THE UNIVERSITY OF SYDNEY

7 December 2016

Manager
Base Erosion and Profit Shifting Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
Parkes ACT 2600
(via online submission portal)

Dear BEPS Unit

Diverted Profits Tax – Administrative Elements

Thank you for the opportunity to provide a submission to the Treasury in relation to the Exposure Draft of the Diverted Profits Tax (DPT) proposals, which were released for comment on 29 November 2016. My submission provides comments only regarding the administrative elements of the proposals.

Period of review rules – the modified s 155-35

The period of review (POR) within which an amendment to an assessment may be made by the Commissioner under s 155-35 of Sch 1 of the *Taxation Administration Act 1953* (Cth) (TAA) would ordinarily be seen as a grant of power beneficial to the revenue as it allows the Commissioner up to 4 years to make an amendment, which of course could include increasing the amount of tax payable. Limiting the period to 12 months (or potentially less on application, see below) seems to disadvantage the revenue, and this shorter time only makes sense once it is appreciated that the right to appeal the DPT assessment under s 155-90 of the TAA cannot be exercised until after this period has expired (proposed new s 145-20 of the TAA). (It is noted that s 155-60 of the TAA will still operate to allow an unlimited period to make amendments in case of fraud/evasion.) This trade-off seems unfortunate and unnecessary. It is not clear why the POR must be limited in order to limit the right of appeal and it would appear more straightforward to leave the amendment power at 4 years and simply include the 12 months rule (and the various mechanisms for its adjustment) in the proposed s 145-20(1), which could read: 'Section 155-90 does not apply until 12 months after the Commissioner first gives notice of the assessment of DPT to you.'

The flow chart of steps on page 23 of the Explanatory Memorandum (EM) suggests that the Commissioner must undertake a review of the DPT assessment during the 12 month POR but s 155-35 of the TAA by its terms does not require an active review – it simply allows for amendments in the period. If the Government proposes that a formal process of internal ATO review be undertaken during the POR, this should be included in the legislation. At a minimum, the details of this process should be included in a Practice Compliance Guideline (PCG).

By virtue of the proposed amendments, the right of a dissatisfied taxpayer to appeal to the Federal Count (only) under Division 5 of Part IVC of the TAA will be limited in that the

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application cannot be made until after the POR has expired. The removal of the objection stage and the option of a review by the AAT should fast track the consideration of these matters by the Federal Court but the requirement to wait up to 12 months to lodge the appeal is a significant change. However, the impact of this rule is mitigated to some extent by the mechanism for an entity to give notice for shortening the period, whereby the period will then expire 30 days from such notice. This is then balanced against the power of the Commissioner to effectively object to the notice by application to the Federal Court for an order not to shorten the POR. The current rules in s 155-35 will continue to allow for extensions of the POR by a Federal Court order under s 155-35(3) (on the same grounds as denying notice to shorten) and under s 155-35(4) with the taxpayer's consent to extension. The other change from the uniform rules is to only allow an extension once, whereas the rule under s 155-35(5) allows extensions more than once. It would seem beneficial to the revenue to allow multiple extensions if that is necessary to resolve the assessment without resort to a Federal Court appeal.

The modified appeal rights proposed by the exposure draft should be considered within the broader context of the entrenched right to judicial review that was recognised by the High Court in *Plaintiff S157/2002*.[1] In the *Futuris* decision,[2] the High Court accepted the operation of s 175 of the ITAA 1936 (the no invalidity rule) and effectively limited the grounds of judicial review to bad faith or conscious maladministration in light of the availability of the alternative avenue of Part IVC of the TAA to ventilate such issues. An equivalent to s 175 of the ITAA 1936 is found in s 155-85 of the TAA, which would apply to DPT assessments. It is also noted that an amendment is proposed to Sch 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (decisions to which the Act does not apply) to exclude DPT assessments from the statutory judicial review process provided by that Act. There is a risk that, due to the burdens placed on the appeal process in relation to DPT assessments, a court could find that *Futuris* is distinguishable and therefore a judicial review application could be entertained under s 39B of the *Judiciary Act 1903* (Cth) on grounds not limited to bad faith or conscious maladministration.

EM paragraph [1.95] states that 'an amended DPT assessment to increase the DPT liability must be issued no later than 30 days prior to the end of the review period.' It is assumed that the intention is that the amended DPT assessment under s 155-35 must be made in this time and the requirement to issue a notice would be under s 155-10. The amendments to s 155-35 by proposed s 145-15 do not include this 30 day rule and the EM para [1.108] identifies this as a consequential amendment to come, but it is submitted that this rule would be easily included in the proposed s 145-15. What is not clear from the EM is why the Commissioner should be restricted in this way, effectively losing one month out of the 12 months of the POR. This rule also has implications for the restricted evidence rule, discussed below.

Time for payment of the DPT

The EM states a number of times that the DPT will be due for payment within 21 days of the notice and seems to suggest that this is unusual, but this is in fact the rule for the income tax (see s 5-5 of ITAA 1997) and therefore would be expected. EM paragraph [1.90] links the requirement that tax must be paid upfront to the right of appeal, but the rules in the TAA already state that an objection or appeal does not affect the right to recover (ss 14ZZM and 14ZZR of the TAA). These comments raise the question: is there a suggestion that the Commissioner will not be entering into any discussions re payment arrangements such as 50/50 arrangements in relation to disputed DPT? If this is the case, perhaps this should be included in a PCG. Such

[1] *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2;(2003) 211 CLR 476.
[2] *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32.

PCG should also include the details of the stage 1 administrative processes described in the flow chart on page 23 of the EM as these are not provided for in the proposed legislation.

Timing of initial assessment

It is proposed that an assessment of DPT may be made at any time in the 7 year period from the notice of income tax assessment. Other instances of tax avoidance in Part IVA, including new MAAL in s 177DA of the ITAA 1936, are countered by amended assessments that are subject to the 4 year rule in s 170 of the ITAA 1936 except in cases of fraud or evasion. Perhaps there is a policy rationale for this departure from the norm but it would be desirable if this were made explicit, especially as the trend in recent years has been to reduce amendment periods (see, eg, the amendment in 2005 to s 177G of the ITAA 1936 to remove the special 6 year rule for amendments triggered by Part IVA determinations).[3]

Restricted evidence rule

This restricted evidence rule appears to be modeled on s 264A of the ITAA 1936 (which is proposed by the Treasury to be re-written as ss 353-20 and 353-30 of the TAA). The rule as currently drafted treats as 'restricted DPT evidence' that which, broadly, the entity has but the Commissioner does not have at any time in the period of review. This could lead to unintended consequences when combined with the proposed rule that the Commissioner must make any amended DPT assessment before 30 days of the end of the POR. It would be possible for information to be provided within 30 days of the end of the period, when the Commissioner is out of time to amend, and that information would not then be restricted evidence. It may be preferable to require that the evidence be held by the Commissioner before this cut-off date and thereby align the operation of these provisions.

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Thank you for the opportunity to make a submission in relation to this legislative proposal. I am happy to be contacted to discuss this submission and look forward to the release of further iterations of the proposed amendments, including the additional necessary consequential amendments.

Sincerely,

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[3] *Tax Laws Amendment (Improvements to Self Assessment) Act (No 2) 2005* (Cth) (Act 161 of 2005).