cta Corporate Tax Association

Level 11, 455 Bourke Street
Melbourne, 3000

Tel 03 9600 4411
Fax 03 9600 4055
Email admin@corptax.com.au

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The Manager
Base Erosion and Profit Shifting Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: BEPS@treasury.gov.au

Dear Greg

Australia's adoption of the BEPS Convention (Multilateral Instrument)

The Corporate Tax Association (CTA) is the key representative body for major companies in Australia on corporate tax issues and welcomes the opportunity to provide comments on the Treasury consultation paper titled "Australia's adoption of the BEPS Convention (Multilateral Instrument)". Please accept our sincere apologies for the lateness of this submission.

The CTA and its members are fully supportive of tax rules that support and develop confidence and integrity in the tax system and the international tax system in particular. Whilst we recognise there are estimates that worldwide revenue losses attributable to Base Erosion and Profit Shifting (BEPS) activity are between 4-10% of global tax revenues, we note that outside of the proposed adoption of the MLI, over the last four years Australia has introduced 18 measures ostensibly aimed at improving the integrity of the Australia's tax system, with a particular focus on international taxation (see the Appendix). A recent OECD working paper also indicated that Australia's rules, as at the end of 2014, were ranked highest from a tax integrity perspective based of four key measures.[1] There have also been observations made that in the context of large businesses, the total tax gap attributed to BEPS activity in Australia is relatively low.[2] In our view, it cannot be questioned that Australia's rules and their administration is robust, and although there is a commitment by the current Government to adopt the Multilateral Instrument (MLI) as part of Australia's suite of integrity measures, **care should be taken to ensure the MLI adoption choices are carefully considered and do not over reach.**

This is critical in the context of Australia's relatively small and open economy (with current stocks of inbound and outbound investment at $3 trillion), world class tax integrity and transparency rules and Australia's high headline corporate tax rate of 30% relative to the OECD average of 25%. It is imperative that Australia is seen as "open for business" for the benefit of all Australians.

More detailed observations

1 The Government should produce consolidated versions of each modified treaty.

Whilst we agree with the overall approach proposed for the adoption of the MLI and the three underlying principles outlined at paragraph 22 of the consultation paper, we would recommend that, rather than follow existing practice, the Government should produce consolidated versions of each modified treaty.

The complexity and interaction of Australia's laws is already difficult to decipher, even for the most experienced tax professional. Referencing the sets of choices in the OECD depository and an existing treaty will clearly add further complexity to this already complex area of tax law.

Consolidated versions may also reduce the need for the Australian Taxation Office to develop additional guidance to help identify how the MLI modifies individual covered tax agreements, thereby further reducing administrator and taxpayer compliance, particularly as the MLI compatibility clauses are either "inserted into", "replace", "apply in the place of", "sit beside" or "modify or override" existing clauses. Furthermore, the possibility of a "user" of the treaty network making a mistake in interpretation is reduced with the MLI text being in one consolidated treaty document.

2 Article 7 – Adopt the Optional Rule for Competent Authority (CAs) consultation

In our view Australia should adopt the principal purpose test subject but include the optional rule that requires CA consultation before rejecting a taxpayer's request for Treaty benefits. Whilst we recognise the Australia – Germany Treaty does not include the optional consultation clause, we note that Article 10(9) of the Australia-New Zealand Treaty does, and it is not clear to us why it is not considered a requirement for CAs to consult at an early stage in a potential dispute.

In our view, seeking clarity around the issues in dispute, and coming to a resolution based on that understanding is a key tenet in building and maintaining open and transparent relationships between all impacted parties (tax authorities and taxpayers) and making the treaty network efficient and effective.

3 Article 10 – Do not adopt the anti-abuse rule for permanent establishments

We agree with Australia's proposed initial approach to not adopt the proposed anti-abuse rule for permanent establishments. The reality of Australia's current tax rate of 30% means that the rule would effectively only impact arrangements where the tax rate in the other resident country is below 18% (which at present would only include Ireland, Hong Kong and Singapore) and the income being exempt in the PE

in a third country. In our view, the adoption of Article 7 definition of PE and the principal purpose test would provide sufficient levels of protection from the specific arrangements which Article 10 is trying to address.

4 Article 12 to 15 – Australia should await the PE attribution rules

BEPS Action Item 7 and its related recommendations which have found their way into the MLI via Articles 12 to 15 are all effectively addressing the expansion of the definition of PE. In many respects, the mischief that is being addressed is identical to that which the Australian Multinational Anti-Avoidance Law (the MAAL) addresses in the context of in-bound significant global entities (SGEs). We note however the proposed MLI Articles have wider impact as they:

- do not rely on a principal purpose test
- apply to all taxpayers and not just SGEs; and
- have application in an Australian out-bound context.

Whilst the intent of the provision is to ensure that foreign resident enterprises do not artificially avoid creating a PE, the changes if implemented could potentially impact sales made by Australian companies overseas, thereby eroding Australia's tax base, particularly given the PE attribution rules have yet to be finalised. In our view, as a minimum, the decision to implement the MLI should await the outcome of the OECD work on PE attribution (and once it is determined if Australia is to adopt the 2010 OECD guidelines on the attribution of profits) before a decision on when to adopt Articles 12 to 15 is made.

We note that the PE profit attribution rules have yet to be finalised albeit the necessary guidance was expected before the end of 2016, and some comments received on the PE attribution rules have expressed concern in adopting the revised PE rules in circumstances where countries, like Australia, have not adopted the 2010 guidelines.[3]

In our view, it seems prudent to await the outcome and analyse the effect of the revised PE attribution rules (and the adoption of the 2010 OECD guidelines) before committing to these Articles.

5 Part IVA Assessments (to the extent of the MAAL and DPT) should not be excluded from Mandatory Arbitration

We note that Australia's initial approach is to adopt Part VI of the MLI but to enter a reservation to exclude Part IVA determinations on the basis that Part IVA prevails over Australia's bilateral treaties.

Whilst a reservation for Part IVA may have some merit in the context of the "traditional" Part IVA provisions where the underlying test is one of dominant purpose, both the MAAL and DPT adopt a "principal purpose test" akin to that which is intending to apply under Article 7 (dealing with the prevention of treaty abuse) under the MLI. In effect, in circumstances where a MAAL assessment is issued, it effectively undermines the purpose behind adopting the revised PE definition in the

MLI and the principal purpose test, with the added inability to resolve any double taxation consequences as a result.

Moreover, the DPT rules are designed to make reference to the 2015 OECD transfer pricing guidelines as part of the gateways upon which to apply the DPT. It is feasible therefore that a taxpayer could end up in a situation of double taxation merely by the form of assessment that is issued, albeit the financial and economic outcomes are the same (i.e. a transfer pricing adjustment plus a 10% penalty would appear to allow mandatory arbitration, whereas a 40% DPT assessment will not). Such an outcome is not difficult to imagine, given the proposed DPT fails to clearly define where the transfer pricing laws end and the DPT begins.

Mandatory arbitration is regarded as an integral part of the MLI for large corporates, given the changes imposed by its articles will most likely increase the chances of cross border tax disputes. To have a situation where a revenue authority can effectively by-pass mandatory arbitration via a provision that will very likely result in double taxation is of great concern. Given the potential outcomes under the proposed DPT, we suspect other countries may also take exception to its exclusion from mandatory arbitration.

As such we would recommend any reservation in relation to mandatory arbitration should be limited to Part IVA assessments (other than assessments issued under the MAAL or DPT) due to the inherent overlap with the MAAL and DPT. In making this request we note that intent behind adopting the MLI is not purely to prevent double non-taxation, but to make dispute resolution more effective.

Should you have any questions in relation to the above, please do not hesitate to contact me or Paul Suppree.

Yours sincerely

Michelle de Niese
Executive Director

Appendix

Recent Australian Tax Integrity and Tax Disclosure Measures

	Measure	Effective Date	Summary of Change
1	General Anti-avoidance	Schemes entered into after 16 November 2012	Strengthening of the definition of tax benefit
2	Multinational anti-avoidance law	From 1 January 2016	Prevent the artificial avoidance of permanent establishments
3	Thin capitalisation	1 July 2014	Reduction in safe harbour debt limits from 75% to 60% for Non Banks and from 95% to 90% for Banks of Australian Assets.
4	Transfer Pricing	For years ending 30 June 2014	Substantial changes to modernise Australian rules to accord with contemporary OECD standards. Requirement for contemporaneous documentation to support positions taken otherwise significant penalties imposed.
5	Country by Country Reporting	For tax years commencing on or after 1 January 2016	Requirement to file country by country reports, including master and local files with the ATO in accordance with OECD requirements
6	Tax Transparency Code	May 2016	Implementation of tax transparency code for large corporations.
7	Public tax disclosures	From the 2014 income tax year	ATO to annually publish tax data for publicly listed and foreign taxpayers with over $100m turnover of total income, taxable income and tax paid (including PRRT)
8	Filing of general purpose financial statements	For tax years commencing on or after 1 January 2016	Requirement to lodge general purposes financial statements with the ATO
9	Tax Exchange of Information Agreements	Various	TEIAs to enable ATO access to information from 36 non treaty country tax administrators, including countries such as Cayman Islands, Luxembourg & Bermuda,

10	Reportable tax positions	From the 2014 income tax year	Taxpayers to disclose to the ATO tax positions taken that are not reasonably arguable
11	Revised International Dealings Schedule	From the 2012 income tax year	Modernisation of related party tax disclosures to the ATO, including details of all related party transactions
12	Anti–hybrid rules	1 January 2018 or six months after the hybrid mismatch legislation receives Royal Assent.	Adoption of OECD standards to ensure no double non taxation or double deductions for certain hybrid instruments and structures
13	Updated OECD transfer pricing rules	Proposed to apply as from 1 July 2016	Australia to adopt revised OECD BEPS transfer pricing guidance into Australia's tax laws

14	Diverted Profits Tax	From 1 July 2017	40% tax on certain transactions with lower tax jurisdictions to ensure tax is paid in where activities of economic substance reside.
15	100-fold increase in late lodgement penalties	From 1 July 2017	A 100-fold increase in penalties for late lodgement of approved forms with the ATO (i.e. $90,000 per month for any approved form).
16	Doubling of penalties for false and misleading statements	From 1 July 2017	A 100% increase in penalties for false or misleading statements.
17	Revised reportable tax positions	For income years commencing after 1 July 2016	Revised filing requirements for certain transactions that are subject to certain ATO Tax Alerts
18	Doubling of penalties for international tax schemes	From 1 July 2015	100% penalty applying to significant global entities for entering into tax avoidance and profit shifting schemes with the dominant purpose of creating a tax benefit. 50% penalty if no dominant purpose.

End Notes

[1] See: OECD Working Paper No 1356 "Anti avoidance rules against international tax planning: A classification' at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2016)80&docLanguage=En

[2] See the ATO submission to the Senate Inquiry into Tax Avoidance where at page 34 the ATO states: "A suite of indicators generally suggest companies are paying the income tax required under Australia's tax laws. Company income tax receipts continue to move in line with macro-economic indicators, reflecting broad compliance by corporates with their income tax obligations". See submission 48 at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance/Submissions

[3] See page 11 of the Action 7: 2015 Final Report – Preventing the Artificial Avoidance of Permanent Establishment Status. We note in particular the comments of BIAC in its submission to the Action 7 report at page 38 which can be found at: https://www.oecd.org/ctp/transfer-pricing/Comments-on-discussion-draft-beps-action-7-attribution-of-profits-to-permanent-establishments-part1.pdf