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Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: economics.sen@aph.gov.au

Dear Sir/Madam,

Tax Laws Amendment (Cross Border Transfer Pricing) Bill (No.1) 2012 ("the Bill")

GM Holden Ltd ("Holden") has been building cars in Australia since 1948 and is one of only three OEM's which still make cars in this country, in the face of increasingly challenging conditions for local manufacturers and component suppliers. Holden builds 47 variants of the Commodore, Cruze and Caprice car lines at its Elizabeth, South Australia operations. Holden's Design and Engineering facilities and High Feature V6 engine plant are located at Port Melbourne, Victoria.

Holden welcomes the opportunity to make a submission on the Bill, which if enacted, will bring Australia's transfer pricing laws more in line with other developed nations and the OECD guidelines. However, Holden is firmly of the view that these amendments should only have prospective application.

Holden notes the following elements of the Bill which are of concern:

1. Retrospective operation is unfair, promotes uncertainty and may result in the need to expend additional resources and incur additional compliance costs;

2. Relief from double taxation will not be as easy to obtain as the Explanatory Memorandum to the Bill ("EM") purports it to be; and

3. The proposed law is in conflict with Customs Duty valuation rules.

These issues are considered further below.

Retrospective operation is unfair, promotes uncertainty and may result in the need to expend additional resources and incur additional compliance costs

Holden notes the precautionary approach adopted by Parliament in relation to retrospective legislation (noted at paragraph 1.5 of the EM). However, Holden does not agree that it is evident that Parliament's intention has always been clear that tax treaties have a separate taxing right and points to several instances within the EM itself where the language used illustrates something less than certainty.[1]

Furthermore, having read several of the recent Submissions on this proposed legislation and having the benefit of receiving advice from its advisers, Holden is aware that the statements made by Parliament over the years on this issue are at best "obscure" and in the case of the comments made

[1] "Real Possibility" at para 1.6; "Strong Arguments" and "If this is the case" at para 1.15;

by the Commissioner of Taxation, represent only the view of the Commissioner and not necessarily those of the taxpayer community or the Courts when interpreting the law as currently enacted.

As a result, the Bill, if enacted, will result in taxpayers having to consider two separate sets of transfer pricing laws, going back to 1 July 2004. This by its very nature promotes uncertainty and the Boards of affected taxpayers will be left in an unenviable position of being unable to provide their shareholders with any meaningful advice on the implications.

Holden considers this to be an unfair burden on taxpayers who have done the right thing and organised their taxation affairs in accordance with the law as it stood when they were contemplating specific transactions. To now require taxpayers to consider an entirely new set of transfer pricing laws, with the accompanying difficulty of considering different "profits-based" concepts and evolving OECD guidelines over the past 8 years, is unconscionable. This will undoubtedly result in additional compliance costs and internal resources which will be spent on "covering old ground".

For companies already under audit or with "open" issues with the Australian Taxation Office, this additional compliance burden will be more keenly felt as they will not know which set of transfer pricing laws they should be defending against (and so may need to defend against both).

Relief from double taxation will not be as easy to obtain as the Explanatory Memorandum to the Bill ("EM") purports it to be

Holden does not agree that relief from double taxation will be as easy to obtain as Parliament has portrayed in the EM. It is a matter of public record that Holden is currently involved in a Mutual Agreement Procedure which has been on-going for some considerable time and as a result, Holden does not believe that future relief from double tax will be easy to obtain in as timely and inexpensive a fashion as Parliament predicts. This problem will be exacerbated for companies, like Holden, that deal with related parties on several transactions in multiple jurisdictions, and represents an unfair compliance burden on these taxpayers should transfer pricing adjustments be made going back to 1 July 2004.

The proposed law is in conflict with Customs Duty valuation rules

Holden submits that there should be a "whole of Government" approach in respect of the drafting of revenue laws. It is unfair and unreasonable to place a company in the position of having to defend the transfer price of the importation of a product under two separate sets of transfer pricing valuation rules.

Whilst Holden acknowledges that there has been some disconnect between income tax and Customs Duty valuation rules for some time, the Bill, if enacted, will only serve to widen the chasm between the two sets of valuation rules. The Bill will bring in a "profits-based" approach, whereas the Customs Duty rules are very much based on a transactional approach to valuation.

In the event that the ATO adjusts a company's transfer price, there is no guarantee that an equal and offsetting adjustment will be made for Customs Duty purposes, even if it is not time-barred.

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As a result of the above, Holden submits that the Committee should not support the retrospective aspect of the Bill.

If you have any questions, please do not hesitate to contact myself or Matt Hobbs (Director Government Relations)

Thank you for your consideration of this submission.

Yours sincerely,

Jason Levine
Group Tax Manager
GM Holden Ltd