

11 May 2012

Principal Adviser
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: consolidation@treasury.gov.au

Addendum to Submission on the Exposure Draft to Tax Laws Amendment (2012 Measures No. 2) Bill 2012: Consolidation - subitem 53(3)(a)(i)

Further to our submission dated 2 May 2012, we have identified a technical anomaly in the Application provisions contained in Part 4, Schedule 1 of the Exposure Draft to Tax Laws Amendment (2012 Measures No. 2) Bill 2012: Consolidation (the "ED") which we would like to bring to your attention.

(Note: Terms not defined in this submission have the same meaning given to them in the ED.)

Technical issue

The application provisions contained in Part 4 of Schedule 1 of the ED operate to determine which set of rules will apply to an assessment of the head company of a consolidated group for an income year in respect of a joining entity that becomes a member of the group at the joining time.

Our concern is in relation to the following scenario:

- ▶ Before 10 February 2010, a Head Company enters into an arrangement under which target company (the "Joining Entity") joined the group;
- ▶ the Joining Time is between 12 May 2010 and 30 March 2011; and
- ▶ the Head Company's notice of assessment for the income year (that relates to the application of subsection 701-55(5C) or (6) of the original 2010 rules in respect of the Join Entity) was served on the Head Company by the Commissioner between 12 May 2010 and 30 March 2011,

Based on subitems 53(2) and 53(3) of the ED, the pre rules will apply to the Head Company - the Head Company will be unable to satisfy the condition in subitem 53(3)(a)(i), as the Joining Time will be after 12 May 2010, so it will not be eligible to apply the interim rules.

We submit that this outcome is inconsistent with Attachment A of the then Assistant Treasurer, Mr Bill Shorten's Media Release No. 159 of 25 November 2011 (the "Media Release"). Specifically, paragraphs 27 and 28 of the Media Release, when read together with item 3 of Table 2, provide that [emphasis added]:

- ▶ "The changes to the original tax cost setting rules for the pre-May 2010 period will apply to claims...in respect of an **arrangement that was entered into before 10 February 2010, regardless of the joining time.**" (para 27)

- ▶ **“However, as outlined in Table 2, the changes to the original tax cost setting rules may not apply to a claim if it is covered by...a notice of assessment or amended assessment issued before 31 March 2011.” (para 28)**
- ▶ **“If the claim is covered by an assessment or amended assessment where the notice issued between 12 May 2010 and 30 March 2011...the changes to the original tax cost setting rules for the pre-12 May 2010 period will not apply to the claim.” (item 3, Table 2)**

On the basis of the Media Release, we believe the Head Company in the above scenario would have concluded that “the changes to the original tax cost setting rules for the pre-12 May 2010 period” will not apply to their claim - that is, the interim rules (and not the pre rules) should be applicable.

Suggested drafting change

Based on our understanding of the policy behind the current amendments, and our reading of the Media Release, we believe that Treasury intended that claims covered by a notice of assessment that was served by the Commissioner between 12 May 2010 and 30 March 2011 would be covered by the Interim Rules.

It would appear that this is simply a technical anomaly that has arisen in the drafting of the ED, which we appreciate is a complex exercise.

We believe this issue can be simply rectified by amending subitem 53(3)(a)(i) so that the first condition will be satisfied where the joining time is before 30 March 2011.

The amended provision would read as follows (change underlined):

- (3) Despite subitem (2), those provisions are the interim rules if:
 - (a) both of these conditions are satisfied:
 - (i) the joining time is before 30 March 2011;
 - (ii) the head company’s latest notice of assessment, for the income year, that relates to the application of subsection 701 55(5C) or (6) of the original 2010 rules in respect of the joining entity, was served on the head company by the Commissioner on or after 12 May 2010 and on or before 30 March 2011; or

...

If you wish to discuss this issue further, please contact Jonathan Rintoul (02 9276 9256), Tony Stolarek (03 8650 7654) or Richard Czerwik (03 9288 8408) in the first instance.

Yours faithfully

Tony Stolarek
Tax Centre for Excellence and Tax Policy Services