



Thursday, 4 May 2023

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By email: [MNETaxIntegrity@treasury.gov.au](mailto:MNETaxIntegrity@treasury.gov.au)

Dear Ronita

### **Denying deductions for intangible payments connected with low tax jurisdictions**

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to provide feedback on *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Deductions for payments relating to intangible assets connected with low corporate tax jurisdictions* exposure draft legislation (ED) and explanatory materials (EM).

CA ANZ represents more than 128,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live. Around the world, Chartered Accountants (CAs) are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

We welcome the release of the ED and EM which implements the October 2022-23 Federal Budget announcement to introduce an anti-avoidance rule to prevent significant global entities (SGEs) (entities with global revenue of at least \$1 billion) from claiming tax deductions for payments made directly or indirectly to associate parties in relation to intangibles held in low or no tax jurisdictions. CA ANZ is pleased that Treasury has taken on feedback through its consultation on the multinational tax integrity measures last September with the result being that the Budget measure is more targeted since it was first announced as an election commitment.

However, given there are various integrity regimes that capture the concerns that this measure is targeting, we question the necessity for another provision to target payments in respect of intangible assets. As the proposed provisions are very broad in scope and have no purpose requirement, they add significant uncertainty when dealing with payments relating to intangible assets.

We also find it difficult to understand why taxes which apply to the income in the recipient entity other than just the normal corporate tax, especially any Qualifying Domestic Minimum Taxes (which are naturally designed to ensure that such income is subject to a minimum 15% tax rate in the recipient country) are not being taken into account in an Australian legislative provision aimed at ensuring that such income is indeed subject to a 15% minimum tax burden.

We have provided high level comments on the ED and EM in the attached Appendix.

If you have any queries, please contact Karen Liew at [karen.liew@charteredaccountantsanz.com](mailto:karen.liew@charteredaccountantsanz.com) in the first instance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Michael Croker'.

**Michael Croker**

Tax Leader - Australia

# Comments on the ED

## Requirement to look through the value chain

The proposed new law applies to payments made directly to an associate or indirectly through any number of entities (which do not necessarily need to be associates or located in low corporate tax jurisdictions). For the purposes of determining whether a payment is attributable to a right to exploit an intangible asset which leads to the derivation of income in a low or no tax jurisdiction, subsection 26-110(3) of the *Income Tax Assessment Act 1997* (ITAA 1997) states that it does not matter whether you make the payment to the recipient directly or through one or more other entities. This means entities may need to look through the intra-group value chain in order to test the application of the proposed new measure to any in-scope payments. Without providing a limit to how far you look “up” the chain or prescribing a tracing requirement, this will make it difficult for entities to confirm with certainty that section 26-110 does not apply to a payment.

## Low corporate tax jurisdiction

CA ANZ is concerned with the way the 15 per cent corporate income tax rate is calculated in section 960-258 of the ITAA 1997. There is no consideration for:

- Where a payment is subject to Australian withholding tax. A payment could be within scope of a “royalty” and subject to Australian withholding tax yet also be treated as non-deductible if the other relevant conditions are met.
- Where the intangible asset owner is subject to a foreign country’s Controlled Foreign Company (CFC) rules, the Pillar Two Income Inclusion Rule (IIR) and/or a Qualifying Domestic Minimum Top-up Tax (QDMTT) at a rate of 15 per cent or more.

This lack of interaction could create uncertainty, complexity and the potential for double taxation.

In addition, it does not seem to consider the aggregation of federal and regional taxes in determining whether a foreign country has a federal tax rate of less than 15 per cent. This could be critical for countries that have a national corporate tax rate of less than 15 per cent but regional taxes that operate such that the aggregated tax rate meets or exceeds 15 per cent.

## Shortfall penalty provision

The Government is also considering a shortfall penalty provision as a punitive measure to penalise SGEs who mischaracterise payments that are effectively made to acquire or exploit an intangible asset as payments made for other things, to avoid income tax, including withholding tax. CA ANZ queries whether another shortfall penalty provision is necessary as a punitive measure given that SGEs are already subject to increased penalties compared to other taxpayers. A SGE that has mischaracterised a payment which has resulted in a shortfall could be penalised under the existing subsection 284-75(1) of the Schedule 1 to the *Taxation Administration Act 1953* for making a false or misleading statement that results in a shortfall amount, and the base penalty amount is doubled for a SGE.