From: Mike Durack
Sent: Wednesday, 3 June 2009
To: Economics, Committee (SEN)

To: Mr John Hawkins,
Committee Secretary,
Senate Standing Committee on Economics

Ref: Submission opposing the proposed changes to Section 23AG of the Income Tax Assessment Act

Dear sir,

The Australian Government are proposing changes to section 23AG of the Income Tax Assessment Act 1936 which currently provides an income tax exemption for Australian residents' foreign earnings derived from foreign service employment. The Government believes these changes will recoup additional funds by increasing the personal income tax (PIT) payable by Australian workers employed overseas.

I believe the Government is missing the bigger picture, and that these proposed changes will overall have a negative effect on the Australian economy, with the resultant loss of incoming earnings and jobs, out weighing any return from the collection of PIT from those workers who may choose to continue in their overseas employment once their income is subject to full Australian PIT.

With full PIT for Australians working overseas, there is no incentive to remain working overseas, – or, some workers may choose to become non resident. Either way, the Australian economy misses out on these overseas earnings returning to Australia and being circulated into the economy. The recent cash handouts from the Government were intended to inject funds into the Australian economy, hence it seems odd to now be considering policy that will cause a reduction in funds entering the Australian economy.

With rising unemployment, it is nonsensical to create a disincentive for Australians to seek work overseas. On the contrary, the Government should incentivize overseas employment. What better panacea for an ailing economy than to have Australians gaining employment overseas instead of taking jobs in Australia, and their subsequently returning home to invest their foreign income into the Australian economy ?

Encouraging Australians to work overseas is a simple and very cost effective means of boosting the Australian economy. It provides a net gain in available jobs and injects foreign sourced funds, thus providing a positive contribution to Australia's economic recovery.

I am not alone in these concerns - please refer to the attached doc. file entitled 23AG Consequences as a result of proposed amendments 23AG, and also the .pdf file being a copy of the Submission from the Tax Institute of Australia, entitled 09 TIA Submission re taxing o-sea employment income, voicing the Tax Institutes concerns re the proposed changes to Section 23AG.

As mentioned above, this legislation will not achieve the result the government expects. In my personal circumstance, there will be a net loss of tax revenue to the Australian Government if they enact 23AG, as compared to my circumstance under the current legislation.

I ask that the senate inquiry make a recommendation vote against any changes to section 23AG of the Income Tax Assessment Act 1936, and instead, consider various means to incentivize Australians to seek employment overseas, whilst remaining resident in Australia.

I would be grateful for confirmation of receipt of this email, and an indication of timing for when the Senate Inquiry may be ready to decide on the proposed changes to section 23AG.

Thanks & regards,

P.M. Durack

Tax Laws Amendment (2009 Budget Measures No.1) Bill 2009

☒ **MP's** ☐ **IMMIGRATION** ☐ **PRIVATE ENTERPRISE** ☐ **MISC**

Australian Residents Working Overseas and Residing in Australia

RESPONCE

TITLE: CONSEQENCES AS A RESULT OF PROPOSED AMENDMENTS TO 23AG

APPROVED & AUTHORISED NETWORK VERSION - CONTROLLED COPY	DOCUMENT NUMBER **23AG-001**
APPROVED BY: Brett Lorking DATE: 28 May 2009	REVISION 1
AUTHORISED SIGNATURE DATE:	NUMBER OF PAGES 7
Note, any paper copy of this document is considered an **UNCONTROLLED COPY** unless it is approved and signed by the Author.	*NUMBER OF APPENDICES 2 * If NONE, write "NONE"

REVISION RECORD

REVISION	DATE	DESCRIPTION OF REVISION	PARAGRAPH / APPENDIX
0	28 May 2009	Nil	Nil

CONTENTS

1.0 PURPOSE

To inform Government and Private enterprise of the Impact on Australian Expatriates and consequences of proposed changes to 23AG

2.0 FACTS

2.1.2 Treasury press release No 066 (better targeting the income tax exemption for Australian workers over seas)

2.1.1 **Revenue:** Treasury estimated (quote Press release No 006) that $675 Million in the forward estimate will be received as Tax Revenue over 4 years

2.1.2 **Revenue Administration:** Mr. Greg Woods (Manager of International Tax Units The Treasury) on the 25th May 2009 @ 10:45 EST advised the following:

- If you are employed over sea by an Australian company you are be deemed as PAYG
- If your are employed over seas by a non Australian company you are NOT deemed as PAYG and your income will be considered GROSS
- The majority of over seas employees have employment contracts, they are not employed as Contractors or sub-contractors

2.1.3 **Fair and Equitable:** Currently the Australian Expatriate dose not have equity as follows

- No Entitlement to Government backed Superannuation scheme Employer contributions
- No Entitlement to Holiday leave, pay or loading
- No Entitlement to Sick leave
- No protection for unfair dismissal
- No Entitlement to Tax Minimization, where any money earned in Australia (at source) is taxed at the highest rate and gearing for tax minimization is negligible
- No Transition Period for Australian Expatriates to adjust Investments for Tax minimization to meet the changes to 23AG
- No Entitlement to Salary Sacrificing
- 23AG will still apply to Government Employees

2.1.4 **Immigration:** Australian Expatriates returning to work in Australia

- Mining Companies have Non Australian Expatriates employed and or residing in Australia
- A percentage of Australian Expatriates will return to Australia seeking Employment

3.0 CONTENSIONS

3.1.1 Revenue (2.1.1): The Government will not receive the expected forward estimate of $675 Million over 4 years.

- Australians Expatriates taking up non residence status (30%)

(Table 1)

Potential Out Come as a Result of 30% lose of Expatriates foreign income & Tax revenue			
Lose of Foreign income spent in Australian economy over 4 year period	Lose of Tax Revenue over four years	Government forward estimate of revenue over 4 years	Combined loss of Revenue and foreign income spent in Australian Economy
-600,000,000	-202,505,000	675,000,000	-127,500,000

- GST as Lost Revenue must also be accounted for however given the differences in personal spending this figure has not been included

- **Expatriates remaining in Australia (50%)**

Currently approximately 50% of over-sea employees invest in property as a means of superannuation as they do not have the advantages of those employed within Australia who are members of a Government guaranteed super scheme. In many cases the investment properties are in the spouses name as they the over-sea employee does not have the tax benefits that are available to those employed within Australia. It follows then that the spouse will gear the property against income and when sold will pay capital gains tax.

As of 1 July 2009 the following is likely to happen

The spouse will transfer the property at market value to the over-seas employee. Given the current climate the capital (if any) will be minimal depending on when purchased, The over-seas employee will then gear the property against income earned which will in turn reduce taxable income. See example below.

Spouse purchased property in 2007 for $550,000
1July 2009 spouse transfers the property to over-seas employee for market value of 600,000
Gain is off-set by purchase and selling cost (stamp duty $40,000, transfer cost $800) reducing the gain 9,200. 50% concession gives a net capital gain of $4,600.

(Table 2)

Rental received	$23,500
Foreign income	$150,000
Total	$173,500
Investment deductions	
Interest	-$64,800
Management	-$1800
Strata fees	-$4,500
Council rate	-$2000
Depreciations	-$5000
Total Deductions	-$78,100
Taxable income	$95,400
Foreign tax credits	$9,540
Australian tax payable	**$23,850**

Based on the above example the average tax paid will be between $20,000 and $30,000. If this is multiplied by the 50% over-seas employees engaged in property investment the total revenue over the fours years is $95,400,000.

This will reduce loss in revenue to -$32,100,000.

We acknowledge that the remaining 20% not yet accounted for will further reduce this loss. However it is reasonable to assume that they will engage in some form of tax minimization. That is, the governments expected revenue clearly will not be obtained. Further, the impact this will have on the economy as a whole will be significant particular in the current climate where the government is encouraging communities to stimulate the economy with cash flow. In addition, there is not only the likelihood that the revenue will not be achieved but concerns that the government may actually be in a deficit as a result of this new measure.

3.1.1 **Revenue Administration** Ref Sec 2 (2.1.2):

- **If employed over seas by a NON Australian company** you will not be deemed as PAYG for Australian Tax purposes. This being the case how will the following be administered for Australian citizens working as Expatriates
- **Will a fair and reasonable ruling be tabled** to ensure the following:
    - Government Super guarantee for Employers contribution be available
    - Worker's Compensation be available
    - Holiday and sick leave be available
    - Salary Sacrificing be available
    - Unfair dismissal safety net

3.1.2 **Fair and Equitable** Ref Sec 2 (2.1.3)

- **Currently under the 23AG** rule the Australian Expatriates operate with in a fair and equitable system with their Australian counterparts, where:
    - Australian Expatriates do not have the entitlements their Australian counter parts do Sec (2.1.2)
    - Australian Expatriates take greater investment risks by injecting millions of dollars in foreign currency into Australian real estate to make up the short fall for the lack of Government super guarantee for employers contribution
    - Australian Expatriates have no opportunity to minimize Tax on any income earned or invested in Australian
    - Australian Expatriates Inject Mutable Millions of foreign dollars into the Australian economy and spend only 5 months of the years in consuming/utilizing Government utilities
- **Changes to 23AG** will not be fair and equitable to Australian Ex-Pates where:
    - They will NOT be considered as PAYG "ref dot point 2"(2.1.2) and if a ruling is not tabled to ensure the following is implemented then this will result in and unfair an un-equitable balance between the Australian Expatriates and their Australian counter parts
        - No Entitlement to Government backed Super guarantee for employers contribution

- No Entitlement to workers compensation
- No Entitlement to Holiday's, pay and loading
- No work safety Net for unfair dismissal
- No Entitlement to Salary Sacrificing
- No transition period for Australian expatriates to adjust investments, where currently they have invested in accordance with the 23AG ruling. Families will be forced to sell off assets and in extreme cases maybe faced with bankruptcy

- **23AG will still apply to Government Employees** and charitable organization
  - Where is the Fairness in this
  - If treasury feel 23AG is unfair why do they not remove the ruling all together
  - If 23AG is to be retained for fairness it should only apply to charitable organizations

3.1.3 Immigration sec 2 (2.1.4)

Australian Expatriates returning to Australia

- Currently Australian Expatriates endure hardship to work over seas:
  - Travel can take up to a week to place of employment and returning to place of residence which is considered to be time off. More often than not at some point of the journey you are placed on airlines that are black listed by the International Aviation Governing bodies
  - The countries they are assigned to and conduct their tours can be politically unstable where armed escorts are often required to and from their place of employment
  - Disease is prominate in most location and currently 90% of the operators require Expatriate Employees to take medication to combat the onset of illness and minimize the symptoms of diseases such as Malaria, These medications do have side effects.

- **Non Australian Ex-Pates working/rotating/residing in Australia**
  - Given the hardship Unfair and Un-equitable circumstances that will arise from the changes to 23AG there will be a percentage of Australian Expatriates returning to Australia for Employment:
  - Non Australian Expatriates working in Australia will be at risk of loosing their position to a returning Australian Expatriates
  - A precedent exists from the 1990's where a Company was informed by the Australian Immigration Dept that the Non Australian Expatriate was to vacate the position and Australian resident was placed into the position

4.0 CONCLUSION

It would appear that 23AG in its current state is Fair and Equitable. The current flow of foreign currency into the Australian economy on an annual basis is in the Millions in the form of spending and investments. This injection of foreign currency is in line with the current Governments policy of stimulating the lagging economy, Should the changes to 23AG reach “Royal Decent” the flow of foreign currency into the economy will be severely eroded by Australian Expatriates relocating over seas as Non Residence and those whom will return to Australia for employment will utilize tax minimization to the point where they can become almost revenue neutral.
The forward estimate by treasury of $675 Million over 4 years will note be achievable and dependant on the way in which the Australian Expatriates conduct them selves there is the possibility that the Treasuries forward estimate may become a Liability to the Australian Tax Payers.

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TAXATION INSTITUTE *of* AUSTRALIA
IT'S ESSENTIAL

25 May 2009

The Hon Wayne Swan MP
Treasurer
PO Box 6022
Parliament House
Canberra ACT 2600

Email: Wayne.Swan.MP@aph.gov.au

Dear Treasurer

Limiting the income tax exemption for Australians working overseas

The Taxation Institute of Australia (**Taxation Institute**) has concerns regarding the proposal to limit the scope of s 23AG of the *Income Tax Assessment Act 1936* (**ITAA 1936**) (i.e. the income tax exemption for Australians working overseas) solely to aid, charitable and certain government workers. Our concerns include the following:

- it will add complexity to tax law and administration which will impact unfairly on ordinary Australians working overseas and Australian businesses;
- it will impose additional costs on Australian companies employing Australian residents overseas and therefore reduces their competitiveness; and
- the proposals have been introduced without sufficient opportunity for consultation on the impact of the changes for ordinary Australians and Australian businesses competing internationally.

Background

Generally, the taxing right in respect of salary income is allocated to the country of source under Australia's double taxation agreements (**DTAs**). Section 23AG of ITAA 1936 was introduced as part of the foreign tax credit system for the purpose of ensuring the administrative integrity of the then foreign tax credit system by removing many small taxpayers from its operation (see *Explanatory Memorandum, Taxation Laws Amendment (Foreign Tax Credits) Bill 1986 (Cth)*, 22). Therefore, s 23AG effectively only applied to exempt foreign source personal service income in circumstances where the posting was to a non-DTA country for a period of 91 days or more or to a DTA country for a period exceeding 91 days, but not greater than 183 days.

Thus, both the original foreign tax credit rules in the ITAA1936 and the revised the foreign tax offset (**FTO**) rules in Division 770 of the of the *Income Tax Assessment Act 1997* (**ITAA 1997**) were designed only to deal with foreign tax offsets of sophisticated taxpayers and on the rare occasions with the small amounts of foreign income not excluded by s 23AG (as illustrated by the $1,000 limit under s 770-75(2) of the ITAA 1997).

The pay-as-you-go (**PAYG**) withholding rules do not apply in relation to income which is exempt under s 23AG. However, as a result of the proposed changes to limit the scope of s 23AG, many employees who were previously exempt from the PAYG withholding provisions will now be subject to those provisions. A corresponding number of employers will have Australian PAYG withholding

obligations based on the gross foreign salary of the employee. Double PAYG withholding could arise, for example, where an individual taxpayer is working in a non-DTA country (eg Greece) and being paid by a non-resident employer. Assuming that the relevant non-DTA country imposes PAYG withholding on the individual, the individual could be subject to double PAYG withholding (i.e. PAYG withholding overseas and PAYG in Australia). This will depend on the timing, availability and quantum of FTOs in respect of any foreign tax "paid" by the individual as the relevant individual's PAYG instalments should be determined taking into account any FTOs which are available.

Employers are exempt from fringe benefits tax (**FBT**) in relation to fringe benefits provided to Australian resident employees working overseas if the income paid to the employees is exempt under s 23AG. However, as a result of the proposed changes to limit the scope of s 23AG, some employers who were previously exempt from the FBT provisions in respect of fringe benefits provided to employees working overseas will now be subject to those provisions. Double FBT liabilities could arise, for example, where fringe benefits are provided to an individual taxpayer working overseas who is personally subject to FBT in the overseas jurisdiction and whose Australian employer is also subject to FBT under Australian tax law.

Issues with complexity in detail

With over one million Australians working overseas the compliance cost impact of the measure is immense as every tax agent in Australia is likely to have at least one client who has worked overseas during the year. Given this multi million dollar compliance cost imposition the Taxation Institute is concerned that there has been no attempt by the Government to ameliorate the impact of these compliance obligations nor deal with the harsh financial imposts arising from the interaction between s 23AG, the FTO, PAYG, FBT provisions and Australia's tax treaties. The compliance cost concerns arise primarily from the fact that the FTO rules in Division 770 of the ITAA 1997 are ill equipped to deal equitably with the large number of affected ordinary working Australians as it was designed within the policy setting of only a small number of individual taxpayers being within its scope (via s 23AG of the ITAA 1936).

There are also compliance costs associated with employers determining whether each employee in a foreign job is in fact a resident of Australia before seeking to make PAYG withholding in respect of the gross foreign sourced salary of that employee. It is likely this will result in a structural change to the manner in which foreign postings are arranged in the future, with a shift in the identity of the employer to a foreign entity. It will also favour foreign multi-nationals as against Australian employers.

Given the lack of consequential amendments in the exposure draft of the proposed amendment to s 23AG, released on 12 May 2009, it appears that no consideration has been given to modifying the FTO rules to reduce the large compliance burden imposed by the proposed change on unsophisticated taxpayers. In particular, how the "tax paid" requirement will affect the cash flows of these salaried taxpayers has not been considered.

Given that the ATO has accepted that fringe benefits provided to an employee who is within the present s 23AG are not caught by the FBT legislation and do not give rise to an FBT liability, there will also be a significant change in the complexity of reporting and paying tax in respect of those fringe benefits plus the actual compliance costs. The effect of this is also going to make Australian companies seeking to use Australian employees in their foreign activities less competitive

Consultation

The 18 May 2009 closing date for comments on the exposure draft reflects the lack of thought to the complexity and associated issues of fairness and equity and international competitiveness noted above and is disappointing given your Government's commitment to the fundamental principle of consultation. The Taxation Institute is concerned that the issues we have identified with the proposed change have not been addressed.

Recommendation

Given the high compliance burden imposed by this decision, the Taxation Institute urges the Government to reopen consultation and authorise the Treasury to consult on possible consequential amendments that would reduce these compliance burdens and remove adverse interactions.

If you require any further information or assistance in respect of our submission, please contact Joan Roberts on 03 9611 0178 or the Taxation Institute's Senior Tax Counsel, Dr Michael Dirkis, on 02 8223 0011.

Yours sincerely

Joan Roberts
President