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Inserts for
**Treasury Laws Amendment (Measures
for Future Bills) Bill 2023: Deductions
for payments relating to intangible assets
connected with low corporate tax
jurisdictions**

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Schedule #—Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions

Income Tax Assessment Act 1997

1 Section 12-5 (after table item headed “insurance with non-residents”)

Insert:

intangible assets—income connected with low corporate tax jurisdictions

payments etc. that significant global entity makes to 26-110
associate in relation to exploiting intangible asset
connected with low corporate tax jurisdiction, no
deduction for

2 At the end of Division 26

Add:

26-110 Payments etc. to associates—intangible assets and low corporate tax jurisdictions

- (1) The object of this section is to deter *significant global entities from avoiding corporate income tax by structuring their *arrangements so that income from *exploiting intangible assets is derived in *low corporate tax jurisdictions.
- (2) An entity (the *payer*) cannot deduct under this Act, for an income year, an amount for a payment it makes, to the extent that the payment is attributable to a right to *exploit an intangible asset, if:
 - (a) the payer is a *significant global entity for the year; and
 - (b) the payer makes the payment to an entity that is its *associate (whether directly or indirectly through one or more interposed entities, and wherever that associate is located); and
 - (c) the *arrangement under which the payer makes the payment (either alone or together with any other related arrangement) results in:

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- 1 (i) the payer (or an associate of the payer) acquiring the
2 intangible asset or a right to exploit the intangible asset,
3 or exploiting the intangible asset; and
4 (ii) the associate mentioned in paragraph (b), or another
5 associate of the payer, *deriving, in a *low corporate tax
6 jurisdiction, and whether directly or indirectly through
7 one or more interposed entities, income from exploiting
8 the intangible asset, or a related intangible asset.

9 Note 1: Examples of intangible assets include the following:
10 (a) intellectual property;
11 (b) information or data, including a database of customers;
12 (c) an algorithm.

13 Note 2: For the definition of *exploit*, see subsection (10).

- 14 (3) For the purposes of determining whether a payment is made
15 indirectly through one or more interposed entities to an entity, and
16 whether income is *derived indirectly through one or more
17 interposed entities:
18 (a) it is sufficient if amounts are paid or transferred between
19 each entity; and
20 (b) it is not necessary to demonstrate that each payment or
21 transfer in a series of payments or transfers funds the next
22 payment or transfer, or is made after the previous payment or
23 transfer.

24 *Effect of certain rates and inclusions on status of income*

- 25 (4) For the purposes of subparagraph (2)(c)(ii):
26 (a) in determining whether a foreign country is a *low corporate
27 tax jurisdiction, have regard only to the rate of corporate
28 income tax in respect of the income of an entity that is a
29 *significant global entity; and
30 (b) treat income derived in a foreign country that is a low
31 corporate tax jurisdiction as being derived otherwise than in a
32 low corporate tax jurisdiction to the extent that the income:
33 (i) is, or will be, *subject to foreign income tax at a rate of
34 15% or more; or
35 (ii) would be subject to foreign income tax at a rate of 15%
36 or more if subsection 832-130(6) and paragraphs
37 832-130(7)(d) and (e) were disregarded; or

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1 (iii) is included in the assessable income of any entity for an
2 income year under section 456 or 457 of the *Income Tax*
3 *Assessment Act 1936*.

4 Note: For the definition of *low corporate tax jurisdiction*, see
5 Subdivision 960-J.

6 *Similar arrangements*

7 (5) This section applies:

- 8 (a) in relation to each of the following in the same way as it
9 applies in relation to making a payment to an entity:
10 (i) incurring a liability to pay an entity;
11 (ii) crediting an amount to an entity; and
12 (b) in relation to permission to *exploit an intangible asset in the
13 same way as it applies in relation to a right to exploit the
14 intangible asset.

15 *Intangible assets etc.*

16 (6) Without limiting what is an intangible asset in this Act (including
17 in this section), in this section the expression intangible asset
18 includes (subject to subsection (7)):

- 19 (a) any of the following mentioned in paragraph (a), (c), (da),
20 (db), (dc) or (e) of the definition of *royalty* in subsection 6(1)
21 of the *Income Tax Assessment Act 1936*:
22 (i) any copyright, patent, design or model, plan, secret
23 formula or process, trade mark, or other like property or
24 right;
25 (ii) scientific, technical, industrial or commercial
26 knowledge or information;
27 (iii) visual images or sounds transmitted to the public by
28 satellite or cable, optic fibre or similar technology;
29 (iv) a part of the spectrum (within the meaning of the
30 *Radiocommunications Act 1992*);
31 (v) motion picture films, films or video tapes for use in
32 connection with television, or tapes for use in
33 connection with radio broadcasting; and
34 (b) any assistance mentioned in paragraph (d) of that definition,
35 other than assistance relating to equipment mentioned in
36 paragraph (b) of that definition (which is about industrial,
37 commercial or scientific equipment); and
38 (c) a right in respect of, or an interest in, an intangible asset; and

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- 1 (d) anything prescribed by the regulations for the purposes of
2 this paragraph.
- 3 (7) This section does not apply in relation to an intangible asset that is
4 any of the following:
- 5 (a) a right in respect of, or an interest in, a tangible asset;
6 (b) without limiting paragraph (a):
7 (i) an estate, interest or right in or over land; or
8 (ii) a right in respect of such an estate, interest or right;
9 (c) a *Division 230 financial arrangement;
10 (d) an arrangement that is a *financial arrangement under
11 section 230-50 but is not a Division 230 financial
12 arrangement;
13 (e) a right in respect of, or an interest in, an intangible asset if,
14 because of this subsection, this section does not apply in
15 relation to that intangible asset;
16 (f) anything prescribed by the regulations for the purposes of
17 this paragraph.

18 *Exception if amounts paid to Commissioner in relation to royalty*

- 19 (8) Subsection (9) applies if:
- 20 (a) all or part of the payment to which subsection (2) applies is a
21 *royalty; and
- 22 (b) apart from subsection (2), the payer mentioned in that
23 subsection can deduct an amount for the royalty for an
24 income year; and
- 25 (c) the payer paid an amount (the *paid amount*) relating to the
26 royalty to the Commissioner under section 16-70 in
27 Schedule 1 to the *Taxation Administration Act 1953*, either:
- 28 (i) because the entity withheld an amount from the royalty
29 in compliance with Subdivision 12-F in that Schedule;
30 or
- 31 (ii) for a royalty in the form of a *non-cash benefit—
32 because section 14-5 or 14-10 in that Schedule, together
33 with Subdivision 12-F, required the entity to pay the
34 amount to the Commissioner before providing the
35 benefit.
- 36 (9) Despite subsection (2), the amount the entity cannot deduct in an
37 income year is the difference between:

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- 1 (a) so much of the deduction for the payment (including for any
2 part of the payment that is not a *royalty) as would, apart
3 from this subsection, be disallowable under subsection (2);
4 and
5 (b) the amount calculated by dividing the paid amount
6 mentioned in paragraph (8)(c) by the entity's *corporate tax
7 rate for the income year.

8 *Meaning of exploit*

- 9 (10) **Exploit** an intangible asset includes:
10 (a) use the intangible asset; and
11 (b) market, sell, license or distribute the intangible asset; and
12 (c) supply, receive, or forbear in respect of, the intangible asset if
13 paragraph (c), (d), (da) or (f) of the definition of **royalty** in
14 subsection 6(1) of the *Income Tax Assessment Act 1936*
15 applies to the supply, receipt or forbearance; and
16 (d) exploit another intangible asset that is a right in respect of, or
17 an interest in, the intangible asset; and
18 (e) do anything else in respect of the intangible asset.

19 **3 After Subdivision 960-J**

20 Insert:

21 **Subdivision 960-L—Low corporate tax jurisdictions**

22 **Table of sections**

23 960-258 Low corporate tax jurisdictions

24 **960-258 Low corporate tax jurisdictions**

- 25 (1) A foreign country is a **low corporate tax jurisdiction** if:
26 (a) the rate of corporate income tax under the laws of that
27 foreign country is:
28 (i) less than 15%; or
29 (ii) nil; or
30 (b) the foreign country is determined under subsection (4).
31 (2) For the purposes of paragraph (1)(a):
32 (a) have regard only to tax that applies to income derived in the
33 ordinary course of carrying on a *business; and
34 (b) disregard:
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- 1 (i) the effect of deductions, offsets, tax credits, tax losses,
2 tax treaties, concessions for intra-group dividends,
3 exemptions for particular industries and exemptions for
4 particular types of income; and
5 (ii) rates of income tax that apply only to non-residents; and
6 (c) if the application or rate of income tax under the laws
7 mentioned in paragraph (1)(a) depends, to any extent, on the
8 amount of income of the taxpayer—have regard only to the
9 highest possible rate; and
10 (d) if, under those laws and after applying paragraphs (a) to (c),
11 there are different rates of income tax for different types of
12 income—have regard only to the lowest rate.

- 13 (3) For the purposes of subsection (1), treat the rate of corporate
14 income tax on a particular amount of income under the laws of a
15 foreign country as being nil if, under those laws, there is no income
16 tax on that income.

17 *Preferential patent box regimes*

- 18 (4) For the purposes of paragraph (1)(b), the Minister may, by
19 legislative instrument, determine a foreign country if the Minister
20 is satisfied that the income tax laws of the foreign country provide
21 for a preferential patent box regime without sufficient economic
22 substance.
23 (5) In making a determination under subsection (4), the Minister may
24 have regard to any relevant findings, determinations, advice,
25 reports or other publications of the Council of the Organisation for
26 Economic Cooperation and Development.

27 **4 Subsection 995-1(1)**

28 Insert:

29 *exploit* an intangible asset has a meaning affected by
30 subsection 26-110(10).

31 *low corporate tax jurisdiction* has the meaning given by
32 section 960-258.

33 ***Taxation Administration Act 1953***

34 **5 After subsection 284-90(1B) in Schedule 1**

35 Insert:

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1 (1C) The *base penalty amount in any of items 1 to 4 of the table in
2 subsection (1) that applies to you is taken to be doubled:

3 (a) in the case of item 1, 2, 3 or 4—to the extent (if any) your
4 *shortfall amount or part arises because of
5 subsection 26-110(2) of the *Income Tax Assessment Act*
6 *1997*; or

7 (b) in the case of item 3A, 3B or 3C—if the *taxation law
8 mentioned in that item is subsection 26-110(2) of the *Income*
9 *Tax Assessment Act 1997*.

10 Note: Subsection 26-110(2) of the *Income Tax Assessment Act 1997*
11 prevents a significant global entity from deducting, in certain
12 circumstances, an amount for a payment to an associate in relation to
13 exploiting an intangible asset connected with a low corporate tax
14 jurisdiction.

15 (1D) If subsections (1A) and (1C) of this section both apply to a *base
16 penalty amount to any extent:

17 (a) apply subsection (1A) first; and

18 (b) then apply subsection (1C).

19 Note: The combined effect of subsections (1A) and (1C) may be to
20 quadruple the base penalty amount.

21 6 Application of amendments

22 Section 26-110 of the *Income Tax Assessment Act 1997* applies to
23 amounts paid, liabilities incurred or amounts credited on or after 1 July
24 2023.