

SUBMISSION 1



20 February 2013

Mr. Stephen Boyd
Committee Secretary
House of Representatives Economics Committee
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Dear Mr Boyd

SUBJECT: SUBMISSION ON SCHEDULE 1 OF TAX LAWS AMENDMENT (COUNTERING TAX AVOIDANCE AND MULTINATIONAL PROFIT SHIFTING) BILL (2013)

CPA Australia represents the diverse interests of more than 144,000 finance, accounting and business professionals in 127 countries. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders.

Against this background we provide this submission concerning the proposed amendments to the general anti-avoidance provisions of Part IVA of the Income Tax Assessment Act (1936) (the ITAA 1936) which are included in Schedule 1 of Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (the Bill) which is the subject of a current inquiry by the House of Representatives Economics Committee.

As a general observation CPA Australia recognises the important and enduring role that the provisions of Part IVA has long played in limiting and deterring income tax avoidance in this country. In our view the maintenance of an effective and well understood general anti-avoidance provision is crucial to ensuring compliant behaviour and a robust income tax regime.

However, we believe that the proposed amendments to Part IVA contained in Schedule 1 of the Bill are confusing and deficient and do not result in an anti-avoidance regime which is comprehensible to tax practitioners let alone the broader community.

Our concerns are listed below:

- It is stated in the Explanatory Memorandum that the financial impact of this amendment will be \$1 billion annually. We are not in a position to quantify such impacts. However, it should be noted that the Australian Taxation Office (ATO) has never lost one case purely because of the 'do nothing' argument that is specifically targeted by these amendments. In almost every relevant decision it is noted that the taxpayer would have won regardless because the dominant purpose test was not established (see, for example, *RCI Pty Ltd v Federal Commissioner of Taxation* (2011) FCAFC 104).
- The Explanatory Memorandum is essentially a recut of the explanatory materials that accompanied the Exposure Draft Legislation in November 2012. However, the proposed legislation in Schedule 1 of the Bill has been substantially rewritten. More effort needs to be made to align the Bill with the Explanatory Memorandum. For example, the Explanatory Memorandum should provide guidance on when subsection 177CB(2) will apply rather than subsection 177CB(3); what it means to have particular regard to the factors listed in subsection 177CB(4) and what happens if a 'reasonable alternative' cannot be identified.
- The Explanatory Memorandum states in the comparison of key features of the new law and the current law, that, following the enactment of the amendments, the question as to whether Part IVA applies to a scheme under the proposed amendments will start with a consideration as to whether any person participated in the scheme for the sole or dominant purpose of securing a tax benefit (compared to the requirement as to whether there is a tax benefit under the current test). This is counter intuitive. Nowhere is it explained how one can apply the dominant purpose test without first identifying the tax benefit. It is

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also at odds with paragraph 1.25 of the Explanatory Memorandum, which states that the alternative postulate inquiry (relevant to tax benefit) serves by first being relevant to the identification of tax advantages and second assisting the section 177D(1)(b) analysis. It would be useful to have an example of how this aspect of the amendments is to work as the common view of the profession is that it is flawed.

- Contrary to the Second Reading speech and the Explanatory Memorandum, the provisions will impact normal commercial transactions. For example, a decision to sell the shares in a company rather than the underlying assets will often be made after taking into account an analysis of costs including tax. Under these proposed amendments tax would be excluded from the analysis, throwing up a tax benefit and, therefore, the need for the taxpayer to demonstrate that there was not a dominant purpose of tax avoidance. Whilst a taxpayer can rely on the dominant purpose test to contend that the entity has not obtained a tax benefit over the broad array of alternative postulates which may potentially need to be considered in respect of a particular transaction, such a process will be highly time consuming and expensive and an unnecessary distraction from commercial operations.
- The requirement in sub-section 177CB(4) that the reasonable alternative be determined having regard to the substance of the scheme is limiting on both taxpayers and the ATO. The Explanatory Memorandum gives examples on this provision – for example, if the taxpayer invests funds on deposit, the alternative is limited to that type of investment, and cannot include an alternate investment in shares. Thus, if a taxpayer sold shares rather than assets, the ATO and the taxpayer would be limited to considering an alternate postulate involving a sale of shares, and could not propose an alternate postulate involving a sale of assets, and
- It is unclear whether the alternative postulate for the dominant purpose test will be the real alternative postulate or the alternative postulate determined by reference to the section 177CB(4) limitations.

If you have any questions regarding the above, please contact Mark Morris, Senior Tax Counsel, on (03) 9606 9860 or via email at mark.morris@cpaaustralia.com.au.

Yours faithfully



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