



AUSTRALIAN DIVERTED PROFITS TAX (“DPT”)

Australia has followed the UK path of pre-empting the implementation of the OECD’s Base Erosion and Profit Shifting (BEPS) final reports dated 5 October 2015 which deals with international tax avoidance alleged against by the likes of Google and Amazon. The UK introduced its Diverted Profits Tax with effect from 1 April 2015. In Australia, this has happened by:

- a) introducing essentially the first limb of the UK DPT relating to “Avoided PE’s” by non-residents, by amendments to the general anti-avoidance provisions (Part IVA) (the amendments commonly known as the Multinational Anti-Avoidance Law (“MAAL”)) effective 1 January 2016, and
- b) by proposing the introduction of the second limb of the UK DPT as a tax, standing outside the Australian Income Tax Assessment Acts, with proposed start-up date being 1 July 2017. Like the second limb of UK DPT, the Australian DPT will apply to residents transferring profits, assets or risks offshore, through related party transactions that lack economic substance, giving rise to an “Effective Tax Mismatch”.

Pre-emption of the BEPS initiative is likely to result in unrelieved double taxation.

Both Australian limbs affect only “Significant Global Entities” (annual global consolidation accounting profits of A\$1B). In contrast, the UK DPT affects taxpayers who are not SMEs (i.e. >250 employees > €50 million turnover > €43 million net assets)

Unlike both limbs of the UK DPT, the MAAL is not a tax separate to income tax, and by virtue of the provision of s4(2) of the International Agreements Act 1953, is an express treaty override by Part IVA. Since that provision has been in existence since Part IVA was introduced in 1981, it was well known to Australia’s treaty partners in entering treaties or revising treaties from that date. Indeed, it made sense to tackle the issue of Avoided PE in the Australian domestic law

with the effect that any additional Australian tax raised by the measure should be creditable in the non-resident taxpayer's home jurisdiction under treaty provisions.

The proposed introduction of the second limb of the UK DPT as an Australian DPT is completely different to the MAAL, as it expressly purports not to be an income tax (presumably relying on the logic of the UK Court of Appeal decision in *Bricom Holdings*), and would arguably not be creditable in the non-resident taxpayer's home jurisdiction under treaty provisions.

Also, the MAAL may be seen as simply bringing forward the implementation of amendments to bilateral treaties recommended by BEPS action item 7, and as already implemented in the new Australia/Germany treaty. If indeed a Multilateral Tax Treaty is entered into under BEPS action item 15, which covers Avoided PE's, and most of Australia's treaty partners become parties to such a Multilateral Tax Treaty, the introduction of the MAAL will ultimately prove not to be as controversial as the Australian DPT.

Just like the criticism of the UK DPT, the Australian commentators have been likewise vocal concerning the Australian DPT for the reasons noted above, and also for the reason that the Effective Tax Mismatch requirement (that the non-resident receiving the Australian diverted profits be taxed at least at a level of 80% of Australia's now relatively high 30% corporate tax rate, compared to the UK's now competitive 20% corporate tax rate), means that many non-resident jurisdictions including the UK itself, now have a corporate tax rate which would still give rise to an Effective Tax Mismatch.

The three examples given by the Australian Treasury in its document "Implementing a Diverted Profits Tax", are all arguably able to be countered under existing Australian law, with the implication that the introduction of the Australian DPT at a penal 40% tax rate (UK DPT rate 25%) is a heavy handed response to frustrations in raising the tax the Government thinks should be raised, on a timely basis.

Both Australian limbs could easily be recalibrated down from the Significant Global Entity threshold in the future, to impact even SMEs. There is likely to be some refinement in the final form of the DPT, after consultation.

Pointon Partners have special expertise in international tax. If you have any queries regarding the above please contact Robert Gordon of our office on (03) 9614 7707.

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