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8 August 2022

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Dear Sir / Madam

### **Deloitte comments**

#### **Adjustment to tax on certain payments or credits paid to Indian firms**

We write in response to the Exposure Draft legislation and Exposure Draft Explanatory Materials (EM) released on 1 August 2022 with respect to the "Adjustment to tax on certain payments or credits paid to Indian firms".

We have no comments of substance on the proposed legislative amendment, inserting new section 11J into the International Tax Agreements Act, 1953.

We do however have some observations on the EM and some minor drafting comments.

#### **1 Identification of the Indian entity**

- The Exposure Draft legislation refers to "Indian firms" (lower case f), in the Bill title and in the Schedule heading
- The EM refers to "Indian Firms" (capital F) in the Chapter heading
- The content in the EM refers to "non-resident Indian firm/s"

We submit that the reference to "firm / Firm" is unusual in a treaty context, and the reference to "non-resident Indian firm/s" is unclear.

The relevant person identified in Art 12(1) of the Indian Agreement is a person who is "a resident of the other Contracting State". That is, a **resident of India**.

We would suggest:

- that the term "non-resident Indian firm" in the EM be replaced by the term "Indian resident"
- that a sentence along the lines of the following be added to paragraph 1.2
  - "A reference in this chapter to an Indian resident is a reference to a person who is a resident of India, and not a resident of Australia, for the purposes of Article 4 of the Indian Agreement"

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- That references to Indian firms / Indian Firms be replaced with Indian resident

## 2 Meaning of remote services

We suggest two changes in paragraphs 1.1 and 1.2 of the EM (see mark up below) to make it clear that concept / definition of remote services involves the provision of services which are not provided through a permanent establishment in Australia.

Outline of chapter

1.1 Schedule # amends the Agreements Act to stop Australian taxation on income of non-resident Indian firms providing technical services remotely (not through a permanent establishment in Australia) to Australian customers that are covered by Article 12(3)(g) of the Indian Agreement, that is a not a royalty within the meaning of the ITAA 1936, and that is only taxable in Australia because of the operation of Article 12(3)(g) and Article 23 of the Indian Agreement, as given effect by the Agreements Act.

1.2 Unless otherwise stated, all treaty references in this chapter are to the Indian Agreement. Any references to providing technical services remotely means services not provided through a permanent establishment in Australia. In addition, all references to payments or credits in this chapter are to payments and credits that are not royalties within the meaning of the ITAA 1936. All references to Indian residents is a reference to a person who is an Indian resident and is not an Australian resident for the purposes of the Indian Agreement.

## 3 Not ITAA 36 royalties

With reference to the yellow sentence above in paragraph 1.2:

- Whilst it is the case that the proposed operative provision only applies to a payment, etc that, inter alia, is not a royalty within the meaning of the ITAA 36;
- Paragraph 1.10 of the EM contemplates a case where the payment, etc is a royalty within the meaning of the ITAA 36

It may be that the yellow sentence can simply be removed.

## 4 Example 1.1

The heading to this example in the EM is "Technical service that will not be subject to Australian tax". Should this heading be modified to Payment for technical service that will not be subject to Australian tax?

## 5 Section 11J

With respect to the drafting of section 11J: paragraphs (a) and (c), and the Note refer to the treaty as the "Agreement" (capital A).

We note that similar provisions (s11S(3), s11F(2), s11ZA and s11ZF(4)) refer to the "agreement" (lower case a).

If you would like to discuss further, please contact David Watkins on 0498 344 000.

Yours sincerely



David Watkins  
Partner, Tax & Legal