

The General Manager
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By email: CGT_BeneficialInterests@treasury.gov.au

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Dear Sir / Madam

Proposals Paper: Changes to Support the Measure to Provide Greater Consistency in the Scrip for Scrip Roll-Over and the Small Business Entity Provisions

We thank you for the opportunity to make a late submission in relation to the proposals contained in the Proposals Paper “Changes to Support the Measure to Provide Greater Consistency in the Scrip for Scrip Roll-Over and the Small Business Entity Provisions”.

Our submission relates to the changes proposed in paragraphs 3.2 to 3.3 regarding the vesting of assets the context of bankruptcy, liquidation and security arrangements. In particular, our submission relates to the suggested amendments to the capital gains tax (CGT) provisions currently located in Subdivisions 106-B and 106-D of the *Income Tax Assessment Act 1997* (Cth). We understand these changes were proposed following the design and consultation of the amendments to the scrip roll-over integrity provisions proposed in the 2011-12 budget measures, which were originally considered necessary to ensure that the scrip for scrip integrity measures applied appropriately to all trusts, superannuation funds and life insurance companies. We also note that similar concerns were raised in the 2011-12 about the application of the small business tax concessions.

It is indicated in the Proposals Paper that the amendments are necessary to address interaction issues with the CGT provisions dealing with beneficiaries, security arrangements, liquidators and bankruptcy (page 1). It is not clear in the Proposals Paper specifically what the interaction issues may be in relation to the scrip for scrip roll-over provisions contained in Subdivision 124-M and the CGT provisions in Subdivisions 106-B, 106-C and 106-D. It would seem that the proposed amendments are designed to ensure that, in all circumstances, the capital gain or loss is made by the beneficiary, security holder, individual or company as relevant. In that regard, we do not, in principle, have concerns with the suggested amendments to Subdivision 106-C regarding absolutely entitled beneficiaries as these measures should provide the proper liability for CGT purposes. However, in relation to the proposed amendment to section 106-35 we make the following comments:

1. Generally under corporate law assets do not vest in a liquidator on liquidation but remain the property of the company. Given that the order must be made by the Court, we suggest that this provides an appropriate level of integrity to the effectiveness of section 106-35.
2. If section 106-35 is amended as suggested, there may be unnecessary and unintended consequences on the introduction of these measures. For example, it is not clear how the proposed amendment would interact with section 254 of the *Income Tax*

Assessment Act 1936 (Cth) in terms of creating an unintended priority on insolvency for taxation debts of the company.

3. Finally we note that the scrip for scrip integrity measures provided by sections 124-782 and 124-783 are currently subject to review in the Proposals Paper entitled “Strengthening Certain Integrity Provisions in the Scrip for Scrip Roll-Over” (submissions due 13 August 2012). We suggest that it might be appropriate to wait until those amendments are finalised before addressing possible interaction issues.

We have similar concerns for the proposed amendments to Subdivision 106-D. In particular, it is not clear what circumstances the suggested amendment is aiming to capture and the current proposal would appear to cast the application of section 106-60. It would seem that, in the absence of clearly articulated policy reasons, the limitation provided by “for the purpose of enforcing or giving effect to a security, charge or encumbrance the entity holds over the asset” should remain.

Yours faithfully

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