

Dear Natasha and Nicholas,

In relation to the proposed changes to the International Agreements Act 1953 to remedy the taxation by Australia of technical services fees earned from services in India, we make the following comments.

The start date for the changes in question currently is proposed as follows in the draft:

Application of amendments

The amendments made by this Schedule apply in relation to assessments for years of income starting on or after the commencement of this Schedule.

Moreover the commencement of the Schedule requires both Royal Assent and the official coming into effect of the Australia/India FTA (FTA finalisation).

We believe it would be more appropriate for the start date to be either in relation to assessments for years of income ENDING (ending rather than starting) on or after the commencement of this schedule. Or alternatively the start date should be in relation to income earned or payments for services made after the commencement of this schedule.

The reason for our suggestions are that the India /Australian free trade agreement was negotiated on 2 April 2022 and whilst not yet effective, once effective, it would be appropriate and indeed equitable for the new rules to apply as close as possible to 1 April 2022 which happens to be the start of the tax year for most if not virtually all Indian companies subject to these rules.

If the option to commence the new exemption was effective for years ENDING after the commencement of the Schedule, and Royal Assent and FTA finalisation occurred before 31 March 2023, then the new rules would be effective for most affected taxpayers from 1 April 2022 since, as mentioned earlier, this is the typical start date for Indian resident companies. This would coincide nicely with the intent of the negotiated FTA process made on 2nd April 2022 compared to an otherwise 1 April 2023 start date under the draft even assuming that Royal Assent and FTA finalisation both occurred prior to 1 April 2023.

Moreover under the existing draft commencement date, if Royal Assent and FTA finalisation occurred after 1 April 2023 – even by a few days let's say on 4 April 2023, then Indian companies would not be able to take advantage of a measure negotiated on 2 April 2022 until the start of the following income tax year commencing 1 April 2024, virtually a full two years later. This seems rather inequitable and an unnecessary delay in bringing into effect the spirit of the April 2022 negotiated settlement.

A less favourable option but a nonetheless better option than the currently drafted option, would be to have the new measure apply to income earned or payments for services made after the commencement of this schedule. This would mean, in the above example, that at least income earned/payments made after a hypothetical effective date of 4 April 2023 would at least be covered. Since the nature of the tax in question, although strictly an income tax, is really a form of taxation of royalty income which is typically subject to withholding taxes, making the commencement of the new exemption measure apply to income earned or payments made after a certain date is very consistent with the application date for most if not all withholding tax measures.

In short, we see no real need to delay the intent of the revised royalty taxation position, negotiated as part of the Australia/India FTA agreement, to a point beyond what is reasonable and appropriate given the options suggested above.

Kind regards,
Tony Merlo