15 May 2012

Email: NFPReform@treasury.gov.au

Dear Sir/Madam

Submission to the Treasury- Restating the 'in Australia' special conditions for tax concession entities

Thank you for the opportunity to make submissions in relation to the provisions in the Revised Exposure Draft of the Tax Laws Amendment (2011 Miscellaneous Measures) Bill (No.1) 2011 ('Exposure Draft'), as explained by the accompanying Explanatory Material, 'Restating the "in Australia" special conditions about for tax concession entities' ('Explanatory Material').

About Movember

Before outlining our comments in relation to the revised Exposure Draft, we wanted to provide you with background to our charity so that you may understand the context to our concerns with respect to the proposed revised Exposure Draft.

Movember's vision is to have an everlasting impact on the face of men's health. We do this by raising awareness and funds through the annual Movember campaign. On Movember 1st, guys ("Mo Bros") register at Movember.com with a clean-shaven face and for the rest of the month grow their moustache and raise funds by seeking out sponsorship for their Mo growing efforts. Mo Bros effectively become walking, talking billboards for the 30 days of November, and through their actions and words raise awareness by prompting private and public conversation around the often ignored issue of men's health.

In 2011, Movember had 142,200 participants in Australia raising $26m AUD whilst globally more than 856,000 people participated in the Movember campaign.

The funds raised through the Movember campaign are allocated to programs in line with Movember's vision and strategic goals. In Australia, funds are committed to programs supporting prostate cancer and male depression initiatives. Some of these programs are carried out directly by Movember and some through our men's health partners in Australia; the Prostate Cancer Foundation of Australia and beyondblue: the national depression initiative.

The Movember Foundation's head office is based in Melbourne. Movember has expanded now to the United Kingdom, USA, New Zealand, Ireland, Canada, Finland, the Netherlands, Belgium, the Czech Republic, Denmark, Norway, South Africa and Spain. Movember has registered not-for-profit incorporated entities in the US, UK and Canada. In those territories where Movember has not established a legal entity, the funds raised in that territory are directed to Movember's health partner in that territory, such as the Cancer Association of South Africa (in South Africa) and the Cancer Society of New Zealand and the Mental Health Foundation of NZ (in New Zealand). Alternatively, the funds may be directed towards the Movember Foundation for the purpose of funding Movember programs globally.

The Movember Foundation has been endorsed by the Australian Taxation Office as a deductible gift recipient as a charitable institution with the principal purposes of health promotion under item 1.1.6 in the table in section 30-20 of the Act ('health promotion charity'); The Movember Foundation was also endorsed for charity tax concessions (ie, income tax exemption and GST concession status).

Further information about Movember is available on our website at www.movember.com.

Comments

The 'Solely in Australia' and 'Principally in Australia' requirements

Overall concern

We understand that under the proposed legislation, deductible gift recipients ("DGRs") will be required to comply with a stricter threshold in order to meet the 'in Australia' conditions. In order for a charity to maintain its DGR status, an entity must operate solely in Australia at all times. The EM notes that 'solely in Australia' has been interpreted to require DGRs "to be established and operated only in Australia (including control, activities and assets) and must have their purpose and beneficiaries only in Australia".

This imports a very high threshold which we feel is not appropriate for charities such as the Movember Foundation. In contrast we understand that income tax exempt entities will be required to apply the 'principally in Australia' test. The EM notes that the term 'principally' means 'mainly' or 'chiefly' and that 'less than 50% is not considered principally'. We feel that this "principally" test would be more appropriate for DGRs such as the Movember Foundation where we are not only looking to undertake charitable activities primarily in Australia, but are also looking to lead the world in the promotion of men's health issues. In order to fulfill our objectives, we operate small campaigns in overseas territories until such time when the overseas campaign is of a size that supports the need for the overseas territory to have its own charitable entity.

Proposed legislation restricts the growth of charitable activities and increases administrative costs

It is our concern that this strict threshold may severely limit Movember's scope to grow its charitable activities, which will include supporting its overseas campaigns.

Before Movember proceeds with establishing a structure in an overseas territory where it runs a campaign, Movember must first gauge if the proposed campaign in that territory is likely to be successful and will be of a sustainable size which would support the need of a separate legal entity. To do so, the Movember Foundation will carry out certain start up activities such as meeting up with local partners to start building relationships, sourcing public relations agents, and preliminary fund raising activities. In addition, the Movember Foundation may run its campaign in that territory for a number of years to understand whether there is sufficient interest in the campaign by local participants and the level of funds that will be raised in that territory through the campaign.

We are concerned that these overseas activities may breach the 'solely in Australia' requirement and jeopardize the Movember Foundation's DGR status as a result.

However, we believe that it is important that this initial research work is performed by the Movember Foundation prior to committing funds in that overseas territory to establish a legal entity and meet the local reporting and compliance obligations that will arise as a result of having that legal entity. Movember seeks to maximize the proportion of the funds that are spent in furthering its charitable activities and therefore prefers to minimise its administration costs where it is practical to do so.

In order to meet the revised "in Australia" definition, and maintain its DGR status , Movember will effectively be required to separate these start up activities into individual entities from the outset without having the opportunity to first evaluate the potential success of the overseas campaigns. This will entail significant administrative, financial and legal burdens. The additional time and costs required to deal with such issues would only serve to detract Movember from its core altruistic purposes.

If this revised definition is enacted, Movember will need to consider very carefully whether the additional administrative burden of operating a campaign in an overseas territory through a separate legal structure (where it could be small taking into account all Movember's campaigns or the potential success could be unknown) outweighs the potential opportunity to raise funds to further Movember's men's health objectives, both in Australia as well as globally.

If Movember is required to meet the proposed "solely in Australia" test, it may decide not to proceed with some campaigns in overseas campaigns where the cost of setting up and maintaining separate legal structures outweighs the potential fundraising opportunities in that territory, although if the campaign could have been operated through the Movember Foundation, it would have been generated surplus funds to further Movember's charitable causes.

We propose that instead of the proposed 'solely in Australia' test, the uniform application of a single 'principally in Australia' test to both income tax exempt and DGR entities should be adopted. Currently, 83% of all worldwide donations received by Movember are from Australia. In addition, the central management and control of Movember also resides in Australia. Hence, given Movember's long and well established ties to Australia from its formation, we believe that it would be appropriate for Movember to be considered to meet the DGR criteria on the basis that it is "principally in Australia".

Incidental Activities

We appreciate that the Exposure Draft states that a DGR does not fail the 'solely in Australia' test above if the overseas activities are merely incidental to the Australian activities of the entity, and the overseas activities are minor in extent and importance when considered with reference to the Australian activities.

Although the Exposure Draft does provide some capacity to engage in 'merely incidental' or 'minor' activities, we submit that this exception is very narrow and it is unlikely that Movember's overseas activities would fall within this exception. As Movember sees men's health issues as a critical problem that must be addressed globally, it is looking to operate a number of campaigns in overseas territories to extend awareness of these issues. Although these campaigns may be small on a territory by territory basis and hence do not warrant a separate legal structure, taken together, these campaigns are likely to exceed the 'merely incidental test'.

Therefore, as explained above, rather than imposing such a strict threshold test with only very limited exclusions, it is our submission that the 'principally in Australia' test be adopted instead.

Transitional provisions

As currently drafted the proposed 'in Australia' amendments included in the revised Exposure Draft are to apply for income years following Royal Assent. If the revised Exposure Draft is enacted as currently drafted, Movember will need a period of time to restructure all its overseas operations in order to ensure compliance with these new rules in order to maintain its DGR status. In some territories, this may be a lengthy process, given that Movember will be required to register local entities with the statutory authorities in that territory which can take considerable time.

Given the potential impact on Movember and the possible need to undertake an extensive restructure, it is our recommendation that a minimum 12 month transitional period should be provided.

In conclusion, we would propose that Treasury should reconsider the potential implications for charities such as Movember when considering revisions to the "in Australia" definition. The tests as outlined in the revised Exposure Draft are too restrictive and will prevent DGRs in particular from extending their charitable work as they seek to address their charitable causes globally in the most cost efficient and effective way possible. If these revised definitions are enacted, we would seek that transitional provisions also be included so that Movember may have time to restructure its overseas campaigns to ensure that it maintains its DGR status which is invaluable for the work it does in furthering awareness of men's health issues in Australia.

We would be pleased to meet with the Treasury to discuss further our concerns with the revised Exposure Draft and explain why we believe the revisions will significantly impact the Australian DGR community.

Please contact me on (03) 8416 3900 or via email on astrid@movember.com if you would like to discuss these submissions in further detail.

Yours sincerely,

Astrid Heward
General Counsel