Australian Government

The Treasury

TAX LAWS AMENDMENT (COUNTERING TAX AVOIDANCE AND MULTINATIONAL PROFIT SHIFTING) BILL 2013 (SCHEDULE 2) — MODERNISATION OF TRANSFER PRICING RULES

SUMMARY OF CONSULTATION PROCESS

The Government announced on 1 November 2011 that it would modernise Australia's transfer pricing rules by aligning them with international best practice.

These reforms were included in Schedule 2 to the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013*, which was introduced into the House of Representatives on 13 February 2013.

Consultation process

Consultation on draft legislation and the accompanying explanatory material was conducted between 22 November 2012 and 20 December 2012. Twenty-four submissions were received; of these, one was confidential. A consultation meeting with peak-body, industry and corporate representatives was also held at Treasury on 7 December 2012.

Summary of key issues

The Bill has greatly benefited from feedback received on the exposure draft during consultation.

Most submissions supported the alignment of Australia's domestic transfer pricing rules with international best practice, as represented by the OECD Transfer Pricing Guidelines (the OECD Guidelines). The OECD Guidelines are used by tax administrations and multinational enterprises globally.

Some submissions raised concerns about the extent to which certain concepts were defined in the domestic law, as opposed to being left to the OECD Guidelines. Several key concepts (such as 'arm's length conditions') are pivotal to the operation of the transfer pricing rules and, as such, require a definition in the domestic law. This provides certainty for taxpayers.

The majority of submissions were supportive of the move towards self-assessment, which brings the domestic transfer pricing rules in line with the overall design of the Australian taxation system.

Some submissions suggested that the rules should allow a taxpayer to downward assess a liability. This approach would be inconsistent with other revenue protection measures and the practice of other jurisdictions (including those that have adopted self-assessment transfer pricing rules). However the new rules do not prevent the transfer pricing rules contained in a tax treaty from making a downwards adjustment in the event they apply.

A key area of focus by the majority of submissions was the documentation rules. Concerns were raised that the scope of the rules in the exposure draft was too broad as they required a taxpayer to prepare documentation in respect of all conditions that satisfied the cross-border requirement. As a result of this feedback, the documentation rules have been revised in order to ensure that compliance costs for taxpayers are appropriately balanced against incentives to adequately document issues relevant to transfer pricing.

Several submissions also suggested that the link between preparing documentation and having a reasonably arguable position in respect of administrative penalties was inappropriate. This approach allows the preparation of documentation to be voluntary as taxpayers can risk assess those matters that could be the subject of administrative penalties and prepare documentation accordingly. The link between documentation and a reasonably arguable position does not, however, prevent the Commissioner of Taxation (Commissioner) from exercising a general discretion to remit administrative penalties where appropriate.

Another key area of focus by the majority of submissions was the reference to a reconstruction power. Reconstruction is clearly provided for under the OECD Guidelines and is an essential part of all modern robust transfer pricing regimes. In response to concerns raised in submissions, the provisions relating to reconstruction have been more closely aligned with the language used in the OECD Guidelines.

A number of submissions also suggested a reduction in the proposed eight-year time limit for the Commissioner to amend a taxpayer's assessment to give effect to the new rules (under the previous transfer pricing rules, the Commissioner had an unlimited period in which to amend an assessment). This time limit has now been reduced to seven years.

Given that transfer pricing audits often require information from other jurisdictions and relate to complex arrangements spanning several income years, a seven year time limit strikes an appropriate balance between providing the Commissioner with the time required to conduct an audit, and providing taxpayers with certainty as to their tax affairs.

In addition to revisions in respect of substantive changes to the draft Bill, the explanatory material was also amended to provide further explanation and clarification in response to the specific issues raised in submissions.

Feedback

Feedback on the consultation process for this measure can be forwarded to consultation@treasury.gov.au . Alternatively, you can contact Kristy Baker on (02) 6263 2708.

Thank you to all participants in the consultation process.