cta Corporate Tax Association

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21 November 2016

General Manager
Law Design Practice
The Treasury
Langdon Crescent
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By email: lawdesign@treasury.gov.au

Dear Sir/Madam

Improvement to the Debt/Equity Tax Rules

The Corporate Tax Association (CTA) welcomes the opportunity to comment on the proposed amendments to the Debt/Equity rules contained in the Exposure Draft legislation, the Draft Income Tax Assessment (Debt and Equity Examples) Declaration 2016 and accompanying Draft Explanatory Memorandum. The CTA also has had the opportunity to read the submission prepared by Greenwoods & Herbert Smith Freehills dated 21 November 2016, and support the observations made therein.

The CTA would, however, like to make the following observations directed towards the practical implementation of the new rules:

1. Being a principled based rule, the reality will be the determination to treat certain arrangements as an aggregated scheme, will rely heavily on the way the Commissioner of Taxation will administer the provisions. Whilst we recognize the draft law includes carve outs for mere funding, stapling, subordination and security and the Income Tax Assessment (Debt and Equity Example) Declaration 2016 will go some way to creating a "brighter line" and reduce uncertainty and compliance costs, the reality will be that cases on the cusp will inevitably be resolved by whether the Commissioner determines that it will be unreasonable for the section to apply to the scheme under the proposed sec 974-155(2)(b).

2. In cases where there may be uncertainty in the application of the rules, taxpayers can seek a private ruling to resolve that uncertainty, however difficulties may arise particularly if the ATO is reviewing a matter under audit, possibly many years later. In this regard, we note the proposed section 974-155(1)(c)(vi) uses a test in which "any other relevant matters" can be considered in determining whether there is an aggregated scheme. Our concern is this phrase could be administered widely, and potentially bring into play factors that are not relevant to the classification of an aggregated scheme at the time the scheme was entered into. Whilst the EM makes it clear the test is an objective one, and it would appear that the "relevant matter" must go to the conclusion of the combined economic effect of the scheme, the concern is the provision could be administered to deny deductions based on other matters (for example the amount of tax at risk, a taxpayer's overall risk profile, linking subsequent events to the original arrangements). Given the taxpayer has the onus to prove the Commissioner's view may be incorrect, including a provision in the law,

or statements in the EM, that section 974-155 should only apply in limited circumstances is recommended to reduce this risk. We believe the overriding provisions in Part IVA would operate as an appropriate integrity rule to limit abuse.

Should you have any questions in relation to the above, please do not hesitate to contact either Michelle de Niese or myself.

Yours sincerely

Paul Suppree
Assistant Director