

Tax Laws Amendments (2012 Measures No.4) Bill 2012 Chapter 1

Dear Mr Secretary and Honourable Members of the Economics Committee,

I would be grateful if you would consider my submission in respect of the *Tax Laws Amendments (2012 Measures No.4) Bill 2012 Chapter 1 : "Reform of the living-away-from-home allowance and benefit rules"*, and in particular paragraph 1.78 under the "Application and transitional provisions" section.

The transitional rules delay the application of the new legislation until July 2014 for those who had arrangements in place for the payment of LAFH allowances prior to 7.30 pm (AEST) May 8th 2012

Section 1.78 quotes:-

"1.78 .Transitional rules apply to:

- *permanent residents; and*
- *temporary residents or foreign residents who are maintaining a residence in Australia for their own personal and immediate use and enjoyment at all times, that they are required to live away from for work; who have employment arrangements for LAFH allowances and benefits in place prior to 7.30 pm (AEST) on 8 May 2012."*

My submission is that, by allowing permanent residents the concession without any restrictions, and namely that they do not have to maintain a residence in Australia that they are required to live away from for the transitional period (i.e. until July 1st 2014), but temporary residents do have to meet this requirement, means that under the same conditions as permanent residents, temporary residents from the UK on 457 visas will be taxed on any LAFH allowance and permanent residents will not.

As this discriminatory taxation is based solely on residential status it could be successfully challenged in law as being in breach of Article 25.1 of the " UK / Australia Double Taxation Convention (the "Convention")" applicable to both income tax and fringe benefits tax, incorporated into Australian domestic law through the International Tax Agreements Act 1953.

Article 25.1 of the Convention, states:

"Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected".

According to the ATO:

Article 25 (Non-discrimination) "is included to protect nationals of one country from tax discrimination in the other country".

According to the UK HMRC explanatory memorandum:

"...this Article provides that neither country shall impose discriminatory taxes (or requirements) on the nationals, permanent establishments and enterprises of the other"

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In respect of existing LAFH transitional allowance arrangements until July 2014, as set out in the Exposure Draft, "temporary residents" and "foreign residents" (which includes UK 457 visa holders) will be subject to an additional restriction to which Australian permanent residents will not be subject – namely the requirement to maintain a dwelling in Australia – and this is in breach of the non-discrimination clause.

Unless amended the result is that on 1 October 2012, UK nationals already working in Australia on 457 visas with LAFH allowance arrangements, will overnight see a decrease in their take home pay of up to 40% and possible immediate financial ruin, whereas the Australian Government has seen fit to put full transitional arrangements in place for permanent residents with existing LAFH allowance arrangements until July 2014, to avoid such an immediate burden on them and to give them time to adjust..

In this area then the unintended and unforeseen outcome of this legislation will be that the Australian Government would be subject to legal challenge and likely humiliation in the courts as successful claims are made against this legislation. Clearly the proposed discriminatory transitional arrangements conflict with Australia's International Tax Agreements Act 1953.

Existing Australian domestic law and treaty obligations therefore require that the transitional LAFH allowance arrangements applicable to July 2014 must be applied to UK nationals working in Australia on 457 visas, in the same way as they will apply to permanent residents or the legal challenges will ensue.

In addition compensation claims may also be brought to claim back not only any tax unlawfully collected, but also any consequential costs / losses that may have occurred due to the illegal application of this tax.

The absolute ultimate unforeseen circumstance if the Government pursue this action could be a tearing up of the tax convention between the two countries which would have dire consequences to Australian business not only in Australia but also overseas.

I would ask that you would consider this submission and the possible unforeseen outcome of applying the discriminatory transition periods and make a recommendation that the transition rules be amended to ensure that the tax concession is applied equally to UK residents on temporary visa's to both ensure a fair and level playing field with permanent residents and also to ensure that the tax treaties are not violated.

If you wish to clarify any points of the above submission you may reach me on either:-

I am more than happy for the details of this submission to be made public

.Yours Faithfully

Mr. Ian N Bissett