

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

16 February 2012

Question No: AET 21

Topic: TPG – measures directed at closing down tax structure

Hansard Page: 91

Senator CAMERON: I have run out of time, so I will put some questions on notice for you. Has the ATO made any rulings that are directed to closing down the type of tax structure that was employed by TPG in relation to its Myer asset?

Mr D'Ascenzo: The answer is yes.

Senator CAMERON: Please give us details of that on notice. Other than ATO rulings, which presumably are challengeable in court, what other measures are available to close down the loophole through which TPG passed?

Answer:

The ATO has issued four determinations which refer to private equity transactions and structures:

- TD 2010/21 *Income tax: treaty shopping - can Part IVA of the Income Tax Assessment Act 1936 apply to arrangements designed to alter the intended effect of Australia's International Tax Agreements network?*

This determination sets out the Commissioner's view that profits realised on the sale of shares acquired in a leveraged buyout can constitute the 'ordinary' assessable income of the vendor - rather than a capital gain.

- TD 2011/24 *Income tax: is an 'Australian source' in subsection 6-5(3) of the Income Tax Assessment Act 1997 dependent solely on where purchase and sale contracts are executed in respect of the sale of shares in an Australian corporate group acquired in a leveraged buyout by a private equity fund?*

This determination explains the Commissioner's view that attributing a 'source' to private equity profits requires consideration of all relevant facts and circumstances – not just the place where purchase and sale contracts are executed. Where the activities which add value are undertaken in Australia, the gains realised should be attributed an Australian source.

- TD 2011/25 *Income tax: does the business profits article (Article 7) of Australia's tax treaties apply to Australian sourced business profits of a foreign limited partnership (LP) where the LP is treated as fiscally transparent in a country with which Australia has entered into a tax treaty (tax treaty country) and the partners in the LP are residents of that tax treaty country?*

This determination explains that tax treaties can 'exempt' Australian sourced profits from Australian tax where an investment is held by 'fiscally transparent' partnership and the partners are residents of a tax treaty country and subject to the tax laws of that country.

- TD 2010/20 *Income tax: treaty shopping - can Part IVA of the Income Tax Assessment Act 1936 apply to arrangements designed to alter the intended effect of Australia's International Tax Agreements network?*

This determination states the Commissioner's view that Australia's general anti-avoidance provisions do apply to treaty shopping arrangements which are designed to alter the intended effect of Australia's tax treaties – such as ensuring that Australian investments are held by a treaty country resident on behalf of a non-treaty country resident.

The Compliance program 2011-12 states the ATO's intention to publicise and reinforce its position on private equity by conducting risk reviews and, where necessary, audits.