Minerva Financial Group Pty Ltd v Commissioner of Taxation -

Decision impact statement

Minerva Financial Group Pty Ltd v Commissioner of Taxation

Court citations:	[2024] FCAFC 28 [2022] FCA 1092
Venues:	Full Federal Court of Australia Federal Court of Australia
Venue reference nos:	VID 662/2022 VID 446/2020
Judge names:	Besanko, Colvin and Hespe JJ O'Callaghan J
Judgment dates:	8 March 2024 16 September 2022
Appeals on foot:	No
Decision outcome:	Unfavourable to the Commissioner

Impacted advice

This decision has no impact on any related advice or guidance.

Summary

This Decision impact statement outlines the ATO's response to this decision, which concerns whether the general anti-avoidance rules contained in Part IVA of the *Income Tax Assessment Act 1936* applied to a 'second scheme' and a 'third scheme' under which Minerva Financial Group Pty Ltd (Minerva) had received a tax benefit. The tax benefit was income that would otherwise have been assessable to Minerva but was instead distributed to its non-resident parent.

As the Full Court commented, the 'true gist' of the 2 schemes to which Part IVA was found to apply at first instance was Minerva's failure to exercise its discretion as trustee of a unit trust to make distributions to the holder of special units in the unit trust.

All legislative references in this Decision impact statement are to the *Income Tax Assessment Act 1936*.

Brief summary of facts

Minerva is a member of a group of companies and trusts known as the Liberty Group that carries on business as a non-bank lender.

The Liberty Group raised funds for its lending business through a process called securitisation, which involved the establishment of special purpose 'securitisation trusts'. The trustee of the securitisation trusts issued notes to third-party investors

(noteholders) and issued units to a Liberty Group entity in the form of a residual income unit (RIU) and a residual capital unit (RCU).

Prior to 2007, Liberty Financial Pty Ltd (LF), the main operating entity of the Liberty Group, was the holder of the RIUs and RCUs in the securitisation trusts. Accordingly, LF was entitled to receive the 'residual income' of each securitisation trust. This was the income left after interest was paid to noteholders and other expenses were paid.

In 2007, in anticipation of conducting an initial public offering (IPO) of 'stapled securities', the Liberty Group restructured itself into what the primary judge referred to as a 'trust silo' and a 'corporate silo'. The stapled securities were to consist of a share in Minerva, which would hold the group's active assets (the corporate silo) and a unit in the Minerva Financial Group Trust (MFGT), which would hold the group's passive financial assets (the trust silo).

Although the IPO did not proceed at the time, the Liberty Group implemented a restructure broadly consistent with its plan for an IPO. From 15 April 2008, the RIUs and RCUs in any new special purpose trust established as part of the securitisation process were issued to a newly settled holding trust, Minerva Holding Trust (MHT). As a result, residual income derived from these new securitisation trusts were distributed to MHT, and not to LF.

MHT, in turn, made distributions to its unit holders. Most of MHT's distributions were made to MFGT, which was the ordinary unit holder. MHT made nominal distributions to LF, which was a special unit holder.

The holder of all units in MFGT was the parent of the Liberty Group, being Jupiter Holdings BV (Jupiter) up to 12 April 2013 and, thereafter, Vesta Funding BV (Vesta), both incorporated in, and tax residents of, the Netherlands.

The taxation consequence of the distributions from the trust silo going to MFGT's non-resident unitholder, rather than to LF, was that the distributions were subject to a withholding tax of 10% rather than the corporate tax rate of 30%.

The Commissioner made Part IVA determinations to include in Minerva's assessable income in each of the relevant years an amount equal to the income distributed to MFGT, being income that would have been included in Minerva's assessable income if the income had been distributed to LF, a subsidiary member of the tax consolidated group of which Minerva was the head company.

This case was Minerva's appeal to the Full Federal Court against O'Callaghan J's decision in *Minerva Financial Group Pty Ltd v Commissioner of Taxation* [2022] FCA 1092.

Issues decided by the Court

Whether Part IVA applied to the schemes identified by the Commissioner

The Full Federal Court held that Part IVA did not apply to the schemes identified by the Commissioner.

The key points from the Full Federal Court's decision are as follows.

Tax benefit

It was not disputed that Minerva obtained a tax benefit as defined in section 177C in each of the relevant years in respect of each of the schemes.

Dominant purpose

The dispute centred on whether it would be concluded, having regard to the 8 factors set out in section 177D, that a person or any one of the persons who entered into or carried out the scheme, or any part of it, did so for the dominant purpose of securing the tax benefit.

The Commissioner relied on 3 alternative schemes in support of the Part IVA determinations. The first scheme related to the establishment of the trust silo in April 2008 with MHT being nominated as the RIU holder and the distribution of residual income from the securitisation trusts to MHT. At first instance, the primary judge held that Part IVA did not apply to the first scheme and concluded on the evidence that the restructure was undertaken for the dominant purpose of facilitating an IPO of stapled securities. The Commissioner did not appeal this finding.

Minerva's appeal concerned whether Part IVA applied to the second and third schemes under which Minerva had received a tax benefit. At first instance, the primary judge found that because the trustee did not proffer a commercial reason why MHT only distributed nominal amounts of income to the special unitholders, both the manner in which the schemes were carried out and the timing of the schemes were indicative of the dominant purpose of obtaining a tax benefit. The remaining factors were considered by the primary judge to be neutral.

On appeal, the Full Court decided that the finding of objective purpose required by section 177D could not be reached. A person's subjective understanding of a commercial reason or motive does not answer the question posited by Part IVA.

The default position under the terms of the MHT constitution was for distributable income to be distributed to the ordinary unitholders such that there was nothing extraordinary about distributions flowing in accordance with the terms of the trust constitution. The objective facts were that special unitholders had no entitlement to the income of MHT absent the exercise of the discretion available under the trust constitution. This conclusion was also supported by the commercial context of the restructured business, and in particular the changes to LF's role in that business.

The Full Court found that the same commercial outcome for the parties would not have been achieved had distributions been made instead to LF. The distribution of income to Jupiter and Vesta had real economic and financial consequences to them that would not have flowed had the income been distributed to LF. The Full Court relied upon these facts in finding that the fourth factor was neutral and that the sixth factor pointed away from a party having the requisite dominant purpose.

ATO view of decision

While the Full Court found that Part IVA did not apply, it did so on the basis of a conclusion of the particular facts in this case of a non-bank lender with an 'IPO ready' business structure. Accordingly, we do not consider this decision as having any impact on the Commissioner's current advice and guidance.

The decision does not disturb the Commissioner's long-held view that schemes which include a trustee's exercise of discretion to distribute income can attract the operation of Part IVA. Further, whether Part IVA will apply to such a scheme will not be answered by the trustee's evidence of their purpose. It will depend on a consideration of the 8 factors collectively applied to the objective facts, to ascertain whether a party to the scheme had the requisite objective purpose that the taxpayer would obtain a tax benefit.

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.

Date issued:	29 May 2024
Due date:	28 June 2024
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Legislative references

ITAA 1936 177C
ITAA 1936 177D
ITAA 1936 Part IVA

Case references

Minerva Financial Group Pty Ltd v Commissioner of Taxation [2024] FCAFC 28; 2024 ATC 20-896

Minerva Financial Group Pty Ltd v Commissioner of Taxation [2022] FCA 1092; 2022 ATC 20-839

ATO references

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