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Manager
Base Erosion and Profit Shifting Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: BEPS@treasury.gov.au

DIVERTED PROFITS TAX

Dear Sir/Madam

I am writing in relation to the proposed Diverted Profits Tax measures as contained in the Exposure Draft material issued on 29 November 2016.

Ai Group supports measures that are appropriate to ensure that taxpayers comply with the letter and the spirit of Australia's tax law. We also recognise that it is important that Australia's citizens have a high degree of confidence in the integrity of the tax system.

We acknowledge this confidence is not currently as high as it should be - particularly in relation to corporate tax compliance. However, our very strong view is that shortfall in confidence is in large measure due to misapprehensions about the general level of corporate compliance which remains very high. Ironically these misapprehensions are in part due to poorly-informed commentary surrounding the Government's tax transparency measures.

We understand that, notwithstanding the generally high compliance levels and the strength of Australia's existing tax laws, the Government has decided that the further measure of the Diverted Profits Tax will add to the armoury of the ATO and will provide the Government with further evidence that it takes corporate tax compliance very seriously. Nevertheless, we remain concerned at the absence of rigorous assessment of the additional costs relative to projected benefits of the measure. Such costs would include the additional administrative costs, the additional compliance costs and the costs associated with the additional uncertainty associated with the measure.

We have three specific concerns with the measure as currently proposed.

Undefined Parameters

The broad application of the proposed law combined with the lack of specific tests in the legislation setting out how it will apply creates investment uncertainty that is contrary to the objective of encouraging investment in Australia.

The lack of control in the legislation over how and when the proposed measure will be applied means it may be prone to misuse - for example to apply pressure as part of a settlement negotiation process.

There is an absence of detail about how the dollar value of the DPT assessment will be calculated, and no requirement for the ATO to compensate companies at commercial interest rates where the ATO has assessed a provisional liability under the DPT and the taxpayer has been found to not to be liable following the assessment process.

We propose:

- The DPT explanatory memorandum should include specific tests for how the 80 per cent tax threshold in foreign jurisdictions will be calculated;
- The DPT explanatory memorandum should specify how the ATO will calculate the figure to which the 40 per cent penalty tax rate will apply; and
- The DPT legislation should require, when a taxpayer has found not to have a liability following the DPT assessment process, that the ATO should repay the penalty plus an appropriate amount of interest and specify how that rate will be calculated in the explanatory memorandum

Inconsistency with Existing Legislation

Inconsistency in language between the DPT and OECD Transfer Pricing (TP) Guidelines creates uncertainty about when the DPT will apply and where traditional TP assessment will apply.

This inconsistency risks a substantial increase Australia's compliance costs in comparison to international peers. Multinational firms will need to make separate DPT assessments across the value chain from Australia in addition to their existing TP assessments. This creates a significant administrative burden for firms considering investment in Australia as well as for existing businesses that would need to conduct an entirely new form of assessment (potentially across several jurisdictions) because of an Australian law that is intended to apply only to uncooperative taxpayers.



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Aligning the DPT and OECD language would also assist the Government's objective that the DPT should encourage transparency and cooperation from taxpayers by ensuring that international TP assessments already being undertaken by companies can be applied in relation to the Australian DPT.

Procedural Fairness

The proposal to deny a taxpayer the right to present all information before a Court (as opposed to only information presented to the ATO during the review process) would lack procedural fairness as it would be hard for a taxpayer to pre-empt all arguments and/or information that may be considered by the Court including information and arguments presented to the Court by the ATO.

Taxpayers should have the right to present any information relevant to a case to the Federal Court whether or not it was provided to the ATO as part of the DPT review process.

Please do not hesitate to contact me if you would like further information.

Kind regards,

Innes Willox
Chief Executive