



28 April 2023

By email: MNETaxIntegrity@treasury.gov.au

Attention: Ronita Ram

A/g Assistant Secretary
Tax Treaties Branch
Corporate and International Tax Division
Treasury
Langton Crescent, Parkes, ACT 2600

Re: Multinational tax integrity – denying deductions for payments relating to intangible assets connected with low corporate tax jurisdictions (April 2023)

ResMed Submission

Dear Ms Ram,

We appreciate the opportunity to make a submission on the proposed legislation to deny deductions for payments relating to intangible assets connected with low or no tax jurisdictions (**the proposed law**).

ResMed is proud of our strong local roots in Australia. We employ approximately 2,000 Australians, with a large proportion of our Australian workforce located in our advanced manufacturing facility in Bella Vista, in Western Sydney. While ResMed operates in more than 150 countries, Australia is at the heart of our business. With both Research and Development (R&D) and manufacturing co-located at Bella Vista, ResMed has grown to be one of Australia's largest exporters of medical devices and are committed to Australia thriving as one of the best places to do business. We seek to continue fostering a partnership on economic and healthcare policy across connected medical devices and digital health, ensuring that advanced technology and manufacturing grow in Australia.

ResMed supports government policies that will combat harmful tax practices and fully supports the Government's aim to protect and invest in Australia's domestic sovereign capability. We believe that the proposed law might have been drafted with the intent of targeting certain arrangements, and we have identified what we believe are unintended consequences of the proposal. Appreciating and maintaining the intent, we have suggested some amendments to mitigate these effects for your consideration.

ResMed is committed to the success of Australian industry and appreciate the opportunity to comment on this proposed policy. ResMed believes in and is dedicated to cultivating a world-leading culture of innovation and competitiveness in country. Our team are happy to discuss this submission. Please do not hesitate to contact Chris Merjane (Senior Tax Counsel) at chris.merjane@resmed.com.au on +61 2 8884 1733 or Amanda von Leer (Senior Director, Government Affairs) at amanda.vonleer@resmed.com.

Yours faithfully,

DocuSigned by:
A stylized signature of Brett Sandercock in black ink.
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Brett Sandercock
Chief Financial Officer
ResMed



The Concern for Australian Exporters

We believe the proposed law may result in unintended consequences regarding how a “low tax” jurisdiction is defined and its application to businesses that use intangibles to transform and export goods from Australia. It appears the proposed laws have been designed to address taxpayers who are *importers* of intangibles, and we ask that Treasury considers Australian *exporters* more thoroughly.

ResMed designs and manufactures medical devices in Australia. It uses intangible assets (**intangibles**) from around the world in Pillar II compliant countries¹ and the United States. It then exports Australian-made medical devices. Over 90% of ResMed Australia’s devices are exported.

In other words: ResMed in Australia pays its affiliates to make and export Australian medical devices which include embedded or bundled intangibles. ResMed imports to export.

Under the proposed law, it is unclear if payments to these offshore associates may be denied a deduction even when they are being paid to jurisdictions which are otherwise Pillar II compliant, or the United States, and even when those rights are used in conjunction with Australian manufacturing for export.

This outcome arises because the recipient of the payment is deriving income in a “low tax jurisdiction” according to the draft legislation.

For example, Pillar II compliant countries might be a low tax jurisdiction despite have a greater than 15% effective tax rate given the test adopted in section 925-258 deviates from the OECD model rules. Further, there is uncertainty as to whether the United States would be a low tax jurisdiction given income associated with Foreign Derived Intangible Income (**FDII**) is effectively taxed at a rate of 13%, being the “lowest rate” applicable for the low tax jurisdiction test.²

ResMed believes this will have an unintended outcome and could result in full tax on income from export, but a denial of deduction on import. This policy could disincentivise advanced manufacturers with manufacturing operations located in Australia, who have a substantial need to import knowledge and intangibles from associated entities all around the world. Enacting this policy whilst simultaneously trying to secure advanced manufacturing and drive sustainable economic would send mixed messages on how the Government intends to drive investment in Australia.

Instead, if outbound payments are made to a Pillar II compliant country, then tax deductions should be allowed. Further, if payments are made by a manufacturer to make goods in Australia, especially for export, then those payments should not be discouraged. Instead, other laws such as within transfer pricing, Pillar II, the Diverted Profits Tax, and the general anti-avoidance rules, can be leveraged to ensure integrity.

¹ Through enacted or announced (to be enacted) measures.

² Section 960-258(2)(e) of the proposed law.



Proposed solution

If Treasury believes that the proposed laws proceed following consultations, then carve-outs should be legislated to prevent unintended consequences to the Australian manufacturing industry:

- (a) **OECD-compliant tax regimes:** In defining a "low tax" jurisdiction, section 960-258 should include a carve-out for countries that have implemented (or have announced implementing) a Qualifying Domestic Minimum Top-Up Tax (**QDMTT**). This will ensure jurisdictions that are "Pillar II" compliant – or soon to be Pillar II compliant – are not unintentionally caught by the measures. There should be a transitional measure to give countries time to implement their Pillar II measures.
- (b) **R&D and manufacturing carve-out:** Government must not detract investment in Australian R&D and manufacturing. Licensing intangibles into Australia is part-and-parcel of standing up Australia's domestic capability. A carve-out for intangible assets in section 26-110(7) for intangible assets that are incorporated in or bundled with tangible goods that are substantially transformed in Australia will ensure manufacturing remains competitive. Similar carve-outs from our CFC rules are provided for Australian multinationals with manufacturing operations offshore (the "substantial alteration test").
- (c) **Net royalty exporter safe harbour:** ResMed Australia receives significantly more in inbound royalties than it pays in outbound royalties. In other words, ResMed Australia is a net royalty exporter. It is inconsistent with sound tax policy that inbound royalties are subject to income tax, yet outbound royalties may not be deductible. This economic mismatch can be mitigated through a safe harbour for net royalty exporters. This would match Treasury's proposed new thin capitalisation rules, also intended to apply from 1 July, which are based on the concept of "net debt deductions". That is, the new thin capitalisation rules will generally only apply to the extent interest deductions exceed interest income, with no application for Australian taxpayers with net interest income, based on the policy position that in these circumstances there is no mischief to which the rules should apply.

While adopting these recommendations would mitigate the proposed policy's negative unintended consequences, the Government should do more to proactively invest in our manufacturing sector. This was the primary reason we strongly supported – and continue to support — the adoption of an OECD-compliant manufacturing incentives that would narrow this gap and make Australia more competitive on the world stage.

We thank you for your consideration of these comments. We would be happy to arrange a briefing to provide more information and detail if helpful.

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