

Private & Confidential

The Manager
International Tax Integrity Unit
The Treasury
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Sent via email: transferpricing@treasury.gov.au

Thursday, 20 December 2012

Dear Sir/Madam

Submission – Transfer Pricing Exposure Draft and Explanatory Memorandum

The American Chamber of Commerce in Australia (AmCham) welcomes the opportunity to provide comments on the exposure draft (ED) and explanatory memorandum (EM) of *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill 2013: Modernisation of transfer pricing rules*.

Transfer pricing is an important tax issue for all of our members with international transactions, particularly as the US has rigorous transfer pricing rules in section 482 of the Internal Revenue Code. We also recognise that it is in the national interest for Australia to have a robust and modern set of transfer pricing rules to ensure integrity of the corporate tax base in Australia, consistency with international standards, and our obligations to our trading partners, particularly the US (being our largest) through our international tax treaties.

We support aligning Australia's transfer pricing rules with the arm's length principle and the guidance from the Organisation for Economic Cooperation and Development (OECD). However we are concerned that there are particular provisions in the ED which are not consistent with the intent of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPGs) and/ or do not properly reflect the position of the OECD in its appropriate context.

We also note that the regulations that underpin the application of the US transfer pricing approach of section 482 and the concept of "super royalty" under other US tax rules for foreign exploitation of Intellectual Property developed in whole or in part in the US may well result in inconsistencies between the approach of the ED and US law. This will lead to uncertainty and increased risk of dispute and potentially double taxation.

The most significant area of concern is the apparent requirement for taxpayers to "reconstruct" their dealings in certain circumstances. This requirement seems to be complex in operation, unnecessary in nature and inconsistent with a self assessment regime. In particular the approach of the US Internal Revenue Service to the application of "reconstruction" of transactions does not contemplate self assessment and hence there is a material risk of double taxation or, at a minimum, considerable risk of mismatch of US and Australian taxation treatment of the same transaction.



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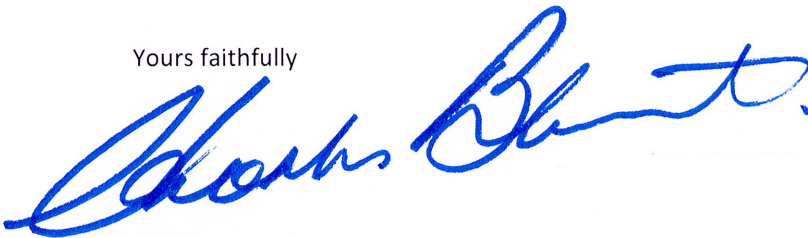
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We accept that Australian companies, including many of our members support a self assessment basis of filing returns. We welcome the introduction of a time limit for amendments relating to transfer pricing; however, we consider that four years is more appropriate than the proposed eight years. We note that in general the US tax law applies a limit of 3 years for such pricing adjustments.

The documentation requirements should provide a positive incentive for taxpayers to prepare documentation rather than precluding taxpayers who do not prepare documentation from establishing a reasonably arguable position (RAP). As presently drafted, the documentation requirements are over prescriptive and are drafted in a way that could be interpreted widely. This will create complex compliance burdens for transactions that may be relatively straightforward and low risk. To date, many of our members have relied upon the global transfer pricing documentation of their US parent company which have complied with documentation requirements for the purposes of the Internal Revenue Code of the US. Such documentation has often been considered sufficient under ATO rulings and practice to date. The change in such documentation anticipated by the ED is unfortunate, unnecessary and inefficient for our members doing business in Australia.

Thank you for the opportunity to comment on this important piece of legislation. We would be pleased to discuss any of the comments made in this submission with Treasury.

Yours faithfully



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