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| **EXPOSURE DRAFT** |

Inserts for

Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions

Schedule #—Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions

Income Tax Assessment Act 1997

1 Section 12‑5 (after table item headed “insurance with non‑residents”)

Insert:

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| intangible assets—income connected with low corporate tax jurisdictions |  |
| payments etc. that significant global entity makes to associate in relation to exploiting intangible asset connected with low corporate tax jurisdiction, no deduction for | 26‑110 |

2 At the end of Division 26

Add:

26‑110 Payments etc. to associates—intangible assets and low corporate tax jurisdictions

(1) The object of this section is to deter \*significant global entities from avoiding corporate income tax by structuring their \*arrangements so that income from \*exploiting intangible assets is derived in \*low corporate tax jurisdictions.

(2) An entity (the ***payer***) cannot deduct under this Act, for an income year, an amount for a payment it makes, to the extent that the payment is attributable to a right to \*exploit an intangible asset, if:

(a) the payer is a \*significant global entity for the year; and

(b) the payer makes the payment to an entity that is its \*associate (whether directly or indirectly through one or more interposed entities, and wherever that associate is located); and

(c) the \*arrangement under which the payer makes the payment (either alone or together with any other related arrangement) results in:

(i) the payer (or an associate of the payer) acquiring the intangible asset or a right to exploit the intangible asset, or exploiting the intangible asset; and

(ii) the associate mentioned in paragraph (b), or another associate of the payer, \*deriving, in a \*low corporate tax jurisdiction, and whether directly or indirectly through one or more interposed entities, income from exploiting the intangible asset, or a related intangible asset.

Note 1: Examples of intangible assets include the following:

(a) intellectual property;

(b) information or data, including a database of customers;

(c) an algorithm.

Note 2: For the definition of ***exploit***, see subsection (10).

(3) For the purposes of determining whether a payment is made indirectly through one or more interposed entities to an entity, and whether income is \*derived indirectly through one or more interposed entities:

(a) it is sufficient if amounts are paid or transferred between each entity; and

(b) it is not necessary to demonstrate that each payment or transfer in a series of payments or transfers funds the next payment or transfer, or is made after the previous payment or transfer.

Effect of certain rates and inclusions on status of income

(4) For the purposes of subparagraph (2)(c)(ii):

(a) in determining whether a foreign country is a \*low corporate tax jurisdiction, have regard only to the rate of corporate income tax in respect of the income of an entity that is a \*significant global entity; and

(b) treat income derived in a foreign country that is a low corporate tax jurisdiction as being derived otherwise than in a low corporate tax jurisdiction to the extent that the income:

(i) is, or will be, \*subject to foreign income tax at a rate of 15% or more; or

(ii) would be subject to foreign income tax at a rate of 15% or more if subsection 832‑130(6) and paragraphs 832‑130(7)(d) and (e) were disregarded; or

(iii) is included in the assessable income of any entity for an income year under section 456 or 457 of the *Income Tax Assessment Act 1936*.

Note: For the definition of ***low corporate tax jurisdiction***, see Subdivision 960‑J.

Similar arrangements

(5) This section applies:

(a) in relation to each of the following in the same way as it applies in relation to making a payment to an entity:

(i) incurring a liability to pay an entity;

(ii) crediting an amount to an entity; and

(b) in relation to permission to \*exploit an intangible asset in the same way as it applies in relation to a right to exploit the intangible asset.

Intangible assets etc.

(6) Without limiting what is an intangible asset in this Act (including in this section), in this section the expression intangible asset includes (subject to subsection (7)):

(a) any of the following mentioned in paragraph (a), (c), (da), (db), (dc) or (e) of the definition of ***royalty*** in subsection 6(1) of the *Income Tax Assessment Act 1936*:

(i) any copyright, patent, design or model, plan, secret formula or process, trade mark, or other like property or right;

(ii) scientific, technical, industrial or commercial knowledge or information;

(iii) visual images or sounds transmitted to the public by satellite or cable, optic fibre or similar technology;

(iv) a part of the spectrum (within the meaning of the *Radiocommunications Act 1992*);

(v) motion picture films, films or video tapes for use in connection with television, or tapes for use in connection with radio broadcasting; and

(b) any assistance mentioned in paragraph (d) of that definition, other than assistance relating to equipment mentioned in paragraph (b) of that definition (which is about industrial, commercial or scientific equipment); and

(c) a right in respect of, or an interest in, an intangible asset; and

(d) anything prescribed by the regulations for the purposes of this paragraph.

(7) This section does not apply in relation to an intangible asset that is any of the following:

(a) a right in respect of, or an interest in, a tangible asset;

(b) without limiting paragraph (a):

(i) an estate, interest or right in or over land; or

(ii) a right in respect of such an estate, interest or right;

(c) a \*Division 230 financial arrangement;

(d) an arrangement that is a \*financial arrangement under section 230‑50 but is not a Division 230 financial arrangement;

(e) a right in respect of, or an interest in, an intangible asset if, because of this subsection, this section does not apply in relation to that intangible asset;

(f) anything prescribed by the regulations for the purposes of this paragraph.

Exception if amounts paid to Commissioner in relation to royalty

(8) Subsection (9) applies if:

(a) all or part of the payment to which subsection (2) applies is a \*royalty; and

(b) apart from subsection (2), the payer mentioned in that subsection can deduct an amount for the royalty for an income year; and

(c) the payer paid an amount (the ***paid amount***) relating to the royalty to the Commissioner under section 16‑70 in Schedule 1 to the *Taxation Administration Act 1953*, either:

(i) because the entity withheld an amount from the royalty in compliance with Subdivision 12‑F in that Schedule; or

(ii) for a royalty in the form of a \*non‑cash benefit—because section 14‑5 or 14‑10 in that Schedule, together with Subdivision 12‑F, required the entity to pay the amount to the Commissioner before providing the benefit.

(9) Despite subsection (2), the amount the entity cannot deduct in an income year is the difference between:

(a) so much of the deduction for the payment (including for any part of the payment that is not a \*royalty) as would, apart from this subsection, be disallowable under subsection (2); and

(b) the amount calculated by dividing the paid amount mentioned in paragraph (8)(c) by the entity’s \*corporate tax rate for the income year.

Meaning of **exploit**

(10) ***Exploit*** an intangible asset includes:

(a) use the intangible asset; and

(b) market, sell, license or distribute the intangible asset; and

(c) supply, receive, or forbear in respect of, the intangible asset if paragraph (c), (d), (da) or (f) of the definition of ***royalty*** in subsection 6(1) of the *Income Tax Assessment Act 1936* applies to the supply, receipt or forbearance; and

(d) exploit another intangible asset that is a right in respect of, or an interest in, the intangible asset; and

(e) do anything else in respect of the intangible asset.

3 After Subdivision 960‑J

Insert:

Subdivision 960‑L—Low corporate tax jurisdictions

Table of sections

960‑258 Low corporate tax jurisdictions

960‑258 Low corporate tax jurisdictions

(1) A foreign country is a ***low corporate tax jurisdiction*** if:

(a) the rate of corporate income tax under the laws of that foreign country is:

(i) less than 15%; or

(ii) nil; or

(b) the foreign country is determined under subsection (4).

(2) For the purposes of paragraph (1)(a):

(a) have regard only to tax that applies to income derived in the ordinary course of carrying on a \*business; and

(b) disregard:

(i) the effect of deductions, offsets, tax credits, tax losses, tax treaties, concessions for intra‑group dividends, exemptions for particular industries and exemptions for particular types of income; and

(ii) rates of income tax that apply only to non‑residents; and

(c) if the application or rate of income tax under the laws mentioned in paragraph (1)(a) depends, to any extent, on the amount of income of the taxpayer—have regard only to the highest possible rate; and

(d) if, under those laws and after applying paragraphs (a) to (c), there are different rates of income tax for different types of income—have regard only to the lowest rate.

(3) For the purposes of subsection (1), treat the rate of corporate income tax on a particular amount of income under the laws of a foreign country as being nil if, under those laws, there is no income tax on that income.

Preferential patent box regimes

(4) For the purposes of paragraph (1)(b), the Minister may, by legislative instrument, determine a foreign country if the Minister is satisfied that the income tax laws of the foreign country provide for a preferential patent box regime without sufficient economic substance.

(5) In making a determination under subsection (4), the Minister may have regard to any relevant findings, determinations, advice, reports or other publications of the Council of the Organisation for Economic Cooperation and Development.

4 Subsection 995‑1(1)

Insert:

***exploit*** an intangible asset has a meaning affected by subsection 26‑110(10).

***low corporate tax jurisdiction*** has the meaning given by section 960‑258.

Taxation Administration Act 1953

5 After subsection 284‑90(1B) in Schedule 1

Insert:

(1C) The \*base penalty amount in any of items 1 to 4 of the table in subsection (1) that applies to you is taken to be doubled:

(a) in the case of item 1, 2, 3 or 4—to the extent (if any) your \*shortfall amount or part arises because of subsection 26‑110(2) of the *Income Tax Assessment Act 1997*; or

(b) in the case of item 3A, 3B or 3C—if the \*taxation law mentioned in that item is subsection 26‑110(2) of the *Income Tax Assessment Act 1997*.

Note: Subsection 26‑110(2) of the *Income Tax Assessment Act 1997* prevents a significant global entity from deducting, in certain circumstances, an amount for a payment to an associate in relation to exploiting an intangible asset connected with a low corporate tax jurisdiction.

(1D) If subsections (1A) and (1C) of this section both apply to a \*base penalty amount to any extent:

(a) apply subsection (1A) first; and

(b) then apply subsection (1C).

Note: The combined effect of subsections (1A) and (1C) may be to quadruple the base penalty amount.

6 Application of amendments

Section 26‑110 of the *Income Tax Assessment Act 1997* applies to amounts paid, liabilities incurred or amounts credited on or after 1 July 2023.