Friday, 19 April 2024

[redacted]

Corporate and International Tax Division
Treasury

By email: taxtreatiesbranch@treasury.gov.au

Dear [redacted]

Expansion of Australia's tax treaty network

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to provide comments for consideration during Treasury's tax treaty negotiations with Brazil, New Zealand, South Korea, Sweden and Ukraine as part of its expansion of Australia's tax treaty network.

CA ANZ represents more than 136,000 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 are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

We have sought feedback from our members on the expansion of Australia's tax treaty network and provide the following comments.

New Zealand

Definition of resident – Article 4

Due to a High Court case[1] and the consequential Australian Taxation Office (ATO) guidance[2], a foreign incorporated company with Australian directors could be an Australian tax resident, despite its commercial activities being carried outside of Australia, if it has majority Australian directors and either meetings are not physically held (circular resolutions) or meetings are held in multiple places, or in Australia. Due to improvements in technology, it is much easier for Australian directors to attend board meetings virtually which means that foreign incorporated companies with some Australian directors may find themselves dual residents of Australia and its country of incorporation.

The previous government sought to resolve this issue by announcing[3] it would amend the law to provide that a company that is incorporated offshore will be treated as an Australian tax resident if it has a 'significant economic connection to Australia'. This test would be satisfied where both the

[1] *Bywater Investments Limited & Ors v. Commissioner of Taxation; Hua Wang Bank Berhad v. Commissioner of Taxation* [2016] HCA 45; 2016 ATC 20-589
[2] Taxation Ruling TR 2018/5 Income tax: central management and control test of residency and Practical Compliance Guideline PCG 2018/9
[3] 6 October 2020 Federal Budget 2020-21

company's core commercial activities are undertaken in Australia and its central management and control is in Australia. However, there is still uncertainty with the Australian corporate residency rules as the current Government has not made any decision as to whether it would progress the changes to the corporate tax residency rules.

Our members have said that this uncertainty produces practical difficulties when it comes to NZ incorporated subsidiaries of Australian companies.

Article 4 of the Australia/New Zealand tax treaty, as modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI), requires that where a company is a resident of both, the competent authorities shall endeavour to determine by mutual agreement the country of which such company shall be deemed to be a resident for the purposes of the tax treaty. In the absence of mutual agreement, the benefits of the treaty cannot be accessed (including dividend withholding tax exemptions).

We note the New Zealand (NZ) Government enacted legislation in March 2023 in response to the uncertainty with the Australia corporate tax residency rules to ensure that dual resident companies of both NZ and Australia could access concessionary NZ regimes and not lose standing in respect of group membership, loss transfer and retention/use of imputation credits.

Requiring the mutual agreement process to determine the residency of a dual resident company seems burdensome, lengthy and an expensive process to resolve a simple issue. Although the Australia and NZ's administrative approach to MLI Article 4(1) (the Administrative Approach) allows a company to self-determine its place of effective management, there a number of eligibility criteria that needs to be satisfied before the company can apply the administrative approach. We suggest that Australia and NZ embed a more streamlined approach to determining residency for dual residents in the tax treaty.

Our members have also recommended that the eligibility criteria to apply the Administrative Approach be broadened. For example, one of the criteria is that the taxpayer's group annual accounting income is less than AUD $250 million or ND $260 million based on prepared financial statements for the most recent reporting. A subsidiary with a small presence in Australia or NZ, but is part of a large corporate group that does not meet the annual accounting income threshold, will not be able to apply the Administrative Approach. The subsidiary will have to apply for the burdensome and lengthy mutual agreement process to determine its residency. We understand that changes to the Administrative Approach is a matter for the ATO and the NZ Inland Revenue to consider.

Brazil

Non-discrimination – Article 24

Australia and Brazil entered into memorandum of understanding for a reciprocal Work and Holiday (subclass 462) visa arrangement in 2022. Working holiday makers (WHM) in Australia have different tax rates than Australian residents and do not have the benefit of a tax-free threshold.

In 2021, the High Court decided in *Addy v Commissioner of Taxation*[4] that a British citizen, who held a working holiday visa and was found to be an Australian resident, was entitled to be taxed on the same

[4] [2021] HCA 34

basis as a resident Australian national and not at the WHM tax rates that normally apply based on the non-discrimination article contained in the Australia-United Kingdom tax treaty.

If negotiations turn to whether a non-discrimination article should be included in the tax treaty, Treasury should bear in mind the impact on working holiday makers.

International shipping and air transport – Article 8

The inclusion of Article 8 will ensure that the profits from the operation of ships or aircraft in international traffic will be taxed in one State alone. We have received feedback from a member in the aircraft industry that Article 8 should be included in the tax treaty and the article should limit the taxing right to the Contracting State of the enterprise. We understand there has been a lack of clarity regarding taxing rights over airline profits in Brazil for many years and it has been submitted from those in the airline industry that consideration be given to the retrospective application of Article 8. We support a retrospective application date if it resolves any uncertainty between Australia and Brasil in respect of taxing rights over airline profits. Precedent for a retrospective application date in respect of Article 8 can be found in the Australia-Taipei tax treaty under Article 25, subparagraph(a)(ii).

Non-discrimination articles and property taxes and fees

We also note the previous issue with foreigner surcharge purchaser duty in New South Wales and the non-discrimination article in Australia's tax treaties with New Zealand, Finland, Germany, India, Japan, Norway, South Africa and Switzerland. Although this issue has been resolved domestically with the recent enactment of Treasury Laws Amendment (Foreign Investment) Bill 2024, we suggest that this legislation be noted should the topic of including a non-discrimination article arise. Specifically, it would be preferable if such clauses are made clear in relation to the taxes to which it applies, rather than they extend to 'taxes of every kind and description'. This should ensure that there is no potential inconsistency in respect of the interaction with taxes that are not covered taxes under the treaty, such as Commonwealth foreign investment fees and state and territory property taxes.

***

If you have any queries regarding the comments provided, please contact Karen Liew on 02 8078 5483 or at karen.liew@charteredaccountantsanz.com.

Sincerely,

Michael Croker

Tax Leader – Australia