s22

From: s22 @ato.gov.au>
Sent: Wednesday, 25 May 2011 4:27 PM
To: s22
Cc: s22

Subject: Other options for consideration.doc
Attachments: Other options for consideration.doc

<<Other options for consideration.doc>>

s22 a slightly more coherent version of my email earlier today. Given the time constraints I have not been able to put into a formal minute.

Regards,

s22

Other options for consideration

Company tax collections last year amounted to only $52 billion. The *current* costs of claims received or identified amount to over $30 billion in deductions, and if no more than half of these were ultimately deductible—due to undeclared claims it is unlikely to be so little—we are still dealing with claims amounting to 10% of annual company collections. It is inconceivable that Government would have proceeded with the amendments, whatever was intended by the original announcement, had that cost been apparent to it.

Recommendations 5, 6, 7 are basically clarificatory. The probable effect of their retrospective application to categories 2 & 3 is thus not to reduce cost to revenue in the end, but only to reduce uncertainty and bring finality to unjustified claims sooner.

Options 8 and 9 only go to the time value of money and do not reduce the primary cost of the retrospective amendments[1].

The consequence is that we still talking about a significant outlay over forward estimates period that was not intended—that is, the *cost* was not intended, whatever was intended by the measure.

As acknowledged at paragraph 63, Category 3 taxpayers have not relied on the amendments in commercial transactions. They may have expected deductions on the basis of an announcement, but the disappointment of that expectation is not in itself a sufficient reason for excluding retrospective change: they will stand the same position if the entitlements are withdrawn now as they would have been in, had Government simply not proceeded with the announcement.

A taxpayer that has actually received a *refund* based on a conceded claim may thereafter have acted on the basis that the money was available to it and so acted to its detriment, effectively putting it in category 2. A similar but weaker case can be made for someone that has received a *ruling*. Call these category 4.

Those that have merely made claims or done nothing can suffer no detriment from the retrospective retraction of entitlements retrospectively conferred.

While it may not be for the Board to judge the appropriateness of a course of action that involves such a retrospective retraction of claims for category 3 (excluding category 4), it being a matter for Government to consider, it cannot be said to be necessarily inappropriate and should be an option for consideration in the report.

Putting category 3 in the same position as ongoing claims should be mentioned as an option if not necessarily recommended.

---

1 Two points: if the substantive claim is warranted, why is interest on it not warranted? This option may attract criticism precisely because the underlying claim is not withdrawn. Second, the effect of spreading the cost over the next five years may not have any material budgetary advantages; it would be necessary to spread the cost over a much longer period. Of course, if the claims are pushed into periods when the budget will be under pressure from increased outlays, the ultimate result may actually be to worse budgetary positions.

We would also make the point that the interaction of s.40-880 with Part 3-90 was not only contested during the relevant period as a matter of law, it is contested as a matter of appropriateness in policy. It is also expensive and we think it highly unlikely that government would have consciously agreed to the provision applying by reason of the residual cost setting rule had it been aware of the issues and cost. This should, we feel, justify consideration, again as an option even if not as a recommendation, in the report.

And it would be useful to state explicitly that claims removed from the ambit of s.716-405 do not fall back into s.8-1 via s.701-55(6).

Also, as noted in my previous email, while the outcome of s.701-55(6) for derivatives may be appropriate in itself, on one view, a corresponding anomaly on the liability side could produce, and we think has produced, an anomalous overall outcome. Since the retrospective deduction was a windfall gain for taxpayers in category 2, a retrospective correction of an anomalous liability treatment for such taxpayers will not produce an overall result that is unjust: quite the contrary.

Finally, returning to the revenue point, it needs to be appreciated that, however embarrassing retrospective legislation may be *now*, it would pale in comparison to the embarrassment that would ensure if claims blow out further to the point where Government is compelled to act *again* in regard to category 2. There must not be further amendments. This point cannot be overemphasised. Hence the need to ensure that cost to revenue is definitely contained.

s22

Deputy Chief tax Counsel
25 May 2011