SUBMISSION 15

American Chamber of Commerce in Australia

Suite 9, Ground Level
88 Cumberland Street
Sydney NSW 2000

Tel: +61 2 8031 9000
Fax: +61 2 9251 5220

Email:
nswamcham@amcham.com.au
www.amcham.com.au
ABN 62 000 361 633

Inquiry Secretary
House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

Monday, 25 February 2013

Dear Sir / Madam

Submission Relating to Tax Law Amendments (Countering Tax Avoidance and Multi National Profit Shifting) Bill 2013

The American Chamber of Commerce (AmCham) seeks to make the following comments in relation to the above Bill. We attach, for your reference, our comments of 20 December 2012 in relation to the Exposure Draft which we lodged directly with the Treasury (Submission – Transfer Pricing Exposure Draft and Explanatory Memorandum. Thursday, 20 December 2012). All material concerns we raised in the Exposure Draft continue to apply in relation to the Bill currently before the Parliament.

Time Limit for Amendments

The members of AmCham continue to be concerned that the time limit within which adjustments for transfer pricing may be made is seven years, rather than the more appropriate time limit of four years. A time limit of four years would be consistent with the limit for amendments of taxpayers' income that prevails in relation to other provisions of the Act. It is noted in the extract below that the recent report of the Inspector General of Taxes recommends four years.

"RECOMMENDATION 3.10
To improve the certainty in relation to the review of transfer pricing matters, the Government should consider providing the same period of review for these matters as exists for the general period of review."

As noted in our submission on the Exposure Draft, the period for amendment in relation to transfer pricing in many other jurisdictions of the world is considerably shorter than seven years. In relation to the US, being the tax laws relevant to our members, the period is three years.

Where the amendment period in Australia is materially longer than the amendment period in the US, there is the potential for adjustments to be made which are not easily able to result in a compensatory adjustment for the US counter party to a transaction. In these circumstances, the very costly and time-consuming process of DTA mutual agreement provisions will have to be relied upon, which is unsatisfactory.

Reliance Upon OECD Methodology

It is noted that Australian transfer pricing rules will now be dependent upon the interpretation of transfer pricing provisions by reference to the OECD commentary from time to time. In contrast, the interpretation of transfer pricing under US tax law is determined by Section 482 of the Internal Revenue Code. As noted in our submission on the Exposure Draft, there are material differences between the OECD methodology and the regulations relating to Section 482. This gives rise to the potential for material inconsistency of taxation treatment of our members which are US resident, as they deal with their Australian subsidiaries and equally for our Australian members dealing with their US subsidiaries. The AmCham is concerned that this

embedded inconsistency has not been appropriately considered by those writing the new provisions. We consider this inconsistency underpins our concern with the seven year amendment period which should be aligned with other provisions for four years. It also highlights the need for the ATO to work with the IRS as a matter of urgency to issue instructions on how to reconcile the OECD methodology with the regulations issued with section 482 of the Internal Revenue Code.

Unnecessarily Broad "Reconstruction Power"

The reconstruction provisions in proposed Section 815-130(2),(3)&(4) create an unacceptable level of uncertainty for our members in preparing their Australian income tax returns. It is noted in paragraph 3.94 of the explanatory memorandum to the Bill, that the OECD commentary contemplates that reconstruction will only occur in exceptional circumstances. The members of AmCham are concerned that the manner in which the reconstruction powers of this Bill are adopted by the ATO may be far broader and more common than contemplated by the OECD commentary.

Reconstruction Powers in Relation to Withholding Tax

It is noted that, although not included in the Exposure Draft, section 815-120(1)(c)(iv), paragraph (d)) has been introduced. This provides for the deeming of withholding tax liabilities in circumstances where the reconstruction of a transaction could result in deemed payments of interest or royalties that would be liable to withholding tax. This has a potentially anomalous and significant adverse consequence to members of AmCham. As presently proposed, adjustments under new transfer pricing provisions may never increase the level of deductions of interest or royalties that a tax payer may claim. However, the newly-introduced wording, when combined with the reconstruction powers referred to above, could allow the Commissioner of Taxation to levy withholding tax on deemed amounts, while not being obliged to grant deductions for those deemed amounts.

A particular example of the anomalous outcome would relate to interest-free loans advanced by a US parent to its Australian subsidiary. A foreign lender may be deemed to derive interest and be subject to the withholding tax without the Australian borrower being entitled to a deduction. This may even extend to "reconstruction" an interest-free loan that constitutes deemed non-share equity for the purposes of Division 974. Hence there is the potential result that the substance over form formulas in Division 974 can be set aside by the Commissioner applying another form of reconstruction under the new provisions.

Need for Immediate and Clear ATO Guidance

The extent of the amendments to the manner in which transfer pricing methodologies must now be documented by a tax payer (and may be applied by the Commissioner) leads to the material risk that members in Australia will prepare their tax returns without sufficient guidance of what the Commissioner will consider acceptable. This may lead to unjust imposition of penalties. Over the period of the last twenty years, the Commissioner has issued many tax rulings in relation to transfer pricing. There is an urgent need for these rulings to be reviewed and, where necessary, refreshed in the light of the proposed Division 815-B. The date of commencement of this new law should only be after such clarification has been provided.

Charles W Blunt
National Director
American Chamber of Commerce in Australia

Attached

Further contact:

Tony Clemens
Global Leader ITS Networks - Partner
PwC
02 8266 2953
tony.e.clemens@au.pwc.com

Charles W Blunt
National Director
American Chamber of Commerce in Australia
02 8031 9000
ceo@amcham.com.au

SUBMISSION 15
Attachment

American Chamber of Commerce in Australia

Suite 9, Ground Level
88 Cumberland Street
Sydney NSW 2000

Tel: +61 2 8031 9000
Fax: +61 2 9251 5220

Email:
nswamcham@amcham.com.au
www.amcham.com.au
ABN 62 000 361 633

The Manager
International Tax Integrity Unit
The Treasury
Langton Crescent
Parkes ACT 2600

Sent via email: transferpricing@treasury.gov.au

Thursday, 20 December 2012

Dear Sir/Madam

Submission – Transfer Pricing Exposure Draft and Explanatory Memorandum

The American Chamber of Commerce in Australia (AmCham) welcomes the opportunity to provide comments on the exposure draft (ED) and explanatory memorandum (EM) of *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill 2013: Modernisation of transfer pricing rules*.

Transfer pricing is an important tax issue for all of our members with international transactions, particularly as the US has rigorous transfer pricing rules in section 482 of the Internal Revenue Code. We also recognise that it is in the national interest for Australia to have a robust and modern set of transfer pricing rules to ensure integrity of the corporate tax base in Australia, consistency with international standards, and our obligations to our trading partners, particularly the US (being our largest) through our international tax treaties.

We support aligning Australia's transfer pricing rules with the arm's length principle and the guidance from the Organisation for Economic Cooperation and Development (OECD). However we are concerned that there are particular provisions in the ED which are not consistent with the intent of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPGs) and/ or do not properly reflect the position of the OECD in its appropriate context.

We also note that the regulations that underpin the application of the US transfer pricing approach of section 482 and the concept of "super royalty" under other US tax rules for foreign exploitation of Intellectual Property developed in whole or in part in the US may well result in inconsistencies between the approach of the ED and US law. This will lead to uncertainty and increased risk of dispute and potentially double taxation.

The most significant area of concern is the apparent requirement for taxpayers to "reconstruct" their dealings in certain circumstances. This requirement seems to be complex in operation, unnecessary in nature and inconsistent with a self assessment regime. In particular the approach of the US Internal Revenue Service to the application of "reconstruction" of transactions does not contemplate self assessment and hence there is a material risk of double taxation or, at a minimum, considerable risk of mismatch of US and Australian taxation treatment of the same transaction.

We accept that Australian companies, including many of our members support a self assessment basis of filing returns. We welcome the introduction of a time limit for amendments relating to transfer pricing; however, we consider that four years is more appropriate than the proposed eight years. We note that in general the US tax law applies a limit of 3 years for such pricing adjustments.

The documentation requirements should provide a positive incentive for taxpayers to prepare documentation rather than precluding taxpayers who do not prepare documentation from establishing a reasonably arguable position (RAP). As presently drafted, the documentation requirements are over prescriptive and are drafted in a way that could be interpreted widely. This will create complex compliance burdens for transactions that may be relatively straightforward and low risk. To date, many of our members have relied upon the global transfer pricing documentation of their US parent company which have complied with documentation requirements for the purposes of the Internal Revenue Code of the US. Such documentation has often been considered sufficient under ATO rulings and practice to date. The change in such documentation anticipated by the ED is unfortunate, unnecessary and inefficient for our members doing business in Australia.

Thank you for the opportunity to comment on this important piece of legislation. We would be pleased to discuss any of the comments made in this submission with Treasury.

Yours faithfully

Charles W Blunt
National Director
American Chamber of Commerce in Australia

Further contact:

Tony Clemens
Global Leader ITS Networks - Partner
PwC
02 8266 2953
tony.e.clemens@au.pwc.com

Charles W Blunt
National Director
American Chamber of Commerce in Australia
02 8031 9000
ceo@amcham.com.au