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Sent: Monday, 31 October 2011 1:34 PM
To: s22
Cc: s22 Treasury ATO Gateway; ATO
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Subject: I reasury gateway; s22
Attachments: ATO Minute 572/2011
 20111031 ATO Minute 572-2011.pdf

Security Classification:

Good Afternoon s22

Please find attached ATO Minute 572/2001 in relation to the proposed amendments to the rights to future income and residual cost setting rules - Pre 12 May 2010 period changes.

Regards

s22

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ATO MINUTE	572/2011	31 OCTOBER 2011	
FORMAT	MINUTE NO.	ISSUE DATE	CLASSIFICATION



Australian Government
Australian Taxation Office

ATO MINUTE

FILE REF: [FILE NO.]

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OTHER REFS:		

- CATEGORY:
- Suggested legislative amendments
 - Minor technical amendments to the law - not Tax Issues Entry System (TIES) issues
 - Policy/Law change suggestion - substantive change in policy or law
 - Pre Policy Approval
 - Legislative Measures Development
 - General - includes advice in relation to outcome of litigation/courtcases and TIES issues

ISSUE DATE: 31 October 2011

RESPONSE DATE: NA

SUBJECT: Consolidation : Proposed amendments to the rights to future income and residual tax cost setting rules : Pre 12 May 2010 period changes

Purpose

To advise of an emerging issue, not addressed by the draft amendment options, relating to rights to future income and the residual rule particularly for the retrospective period pre 12 May 2010. In essence, taxpayers have the right under existing law to insist on amended assessments based on that law. But the commissioner will not necessarily have the power to reverse those amendments under the existing terms of section 170 even after the law is retrospectively changed. Therefore section 170 or another machinery provision requires amendment.

Background

To date the ATO have received approximately 26 private rulings, 46 objections and 80 amendment requests relating to the consolidation rights to future income and residual rules, which are yet to be resolved.

The majority of claims made in these rulings and objections relate to the assets which would have reset tax cost allocated to goodwill under the current amendment proposals for the retrospective period.

The emerging issue arises because some taxpayers will be able to appeal rulings or objections, requiring the Commissioner to amend assessments in circumstances where the Commissioner cannot reverse those amendments concordant with the draft amendment options. Even if the government were to make the announcement regarding retrospective change today no enacted law will exist until some time in 2013, at the earliest. In the interim what taxpayers are beginning to do is lodge notices under section 14ZYA or section 359-50 of the *Taxation Administration Act 1953* (TAA 1953) and so take their objection or ruling to the Administrative Appeals Tribunal (AAT) or Federal Court and force a decision on the existing law.

Such a course is open where the right to future income or residual claim relates to an income year prior to 2010.

Presently in the AAT there is a matter which involves a claim under the rights to future income rules for the 2007, 2008 and 2009 income years. The asset in the case is of type which will have its reset tax cost allocated to goodwill under the amendment proposals. The taxpayer's claim under the existing law is, prima facie, strong. Subject to disputing the market valuation of the asset there is nothing to prevent the claim from being allowed by the AAT next month. The Commissioner will be required, pursuant to item 6 of subsection 170(1) of the ITAA 1936 to amend the taxpayers 2007, 2008 and 2009 year assessments to reduce the taxable income in each year, resulting in a total tax refund of \$3,090,600 at the end of the 2009 income year. If the retrospective amendments to the law are not enacted until 2013, the Commissioner will be precluded from amending the amended assessments by subsection 170(2).

Potential claims for the 2003 to 2008 income years, as per objections and private rulings lodged to date, total approximately \$5.1 billion. There is nothing to stop taxpayers in these cases from lodging section 14ZYA and 359-50 notices in the hope of forcing a favourable AAT or court decision and income tax refunds which the Commissioner will be precluded from recovering when the retrospective amendments to the law are enacted.

The cost to the revenue of such claims under the current law will depend largely on the number of cases the tribunal or courts are capable of processing until the amendments to the law are enacted.

There is nothing to stop Australia's banks and insurer's following the example of the taxpayer presently before the AAT. That will mean significant revenue risk.

Advice/Issue

The current amendment proposals for the retrospective period do not deal with the amendment of a pre 12 May 2010 assessment as a result of a tribunal or court decision after the 31 March 2011 this could have a significant, unintended revenue cost.

Recommendation/Action

The amendment proposals for the retrospective period should include a provision to amend section 170 to allow a refreshed amended period for amending amended assessments for the purpose of giving effect to the retrospective period amendments to the rights to future income and residual rules.

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Deputy Chief Tax Counsel