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The Problem With Prediction In Transfer Pricing

By **Matthew Frank** (October 23, 2018, 3:22 PM EDT)

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In April 2017, the Federal Court of Australia decided the high profile case of Chevron Australia Holdings v. Commissioner,[1] ruling in favor of the commissioner and disallowing the equivalent of approximately $500 million in deductions for interest paid by an Australian borrower to its affiliated U.S. lender. The court found that the interest rate on the intercompany loan was too high under the arm's length standard.

The theme of this article is that the Chevron court put too much focus on its conjecture of how the taxpayer would have behaved at arm's length, customizing transfer pricing standards to the taxpayer rather than applying a more general market-based standard. This focus makes transfer pricing enforcement more subjective, hence less predictable, and requires taxpayers to take steps to protect themselves in Australia and elsewhere in the event the Chevron court's approach is adopted by courts or tax authorities in other countries.[2]

The first part of this article provides a quick summary of the facts and proceedings. The rest of the article discusses novel aspects of the decision, identifies the key takeaways, and suggests steps for taxpayers to consider.

The Facts

The fact pattern is a common one: A company makes a high interest rate unsecured loan to an affiliate and urges that the law (applying the arm's length standard) requires that the loan be priced: as if the borrower were a stand-alone entity, not a member of a controlled group, and on the terms as structured, namely, as an unsecured loan.

The borrower was Chevron Australia Holdings Pty Ltd., an Australian company.[3] The lender was Chevron Texaco Funding Corporation, a U.S. company and a subsidiary of the Australian borrower. The loan was made under a Credit Facility Agreement dated June 6, 2003, with a five-year term and a maturity date of June 30, 2008. The interest rate was a floating rate based on one-month Australian dollar Libor plus 4.14 percent, which translated to about 9 percent.[4] The U.S. affiliate lender raised the funds in the U.S. commercial paper market at a rate of 1.2 percent relying on a guarantee (for which it paid no fee) from its AA credit rated ultimate U.S. parent. No security or covenants were supplied by the Australian borrower for the intercompany loan. During the course of 2003, the Australian borrower drew about $2.45 billion from the credit facility.

The tax years before the Chevron court were the five years ending on Dec. 31, 2003, to 2007. The Australian Tax Office issued assessments in 2010 for all five years, producing transfer pricing adjustments that likely totaled about $500 million.[5]

The Proceedings and the Decision

Trial Court

At trial in 2015, the taxpayer adduced testimony that the Australian borrower would have had a low credit rating in the marketplace and, accordingly, would have paid a high rate of interest at arm's length to borrow $2.45 billion of unsecured debt. Part of this argument was based on the taxpayer's view that the arm's length standard requires the credit standing of a borrower to be assessed on a

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so-called stand-alone basis, without regard to its affiliations. The taxpayer also argued that the transfer pricing inquiry had to respect the transaction as structured, namely, as an unsecured loan.

The trial court rejected both taxpayer arguments. Regarding the former, it ruled that the arm's length standard requires only that the parties to the transaction be viewed as unrelated to each other, not that they be viewed as unrelated to the group of which they are a part.[6] Regarding the latter, the trial court found that if the transaction had involved parties dealing at arm's length, "the borrower would have given … security and operational and financial covenants and the interest rate, as a consequence, would have been lower."[7] The court's opinion, at 92,858 words (longer than either of the first two Harry Potter books), made no finding regarding the type of security or covenants that would have been given or their impact on the interest rate, for example, whether they would have reduced the interest rate by five basis points or by 500. The court simply found that security or covenants of some kind would have been given to achieve a lower interest rate and that the taxpayer failed to show the ATO's adjustments were excessive.[8] The taxpayer appealed.

Appellate Court

The court of appeals in its 2017 decision made short work of the stand-alone argument, affirming the lower court's ruling that the arm's length standard requires one to consider the borrower as it is, affiliations and all, just as a third-party lender would and not as a stand-alone entity that has been stripped of its affiliations.[9] This conclusion affirmed the longstanding position of the ATO and is the same conclusion reached in Canada by the Tax Court and Federal Court of Appeal.[10] The conclusion, moreover, has been expressly adopted by the Organization for Economic Cooperation and Development, which addressed the issue in its July 2013 discussion draft on intangibles and in its final 2017 guidelines at paragraphs 1.164-1.167, and again in its 2018 discussion draft on financial transactions. The Chevron court's conclusion on this point was neither novel nor surprising (nor did it affect the outcome of the case because while the appellate court agreed with the ATO that affiliation had to be considered, it accepted the trial court's finding that the Australian borrower's affiliations would not have mattered to lenders at arm's length).[11]

The novel part of the decision is how the court addressed the second issue, concerning whether to respect the unsecured nature of the loan.

The taxpayer argument on this point was straightforward: To price a loan, you need to consider the terms of the transaction — the amount of the loan, the loan's length to maturity, the creditworthiness of the borrower and the presence or absence of covenants or other forms of security. Here, no security was provided for the loan and, at arm's length, this would make the loan more expensive. [12] The taxpayer argued this fact must be taken into account.

In other cases addressing the issue, the counterargument has normally been that posting security would have been a pointless formality. The lender and borrower are part of the same controlled group, giving the lender (or its parent) a degree of control over the borrower's property that is equivalent to a pledge of security so it is appropriate to impute to the lender the protections a third party would have enjoyed through such a pledge.[13]

The Chevron court ruled that the loan must be priced as if security had been pledged but it did not reach this conclusion on the grounds that the lender's group effectively controlled the borrower and thereby had the equivalent of a pledge. Rather, the court based its ruling on its conjecture of how the transaction would have occurred with a third party. The court said:

- The controlled group had a policy of raising funds from third parties at "the lowest cost of funding to the group;"[14]
- The controlled group had in the past, consistent with its policy, provided "a guarantee from its ultimate American parent" to support an affiliate's borrowing in the market;[15]
- There was no reason to expect the taxpayer to depart from its practice in this case because there was no commercial or operational reason for it not to provide security for the loan;[16]
- It is therefore reasonably likely or perhaps certain that if this borrower had borrowed from a

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third party, the parent would have provided security in support of the borrowing,[17] which the chief justice indicated would have taken the form of a guarantee;[18]

- Therefore, this loan should be priced as if the parent had provided security.[19]

The court's decision was seemingly animated by its belief that the taxpayer structured the terms of its intercompany loan to achieve a tax advantage[20] or at least by its belief that a ruling in favor of the taxpayer would license other taxpayers to do that. The chief justice wrote at paragraph 55 that the taxpayer's insistence on pricing the transaction as structured "almost dooms to failure" Australia's transfer pricing regime, explaining:

> All one would have to do would be to constrain internally the transaction to give the highest price and include or omit terms of the agreement that would never be included or omitted in an arm's length transaction and which are not driven or dictated by commercial or operational imperatives, as the foundation for assessing an hypothesized arm's length consideration.

With respect to the imputation of a parental guarantee or other form of parental support, the court recognized that the arm's length principle might require the borrower to compensate the parent for the support and seemed to acknowledge that if this were the case, the ATO's adjustment to the borrower's interest expense would have to reflect (i.e., add back) the arm's length amount of such a fee even though the fee would be paid to a separate party in a separate, albeit related, transaction. But the court concluded this possibility need not be considered in this case because "there was insufficient evidence ... to warrant the conclusion that a fee might reasonably have been expected to have been paid."[21] The chief justice confirmed: "The evidence did not reveal any likelihood of Chevron charging a fee for such guarantee."[22]

The court rejected the complaint that its analysis altered the actual features of the unsecured loan by imputing security. The court reasoned that the presence or absence of security was not a feature of the loan but was a feature of what the borrower paid for the loan — security being a type of consideration paid by a borrower rather than a feature of a loan provided by a lender. [23] Interpreting the Australian transfer pricing statute, the court said it was not changing the property acquired in the transaction; it was simply making adjustments to the arm's length consideration in respect of the transaction — arm's length consideration being defined by the statute as "the consideration that might reasonably be expected to have been given ... if the property had been acquired under an agreement between independent parties dealing at arm's length with each other" — which the court suggested is well within the traditional and accepted boundaries of a transfer pricing analysis.

Analysis

Court's Emphasis on Predicted Taxpayer Behavior

The striking thing about the Chevron decision is not the court's rejection of the stand-alone pricing argument. That argument had been rejected before. Nor is it striking that the court imputed security for purposes of pricing a loan. There is precedent for that.

The striking thing about the decision is the court's focus on predicting how the Chevron group would have behaved with a third party and the court's reliance on the policies and practices of the Chevron group for this purpose. The court referred to Chevron's policy to raise funds externally at the lowest possible cost and its practice of providing parent-level guarantees.[24] From this, the court concluded that the ultimate Chevron parent would have provided security to support the Australian borrower if the latter had borrowed in the marketplace.[25] The chief justice suggested the security would have taken the form of a guarantee:

> If the evidence reveals (as it did here) that the borrower is part of a group that has a policy to borrow externally at the lowest cost and that has a policy that the parent will generally provide a third party guarantee for a subsidiary that is borrowing externally, there is no reason to ignore those essential facts in order to assess the hypothetical consideration to be given.[26]

The appellate court went beyond the findings of the trial court to draw specific conclusions about the

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taxpayer's predicted behavior based on its prior actions. The trial court wrote about the need to "depersonalize" the transfer pricing analysis[27] and framed its findings in a way to suggest a hypothetical borrower rather than the actual Australian borrower. The trial court said "the borrower" would have provided security and/or covenants to achieve a lower interest rate[28] but did not tie that finding to specific conduct of the Chevron group or indicate that the Chevron parent would have provided the security. The ATO had urged the trial court to find that the parent would have provided a guarantee to support the Australian borrower's loan[29] but the trial court made no finding to that effect.

The appellate court's framing of the issue, emphasizing that the goal of a transfer pricing inquiry is to predict how the parties would have behaved at arm's length,[30] and its handling of the issue, emphasizing the policies and practices of the Chevron group, raise the specter that a transfer pricing adjustment may be sustained if the taxpayer's related party transaction deviates from the court's prediction of how the taxpayer would have transacted with a third party. If this is indeed the standard, it would suggest that a taxpayer could borrow on market-based terms and still face an adjustment because of a court's view that the taxpayer would have engaged with a third party on different terms.

Predicted Behavior to Define an Obligation Versus to Fashion a Remedy

A possible counterargument is that the court's exercise was more limited than suggested above — that the court undertook its inquiry into the taxpayer's predicted behavior only to fashion a remedy, not to create an obligation. Under this view, the court first concluded that the subject loan was objectively unreasonable, then performed only the modest role of restructuring the loan to achieve a form that was both reasonable and closest to the form the taxpayer would likely have chosen; the court was not suggesting that it has, or other courts have, a general mandate to ensure that a taxpayer's related party transactions conform to how the taxpayer would have structured those transactions with third parties.

This argument is plausible and may be correct; it may reflect the unspoken premise of the opinion. But this is not clear. The court does not say in its opinion that an adjustment has to be predicated on a finding that the original transaction was objectively unreasonable or non-arm's length in a general sense. The court repeatedly says the arm's length inquiry should seek to replicate the terms on which that taxpayer would have transacted and the court's focus throughout is on the Chevron group's practice.

There are passages in the chief justice's concurring opinion in which the chief justice seems to look beyond the Chevron group in assessing its conduct, generalizing to a broader category of taxpayers and thereby suggesting a more objective, less personalized standard. For instance, at paragraph 61 the chief justice frames the transfer pricing question in terms of what the taxpayer "or a borrower in its position" could reasonably be expected to do, and states elsewhere that "on the evidence, the reasonable expectation would be that Chevron or a company in Chevron's position would give a guarantee …"[31] Similarly at paragraph 44 the chief justice frames the question in terms of what the taxpayer "or a person in the position of the taxpayer and in its commercial context" would do.[32] But these generalizations seem rhetorical and do not expand the focus in a meaningful way beyond the specific taxpayer. At paragraph 62, the chief justice suggests what he means by "person in the position of the taxpayer" when he writes:

> Here the borrower in the independence hypothesis is a company in the position of CAHPL [the Australian borrower]. It is part of a group the policy of the parent of which was to borrow externally at the lowest rate possible. Further, it was usual commercial policy of the parent of the group for a parent company guarantee to be provided by it (the parent) for external borrowings by subsidiaries. In those circumstances, the consideration that might reasonably be expected to be given by a company in the position of the taxpayer CAHPL would be an interest rate hypothesized on the giving of a guarantee of CAHPL's obligation to the lender by a parent such as Chevron.

A "person in the position of the taxpayer" means, in short, a person in a controlled group where the parent would provide a guarantee in support of a loan.

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The narrow focus on the Chevron group is amplified by the fact that there is little or no effort in the trial court or appellate court opinions to put the Chevron group's policies or practices in a broader context, comparing them with marketplace behavior generally. At trial Chevron called as a witness Marc Rowland, who served as chief financial officer of an oil and gas company, Chesapeake Energy Corp., from 1992 to 2010 to testify about that company's experience raising unsecured covenant-lite debt as a sub-investment grade company during the relevant time period. The trial court dismissed this testimony as nonprobative, finding that it did "not provide any useful marker as to how [the Australian borrower] … would have transacted with an arm's length lender."[33] The trial court's handling of this testimony suggested the application of strict comparability standards that few companies could meet, and seemingly little interest in the marketplace experience of others. After rejecting the Chesapeake Energy evidence, the trial court did not complain about the absence of better evidence; it did not fault the parties for failing to adduce evidence from persons similarly situated. It seemed content to limit the focus to the Australian borrower and to the Chevron group. The appellate court's opinion suggested a similarly narrow focus.

Predicting how a taxpayer would behave at arm's length based on its policies and practices rather than testing taxpayer behavior against general market benchmarks limits the relevant reference set to a population of one, and increases the likelihood that the taxpayer's transaction will be characterized as falling out of bounds, leading tax authorities to restructure the transaction or, in this case, the consideration paid in the transaction to take a form that they consider more typical or more appropriate for that taxpayer.

Complexities Arising from the Court's Focus on Form, Rather than Amount, of Consideration Paid

Based on its prediction of taxpayer behavior, the appellate court in Chevron affirmed the trial court's conclusion that security would have been an element of the consideration paid for the loan and said that, with the security in place, the interest rate was too high. The court did not state that the interest rate was too high for the transaction as actually structured — in other words, that the total amount of consideration paid by the borrower was greater than arm's length; rather, the court addressed the composition of the consideration; it said the consideration consisted of too much interest and too little security.[34]

The court did not address the cost to the Australian borrower at arm's length of providing such security. According to the court it did not have to, because the court found that the parent would have provided the security[35] and found no evidence that the parent would have charged for it. [36] The absence of such evidence allowed the court to treat the acquisition and provision of security as costless to the borrower. At arm's length, of course, security is not costless; its cost can approach, equal or even exceed the interest savings achieved. The court indicated that if the Australian borrower had paid its parent or another person for security in connection with the loan, this cost would have been allowed to reduce the ATO adjustment, [37] which leaves open the possibility that if an arm's length charge for security had been factored in, the cost may have fully offset the interest savings, defeating the adjustment entirely.

The appellate court's decision to adjust the mix of interest and security based on its prediction of how the taxpayer would have transacted in the marketplace introduces difficult variables into a transfer pricing analysis because of the variety of options available to a court in fashioning the mix and the lack of meaningful standards. The potential for difficulty is suggested by a comparison of the trial court and the appellate court opinions. The trial court concluded that the Australian borrower would have provided security for its loan but was silent on the type, value and source of that security. The court of appeals concluded that the source of the security would have been the Australian borrower's parent but did not conclude on its value or type, while the chief justice in his concurring opinion concluded that the security would have been a parent guarantee. All three views are speculation to increasing degrees of what the taxpayer would have done.

The court was spared from having to grapple with the particulars of the alternative transaction because the litigants did not engage at that level. From the court opinions, it appears the taxpayer sought to defend its original interest rate and did not argue in the alternative, to show what security it would have provided if it had provided any, the cost associated with that security, or its impact on the interest rate. If the taxpayer had engaged in such counterfactuals, the court's task would have

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been more difficult and the challenges of its approach more obvious. The taxpayer may have argued, for example, that if the borrower had provided security, the security would not have been a parent guarantee as the ATO urged but a pledge of property of $X value, provided by affiliate A in country B at a price of C with an impact on the interest rate of D. A dozen alternative transactions could have been put forward, all of them reasonable and equally speculative.

In a future case, a court may face an array of arguments about the mix of consideration in connection with a loan. When no guarantee is provided, tax authorities may urge that one be imputed. When one is present, tax authorities may urge that it be ignored. The argument in either case, if the lead of the Chevron case is followed, will be premised on a prediction of how the taxpayer would have behaved if it had borrowed in the marketplace.

The traditional focus in transfer pricing cases on the arm's length amount of consideration minimizes speculation by focusing on objective market benchmarks to address a single variable: the interest rate. The decision in Chevron to focus on the mix of consideration, coupled with the court's emphasis on predicting taxpayer behavior, introduces a higher degree of variability and uncertainty into the analysis. The court's decision to expand the focus beyond the parties to the transaction and to introduce the borrower's parent as a third participant in what had been a two-party transaction complicates matters further.

Chevron's future impact outside Australia is uncertain[38] but its general tone reflects a broader trend towards greater transfer pricing scrutiny of intercompany financing transactions. As a matter of prudence, an affiliated borrower seeking to protect itself from transfer pricing adjustments in this environment should consider being prepared to demonstrate that its loan terms reflect the terms on which it would likely have engaged with a third-party lender. It should also be prepared to demonstrate that its loan terms reflect its self-interest to the extent this is not clear from the previous showing. In appropriate cases, materials should make the affirmative case on both of these points by explaining the objectives sought to be achieved through the loan, for example, the reason for the loan and its size, duration and features, substantiated by (or at least reconciled with) any prior experience with third-party lenders. In some cases, the borrower may want to state its objectives in a way to signal which loan features are more or less important to it than the interest rate, so that in the event a tax authority challenges the amount of consideration as non-arm's length, the taxpayer has contemporaneous records to indicate how it would have reformed the loan at arm's length to meet this objection, whether by adjusting the interest rate or by adjusting other elements of the loan consideration. The court's focus in Chevron on reforming the loan transaction based on a prediction of how the taxpayer would have transacted at arm's length makes this type of documentation useful. Explanations for why alternatives were rejected should be considered as well, for instance, why a guarantee was not provided.

Taxpayers should also consider having documents in place to serve as a kind of backstop in case a tax authority or court seeks to restructure a loan in a way that forces consideration of factors the taxpayer would not otherwise address. In Chevron, the court discerned a general taxpayer policy to raise funds at the lowest possible rate but found nothing from which to discern whether the U.S. parent would have expected payment for providing security to its Australian affiliate. A taxpayer may want to take a lesson from that and have something in writing that addresses (with sufficient flexibility) various contingencies, such as the general expectation of group members with respect to the occasion and source of intercompany support and issues like compensation for services or security. All such steps should be approached with appropriate care and nuance, of course. A full discussion of those is left for another day.

Conclusion

The court in Chevron took an unusual analytical path to reach a fairly ordinary conclusion. In Canada and at the OECD, court decisions and guidance prior to Chevron had rejected so-called stand-alone intercompany loan pricing.[39] Court decisions and guidance prior to Chevron had similarly rejected taxpayer attempts to support high interest rates by omitting standard covenants or pledges of security.[40] No case prior to Chevron comes to mind, however, in which the court has customized the transfer pricing analysis to such a degree, focusing the inquiry on the predicted behavior of the taxpayer rather than on the general arm's length nature of the loan structure and pricing. This is a development that merits attention.

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[1] See Chevron Australia Holdings Pty Ltd. v. Commissioner of Taxation [2017] FCAFC 62 (April 21, 2017) ("FCAFC"), https://www.ato.gov.au/law/view/pdf/misc-case/rdr_2017fcafc62.pdf, affirming [2015] FCA 1092 (Oct. 23, 2015) ("FCA"), http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2015/2015fca1092. The Court of Appeals decision is accompanied by opinions ("Reasons for Judgment") written by each of three judges, Chief Justice Allsop, Justice Perram, and Justice Pagone. Justice Pagone's opinion was joined by both of the other two judges and for purposes of this discussion is referred to as the opinion of the Court. Chief Justice Allsop's concurring opinion is cited separately in the text ("Allsop CJ Para.") as it does not necessarily represent the views of a majority.

[2] Most of the court's analysis addressed the application of the Australian transfer pricing statute but its reasoning extended beyond the statute, a point confirmed by the fact that the court applied the same analysis to uphold the adjustments for some of the years under Article 9 of the US-Australia treaty (similar in language to the Organization for Economic Co-operation and Development, or OECD, model treaty Article 9). The court stated that the transfer pricing inquiry "required to be undertaken [under Article 9] is akin to that contemplated by" the Australian domestic statute. FCAFC Para. 156. The Chevron court's approach and rationale thus seem exportable to other countries, leaving the merits aside.

[3] The facts recited in this paragraph are drawn from the trial court and appellate court decisions, at FCA Paras. 2, 6, 10 and at FCAFC Paras. 99, 100, 132, 133, 137.

[4] FCAFC Paras. 100-101; FCA Paras. 2, 104. The court opinions refer to an approximate 9 percent rate; they do not indicate the extent to which it fluctuated over time.

[5] See FCA Paras. 6, 10, indicating Australian dollar adjustments (annual) of $71,805,846 in one year and of $149,639,013 in another. The court's opinion indicates the second adjustment pertained to 2005; it does not indicate the year to which the first adjustment pertained but the significantly smaller size of that adjustment suggests it pertained to 2003, the first year of the loan, which was funded mid-year. Assuming the 2005 adjustment was representative of the adjustments in 2004 and in 2006-2007, the adjustments would have totaled approximately $670 million (AUS) or $501 million (US) applying an exchange rate of $1 (AUS) to $0.7486 (US) based on the five year (2003-2007) average exchange rate at http://fxtop.com/en/historical-exchange-rates.php.

[6] FCA Paras. 604-605.

[7] FCA Para. 87.

[8] FCA Para. 525.

[9] See FCAFC Paras. 130, 131, 156; see also FCAFC Allsop CJ Paras. 43, 44, 49, 50.

[10] See General Electric Capital Canada Inc. v. The Queen, 210 F.C.A. 344 (2010) at Paras. 54-56, aff'g, 2009 T.C.C. 563 (2009).

[11] FCA Para. 606 ("I accept the applicant's submission, that in the absence of a legally binding parental guarantee, implicit credit support had very little, if any, impact on pricing by a lender in the real world").

[12] FCA Paras.123, 155, 171, 488.

[13] Testimony by a taxpayer witness (a former Chevron employee) would have supported this

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approach, the witness explaining that the absence of covenants was due to the fact that covenants were viewed as unnecessary for an intercompany loan, FCA Para. 156, presumably because of the control relationship. Chief Justice Allsop confirmed this reading of the record. See Allsop CJ Para. 38 ("On the evidence here, [the absence of financial and operational covenants] was not dictated by any commercial or operational imperatives; rather their absence can be explained by the protection given to the lender by common control").

[14] FCAFC Para. 132.

[15] FCAFC Para. 132.

[16] FCAFC Allsop CJ Para. 38.

[17] FCAFC Para. 156.

[18] FCAFC Allsop CJ Paras. 60, 62, 93-94.

[19] FCAFC Para. 156.

[20] FCAFC Allsop CJ Paras. 20, 82, 90.

[21] FCAFC Para. 133.

[22] FCAFC Allsop CJ Para. 60.

[23] The court explained the presence or absence of security was simply a feature of the consideration paid for the loan, not a feature of the loan itself. The court wrote: "the absence of security … is more aptly seen as part of the consideration … rather than as a right, privilege, benefit or facility itself." FCAFC Para. 115. "It is true that the terms upon which CAHPL obtained the loan did not require CAHPL to give security but to say that is to make a statement about what CAHPL gave or agreed to give for the loan rather than about the property it acquired. …. The lack of security was an absence in the consideration it was required to give for the funds it received rather than part of what it obtained …." FCAFC Para. 117.

[24] FCAFC Para. 132; Allsop CJ Paras. 62-63, 93.

[25] FCAFC Para. 156.

[26] FCAFC Allsop CJ Para. 63.

[27] FCA Para. 76; see also FCA Para. 499 (a proper transfer pricing approach should address "two parties independent of each other, neither party being an actual party to the actual loan"), FCA ¶ 506 ("the appropriate question does not necessarily involve [the Australian borrower]").

[28] FCA Para. 87.

[29] FCA Para. 496.

[30] FCAFC Paras.127, 130-132, 145.

[31] FCAFC Allsop CJ Para. 60.

[32] See also FCAFC Allsop CJ Paras. 43, 62, 63.

[33] FCA Para. 228.

[34] The Australian transfer pricing statute focuses on the amount of consideration, not its form or mix, stating that a transfer pricing adjustment is permitted in cases where "the taxpayer gave or agreed to give consideration in respect of the acquisition and the amount of that consideration exceeded the arm's length consideration in respect of the acquisition." Income Tax Assessment Act

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1936 (Cth) Division 13, s 117, Sec. 136AD(3)(c) (emphasis added). The court does not address how a statute that focuses on the amount of consideration licenses it to address and rebalance the mix of consideration.

[35] FCAFC ¶ 156; cf. Allsop CJ ¶ 37 (Australian borrower was unable to provide security on its own account because of its inability to grant security over production assets held by its subsidiaries).

[36] See text at notes 21 and 22, supra.

[37] A guarantee or other form of security may provide benefits separate from, or in addition to, an interest rate reduction. It is a mistake, therefore, to assume that interest savings define or cap an arm's length fee.

[38] See note 2, supra.

[39] See note 10, supra, and accompanying text.

[40] See, e.g., Sweden v. Diligentia, June 2010, Regeringsratten case nr. 2483-2485-09, link at https://tpcases.com/sweden-vs-diligentia-june-2010-regeringsratten-case-nr-2483-2485-09/

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