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Manager
International Tax Treaties Unit
International Tax and Treaties Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Manager

Intergovernmental Agreement to implement FATCA

1. Introduction

1.1 Thank you for the opportunity to provide our comments and submissions in respect of the advantages and disadvantages of Australia entering into an intergovernmental agreement (**IGA**) with the United States of America (**US**) based on the reciprocal model IGA (**Model IGA**) published by the US Department of the Treasury (**US Treasury**) on 26 July 2012.

1.2 We submit that except possibly for the costs of negotiating an IGA, there are no material disadvantages associated with entering into an IGA in response to the introduction of a 30% 'FATCA' withholding tax. Further, we respectfully submit that there are significant advantages in entering into an IGA, including the following:

(a) the IGA overcomes impediments to comply with FATCA arising from the overriding need to comply with Australia's domestic laws, namely:

(i) Privacy Act 1988 (Cth);

(ii) Racial Discrimination Act 1975 (Cth); and

(iii) Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth); and

(b) the IGA should simplify compliance costs for Australian businesses associated with the FATCA obligations.

1.3 Accordingly, we support the adoption of an IGA between Australia and the US for these purposes.

1.4 In making this submission, we note, however, that the Model IGA does not fully address some aspects of practical implementation, including the following:

(a) will reporting and exchange of information between the Australian Taxation Office (**ATO**) and the Internal Revenue Service (**IRS**) be based on calendar or financial year end balances;

(b) how will non-compliance with FATCA obligations be enforced; and

(c) what is the intended treatment of pass-thru payments under the IGA.

1.5 In these respects we seek guidance and clarification from the Australian Treasury.

1.6 We have set out below some detailed submissions on these issues for your consideration. Should you require, we would be happy to discuss our submissions with you.

1.7 All legislative references are to the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) and *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) (together **the Tax Act**) unless otherwise stated.

2. Background to FATCA and the Model IGA

2.1 On 18 March 2010, the *Foreign Account Tax Compliance Act* (**FATCA**) was enacted into US law as part of the *Hiring Incentives to Restore Employment Act* of 2010 (the **HIRE Act**).

2.2 The HIRE Act added new Chapter 4 (sections 1471 to 1474) to Subtitle A of the *Internal Revenue Code* of 1986. Chapter 4 expands the information reporting requirements imposed on foreign financial institutions (**FFIs**) with respect to US accounts and withholding requirements on certain payments to FFIs and other foreign entities.

2.3 FATCA was enacted to target tax evasion by US taxpayers through the use of US and non-US financial accounts.

2.4 On 26 July 2012, in a media release by the US Treasury '*Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden*' (**Media Release**), it was announced that a Model IGA had been developed by the US in consultation with France, Germany, Italy, Spain, and the United Kingdom.

2.5 The Model IGA is intended to form the basis of bilateral agreements to be entered into between the US and partnering jurisdictions and will provide an alternative means for the partnering jurisdiction to comply with FATCA.

There are two versions of the Model IGA, a reciprocal version and a non-reciprocal version.

> *'Both versions establish a framework for reporting by financial institutions of certain financial account information to their respective tax authorities, followed by automatic exchange of such information under existing bilateral tax treaties or tax information exchange agreements. Both versions of the model agreement also*

address the legal issues that had been raised in connection with FATCA, and simplify its implementation for financial institutions.

The reciprocal version of the model also provides for the United States to exchange information currently collected on accounts held in U.S. financial institutions by residents of partner countries, and includes a policy commitment to pursue regulations and support legislation that would provide for equivalent levels of exchange by the United States.

*This version of the model agreement will be available only to jurisdictions with whom the United States has in effect an income tax treaty or tax information exchange agreement and with respect to whom the Treasury Department and the Internal Revenue Service (**IRS**) have determined that the recipient government has in place robust protections and practices to ensure that the information remains confidential and that it is used solely for tax purposes.'*[1]

2.6 We understand that should Australia enter into an IGA with the US, it is likely that it will be based upon the reciprocal version rather than the non-reciprocal version because Australia has in place a double tax agreement with the US (**DTA**). Thus we base our comments and submissions on the reciprocal version of the Model IGA.

3. Submissions in support of the Intergovernmental Agreement

Overcomes domestic law impediments

3.1 Under section 1471(b) of the HIRE Act, an FFI may comply with FATCA by entering into an agreement with the IRS (**FFI Agreement**) under which it agrees to report certain information with respect to its US accounts.

3.2 The information required to be reported on US accounts are prescribed under subsection 1471(c) of the HIRE Act as follows:

> *'(A) The name, address, and TIN of each account holder which is a specified United States person and, in the case of any account holder which is a United States owned foreign entity, the name, address, and TIN of each substantial United States owner of such entity.*
>
> *(B) The account number.*
>
> *(C) The account balance or value (determined at such time and in such manner as the Secretary may provide).*
>
> *(D) Except to the extent provided by the Secretary, the gross receipts and gross withdrawals or payments from the account (determined for such period and in such manner as the Secretary may provide).'*

3.3 Where any foreign law would prevent the reporting of such information, the FFI is required under section 1471(b)(1)(F) to obtain a valid and effective waiver of such law from each account holder and if a waiver is not obtained, to close the account.

[1] Media Release dated 26 July 2012 from the IRS

3.4 Alternatively under section 1471(a) of the HIRE Act, for a FFI that does not enter into a FFI Agreement with the IRS, any withholdable payment made to the FFI will be subject to withholding at 30%.

3.5 In respect of the FATCA obligations described above, we agree with the submissions made by the Australian Bankers' Association Inc dated 1 November 2010 to the Commissioner of the IRS regarding Notice 2010-60 (**ABA Submission**).

3.6 In the ABA Submission, it was noted that compliance with FATCA presents significant legal impediments under Australian domestic law including:

(a) Australia's privacy laws in respect of reporting personal information of the account holders;

(b) Australia's anti-discrimination laws in respect of closing accounts on the basis that the account holder is a US person; and

(c) Australia's anti-money laundering and counter-terrorism financing regime in respect of discrimination on the ground of race and national status.

3.7 The conundrum for Australian financial institutions is summarised in the ABA Submission as follows:

> *'If chapter 4 is implemented by Australian banks, then Australian law may be breached; if chapter 4 is not implemented, then the banks will be penalised by the withholding.'*

3.8 As provided in the preamble to the Model IGA, the IGA is intended to be an agreement between Australia and the US to 'provide for the implementation of FATCA based on domestic reporting and the automatic exchange of information pursuant to the Convention' being the Australia-US DTA.

3.9 Thus we expect that the Model IGA, will address these domestic legal impediments as follows:

(a) any reporting will be in accordance with Australian domestic legislation (whether existing legislation or new legislation to be enacted) and not under a private contractual agreement between the FFI and the IRS;

(b) information will be reported to an Australian reporting authority (most likely the Australian Tax Office) and not to IRS; and

(c) any exchange of information with the US will be undertaken at the State level between Australia and the US and not at an entity level or contractual level between the FFI and IRS.

3.10 We submit that Australia should enter into an IGA with the US for the implementation of FATCA as it overcomes significant Australian domestic legal impediments for FFIs to comply with FATCA.

Simplified compliance and reduced costs of implementation

3.11 The Model IGA provides for several deviations from the obligations prescribed under FATCA, including the following:

(a) (**FFI Agreements**) under Article 4(1) of the Model IGA, it is no longer necessary for each FFI to individually enter into an FFI Agreement with the IRS in order to comply with FATCA. An FFI will be treated as complying with FATCA as long as it complies with its obligations under Article 4(1) of the Model IGA;

(b) (**Recalcitrant Accounts**) under Article 4(2) of the Model IGA, an FFI is no longer required to withhold 30% tax on passthru payments made to recalcitrant account holders (as required under section 1471(b)(D) of FATCA) or to close the recalcitrant account (as required under section 1471(b)(F)(ii) of FATCA), as long as information set forth in Article 2(2)(a) of the IGA is provided; and

(c) (**Withholding**) under the Model IGA, an FFI resident in a FATCA partnering jurisdiction with an IGA in place will generally not be subject to withholding under FATCA where it complies with its obligations under the IGA.

3.12 We submit that Australia should enter into an IGA with the US as the provisions under the Model IGA simplify the obligations under FATCA and potentially reduce the costs of implementation.

4. Submissions on priority matter

4.1 We expect that the key to simplifying compliance and administration burden for the Australian financial services industry will be to ensure the list of exempt entities and deemed compliant entities is negotiated as broadly as permissible.

4.2 We expect the entities listed will be broadly of the class listed in the UK/USA IGA as announced on 12 September 2012.

4.3 For example, we expect the list of exempt entities will include:

(a) Australian Governmental Organisations;

(b) Reserve Bank of Australia and its wholly owned subsidiaries;

(c) International Organisations – IMF; World Bank, etc;

(d) Retirement Funds – namely pension or superannuation funds.

4.4 Given the importance of self managed funds in Australia, the class of superannuation funds needs to be broader than an employer sponsored funds and should extend to all funds which have Australian resident members (or where 98% of the members are Australian residents or alternatively are resident in a jurisdiction which has entered into an IGA with the US).

4.5 The list of Non-Reporting Australian Financial Institutions which are Deemed Compliant Financial Institutions should include:

(a) Non-profit Organisations; and

(b) Local Client Base Financial Institutions – e.g. Credit Unions, Industrial and Provident Societies, Friendly/Building/Mutual Societies, Investment Trust Companies and Venture Capital Trusts.

4.6 This category of local client base institutions will be of special importance for the majority of the funds management industry which offer products and investment opportunities to (mainly) Australian residents.

4.7 Under the UK IGA the Local Client Base Financial Institutions must meet additional requirements, including that the financial institution:

(a) must be licensed and regulated under UK laws;

(b) have no fixed place of business outside the UK;

(c) have no account holders solicited outside the UK;

(d) have local withholding tax requirements;

(e) have 98% of accounts held by residents of the UK;

(f) do not provide accounts to certain US Persons; and

(g) only have Related Entities that are UK residents.

4.8 This approach seems a sensible approach and consistent with the low risk status of these entities.

4.9 However, we also note that Australian funds may not only secure capital from the domestic market and would also look to raise capital in Asia, Europe and the United States. Accordingly, for the purposes of negotiating an Australian IGA we consider that the requirement that the Local Client Base Financial Institutions must have 98% of accounts held by residents of Australia should be extended to entities that are resident in a jurisdiction which has entered into an IGA with the US.

4.10 Further in relation to the concept of 'Related Entities' we note that this should be limited to 'Related Entities' of the financial institution and not include 'Related Entities' to the investment manager or other advisors to the financial institution.

4.11 Some additional concessions that may be considered include where the investors in the fund are themselves exempt or deemed compliant entities.

4.12 Cross listed US entities (for example, US companies whose shares are regularly traded in Australia, albeit through CDIs) should be deemed compliant based on the existing FATCA exception for listed entities.

5. Submissions on matters requiring clarification

5.1 If Australia is to enter into an IGA with the US based on the provisions of the Model IGA, then there are several aspects of practical implementation which we seek further clarification from Treasury.

Reporting and exchange of information

5.2 As referred to above at 3.8, if an IGA is entered into, it is intended to address the domestic legal impediments of implementing FATCA by providing for 'domestic reporting and reciprocal automatic exchange pursuant to the Convention' being the Australia-US DTA.

5.3 We note that reporting obligations under FATCA go beyond what FFIs in Australia are required to report under current Australian domestic law.

5.4 In relation to the automatic exchange of information, Article 2(1) of the Model IGA relies on the provisions of the Convention in place between the partnering jurisdiction and the US.

5.5 Under the Australia-US DTA, the 'Exchange of information' article (Article 25(1) of the DTA) provides that:

> *The competent authorities shall exchange such information as is necessary for carrying out the provisions of this Convention or for the prevention of fraud or for the administration of statutory provisions concerning taxes to which this Convention applies provided the information is of a class that can be obtained under the laws and administrative practices of each Contracting State with respect to its own taxes.*

5.6 The information required under the FATCA withholding rules is not information that is currently collected by the ATO for the purposes of administering Australian tax laws. Further, the current drafting of the DTA provides only for the exchange of information 'that can be obtained under the laws and administrative practices of Australia with respect to its own taxes' – that is, with respect to Australian taxes.

5.7 Accordingly, we expect that it will be necessary to amend or introduce new legislation to provide for the collection of information to allow Australian FFI's to comply with the IGA/FATCA exchange of information requirements under Article 25 of the DTA.

5.8 We note that Article 3(6)(a) of the Model IGA does provide that the Competent Authorities of the partnering jurisdiction and the US will enter into an agreement to establish the procedures necessary for the automatic exchange obligations under the Model IGA.

5.9 Therefore in that respect, we seek guidance from the Treasury as to whether current legislation (in particular the Tax Act) will be amended or whether new legislation and regulations will be introduced to provide for the following:

(a) the reporting obligations under FATCA which go beyond what FFIs in Australia are required to report under current Australian domestic law; and

(b) the exchange of information with the US which extends beyond the scope of Article 25 'Exchange of information' in the DTA.

Enforcement of non-compliance

5.10 Article 5(2) of the Model IGA, provides that where there is significant non-compliance with the obligations under the Model IGA, *'the Competent Authority of such other Party shall apply its domestic law (including applicable penalties) to address the significant non-compliance'*.

5.11 We note that Article 3(6)(b) of the Model IGA provides that the Competent Authorities of the partnering jurisdiction and the US will enter into an agreement to prescribe rules and procedures as may be necessary to implement Article 5 'Collaboration on Compliance and Enforcement' of the Model IGA.

5.12 Therefore in that respect, we seek guidance from the Treasury as to whether current legislation (in particular the Tax Act) will be amended or new legislation and regulations will be introduced so as to provide for the following:

(a) the enforcement of obligations under FATCA which go beyond the obligations currently imposed on FFIs under Australian domestic law; and

(b) the penalties for non-compliance with obligations under FATCA.

Passthru payments

5.13 We note that under Article 6(2) of the Model IGA, it is provided that *'the Parties are committed to work together, along with other partners, to develop a practical and effective alternative approach to achieve the policy objectives of foreign passthru payment and gross proceeds withholding that minimizes burden'*.

5.14 In this respect, we seek guidance from the Treasury as to what *'practical and effective alternative approach'* will be considered or negotiated with the US.

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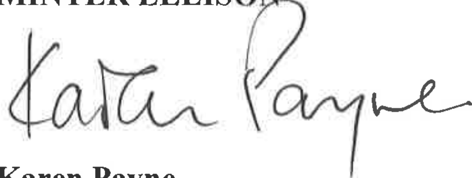
Thank you for the opportunity to participate in this consultation process. Please do not hesitate to contact me should you wish to discuss any of the above matters further.

Yours faithfully
MINTER ELLISON



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