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Tax benefits, Part IVA and treaty tourism – evaluating the ATO’s assault on foreign private equity – *Tim Russell*

Since the Australian Taxation Office (ATO) first sought to embargo the expatriation of profits arising from the sale of the Myer Group in November 2009, it has issued four taxation determinations (TDs) setting out its justification for seeking to impugn offshore investment structures which enable syndicates of foreign “private equity” investors to acquire and dispose of Australian businesses without local taxation being levied on the gains. TD 2010/20 asserts that these investment structures constitute “treaty shopping” and possess the necessary features which entitle the Commissioner to make a determination under s 177F of Pt IVA of the Income Tax Assessment Act 1936 (Cth) cancelling any “tax benefits” generated. This article argues that the ATO has selectively overlooked several of the commercial motivations underpinning the choice of foreign private equity investment structures. The article then proceeds to position the phenomenon of treaty shopping as a practical lens through which to study recent Pt IVA decisions of the Federal Court which set forth the developing judicial algorithm for identifying s 177C tax benefits as well as fresh interpretive principles for applying the statutory anti-avoidance test more generally. It is demonstrated that private equity structures of the sort identified in TD 2010/20 should survive a Pt IVA attack by the ATO on the basis that neither s 177C nor s 177D will be satisfied. In light of recently announced legislative changes, the practicality of the s 177C test in delineating “tax benefits” is further explored. 62

The capital gains tax implications of buy-sell agreements – *Sylvia Villios, Domenic Carbone, John Tretola and Pasqualina Callea*

There are a number of capital gains tax (CGT) consequences that arise at the time an entity enters into a buy-sell agreement (BSA) and at the time an entity (which may not be the same entity) exercises an option under the BSA. There has been considerable uncertainty in relation to the CGT implications of BSAs, in particular those which are funded through insurance policies held by a trustee on behalf of the business owners as beneficiaries. In response to this uncertainty, the Commissioner of Taxation released Product Ruling (PR) 2010/18 on 1 September 2010, which discusses the application of the CGT consequences under certain BSAs. Unfortunately, there are numerous CGT consequences that arise in this context that were not discussed in PR 2010/18 and have not been discussed in any previous rulings. The Australian Taxation Office’s (ATO) position is that guidance concerning BSAs is best provided on a case by case basis by way of Product Rulings. However, this article contends that such an approach is unworkable and undesirable, and in order to clarify the range of CGT issues surrounding BSAs, and in particular those with put and call options which are funded through insurance policies, the ATO must issue a general ruling addressing these issues. 100

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