21 May 2012

The Manager
Philanthropy and Exemptions Unit
Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

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Dear Sir/Madam

As a UK citizen currently living in Sydney, Australia for the past 10 months as a temporary resident, renting both a home here in Australia and maintaining a home in the UK with a mortgage I am dismayed to find that the changes to LAFHA will come into effect on the 1st July 2012 and feel that we are being treated poorly and unfairly.

The Australian Treasury has announced changes to Australian taxation which will affect many foreign nationals, namely the changes to LAFHA, the Living Away from Home Allowance. Apparently the Treasury has become concerned at the amount of tax revenue "lost".

I would remind you that this system has enabled employers to offer tax free payments to cover both accommodation and living expenses to foreign temporary residents in Australia on E457 Visas, by treating such payments as non-taxable fringe benefits. Under currently prevailing tax legislation, the fact that an E457 temporary residence visa holder is "living away from his normal place of residence " (ie his prior foreign address, to which he plans to return at the end of his E457 visa validity) has been adequate ground for entitlement to the LAFHA benefit.

This enabled Australian employers to attract foreign nationals to come and work in Australia, for a lower total remuneration package than if these payments were included in taxable (assessable) income.

For example, someone currently being paid $50,000 annually by their employer as a LAFHA benefit, would pay $23,250 annually in tax on this if it were to be included in their taxable income, which is what is now proposed.

Should this have been treated as taxable income in the hands of the employee from the start, then in order to attract such foreign employee with the same take home pay, employer should have had to pay far greater total remuneration, in the additional amount of $93460 annually, along with an additional $8410 into Superannuation, ie a total of $101,870 per annum. Should this have been treated as a taxable fringe benefit, then the employer should have had to pay to Treasury an additional $23,250 in tax.

I put it to you that Australian employers have benefited far more than their E457 visa workers have from the LAFHA system.

The proposed treatment via taxation in the hands of the employee now means that such an individual will be approximately $2000 per month worse off, if this change to taxation is indeed to be imposed by the ATO on July 1, 2012. Summarily, and with no transitional arrangements for those who currently receive such benefits.

It is most unfortunate that the Australian Treasurer, Mr Wayne Swan, has seen fit to accuse individuals of "rorting" the tax system by claiming ever-increasing benefits annually under this system. What he fails to acknowledge is that (a) it is employers who both offer the LAFHA benefit to prospective E457 visa employees, and then administer it; the employee has no ability to claim the benefit himself, and (b) it is thus Australian employers who are "rorting" the system, as they are able thereby to offer a lower total remuneration package to attract expatriates to work in Australia, and (c) of course there are more and more E457 visa-holders in Australia than previously, as this country desperately needs foreign workers to staff its mining and resources boom, let alone to provide services throughout the Australian economy.

It is also most unfortunate that Mr Swan and his staff believe that employees on E457 temporary residence visas will be able to renegotiate their terms and conditions of employment with their employers. The employees in this situation have no voice and no bargaining position : I have indeed attempted such negotiation and have been rebuffed by my employer, on the basis that it is not the company's responsibility to "shield employees from changes in national taxation law". I can imagine this will be the overwhelming case.

Thus for Treasury to bring in this summary change to taxation, without making some sort of transitional arrangement, is extremely unfair, and not remotely in keeping with the Australian reputation for fair dealing.

At the very least, I wish to register a protest – not only for myself, but also on behalf of all foreign nationals residing here on E457 temporary residence visas and affected by this change in taxation regulations - with regard to this manifestly inequitable treatment of foreign Nationals who have come to work here, and to contribute their skills, experience and effort to the development of the Australian economy, ON THE FINANCIAL BASIS OF THE AFTER-TAX REMUNERATION THEY WERE LEGALLY OFFERED (INCLUSIVE OF LAFHA BENEFITS) BY AUSTRALIAN EMPLOYERS, AND THEREFORE WERE FULLY ENTITLED TO ACCEPT, AND TO EXPECT TO CONTINUE FOR THE DURATION OF THEIR EMPLOYMENT, and who do not deserve to be treated in this most unfair fashion by the Australian Government.

The Treasury needs to be reminded that these E457 visa holders perform valuable services to the Australian economy, and should not be singled out for discriminatory penalisation in this fashion. If the Treasury wishes to change the law, so be it, but a transition period or alternative arrangement (such as requiring the employer to pay fringe benefits tax and to continue to provide the employee with the same take-home pay each month as before), is only fair to those who have already come here and have undertaken commitments and legal obligations (eg residential and business leases, asset purchase and rental arrangements, mandatory private schooling fees etc), based on receiving a benefit legally offered by their employers.

I suggest that this is neither an equitable nor an ethical way in which to achieve a Budget surplus.

I also understand that the relevant transitional elements as they are set out in the exposure draft legislation (Tax Laws Amendments (2012 Measures No.3) Bill 2012: deducting expenses for living away from home) are unlawful, as they breach all of Australia's double-taxation treaties. These treaties are incorporated into Australian domestic law through the International Tax Agreements Act 1953.

This is because, in respect of existing LAFHA arrangements until July 2014, temporary residents and foreign residents will be subject to an additional restriction to which permanent residents will not be subject – namely the requirement to maintain a dwelling in Australia – in breach of the non-discrimination clauses in each treaty.

Taking the UK as an example, this contravenes Article 25.1 of the UK/Australia Double Taxation Convention, because it is subjecting UK nationals to requirements connected with income tax/FBT which is "other" and "more burdensome" than requirements to which Australian nationals are subject in the same circumstances, "in particular with respect to residence".

The Convention with the UK is the first Australian tax treaty to contain a non-discrimination article (Article 26) which gives taxpayers private rights of appeal. UK nationals have a direct right to appeal to the Australian Competent Authority, whose role includes assisting people who believe that the actions of Australia result or may result in taxation that is not in accordance with a particular tax treaty.

"In respect of the Tax Laws Amendments (2012 Measures No.3) Bill 2012: deducting expenses for living away from home exposure draft (the "Exposure Draft"), the proposed provisions in relation to Transitional – existing employment arrangements are unlawful as they are in breach of the UK/Australia Double Taxation Convention (the "Convention") applicable to both income tax and fringe benefits tax, incorporated into Australian domestic law through the International Tax Agreements Act 1953.

Article 25.1 of the Convention, states:

Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.

According to the ATO:

Article 25 (Non-discrimination) is included to protect nationals of one country from tax discrimination in the other country.

According to the UK HMRC's explanatory memorandum:

…this Article provides that neither country shall impose discriminatory taxes (or requirements) on the nationals, permanent establishments and enterprises of the other.

In respect of existing LAFHA arrangements until July 2014, as set out in the Exposure Draft, "temporary residents" and "foreign residents" (which includes UK 457 visa holders) will be subject to an additional restriction to which Australian permanent residents will not be subject – namely the requirement to maintain a dwelling in Australia – in breach of the non-discrimination clause.

The result is that on 1 July 2012, UK nationals already working in Australia on 457 visas under LAFHA arrangements, will overnight see a decrease in their take home pay of up to 40% and possible immediate financial ruin, whereas the Australian Government has seen fit to put full transitional arrangements in place for Australians with existing LAFHA arrangements.

In his justifications, it is entirely disingenuous for the Treasurer (and those under his authority) to continually suggest that all 457 visa recipients of LAFHA are highly-paid executives. The Temporary Skilled Migration Income Threshold is $49,330, compared to the average Australian full-time salary of $68,791(Q3 2011).

It is unacceptable for the Treasurer to continually suggest that foreign workers (including UK nationals) who receive LAFHA are "rorting" (meaning "cheating" or "defrauding") the system. The ATO website currently advises UK expatriate employees on 457 visas that they are entirely entitled to claim LAFHA if eligible under existing arrangements:

Examples of employees on appointments of finite duration who will generally be living away from their usual places of residence are foreign nationals employed in Australia (expatriate employees)... In the case of expatriate employees having to reside in Australia for the term of their employment, each year we publish a tax determination outlining what we consider a reasonable food component.

The proposed discriminatory transitional arrangements, based on the Treasurer's disingenuous and offensive characterisation of UK nationals claiming LAFHA in line with ATO guidance, breach Australia's obligations under the Convention and conflict with its International Tax Agreements Act 1953. Existing Australian domestic law and treaty obligations require that the transitional LAFHA arrangements applicable to July 2014, must be applied to UK nationals working in Australia on E457 visas in the same way as they will apply to Australians.

In view of the Australian Government's failure (in breach of its own guidelines on public consultation) to demonstrate how previous consultation responses to the Assistant Treasurer's November 2011 consultation paper on LAFHA reform have been taken account of in the Exposure Draft (which responses explained inter alia that the Australian Government should not leave UK nationals who are tied into existing employment contracts and financial arrangements in Australia, to overnight financial ruin),

I consider it necessary to copy this consultation response to the following relevant parties:

- the Australian Competent Authority at australiancompetentauthority@ato.gov.uk ;
- the UK Prime Minister, David Cameron, at camerond@parliament.uk;
- the UK First Secretary of State, Secretary of State for Foreign and Commonwealth Affairs, William Hague, at haguew@parliament.uk;
- the UK Deputy Prime Minister, Nick Clegg, at nick.clegg.mp@parliament.uk;
- the UK Leader of the Opposition, Ed Miliband, at ed.miliband.mp@parliament.uk;

- the UK Shadow Foreign Secretary, Douglas Alexander, at alexanderd@parliament.uk;
- the UK Foreign and Commonwealth Office, at http://www.fco.gov.uk/en/contact-us;
- the Leader of the Australian Opposition, Tony Abbott, at Tony.Abbott.MP@aph.gov.au;
  and

the Australian Shadow Treasurer, Joe Hockey, at joe@joehockey.com."

Kindly reconsider this proposal, and introduce some transitional arrangement for the affected E457 temporary residents. Make the employer responsible for FBT on the amount currently paid as LAFHA. This is an equitable middle ground, and will encourage these affected E457 visa holders to congratulate themselves on the choice they made to come and work here in this just and fair society that is Australia, and perhaps, just perhaps, to stay for ever.

Yours sincerely

Miss Claire Ringrose
And on behalf of Mr. Matthew Daly