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Pillar Two Unit
Corporate and International Tax Division
Treasury
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16 April 2024

By email: contact.internationaltax@treasury.gov.au

EY Submission
Global and domestic minimum tax – primary and subordinate legislation

Dear Pillar Two Unit

EY welcomes the opportunity to provide comments in response to the exposure draft law (ED) for Australia's proposed implementation of the OECD/G20 Pillar 2 Solution, including a 15 per cent global minimum tax and domestic minimum tax (DMT), that was released for consultation on 21 March 2024.

We provide comments on a number of aspects of the ED legislation *Treasury Laws Amendment (Multinational – Global and Domestic Minimum Tax) (Consequential) Bill 2024* and for the accompanying Discussion Paper.

We also provide some preliminary comments on the *Taxation (Multinational – Global and Domestic Minimum Tax) Rules 2024 ED (the Rules)* and may make some additional further comments on the Rules at a later stage, prior to the end of consultation on 16 May 2024.

Australia's proposed implementation of a global minimum tax and DMT will have a significant compliance impact on affected entities. We highlight in particular that it would be a very onerous requirement, and would be unusual, for each constituent entity (CE) of a tax consolidated group to be required to lodge a DMT return, given the head entity is responsible for lodging income tax returns and paying any income tax liability. We strongly recommend that there should be a single, consolidated DMT return lodged by the head entity of a tax consolidated group on behalf of all entities in the group.

We set out in the Appendix our comments and recommendations in respect of the ED legislation, Discussion Paper and The Rules ED in relation to:

- Exemptions for filing a DMT return
- Application of Part IVA to a DMT
- Interaction of top-up tax under a foreign qualifying domestic minimum top-up tax (QDMTT) with FITO and CFC rules
- Interaction between global and domestic minimum taxes and Australia's targeted integrity rule

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► Interaction between the Rules and consolidated groups.

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Should you have any questions in relation to the submission or wish to discuss these matters in further detail, please do not hesitate to contact Tony Merlo (03 8575 6412, tony.merlo@au.ey.com) or Alf Capito (02 8295 6473, alf.capito@au.ey.com).

Yours sincerely

EY

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Appendix

A. Treasury Laws Amendment (Multinational–Global and Domestic Minimum Tax) (Consequential) Bill 2024 ED

A1. Exemptions for filing a DMT return

We recommend that the requirement to file a DMT return is aligned to the relevant Australian taxpayer for income tax purposes.

Currently, all CEs of an Applicable MNE Group that are located in Australia for the purposes of the Assessment Bill are required to lodge a DMT return[1]. We recommend that the requirement to lodge a DMT return is aligned to the relevant Australian taxpayer for income tax purposes, i.e. allowing the lodgement of DMT returns on the following basis:

- A single DMT return to be lodged by the head company of a tax consolidated group on behalf of all members of the tax consolidated group. An entity that is a subsidiary member of the tax consolidated group for the entire income year is not required to lodge a separate DMT return.

- A single DMT return to be lodged by the provisional head company of a multiple entry tax consolidated groups (MEC groups) on behalf of all members of the MEC group. An entity that is a subsidiary member of the MEC group for the entire income year is not required to lodge a separate DMT return.

- Where an entity is a member of a tax consolidated group or MEC group for part of an income year, a separate DMT return is required for the period in which the entity is not part of a tax consolidated group or MEC group.

The tax consolidation regime was introduced in Australia to reduce compliance costs for businesses. A requirement to lodge a DMT return for each CE of an Applicable MNE Group located in Australia will significantly increase the compliance burden and administrative costs for both businesses and the ATO and erode the simplification of processes and compliance savings which have been achieved since the introduction of the tax consolidations regime.

Given a head company of a consolidated group files the income tax return and pays the income tax on behalf of all entities, then it should file the DMT return on behalf of all entities and, if required, pay the domestic top-up tax.

We also recommend that the administrative collection mechanism with respect to the payment of DMT is aligned to the relevant Australian taxpayer for income tax purposes.

[1] Section 127-15 of the Treasury Laws Amendment (Multinational – Global and Domestic Minimum Tax) (Consequential) Bill 2024 – Exposure Draft

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Where a CE of an Applicable MNE Group located in Australia is not part of an Australian tax consolidated group or MEC group and is dormant for the entire year, we recommend that the entity has the option to file a 'non-lodgement advice' with the ATO, i.e. a 'Return not necessary' advice or 'Further return not necessary' advice, similar to the current options available for income tax purposes.

We provide below a number of comments and recommendations in relation to the Discussion Paper and the issues raised regarding the interaction of the global and domestic minimum taxes and existing Australian income tax laws.

B. Discussion paper

B1. Application of Part IVA to a DMT

The ED primary legislation is silent on the application of the Part IVA general anti-avoidance rules to a DMT.

Clarification is required on the application of Part IVA to a DMT. We submit that Part IVA should not apply as it applies to taxes imposed under the Income Tax Assessment Act (ITAA) 1936, ITAA 1997 and the Taxation Administration Act 1953. Part IVA applies to income-based taxes, and schemes entered into to reduce income tax. A DMT is not an income-based tax, but is rather a domestic top-up tax applied after other Australian taxes have been imposed and the ETR has been calculated.

We also suspect that a DMT may risk not qualifying as a QDMTT if Part IVA were to apply to it and so there is a further compelling reason to clarify that this is not the case.

We recommend that Treasury include an explicit reference, in the explanatory memorandum, that Part IVA does not apply to a DMT.

B2. Interaction of top-up tax under a foreign QDMTT with FITO and CFC rules

We agree with Treasury's view that it is appropriate that taxes imposed under a foreign qualifying DMT should give rise to a FITO, and we submit that it is appropriate that taxes imposed under any foreign DMT, regardless of whether or not they have yet to be peer reviewed and deemed to be qualified by the G20/OECD Inclusive Framework on BEPS (and therefore a QDMTT), should be eligible for a FITO.

Taxes imposed under each foreign QDMTT, including those DMTs that have not yet been subject to an OECD Peer Review Process, should be eligible for a FITO given the majority of foreign jurisdictions rely on the OECD Model Rules in designing their DMT, and the OECD Administrative Guidance provides details on which aspects of the GloBE Rules need to be reflected in the DMT regime.

Where a DMT has not yet been subject to an OECD Peer Review process, Australia should not unilaterally determine the appropriateness of foreign DMTs, as taxpayers would then need to assess the compliance of foreign DMTs, and this would significantly increase the compliance

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burden on taxpayers. Moreover, once a DMT is considered to be a QDMTT, no further enquiry as to whether any refund of the QDMTT is provided or other surety given should be made. The OECD peer review process should be trusted in this regard, otherwise it would be an onerous, if not impossible, task for taxpayers to assess the appropriateness of each foreign QDMTT.

Similarly, we agree with Treasury's view that Australia's CFC rules should provide for a notional allowable deduction for top-up tax paid under a foreign jurisdiction's QDMTT.

B3. Interaction between global and domestic minimum taxes and Australia's targeted integrity rule

We do not agree with the proposed approach that for purposes of Australia's targeted integrity rule in Subdivision 832-J concerning payments of interest or amounts under derivative financial arrangements, a jurisdiction's QDMTT should not be taken into account in determining whether an amount is subject to foreign tax at a rate of 10% or less.

The purpose of the financing integrity rule is to deny payments where those payments are not subject to a minimum level of tax. The integrity rule therefore is required to measure the rate of tax applied to the income of the recipient, in contrast to a question of whether there is a deduction/non-inclusion or not. In this regard it would seem incongruent to consider federal and state taxes levied in the jurisdiction of the recipient when determining the rate of tax levied, but not other taxes levied in that jurisdiction on income such as a QDMTT. The current rules in Subdivision 832-J take into account certain types of taxes that are otherwise excluded from the definition in subsection 832-130(7), i.e. municipal and State taxes. This is reflective of the targeted integrity rule operating outside the general framework of OECD anti-hybrid rules and being an Australian specific "integrity rule".

Where actual income tax is suffered on those payments, in our view this should be taken into account for purposes of the integrity rule. This should include taxes paid under a QMDTT. For completeness we would also consider that a minimum tax that is not qualifying should also be taken into account for the same reasons above.

We therefore recommend that subsection 832-725(1A) is amended to clarify that DMTs whether qualifying or not are not disregarded for purposes of the targeted integrity rule.

C. The Rules

C1. Interaction between the Rules and consolidated groups

We acknowledge certain parts of the Rules provide special treatment where CEs form part of a tax consolidation group, such as Section 3-185 which provides that an Ultimate Parent Entity (UPE) may make a five-year election to apply consolidated accounting treatment to eliminate income, expense, gains, and losses from transactions between entities, provided they are in a tax consolidation group and all located in the same jurisdiction.

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However, further guidance is required in respect of the interaction between the Rules and the tax cost base resetting process under Part 3-90 of the *Income Tax Assessment Act 1997* on formation, entry to and exit from an Australian Tax Consolidated Group and/or a MEC Group. This includes the application of Chapter 9 of the Rules to transactions which result in a tax cost base reset for assets (and potentially the recognition of a deferred tax asset) prior to Transition Year, as well as the application of Chapter 6 to tax consolidation events that occur during the Transition Year or in subsequent years.