THE TAX INSTITUTE

THE MARK OF EXPERTISE

20 April 2015

Matthew Brine
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The Treasury
Langton Crescent
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By email: MECgroupconsultation@treasury.gov.au

Dear Mr Brine

Multiple entry consolidated groups

The Tax Institute welcomes the opportunity to make a submission to Treasury in relation to its consultation paper on multiple entry consolidated groups dated March 2015 (**Consultation Paper**).

We set out below our responses to the questions in the Consultation Paper.

Responses to consultation questions

Tax Cost Resetting Rules

We note the language in the Consultation Paper refers to the MEC group being able to choose between retaining the cost base of a joining entity's assets and resetting the cost base of a joining entity's assets. The decision to hold the joining entity through an offshore entity or through an Australian entity may well be affected by non-tax issues (such as whether having the newly acquired entity held by an existing eligible tier one company would expose the new investment to risks related to that eligible tier one company's existing activities). Therefore it should not be assumed that such a decision, and the consequent retaining or re-setting of tax costs, is a tax-driven decision in all cases.

If the decision is tax driven and the acquirer takes steps to produce one tax outcome rather than the other, the operation of the general anti-avoidance rules in Part IVA of the Income Tax Assessment Act 1936 need to be considered. The Commissioner of Taxation has already outlined his views on when the general anti-avoidance provisions could apply to corporate groups that organise their affairs with respect to specific choices within the tax consolidation provisions (refer to the ATO Consolidation Reference Manual at C9).

The proposed amendment as noted only targets circumstances where the net tax bases of the assets held by an eligible tier one company are higher than its market value. It would not apply in circumstances where the tax base is lower (we note that the working group considered and did not recommend applying the full entry ACA method to eligible tier one companies due to other concerns with respect to such a proposal). As such, the introduction of a one-sided adjustment requires substantial consideration.

The current situation where the tax bases of assets held by eligible tier one companies are not reset is comparable to the head company of a consolidated group. This is reasonable since in reality eligible tier one companies are more analogous to a holding company than to a subsidiary, and it is only by tax fiction that some of these entities are treated (in part) like subsidiaries within the consolidation regime. In the example group structure provided at diagram 1 of the Consultation Paper, the eligible tier one company could elect to form a tax consolidated group with itself as the head company rather than join a multiple entry consolidated group. Furthermore, the eligible tier one company may also decide not to form or join any consolidated or multiple entry consolidated group, in which case the tax bases of its assets are also not reset or changed. Admittedly either such approach would deny it "consolidation" with the MEC group, but it may be that some future internal restructure would place the MEC group entities under it perhaps with 126-B rollover, facilitating a single group existing. (Given that this is a hypothetical we will not traverse the other possible tax consequences of such a reconstruction.)

If the eligible tier one company did not join the MEC group (whether it initially consolidated or not), the tax bases of its assets (other than the investment in the subsidiary member if it did consolidate) would also not be reset. The proposed amendment would therefore create a potential difference between the treatment of multiple entry consolidated groups and consolidated groups, which could arise fortuitously depending on the history of the relevant groups. To the extent that such an inconsistency may exist, it will not be consistent with the other measures contained in the consultation paper that clarify certain aspects of the consolidation regime

The amendment proposed would result in additional compliance costs incurred in having to undertake Subdivision 165-CC calculations, and in determining the market value of the assets of the joining entities' assets (as well as the market value of the eligible tier one company if it were not acquired directly).

We also have concerns about effectively realising the impact of a loss for tax purposes through the denial of tax base where that unrealised loss may not ultimately eventuate.

Accordingly, our primary position is that a legislative amendment is unnecessary.

Our secondary position is that this amendment, if made, should be made prospective. An advantage of doing so would be that compliance costs on dealing with prior year amendments are not incurred. We note that the measure was proposed in 2013 with an intended start date of 1 July 2014 which indicates that a prospective start was accepted as desirable.

Tax Sharing Arrangements, PAYG instalments and joint and several liability

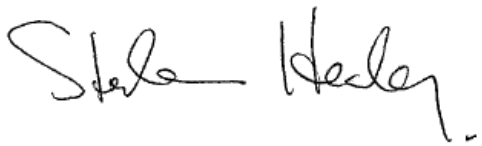
We support the amendments proposed in relation to these issues, and suggest that to the extent that they benefit taxpayers they should take effect from the start of the regime which is now to be corrected. These changes are uncontroversial and it is our experience that taxpayers have been operating on the basis of the proposed approach on the assumption the legislation would be amended accordingly.

CGT event J1

We agree with amendment to section 104-182 of the Income Tax Assessment Act 1997 to include a reference to MEC groups so that CGT event J1 applies to MEC groups in the same way as consolidated groups. The current law results in duplication of capital gains and losses and the technical operation of the provision is unclear and unworkable. We understand that the failure to draft section 104-182 this way at the inception of the consolidation regime was simply an oversight and we suggest that the amendment should apply retrospectively from the date section 104-182 took effect.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely



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