THE TAX INSTITUTE

THE MARK OF EXPERTISE

22 April 2014

Mr Ben Kelly
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By email: AnnouncedUnenacted@treasury.gov.au

Dear Ben,

Protection Measure for Announced but Un-enacted Tax Amendments – Exposure Draft

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014: Protection for discontinued announced measures Exposure Draft* (**Exposure Draft**). We broadly support the protection measure in the Exposure Draft though we have some moderate concerns which are addressed in the submission below.

Discussion

Background

The Tax Institute welcomes the recent Government action of reviewing and clearing the backlog caused by the list of 92 un-enacted tax measures[1] and prioritising the remaining un-enacted measures. This has restored certainty to the Australian tax system and resolved unanswered questions members of the tax profession had about whether certain announced changes would in fact come to fruition.

Such certainty is essential to the proper functioning of our tax system for a variety of reasons, including the need to allow:

- taxpayers to self-regulate behaviour in order to minimise tax risk;

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[1] As noted in the Media Release "Restoring Integrity to the Australian Taxation System" on 6 November 2013 (http://axs.ministers.treasury.gov.au/media-release/003-2013/)

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- the fostering of voluntary and informed compliance with tax laws;
- taxpayers to make investment decisions and strike commercial bargains with certainty as to the tax cost resulting from the relevant transaction;
- corporate taxpayers to make informed dividend policy decisions; and
- listed companies to produce timely financial statements that accurately reflect their tax expense.

We should not get to this stage again where so many measures have been announced but not enacted.

Protection Measure

The Tax Institute broadly supports the protection measure contained in the Exposure Draft that is proposed to be introduced by the Government. We set out below some minor concerns we have with the Exposure Draft for your consideration.

1. Draft sections 170B(6) and (7)

The Tax Institute is concerned that draft sections 170B(6) and (7) may be drafted too broadly. According to the Explanatory Memorandum (**EM**) accompanying the Exposure Draft, a taxpayer may choose not to have "eligible particulars" of an assessment protected where the taxpayer applies for an amendment of the assessment pursuant to draft section 170B(6). Paragraph 1.66 of the EM indicates that a taxpayer makes the choice not to have the protection of the protection measure apply if the amendment requested is in respect of particulars that are subject to the protection measure.

However, as currently drafted, if a taxpayer requests an amendment to a particular in an assessment that is not subject to the protection measure, but there are other particulars in the assessment which are subject to the protection measure, the taxpayer loses the benefit of the protection measure by reason of the relevant assessment being amended. Draft section 170B(7) appears to be drafted to similar effect.

We acknowledge that Treasury has adopted principles-based drafting to draft this provision. However, we suggest that draft sections 170B(6) and (7) be refined to ensure that in the case where a taxpayer requests an amendment to an assessment but that request does not relate to a particular to which the protection measure otherwise applies, the protection afforded by the protection measure is preserved.

We suggest the following amendments (in bold and italics):

170B(6) Subsection (3) does not apply if the taxpayer applies for the amendment of the assessment *in respect of the taxpayer's anticipated amendments*.

170B(7) Subsection (3) does not apply if the Commissioner may amend the assessment *in respect of the taxpayer's anticipated amendments* in accordance with item 6 (review or appeal) of the table in subsection 170(1).

A clear statement should be included in the EM that the Commissioner may amend an assessment that includes the taxpayer's anticipated amendments if the request for amendment does not relate to those "anticipated amendments" and that the benefit of the protection measure will be preserved for those "anticipated amendments".

2. Practical application of the protection measure

We set out below an example of a scenario where we are unsure of the correct result arising where the protection measure is applied.

Item 10 in the table in draft section 170B(9) relates to changes announced to the uniform capital allowance regime on 12 May 2009. Company A claims depreciation on the basis of the law as it existed in the 2009 and 2010 income years. However, Company A decides to claim depreciation in accordance with the announced but un-enacted measure in the 2011 and subsequent income years. As a result, Company A requests the Commissioner to amend its income tax returns for the 2009 and 2010 income years to reflect the announced but un-enacted changes to the uniform capital allowance regime.

In determining the approach to take when applying un-enacted measures, the Commissioner is to follow the principles in *Practice Statement Law Administration PSLA 2007/11*[2] . Broadly, the Commissioner is required to apply the existing law taking into account that in a self-assessment environment, the Commissioner is permitted to determine whether it is an appropriate use of his resources to enforce compliance with existing law where a taxpayer chooses to self-assess by anticipating an un-enacted measure. It follows that the Commissioner may issue an assessment or amended assessment on the basis of a taxpayer choosing to self-assess based on an un-enacted measure.

Should the Commissioner issue an assessment based on Company A's request (who makes the choice to self-assess based on an un-enacted measure), the question arises whether the protection measure could apply to the 2009 and 2010 income years. This would impact requests for an amendment pertaining to particulars affected by un-enacted measures that were on foot at the time the protection measure was announced, but the amendment had not yet been made.

We are unsure how significant this issue may be. It may be sufficient if a note addressing this issue is included in the EM.

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[2] See paragraph 17 of PSLA 2007/11. These sentiments are also captured in paragraphs 1.6, 1.7 and 1.19 of the EM.

3. Extent of protection afforded

The Tax Institute also raises a concern about the extent of the protection. Taking the case of the simplified imputation system measure contained in Item 13 in the table in draft section 170B(9) as an example, though this announcement was made in 2006, it applies from 1 July 2002. That is, the announcement was made to support a practice that taxpayers were already following.

For a taxpayer to be afforded protection under draft section 170B, the announcement must be on foot (as defined in section 170B(9)) at the time the relevant statement is made.

It does not appear that a taxpayer who had made a statement that in effect anticipates the announcement made in 2006 in a return they have lodged in an earlier income year, for example the 2004 income year, would be afforded protection under the protection measure, even though the announcement indicated that they would be protected.

This may also be an issue for other measures captured in the table in draft section 170B(9).

Other measures not captured in the Protection Measure

Item 13 of Schedule 1 refers to 2006-07 Budget Paper No 2, released on 9 May 2006. This announcement was preceded by an announcement on 20 March 2006, Assistant Treasurer's press release No 101, 20 March 2006. Item 13 should be amended so that the announcement is constituted by both the 2006-07 Budget Paper No 2 Part 1 and by the Assistant Treasurer's press release No 101.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely

M.Fly

Michael Flynn
President