THE TAX INSTITUTE

THE MARK OF EXPERTISE

2 September 2015

Ms Luise McCulloch
General Manager
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: taxlawdesign@treasury.gov.au

Dear Ms McCulloch,

Multinational tax avoidance: country-by-country reporting

The Tax Institute welcomes the opportunity to make a submission to Treasury in relation to the *Tax Laws Amendment (Tax Integrity Multinational Anti-Avoidance Law) Bill 2015: Country by country reporting* exposure draft legislation (**Exposure Draft**).

We strongly recommend a number of significant amendments to this Exposure Draft to provide further guidance in the interests of certainty. The Exposure Draft is unclear in a number of respects and gives the Commissioner an unprecedented, and in our view, an unacceptable level of discretion in administering the law. This uncertainty is at least in part caused by the Government moving ahead of relevant developments at the OECD level. The current approach is likely to create significant administrative costs for the ATO notwithstanding the compliance cost burden it will impose for taxpayers.

Multilateral approach

We recommend that the Government continue to monitor development of individual actions of the Organisation for Economic Co-operation and Development (**OECD**) work on "base erosion and profit shifting" (**BEPS**), and the reactions of other OECD and G20 countries to those actions. The Government should then consider on a case-by-case basis whether the adoption of specific finalised actions are in Australia's best interests. We expect variances in the degree of implementation of actions across other countries, and we do not expect all countries to adopt all of the actions. The uncertainty of the Exposure Draft is largely a result of the implementation of a domestic measure consistent with OECD work which has not yet been finalised. In our view, if the Government wishes to act unilaterally, it should do so only after the BEPS project concludes and the reactions of others OECD and G20 countries have been gauged, so that such action can be taken with full knowledge of the actions of Australia's global trading partners.

The OECD is currently finalising its work on country by country reporting and this guidance has not been incorporated into its OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (**Transfer Pricing Guidelines**). Accordingly, there is a likelihood that guidance on country by country reporting at the OECD level will be amended before finalisation. The OECD is encouraging the take up of country by country reporting in early 2016. If the Exposure Draft is progressed on a domestic level prior to the finalisation of the OECD guidance, besides the uncertainty issue discussed above, there is a possibility of divergence between the domestic law and international efforts of country by country reporting which in turn will contribute to the compliance costs of multinational corporations seeking to comply with country by country reporting across jurisdictions.

Technical deficiencies

If the Government intends to proceed with the proposed domestic measure at this juncture despite our concerns, there are a number of technical issues with the Exposure Draft which require further consideration and consultation.

Distinction between country by country reporting, local file and master file

It is our view that the Exposure Draft should be limited to the country by country report and exclude the local file and master file. The OECD has not yet fully developed its thinking with respect to the local file and master file to the extent that it has done so with respect to country by country reporting. It is therefore appropriate that the Exposure Draft limit itself to country by country reporting whilst further global consensus is developed on local and master file requirements.

Further, the Exposure Draft requires the filing of an approved form within 12 months of the end of the relevant income tax year: proposed section 815-355(2). This will typically be 6 months after the lodgement of the income tax return. In a self-assessment system, there is no strong rationale for a taxpayer to provide the detailed information contained in a master file or local file shortly after the lodgement of the income tax return. The master file and local file are more akin to existing transfer pricing documentation requirements, which do not need to be filed with each annual return. Accordingly, in our view these documents should only have to be provided to the Commissioner as and when he has specifically requested this information, for example in the context of a risk review.

Further detail required on 'approved form'

The Exposure Draft requires the relevant taxpayers to file an "approved form" with the only limitation being that this form *may* be relevant to a decision by the Commissioner under Division 815: proposed section 815-355(3). Accordingly, the Commissioner is given a broad power to determine the substance of information that he could require a taxpayer to create and produce under the proposed rule. There is no reference to country by country reporting or OECD guidance in the Exposure Draft. The Exposure Draft goes far beyond the Commissioner's existing information gathering powers in that it may require the taxpayer to create documentation, and obtain documentation from a company it does not control. The Exposure Draft should be drafted with express

reference to Annex III of the OECD's proposed new Chapter V to its Transfer Pricing Guidelines, consistent with the current drafting in Division 815.

Further detail required on exemptions

Proposed section 815-360 allows Commissioner to determine that the approved form does not have to be lodged by certain taxpayers (subject to drafting issues discussed further below). The proposed section does not provide any detail as to the circumstances in which the power should be exercised. It is our view that relevant exemptions should be specified in the Exposure Draft with a provision allowing the Commissioner to determine further exemptions, including by legislative instrument if the need arises.

A specific exemption could be provided in the Exposure Draft where the head company is not in a jurisdiction which imposes an obligation on that company to provide a country by country report. A subsidiary company in Australia will be unlikely to have sufficient information to produce a master file, and to impose such an obligation under this Exposure Draft is onerous having regard to the criminal penalties which may be imposed on such a company and its public officer (discussed further below). Alternatively, the obligation imposed on a subsidiary in this situation could be framed in the Exposure Draft as a requirement to use their best efforts to seek the relevant information from the head company. If despite best efforts, no information is forthcoming, the exemption should apply.

The September 2014 OECD report proposes that a country by country reporting obligation be imposed on those entities with global turnover of over €750million, whereas the Australia requirement applies at global turnover of AUD$1billion. For example, this situation would arise on exchange rates at the time of writing which dictate that €750million approximately equals AUD$1.1billion. This results in domestic companies having a requirement to provide a country by country report under domestic law in a year where they do not have an obligation to provide such a report at the global head company level. The above specific exemption should address this issue.

If the Government is not minded to specify exemptions in the Exposure Draft, guidance should be provided by the Commissioner at the same time that the draft law is enacted.

Exclusion of entities with de minimis overseas operations

The Exposure Draft applies to all entities (with sufficient turnover), even wholly Australian entities or entities with nominal overseas operations. Whilst there is scope for the Commissioner to administratively not seek information, a de minimis exemption in the legislation would effectively minimise compliance costs for both the ATO and the relevant taxpayers, and increase certainty in the law (i.e. where overseas operations are insignificant in comparison to Australian operations similar to the exemption in the thin capitalisation rules).

Exclusion of entities with de minimis local operations

There are likely to be a number of multinational corporations with global revenue exceeding $1billion but with a relatively minor operation in Australia of less than $10million turnover a year. The level of compliance contemplated by the Exposure Draft and Explanatory Memorandum may be overly onerous for such companies. A company and its public officer could face a criminal penalty under Part III Division 2 of Schedule 1 of the *Taxation Administration Act 1953* and section 252(1)(f) *of the Income Tax Assessment Act 1936*, even though the ability to produce the required information may be a practical matter beyond their control.

Consistent global template

To minimise the compliance burden for local taxpayers, we recommend that the Government follow the OECD template and recommendations on country by country reporting such that multinational corporations face reporting obligations in Australia that are consistent with what they might need to report elsewhere. The Commissioner should also publish domestic guidance on how the rules will be administered in Australia on those matters where flexibility is retained in the Exposure Draft. For example, public guidance would be appreciated on the criteria the Commissioner will take into account when providing exclusions to entities. Further, the OECD draft form allows taxpayers to insert a narrative so the Commissioner should specify what the ATO would look for in this narrative.

We also note that existing transfer pricing documentation and local file requirements should be aligned before a local file requirement is incorporated into domestic law. This cannot be done until the OECD provides further clarity on the content of local file requirements, The Explanatory Memorandum at paragraphs 1.31 to 1.36 indicates that existing transfer pricing documentation and local file could be inconsistent. Where an entity has complied with OECD guidance on local file documentation, in our view this would not necessarily be sufficient to form a reasonably arguable position for domestic law purposes under Subdivision 284-E. This is a further reason to exclude local file and master file requirements from domestic law at this stage.

Drafting issues with proposed section 355-160

Proposed section 355-160(1) and (4) refer to “this section” but should instead refer to proposed section 355-155 in order to be operative. Proposed section 355-160(2) only allows the taxpayer to object to a decision to exempt or not exempt a taxpayer under that proposed section, but does not allow the taxpayer to object to the content of the approved form. Such an objection right would be important in circumstances where, as in the current drafting, a very broad discretion is provided to the Commissioner to determine the substance of the approved form.

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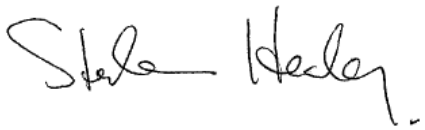
If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours faithfully,



Stephen Healey
President