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Global Tax Alert

Australian taxation of exit gains made by offshore funds – RCF IV special leave to appeal denied

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The Australian High Court has denied the taxpayer special leave to appeal the Full Federal Court (FFC)'s April 2019 decision in *RCF IV LP v Commissioner of Taxation* [2019] FCAFC 51 (See EY Global Tax Alert, *Australia: Taxation of exit gains made by offshore funds – RCF IV appeal*, dated 5 April 2019 for key FFC findings). The taxpayer had divested shares in Talison Lithium Limited, and the case concerned the application of treaty benefits to the limited partners (LPs) invested through a fiscally transparent offshore corporate limited partnership (CLP), and the application of the nonresident capital gains tax regime (Division 855 of the *Income Tax Assessment Act 1997* (Cth)) to the disposal in circumstances where much of the value of the shares sold related to interests in Australian mining rights.

In dismissing the applications with costs, Keane and Gordon JJ found that there was no reason to doubt the correctness of the FFC's decision, and that the applications were not suitable vehicles for the resolution of any question of principle in relation to Division 855.

In relation to the application of treaty benefits to LPs invested into Australian assets through offshore CLPs (as is very common in the funds management industry), the FFC decision was somewhat equivocal as to whether Taxation Determination TD 2011/25 (the Ruling) was correct at law in allowing an offshore CLP itself to rely on treaty benefits (as opposed to the LPs in the CLP).

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The FFC confirmed that RCF IV and V were entitled to rely on the Ruling, as the Australian tax law provides that the Commissioner of Taxation (the Commissioner) is bound by a ruling that applies to a taxpayer and upon which that taxpayer has relied.

In denying the taxpayer special leave to appeal, we are no closer to the High Court providing guidance on how it is appropriate under Australian domestic law to treat foreign treaty-qualified LPs in an offshore fiscally transparent CLP as being eligible to rely on treaty benefits, otherwise than by relying on the Ruling. At present, it would appear that the only way in which Australian domestic law is able to adequately address the accepted Organisation for Economic Co-operation and Development principles relating to the availability of treaty benefits through offshore fiscally transparent CLPs is by binding the Commissioner to his conclusions in the Ruling.

Retention of the Ruling appears to remain sensible administrative practice, as it seems to be inefficient to collect Australian income tax from an offshore CLP only for the LPs to seek to recover a refund of their proportionate share of the Australian tax assessed on the CLP. It is perhaps the case that a legislative fix is needed to clarify the issue. One possible legislative fix might be for Division 5A of the *Income Tax Assessment Act 1936* (Cth), which treats CLPs (regardless of their place of tax residency) as though they were corporations for Australian income tax purposes, to be amended so as to only apply to Australian tax resident CLPs, but with a provision requiring the general partner of the CLP to file a return in Australia, and be responsible for the collection of appropriate Australian taxes by way of withholding.

EY continues to liaise with the Australian Taxation Office in relation to clarification of these matters.

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