective.

Further, the Commissioner's discretion to apply Part IVA is subject to significant internal governance and assurance procedures. For this and other reasons, preparing and running Part IVA cases is highly resource-intensive for both the ATO and taxpayers.