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Tax Treaties Branch
Corporate and International Tax Division
Treasury
Langton Cres
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Australia

Dear Tax Treaties Branch, Corporate & International Tax Division & Treasury - Australia

I would like the Treasury to update the Australia–USA tax treaty to be updated in a manner that will positively effects Dual AUS/USA citizens. The current tax treaty is over 2 decades old and fails to address the the USA taxation of Australia's superannuation or take in account modern investment structures such as managed funds and exchange traded funds. Now is a good time to consider these issues and modernise and improve the tax treaty framework between the two countries.

I am sure that the treaty will enhance foreign and trade opportunities but I would like to see much needed improvements in the treaty that will positively impact individuals - specifically tax payers that have tax obligations in both countries.

The USA is unique in the world by practicing citizenship based taxation so the current tax treaty has numerous gaps and anomalies that results in punitive and double taxation, considerable compliance complexity and creates great difficulty for retirement planning for my family and other dual AUS/USA citizens. In fact, the current treaty guarantees unfair taxation–by the US–of some Australian source income, including superannuation. We personally feel the excessive compliance burden because we must pay the cost of tax preparation in the USA and Australia and require sophisticated financial planning to effectively save for retirement while simultaneously watching and referring to two different tax systems and the impact on each other.

I personally spend a minimum 200 hours each year gathering materials and preparing information for our USA tax accountant for our USA tax return. Each year my husband and I have paid over 5 figures to our USA tax accountant to complete it. In contrast and in our overseas experience - other countries tax returns only take 1 hour to 4 hours to prepare and complete and we are able to complete most of it ourselves. But due to the gaps and uncertainly in the AUS/USA tax treaty, we must spend this extraordinary amount of time and money to stay compliant with the USA tax office.

I would like the following changes made in the AUS - USA tax treaty. I would like these USA tax obligations removed - as my income and assets are Australian - and not American assets to be taxed. USA citizens abroad should only complete a form

declaring that no income or assets are American - with a promise to advise the USA if any are required.

1) fix the taxation of cross boarder Retirement accounts: The Australian taxation of IRAs and 401k accounts and most importantly fix the U.S. taxation of Australia's compulsory Superannuation ("super") savings accounts.

Superannuation: The 2001 Australia-US Tax Treaty does not even mention superannuation, despite it being widely mandated in Australia since 1992. As superannuation is not addressed in the existing tax treaty, nor has either country issued any formal taxation guidance, there has been, and continues to be, much uncertainty about the “correct”. way to include superannuation on a US tax return, even among IRS agents. It is worth noting that both the UK and Canada have more favourable US tax treaties than Australia! In the case of Australian residents, US tax on Australian superannuation of Australian residents is contrary to the interests of Australia as it reduces the ability of Australians to save to fund their retirement and increases. The US should have no claim on super – especially of Australian residents.

If changes are not made - the IRS will continue to treat my superannuation (as well as our Family Trust) as “foreign” grantor trusts. Since superannuation is not a qualified US retirement plan, any movement of super balances between funds may be treated as a taxable distribution. This includes consolidation of fund balances or rollovers when changing employment, all of which are tax free transactions under Australian tax law. Thus, US taxpayers with superannuation accounts are guaranteed to pay double tax on those accounts – once for income taxed inside their superannuation fund and once again by the US

2) fix the US tax treatment of Australian domiciled managed fund investments and exchange-traded funds (ETFs); For over 20 years we held Australian managed funds but we have had to sell of them in the past 3 years because the USA considered them all PFIC (Passive Foreign Investment Company). US Internal Revenue Code generally treats many “foreign” investments as if their only purpose were to avoid or defer US tax, with no ownership distinction made between US and overseas residents. Keeping them meant adding more complexity and cost to our already complex tax return. Not declaring them properly on our tax return also exposed us to punitive tax penalties being applied.

The new treaty should include a clause that prohibits discrimination against investments available to retail investors in the each country. This clause would not override securities law regarding marketing of investments but would provide relief to a mobile overseas workforce who may have assets in place in one country when they move to the other. Or include a clause that states that Australian investment
structures that are sold to retail investors are not to be considered “foreign corporations” under the PFIC rules. That is, the treaty should stipulate that retail investments domiciled in one country should not be more
punitively taxed by the other country than their own similar domestic investments.

3) fix the non-alignment of capital gains taxation on the sale of a personal residence — this is a common issue for Americans expats and dual USA/AUS citizens - the U.S. Capital gain tax on the sale of Australians' personal residences

For us, as USA/AUS dual citizens - the capital gain on the sale of our personal residence is taxable in the US (with a US$250,000 exemption per person). This gain is computed as if the purchase and sale were in US dollars, potentially leading to currency "phantom gains". In addition, since US tax rules assume that the US dollar is the functional currency of all individual taxpayers, discharge of an AUD denominated mortgage can result in taxable foreign currency gains.

Furthermore, since the residence is a personal use asset, losses are not allowed, so only the gain side of the currency transaction will be recognised and taxed. Allowing the US to tax capital gains on Australian real estate owned by Australian residents is contrary to the economic interests of Australia. As we approach our retirement years in a few years these issues will be a great concern as we sell our primary residence. This is money that needs to help fund our retirement savings here in Australia.

I ask that the Treaty try to align treatment of the sale of a personal residence with Australian taxation policy, particularly as extremely high housing costs in Australia force many to tie up a large proportion of their net assets in their primary residence; stipulate that real property located in one country and owned by a resident of that country cannot be taxed by the other country.

4) **removal** of the inclusion of a "saving clause" in the treaty which guarantees the ability of the US to collect US tax on the Australian income of Australian residents.

All US tax treaties contain some form of "Saving Clause" that guarantees the right of the US to tax its citizens as if the treaty did not exist. In the current Australia-US Tax Treaty, the Saving Clause is found in Article 1 paragraph 3, with a limited list of exceptions in Article 1 paragraph 4. No other developed country asserts tax jurisdition based on citizenship alone.This erodes the ability of us to take advantage of Australian public policy and legislated tax concessions designed to encourage retirement savings and local investment.

It is a matter for the US Government to determine its own domestic laws, and it is unlikely that the US will agree to completely remove the Saving Clause from an amended treaty. However, Australia should insist that the Australian tax base is respected under the treaty. The Australian source income of Australian residents should be taxable only by Australia.

5. Treaty reform relating to the issues relating to Transition Tax and GILTI -

USA Tax reform imposed an ongoing tax (starting in 2018) on Global Intangible Low Taxed Income (GILTI). The way GILTI has been defined, most controlled foreign corporations will find that some of their active Australian-source business income has now been re-defined as US-source income, immediately taxable in the US whether distributed to shareholders or not. Where the US taxes undistributed income of Australian corporations, they are draining capital from Australia due to the resulting double taxation. Small Australian businesses owned by Australian-resident US taxpayers are often treated under the US tax code as controlled foreign corporations subject to these provisions. While Congress never considered the impact of this tax on tax-residents of other countries, the USA compliance industry is busy looking for victims.

This means that our son who would like to open a Australian business has to choose to renounce his USA citizenship (which is now costly as well) or pay this USA GILTI tax which would draws from his earnings and retirement planning as well as pay for a USA tax accountant to help keep him compliant with the complex byzantine tax rules for his tax return. This is a huge undertaking for someone in their 20s.

The treaty should specify that the undistributed income of Australian corporations cannot be deemed distributed to US shareholders and that this provision will not be invalidated by the saving clause. .

In Summary
1. Each country should recognise the tax deferred nature of retirement accounts and ensure that moving between countries does not materially alter the tax benefits promised when and where the accounts were established. Contributions to and benefits from any form of pension or retirement plan should be exempt from the saving clause. At a minimum, Superannuation contributions made on behalf of Australian residents should be taxable only by Australia and excluded from US taxation.
2. The treaty should stipulate that retail investments in one country should not be more punitively taxed in the other country than their own similar domestic investments
3. The treaty should include a provision that real property located in one country and owned by a resident of that country cannot be taxed by the other country.
4. The treaty should specify that the Australian source income of Australian residents is taxable only by Australia. The US practice of taxing based on citizenship rather than residence is particularly harmful to Australian residents with US citizenship, most of whom are Australian citizens.

The current tax treaty has numerous gaps and anomalies resulting in punitive and double taxation. Tax treaties are intended to prevent double taxation, improve cross-border tax efficiencies and eliminate tax evasion. Many of the failings of the current treaty are due to the unique US practice of taxing on the basis of citizenship, rather than country of residence, which is the convention accepted by the rest of the world. Given the close relationship between Australia and the U.S. for well over a century, and the large trade between the two countries – it is very unfortunate that individuals are being harmed by the inadequacies of the current treaty. Reform could enhance labour mobility

between our countries, while at the same time preserving Australian sovereignty over domestic policies, minimizing unwarranted tax leakage and, most importantly, providing Australians with the same 'fair go' range of opportunities."

I appreciate you considering these issues when reforming the Australian- USA Tax Treaty.
kind regards
Marla Waak