

31 May 2012

The Chair
Standing Committee on Economics
House of Representatives
PO Box 6021
Parliament House, Canberra ACT 2600
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Dear Madam

SUBMISSION ON TAX LAWS AMENDMENT (2012 MEASURES NO. 2) BILL 2012 (the “Bill”)

TPG Telecom Limited is an ASX Listed provider of telecommunications services and is a member of the ASX200. This submission has been authorised by the Executive Chairman of TPG.

1. Background

TPG notes that the Bill is proposed by Government to correct unintended consequences arising from the *Tax Laws Amendment Act (No 1) 2010* that the Government passed in May 2010 and which was enacted in June 2010 (the “May Law”).

The focus of this submission is the retrospective application of the tax changes that are proposed in the Bill. TPG is a taxpayer adversely impacted by the Bill’s retrospective application.

2. Retrospectivity

A basic tenet of the rule of law is that citizens should be able to arrange their affairs having regard to the law as it is in place from time to time without fear that the government will retrospectively change it, and in so doing, make a once legal act illegal.

This principle has been enshrined in constitutions around the world, including those of the United States of America, Sweden and, closer to home, in Indonesia where the principle is described as “a basic human right”.

K.W. Asprey’s 1975 Taxation Review Committee Report stated (at 11.48):

There is a well-established, fundamental and sound principle that legislation, especially fiscal legislation, should not have a retrospective operation. That which was lawfully done should not, after the completion of the act by which it is done, be made unlawful and subject to penalty. There is a strong presumption against retrospectivity because it manifestly shocks one’s sense of justice.

Concern about the retrospective application of laws has been expressed by members of parliament from both sides of politics on many occasions:

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Mr Latham (UAP)	29/7/1930	Taxpayers and other persons who take advantage of the law to remedy their troubles are entitled to any benefits which they can properly secure in that way, and it is not desirable that we should prevent them from obtaining such redress by making our legislation retrospective.
Mr Archdale (UAP)	31/7/1931	I put it to honorable members, that it is not fair to make legislation of this nature retrospective. Nobody can justify a person being asked in "1931 to pay a certain sum of money on an assessment of income earned eight years ago - at a time when it could have been paid - particularly when the retrospectivity is necessary only by reason of the mistakes of Parliament, or because the Commissioner for Taxation failed to collect the amount when it was due.
Mr Holt (Lib)	22/3/1944	Retrospective legislation of this description should be avoided as far as possible, but it is particularly undesirable to apply retrospectivity to financial matters
Mr Killen (Lib)	21/5/1965	If ever a dangerous doctrine has been propounded in this Parliament, Mr. Chairman, and if ever there has been a doctrine that this Parliament should shy clear of, it is the doctrine of retrospectivity in legislation that has been propounded this afternoon. Where does retrospectivity stop? If our approach to these problems is that we approve of the undoing of complicated transactions that run back over five years, why not apply this doctrine in other fields?
Mr Connolly (Lib)	23/3/1988	The Government has no right, at any stage, to change the game upon which those people have made their decision in the past.
Mr Williams (Lib)	23/11/1995	Retrospective legislation as a class is invidious, and there are few exceptions.
Mr Hayes (ALP)	20/9/2007	Retrospectivity, which I think should be seen as an anathema to all
Mr Kerr (ALP)	20/9/2007	Retrospectivity, which this parliament is always concerned about
Mr Fletcher (Lib)	22/11/2010	[Retrospectivity] is a highly unsatisfactory way for the government to treat industry. It is a highly unsatisfactory way to treat taxpayers, to treat businesses, which are seeking to make a decision about the extent to which they engage in research and development expenditure and face enormous uncertainty about the rules that are going to apply.
Mr Slipper (Ind)	5/7/2011	I think it is vital to recognise that, when the law of Australia says a certain thing on a certain day and people act on the basis of that law as it then exists, it is inappropriate to change the law as at a certain date but backdate the operation of that law to make illegal an action which was within the law when it was taken. I think that makes a lot of common sense and most people in the country would agree.
Ms Plibersek (ALP)	6/7/2011	Successive Australian governments have not lightly pursued retrospective legislation.
Mr Joe Hockey (Lib)	21/11/2011	[R]etrospective legislation creates uncertainty. Investors will be reluctant to invest in a country where the tax system is uncertain and the government and the taxation commissioner have a habit of looking at issues retrospectively.
Mr Perrett (ALP)	29/2/2012	Retrospectivity is abhorrent for every lawyer and all of the members of my committee.

3. The Unfairness of the Bill

The Government clearly understands the concern about the retrospective effect. In the attachment to the media release issued by Mr Shorten MP in November 2011, the following goal appears:

“14. The transitional period changes will protect taxpayers who acted on the basis of the current law before the Board of Taxation review was announced.”

a. Start date of Interim Rules

The Bill does not achieve Mr Shorten's stated goal. The Interim Rules which are included for the purposes of "protecting taxpayers who acted on the basis of the current law" do not protect all such taxpayers.

The operation of the Interim Rules commence on 12 May 2010 (the date the May Law passed both houses of parliament) and end on 30 March 2011 (the date the Government announced that it had asked the Board of Taxation to conduct a review of the effect of the May Law).

The rationale for the exemption period appears to be that taxpayers who made decisions between 12 May 2010 and 30 March 2011 did so on the basis of an effective law which was called into question after 30 March 2011.

The rationale for the end date of 30 March 2011 is that even though the law continued after 30 March 2011 (and continues today), taxpayers were aware from 30 March 2011 of the fact that the Government was considering changing the tax law.

The rationale for the start date of the Interim Rules is quite different. The start date is not the date on which taxpayers were made aware that the Government was considering changing the law. Rather the start date is the date the May Law actually passed both houses of parliament.

If taxpayers are required to arrange their affairs based on an announcement that the Government was undertaking a review, a more consistent approach to the interim period is required. TPG submits that the Interim Rules should start when the exposure draft for the May Law was released on 28 April 2009. After that time, decisions were being taken on the basis that there was a good likelihood that the legislation would be passed, as indeed it subsequently was.

b. Lodgement v Assessment

Furthermore, taxpayers who lodged tax returns prior to 30 March 2011 based on the May Law but whose assessments were not dealt with by the Australian Tax Office until after 30 March 2011 are treated differently to those whose assessments were dealt with before 30 March 2011. It can hardly be described as "fair" that the eligibility or otherwise to an exemption be the result of the timing of events outside the control of the taxpayer.

c. Private Rulings

It is also difficult to see why there should be any difference between taxpayers who obtained a private ruling (and therefore will benefit from the exemption) and those who applied the law as it is written without troubling the ATO for a private ruling. The effect of this different treatment is to create an incentive for businesses to consume ATO resources seeking private rulings on every decision so as to avoid the risk that retrospectively effective legislation will suddenly make them liable for more tax than anticipated. This cannot be good policy.

4. The Impact on TPG

The impact for TPG of the proposed change to the tax laws arises primarily from its purchase of Pipe Networks Pty Ltd. TPG notes:

- TPG completed its acquisition of Pipe on 30 March 2010 – less than 2 months prior to the proposed commencement date of the Interim Rules.

- As a result of the release of the exposure draft for the May Law in 2009, TPG was aware of the Government's proposal to pass the May Law and, throughout the period of the Pipe transaction, was anticipating the passing of that legislation.
- TPG did not and could not account for the acquisition of Pipe until July 2010, after the May Law was passed.
- In doing its accounting for that acquisition, TPG was obliged to account on the basis of the May Law. As such it did not create a Deferred Tax Liability provision as it would have done had the May Law not been passed.
- TPG lodged its tax return for the 2010 financial year and had that return assessed based on the May Law.
- As a result of the proposed change in legislation, the costs that TPG incurred obtaining tax assessments for the 2010 and 2011 financial years will be substantially wasted and TPG will be forced to incur costs to re-process returns.
- Most significantly, TPG will be obliged to bring to account in its Income Statement for the 2012 financial year, a tax liability amounting to approximately \$23million. If the May Law had not been passed, TPG's profit would not have suffered the \$23 million accounting charge as an appropriate tax liability would have been recognised at the time of the acquisition of Pipe.
- The \$23 million hit will be reflected in TPG's financial statements and prior year comparatives for years to come. International lenders and investors would find explanations of this abnormal hit very concerning. It is likely that the anomaly will result in TPG being excluded from some investors' considerations. For many years and having done nothing wrong, TPG will effectively be punished by the legislative error.
- Between May 2010 and March 2011, TPG conducted its business on the understanding that the May Laws would apply. It made capital investments and cash decisions on assumptions based on the May Laws. Retrospectively changing the May Laws has the effect of seriously undermining the business case decisions that TPG made based on the May Laws during that time.
- TPG is a significant competitor in the telecommunications market and has invested many millions of dollars installing infrastructure to provide benefit to Australian consumers with lower prices and innovative services. The proposed changes impact TPG's ability to increase those investments.

5. Alternatives

TPG understands that the Government may wish to correct what it perceives to be imbalances caused by the errors in tax legislation from time to time, even mistakes of its own making.

However, to retrospectively apply changes that have such serious consequences for businesses who have done nothing more than to account accurately based on the law in place is invidious and an anathema.

a. Recommendation 1

The Assistant Treasurer stated that the need for retrospectivity is to protect revenue at risk. There are other ways to do this without adversely impacting taxpayers who applied the law as it was written. As one example, the test for whether a tax deduction was allowable or not could have been based on whether the corporation's first possible tax return following a transaction (regardless of when the transaction occurred) claimed the deduction in reliance on the May Law. If a tax return completed in relation to an earlier transaction was subsequently amended to claim the deduction under the May Law, no deduction would be allowable. However, if the first tax return after a transaction occurred was done in accordance with the May Law, the corporation

should be allowed to claim the deduction. This would be fair to those corporations who had no choice but to comply with the May Law at the time the transaction was accounted for.

b. Recommendation 2

The proposed exemption which is designed to protect businesses who made decisions relying on the law in place, does not do so in TPG's case. TPG believes that the Interim Rules should apply in respect of acquisitions that completed between 28 April 2009 and 31 March 2011. Such a period would be a more consistent approach to protecting taxpayers who acted on the basis of the law.

c. Recommendation 3

A far more equitable approach is that the Interim Rules should apply in respect of tax returns lodged during the period between 12 May 2010 and 31 March 2011 rather than tax assessments issued during that period.

We would be happy to attend and give evidence if the Committee would be assisted.

Yours faithfully

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