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Corporate and International Tax Division
The Treasury
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PARKES ACT 2600

Sent via email: beeps@treasury.gov.au

26 February 2016

Dear Brian

Proposal to adopt new OECD transfer pricing guidance

PwC is pleased to provide input into Treasury's consultation on the implementation of the final transfer pricing recommendations from the OECD under Actions 8, 9 and 10 of the BEPS Action Plan, as issued by the OECD in a final report in September 2015.

Overall, PwC supports the implementation of the revised OECD guidance in Australia. It is important that OECD member countries consistently adopt these measures in order to minimise the risk of double taxation for multinationals.

We have commented on Treasury's specific consultation questions below.

1. Would there be any significant unintended consequences for Australia if these recommendations are incorporated as relevant guidance for the purposes of applying Division 815 of the ITAA 1997?

- We do not anticipate that adopting the final recommendations would cause any significant unintended consequences. There are some areas where ATO guidance is likely to be needed which we have commented on at Question 4 below.
- The areas of work yet to be finalised - eg guidance on profit splits - should not be adopted until the OECD finalises its recommendations.
- We recommend Treasury and/or the ATO also clarify how the new OECD guidance will be used in the interpretation of the Associated Enterprises articles of Australia's double tax treaties. We assume the intention is that the guidance will be applied in mutual agreement procedure negotiations with treaty partners in relation to transfer pricing.

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2. Are there any significant challenges with commencing the new Guidance for income years starting on or after 1 July 2016?

- We do not anticipate problems with this timing, as long as there is adequate time available for the ATO to provide guidance to taxpayers on the implications of the new guidance, especially on what will be expected for documentation purposes, prior to the first tax return filing deadline following adoption. For example, taxpayers with a 30 June year end will need to follow the new guidance for 30 June 2017, so ATO guidance would be needed by mid 2017 to provide taxpayers enough time to revise their documentation (if needed) before they are required to lodge their tax returns (which will be due in mid January 2018 but many taxpayers lodge earlier than this).
- If this timing is adopted, Treasury and the ATO will need to be sensitive that this will mean (for 30 June taxpayers) that the new OECD guidance and the CbC laws will both apply for the first time for 30 June 2017.
- Some transitional issues may need to be considered, in particular how the guidance will be applied to transfer pricing arrangements which span years before and after adoption. This will need to be addressed in the ATO's guidance (as we have noted below).

3. It is envisaged in section 815-135 of the ITAA 1997 that documents to be relied upon in applying Australia's transfer pricing rules can be prescribed by way of regulation. Are there any reasons why regulation (as opposed to legislative amendment) is not the appropriate method for incorporating the recommendations contained within the 2015 OECD report.

- PwC has no concerns with adopting the guidance by way of regulation, particularly as this was anticipated when section 815-135 was enacted.
- It is worth noting that as part of the consultation process on the introduction of the current transfer pricing laws, there was particular concern regarding cherry picking of OECD guidance. It is important that the new (final) guidance is adopted in its entirety to provide consistency for multinationals across all of the OECD jurisdictions they operate in.

4. What new ATO guidance / explanatory materials do you think the ATO will need to prepare (and what existing ATO guidance / explanatory materials will need to be updated) if the changes by the 2015 OECD Report are adopted?

ATO guidance may be needed on:

- What aspects, if any, of the new OECD guidance require a change in the application of the arm's length principle, and what is merely providing further clarification of the previous guidance. To the extent possible, the ATO should follow OECD commentary on this rather than forming separate Australian views.
- What approach will the ATO take when auditing issues which span years covered by the old and new guidance (eg if auditing a transaction conducted over 2015-2018)? The potential impact of this may depend on the point above (ie there will be a greater impact in situations where the new OECD guidance produces a different interpretation of the arm's length principle than in situations where the new guidance merely provides further clarification).



- To what extent will the ATO expect taxpayers to consider the new guidance in their Australian documentation to satisfy the requirements in Subdivision 284-E?¹ Taxation Ruling (TR) 2014/8 will need to be updated to consider this. This should be made a high priority since it impacts all taxpayers.
- To what extent will the ATO expect taxpayers to consider the OECD's new Chapter I guidance on recharacterisation/non-recognition of transactions in their analysis of section 815-130?² TR 2014/6 will need to be updated to provide clarification of this. In our view, the intent of the new OECD guidance is consistent with the intent of section 815-130; however, they are worded differently which creates the potential for ambiguity. There is a question over whether an Australian Court would accept the new OECD guidance as relevant for the interpretation of the statutory language in section 815-130. This should also be considered as a priority.
- Will the ATO allow taxpayers to choose to follow the new guidance for earlier years (on a voluntary basis)? This may be particularly relevant for Australian taxpayers dealing with related parties in jurisdictions that adopt the new OECD guidance earlier than Australia (eg countries which automatically adopt the most recent OECD guidance).
- The ATO's simplified record keeping requirements for intra-group services may need to be updated to consider the new OECD guidance on low value-adding services. The ATO will also need to consider updating or withdrawing TR 1999/1 in light of the new OECD guidance. We anticipate many foreign multinationals will adopt the new OECD guidance in their transfer pricing policies for intra-group services so this is a matter which will be relevant for a large number of taxpayers.
- TR 2004/1 (the ATO's ruling on cost contribution arrangements) may need to be updated to consider the new OECD guidance on cost contribution arrangements. This will be relevant for a small number of taxpayers.

Yours sincerely

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¹ Subdivision 284-E of Schedule 1 of the Tax Administration Act 1953

² Section 815-130 of the Income Tax