

18 December 2009

Senate Economics Committee
Department of the Senate
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Our Ref:

Dear Committee Members

RE: Inquiry into the Tax Laws Amendment (2009 Measures No. 6) Bill 2009

We would like to make this submission to the Committee's inquiry into the Tax Laws Amendment (2009 Measures No 6) Bill 2009. This Bill and its explanatory memorandum (the EM) were introduced into Parliament following the release of a draft bill and explanatory memorandum which were released on 31 July 2009 and 17 August 2009 respectively. These documents were released following the Treasury Discussion Paper (the discussion paper) issued on 16 January 2009 subsequent to the 23 December 2008 announcements made by then Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry MP.

Due to time constraints associated with the timing of the introduction of the Bill into Parliament, its referral to the Committee, and 30 June 2009 income tax return work, we have been unable to provide line by line feedback to Committee.

However, we would like to highlight a number of concerns regarding the Bill as follows:

1. Choice of transfer losses

Under section 310-10, a fund must satisfy a number of conditions before the trustee can choose to transfer losses under the transfer loss provisions.

The Bill indicates that the first condition is satisfied if the transferring entity's assets include assets other than a complying superannuation/FHSA life insurance policy or units in a PST.

Based on this current wording, where a fund holds a mix of assets including a complying

superannuation/FHSA life insurance policy and/or units in a PST, the trustee would not be eligible to transfer its losses. This would appear to be contrary to intention of the Government's announcements regarding the transfer loss provisions.

While there may be some argument that reliance could be put on the EM relating to this section, the current drafting of the EM does not provide sufficient guidance to clarify that funds are able to make a choice regarding the loss provisions where they are holding a mix of assets that include a complying superannuation/FHSA life insurance policy or units in a PST.

In addition, unless the legislation is ambiguous, obscure or leads to a manifestly absurd or unreasonable result, only the legislation can be used to determine what tests the funds need to satisfy.

On the face of it, section 310-10 is clear – a fund only satisfies this condition if it does not hold a complying superannuation/FHSA life insurance policy or units in a PST. As a result, the EM cannot be relied upon to clarify the purpose of this section.

The wording of this section should be amended so that this condition is satisfied if the transferring entity's assets include other assets (ie. the mere holding of a complying superannuation/FHSA life insurance policy or units in a PST should not preclude the trustee of a fund from being eligible to choose to transfer losses where the fund holds a variety of assets which include a complying superannuation/FHSA life insurance policy or units in a PST).

We note that a fund is not subject to tax a complying superannuation/FHSA life insurance policy or units in a PST where it disposes of them and therefore no loss transfer relief is required in relation to these assets.

2. Additional conditions

Under section 310-10(4)(b)(ii), a complying superannuation or approved deposit fund (ADF) other than the original fund must cease to have any members under the arrangement and the individuals of that fund/ADF must become members of the continuing fund. Presumably this condition is relating to a situation where there is a multi-fund merger occurring (ie. two or more funds are merging into a continuing fund).

Under section 310-10, the conditions to be able to make a choice will be satisfied where (amongst other things):

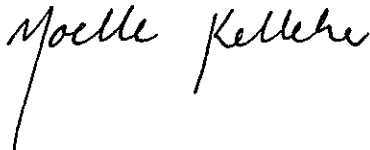
- the original fund (being the fund that wants to make the choice) ceases to have members (section 310-10(3); and
- a fund/ADF other than the original fund ceases to have any members (section 310-10(4)(b)(ii)).

Based on the above, the original fund's ability to choose the loss relief is dictated by whether or not

another taxpayer satisfies the conditions of ceasing to have members. In addition, those former members of the other taxpayer must become members of the continuing fund.

We believe that it is inappropriate that the tax affairs of one taxpayer are dictated by the actions of another taxpayer and therefore this aspect of the conditions should be removed.

If you have any queries regarding the above or require further input, we would be happy to assist. Please contact either Meghan Speers on (03) 9671 7073 or me on (03) 9671 6600.

A handwritten signature in black ink, reading "Noelle Kelleher". The signature is written in a cursive, flowing style.

Noelle Kelleher
Director, Deloitte Touche Tohmatsu Ltd