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24 August 2021

Directors
Market Conduct Division and
Individual and Indirect Taxation Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Directors,

EMPLOYEE SHARE SCHEME – REMOVING CESSATION OF EMPLOYMENT AS A TAXING POINT - BDO SUBMISSION

BDO refers to the invitation by the Government to provide comments on **Exposure Draft – Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Employee Share Schemes – Removing cessation of employment as a taxing point**.

BDO is pleased to provide comments on Exposure Draft **-** Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Employee Share Schemes – Removing cessation of employment as a taxing point (exposure draft – ESS – Removing cessation of employment as a taxing point).

In summary, our main concerns relate to the timing of the proposed new rules which will result in a different tax treatment of ESS awards on ceasing employment depending on when the award is granted. ESS awards that have already been granted will continue to be taxed on ceasing employment. While ESS awards granted in the future will not be taxed on ceasing employment.

If the new rules are introduced in their current form, both employers and employees will need to deal with two different sets of rules and corresponding tax consequences at cessation of employment in the future.

We consider that the proposed rules should apply to all ESS awards, past and future ESS grants, at the employee's option for existing awards where there is a cessation of employment in the future after the new laws have come into effect. BDO's detailed comments in this regard are in the attached appendix.

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Should you have any questions, or wish to discuss any of the comments made in our submission, please do not hesitate to contact me on 02 8221 2245 or james.trainor@bdo.com.au.

Yours sincerely

James Trainor

BDO Partner Tax

APPENDEX

BDO Submission to Treasury

Exposure Draft Legislation – Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Employee Share Schemes - Removing cessation of employment as a taxing point

BDO has considered **Exposure Draft – Treasury Laws Amendment (Measures for a later sitting) Bill 2021** which proposes changes to the regulatory and tax arrangements for employee share schemes (ESS) including the removal of the cessation of employment as a taxing point for ESS interests which are subject to deferred taxation and we provide the following comments on the issues of concern in the exposure draft.

1. **Timing of proposed new ESS rules**

   From a taxation perspective, the proposed change to remove the contentious ESS taxing point at the cessation of employment for tax deferred ESS plans is on the whole welcome. This is because employees who participate in ESS plans where the taxing point is deferred to a later date, will not be subject to tax on ceasing employment. Instead, on ceasing employment an employee's deferred tax arrangements will continue and their ESS taxing point will be deferred until the earliest of the remaining taxing points under the current law.

   Our concerns relate to the timing of the proposed new rules. For tax purposes, ESS awards on ceasing employment will be treated differently depending on when the award is granted resulting in inconsistent treatment between ESS awards that have already been granted and the exact same awards that are granted in the future, when the proposed changes become law. Specifically, if the new rules are introduced in their current form, the removal of ceasing employment as a taxing point will only apply to ESS awards granted in the future (i.e. to ESS interests acquired on or after the first 1 July to occur after the Bill receives assent). However, the proposed new rules (which are based on the date awards are granted in the future) will not apply to ESS awards which have already been granted. This means past and current ESS awards that have been granted to employees will continue to be subject to tax when they cease employment.

   As a result, both employers and employee will need to consider two different sets of rules and the corresponding tax consequences at cessation of employment in the future. That is, some ESS awards will still have a taxing point when an employee leaves while others will not. This will create an additional administrative and compliance burden for employers who will need to monitor both old and new ESS awards with different deferred taxing points, which will be treated differently, for the next 15 years.

   It will also create unnecessary confusion for employees that, for example, may have some of their ESS awards already granted and then are granted more ESS awards after the proposed changes become law. When these employees cease employment, they will have some of their ESS interests taxed at that time and some which will have taxation deferred to a later date.

   We would recommend there should be consistency in the application of the rules to remove ceasing employment as a taxing point and it should not be based on the date ESS awards are granted. We would request that before finalising the consultation on the exposure draft legislation giving effect to these amendments, Treasury should consider and include our recommendations.

2. **Proposed rules to apply to all ESS awards at the employee's option for existing awards**

   We consider that the proposed rules are unnecessarily complicated. They place an undue tax burden on ESS holders with past grants particularly at this time with heightened employment volatility due to the pandemic. Instead, it would be fairer and simpler to have the proposed rules apply to all ESS awards, including past awards, with an option for employees to choose ceasing employment as a taxing point for existing awards where the employee ceases employment after the new laws come into effect. This will provide flexibility for those employees that have factored in their tax liability on ceasing employment and would avoid any detrimental tax consequences at that time and going forward. As a requirement for employees to have the option to choose ceasing employment as a taxing point, they will need to inform their employer of their choice before the required ESS reporting time.

   We believe there would be no downside or risk to revenue in applying the new rules to all ESS awards, at the employee's option for existing awards, because employers will still have reporting obligations when the taxing point arises.

   Therefore, we would recommend that the proposed rules to remove ceasing employment as a taxing point should apply for all ESS awards, both old and new, granted in past and future. We would request that before finalising the consultation on the exposure draft legislation giving effect to these amendments, Treasury should consider and include our recommendations.

Conclusion

BDO submits that before finalising their consultation, Treasury should consider the inconsistencies and issues contained in the exposure draft legislation that are highlighted in our submission and amend the proposed rules in line with our recommendations, to apply to all ESS awards, at the employee's option for existing awards, where there is a cessation of employment in the future.