

7 May 2013

Mr Tim Bryant
Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: economics.sen@aph.gov.au

Dear Mr Bryant,

Inquiry into the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 - Answers to Questions on Notice 30 April 2013

The Australian Bankers Association ("ABA") appeared before the Committee on 30 April 2013 in relation to the Inquiry into the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 ("the Bill").

The Committee put several questions to the ABA that were taken on notice. This letter provides answers to the questions, as they appear on the Committee's transcript of the hearing.

Due the limited time available to the ABA to conduct research and prepare answers, the questions have been addressed in relation only to the four major trading bank members of the ABA: Australia and New Zealand Banking Group Limited (ANZ), Commonwealth Bank of Australia (CBA), National Australia Bank Limited (NAB) and Westpac Banking Corporation (Westpac). These banks all have extensive offshore operations, and seek the clarity which would be gained from the amendments to the Bill proposed in the ABA's submission to the Committee, dated 11 April 2013.

For the sake of clarity, these banks unanimously support the adoption of the 2010 OECD approach for the attribution of profits to permanent establishments (PEs). This approach is wholly in line with established industry practice and is consistent with the approach adopted by the majority of Australia's top two-way trading partners. Adoption of the latest OECD approach will align Australia with international best practice and remove the uncertainty arising from the existing rules and those contained in the proposed Bill.

This is key to our submission that the proposed Bill be amended as proposed, to ensure that the final legislation delivers on its objective of *modernising* Australia's transfer pricing rules, consistent with *latest* international best practice.

We now deal with the specific questions posed to the ABA.

Question 1

Can you take it on notice and consult with your members and provide the committee with details of that litigation—the New Zealand litigation with Westpac—and the issues that arose. We need a summary of that—we can check some of it ourselves—and a summary of any other litigation and the jurisdiction that your members are in, internationally.

Answer

The New Zealand litigation that was mentioned in the hearing related to application of New Zealand's general anti-avoidance provisions to a specific transaction and not to inter-branch transactions, new section 815-C, or any of proposals put forward by the ABA in its submission to the Committee.

All four banks confirm that they are not currently involved in, and have not previously been involved in any litigation on transfer pricing matters regarding inter-branch transactions impacted by section 815-C, with any tax authority.

One bank is in dispute and litigation regarding the transfer price adopted by its local associated enterprises in another country. This country has a double tax agreement (DTA) with Australia and the mutual agreement procedures prescribed in the DTA are likely to be invoked in an effort to achieve a resolution between that other country and Australia on the appropriate pricing to apply to the transactions involved. The dispute concerns subsidiaries of the bank, not branches, and does not concern section 815-C, or any of the proposals put forward by the ABA in its submission to the Committee.

Question 2

Is there an equivalent of 815C in other jurisdictions?

Answer

Yes. For example, the majority of Australia's top two-way trading partners support the use of the latest OECD guidelines for purposes of allocating profit to PEs.

The table below shows Australia's top 10 two-way trading partners and whether in practice they accept the Authorised OECD Approach (AOA) in the determination of profits attributable to branch operations, and/or accept the new Article 7 of the 2010 OECD Model Convention and Commentary in applying attribution principles under local tax law.

Australia's top 10 two-way trading partners 2011*					
	OECD Member	Top 10 Global Financial Centre**	Accept new Article 7 in domestic tax law	Accept AOA in practice ***	Comments
1. China	✓		✓	✓	Observer status with the OECD and generally respects and follows OECD Guidelines. Banking PEs are generally taxed on their actual profits based on audited financial statements`
2. Japan	✓	✓			The Japanese Ministry of Finance, is considering introducing the "force of attribution" concept and the AOA into its domestic tax law for the attribution of profits to PEs.

Australia's top 10 two-way trading partners 2011*					
	OECD Member	Top 10 Global Financial Centre**	Accept new Article 7 in domestic tax law	Accept AOA in practice***	Comments
					The target date for change is not confirmed, but may be part of the 2014 Tax Reform.
3. United States	✓	✓		✓	Treaty by treaty basis domestic attribution rules also in place. There are a number of treaties which contain the revised Article 7.
4. Republic of Korea	✓	✓		✓	Korean tax authorities generally respect internal transactions in determining profit attributable to branch operations. Discussions to amend Korean tax law to clarify adoption of Article 7 concepts.
5. Singapore		✓	✓	✓	Technical income sourcing rules should be curtailed under treaty provisions of the DTA.
6. United Kingdom	✓	✓	✓	✓	
7. New Zealand	✓				Explicit reservation made to the revised Article 7 (2010).
8. India					In its capacity as an observer nation, Indian Revenue has expressed disagreement with OECD principle of recognising internal dealings between the head office and its PE on an arm's length basis.
9. Thailand				Partial	Although the Thai tax law does not accept the OECD business profits and guidance, Thai tax authority tends to follow the OECD guidance, except for some certain expenses which are required to be charged at cost.
10. Malaysia			N/A subsidiaries only	N/A subsidiaries only	Generally tax authorities adopt the arm's length principle and authorise the use of TP methodologies endorsed by OECD Guidelines.
11. Hong Kong		✓		Partial	This is a developing area of the law. Hong Kong revenue is not bound by OECD principles but in practice will draw reference to the OECD attribution principles.

*Source: Australian Department of Foreign Affairs and Trade – Trade at a glance 2012: <http://www.dfat.gov.au/publications/trade-at-a-glance-2012.html>

** Source: The Global Financial Centres Index 12, September 2012: <http://www.longfinance.net/Publications/GFCI%2012.pdf>

***Generally accepts principles as guidance in practice. May be some specific cases where approach differs.

Question 3

Can you also indicate whether any of your members have sought changes to that equivalent legislation overseas and whether there has been any litigation on that 815C type of legislation in overseas jurisdictions—you understand what I want you to have a look at—and whether there has been any outcomes from that litigation.

Answer

Neither the ABA nor any of the four major trading banks have sought changes to legislation which implements a particular country's approach to the attribution of profits to PEs.

As stated above, none of the four banks are currently involved in any litigation on transfer pricing matters regarding inter-branch transactions.

Yours sincerely

Tony Burke