19 October 2009

Senator the Hon. Nick Sherry
Assistant Treasurer
PO Box 6022
Parliament House
Canberra ACT 2600

Dear Senator Sherry

Income Tax Consolidation – Exposure Draft legislation

We are writing to highlight for you some important decisions that we understand the Government will be making very soon as part of the implementation of the unlegislated tax consolidation measures currently being finalised by Treasury. We understand these measures are expected to be introduced in the final two week sitting period of the spring sittings.

We are ready to consult with your office on these matters.

The majority of the unlegislated measures, which span a seven year period and were referred to in the 2008 Federal Budget, are in the Exposure Draft legislation (ED) released for public comment on 28 April 2009. Representatives of the Institute of Chartered Accountants in Australia and the Taxation Institute of Australia (the Joint Bodies) have been consulting on these issues since 2002 and lodged various joint submissions in response to key design features.

The three groups of issues set out below have been covered as part of our earlier submissions and will give rise to a need for the Government to make some important decisions in the coming weeks. Further information can be provided as required.

a) Implementation of this consolidation package

There are a number of measures that are intended to apply retrospectively from 1 July 2002. As a result, the Joint Bodies believe that corporate groups should have the opportunity to reconsider and re-exercise various choices they had to make when entering tax consolidation, in light of the fact that this new legislation was not in place at the time they made certain decisions.

Tax consolidated groups made certain choices about treatment of their assets and tax losses when entering tax consolidation in 2002, based on the law then in force. Those choices became irrevocable on 31 December 2005.

The effect of the new laws proposed in the ED is that some corporate groups will have made choices which will be now be considered inappropriate. A direct consequence of this is that those corporate groups will be subject to a tax disadvantage owing solely to the unusual circumstance of the (then) Government making retrospective policy announcements that are only now being giving effect to by introduction of these new laws.

In our view, it would be appropriate in the circumstances for corporate groups to have a limited opportunity to amend their previous choices (if they so choose) in the light of policy and legislative changes. It is worth pointing out that such an exception was granted when the previous government introduced a similarly large package of retrospective tax consolidation changes in 2005.

The Joint Bodies recognise that the Government currently faces significant expenditure challenges from *budgetary* constraints arising from the impact of the global economic downturn. Notwithstanding this, we believe it is vitally important to deliver a fair and reasonable outcome in relation to these long-running tax consolidation matters. Many, if not all, of the current consolidations issues date back to the commencement of the tax consolidation regime in 2002; these issues have been the subject of ongoing discussions with Treasury and the Government for many years.

If allowing corporate groups to amend previous choices is not possible, we believe there exist alternative mechanisms that could be developed to address the significant compliance and equity concerns of taxpayers, which at the same time deliver the policy objectives of the Government. In particular, we believe that alternative mechanisms could involve optional retrospectivity for taxpayers, to strike an appropriate balance to deal with these compliance and equity issues for potential adjustments spanning the period back to 2002.

b) Earlier application date for some measures

The various measures have differing commencement dates. Some of the previously-announced commencement dates were inappropriate as corporate groups had expected earlier commencement dates in relation to measures under discussion.

This is particularly the case in relation to what is known as the 'MEC special conversion event', measure. At the moment, this particular measure is only expected to operate from 27 October 2006 whereas it had been anticipated that this unintended and anomalous operation of the existing provisions would be corrected from 2002. As such, we believe that consideration be given to providing taxpayers with the option of also applying the corrective measure back to 2002 if they so choose.

c) Transitional consolidation loss measures

The current transitional consolidation treatment of tax losses and capital gains tax losses is still creating significant problems for taxpayers. A detailed submission dealing with these issues (including possible solutions) was lodged by the Joint Bodies along with the Corporate Tax Association and CPA Australia on 1 May 2008.

We believe that these 'transitional loss' aspects also need to be resolved as part of a successful implementation of the backlog of unlegislated measures (whether this be done by enabling taxpayers to re-exercise elections as proposed in the 2008 submission or via an alternative approach).

All of the matters described above have been discussed with Treasury.

We fully support and commend the efforts of this Government to enact previously announced, but unlegislated, measures. It is clearly in the interests of taxpayers and the Government for all of these various consolidations issues dating back to 2002 to be quickly resolved to the satisfaction of all stakeholders.

Given the complexity associated with the tax consolidation regime, we would be pleased to provide further information and meet with your office to discuss the matters we have raised in this letter.

Please do not hesitate to contact, in the first instance, Susan Cantamessa from the Institute on 02 9290 5625 or Angie Ananda from the Taxation Institute on 02 8223 0011.

Yours sincerely

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