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Manager
Philanthropy and Exemption Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: ESSreforms@treasury.gov.au

Dear Sir/Madam

The Taxation Institute of Australia (**Taxation Institute**) welcomes the opportunity to provide comments on the transitional provisions in the exposure draft of *Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009 (Exposure Draft)* which were released for comment on 15 September 2009.

The Taxation Institute has concerns regarding the transition of certain shares and rights acquired before 1 July 2009 into the new rules. The Taxation Institute also has concerns regarding some aspects of the drafting as it creates uncertainty. These concerns are discussed in detail below.

ESS interests transitioned into new rules

Shares or rights acquired before 1 July 2009, on which tax has been deferred beyond 1 July 2009, will be brought within the new employee share scheme rules (refer s83A-5(2)). The current taxing points (ie the cessation time for the purposes of Division 13A and the equivalent provision under former s26AAC), are preserved (refer s 83A-5(4)(b)). Further, the refund provisions are also preserved (refer s 83A-5(4)(c)).

However, the Taxation Institute is concerned that other aspects of former rules may also need to be retained. From a drafting perspective, the Taxation Institute would prefer the new rules to explicitly state that the former rules apply to all shares and rights acquired prior to 1 July 2009 in all respects except where the new rules specifically state that they apply to the shares and rights acquired prior to 1 July 2009. This would avoid any unintended outcomes and the possible need for consequential amendments. [**TBD – Joan I would like to discuss this point with you**]

Drafting uncertainty

Some schemes provide employees with a “right” to be issued with an “option” on the happening of certain events (eg a minimum period of service). This “option” can then be exercised and converted to a share at a later point. Where an employee started employment before 1 July 2009 and (arguably) acquired the “right” at that point, it is not clear whether the issue of the “option” will be dealt with under the old or the new legislation. The Taxation Institute considers that this point should be clarified.

The Taxation Institute considers that the interaction between s 83A-10 and s 83A-5 is unclear and creates uncertainty. Section 83A-5(1) provides that the new rules apply to all shares and rights

acquired on or after 1 July 2009. Section 83A-5(2) provides that the new rules will also apply to shares and rights acquired before 1 July 2009 if taxation was, and continues to be, deferred.

Section 83A-10 provides that if Division 13A (or the former s26AAC) applied in relation to a share or rights just before the commencement of the new rules then Division 83A (ie the new rules) do not apply.

Presumably, it is intended that s83A-5(2) takes precedence (ie the new rules apply even if Division 13A applied where the shares or rights are subject to deferral taxation). However, there is nothing in the legislation which states this. The drafting should be amended to make this clear.

There appears to be a typo in subsection 83A-10(b). The last sentence (ie "Division 83A if under section 83A-10"), should apply to subsections (a) and (b). Therefore, it should appear underneath paragraph (b). Further, the reference to section 83A-10 appears to be unnecessary.

There appears to be a typo in subsections 83A-10(2) and (3). These subsections refer to subparagraphs (1)(a)(i) and (1)(a)(ii) respectively. These should be reversed (ie s83A-10(2) refers to s26AAC and should refer to s83A-10(1)(a)(ii) which relates to s26AAC and s83A-10(3) refers to Division 13A and should refer to s83A-10(1)(a)(i)).

It is not clear what definition is being referred to in s83A-5(1)(b) (refer to the words "relevant share or right (within the meaning of Division 13A ...)"). The drafting should be amended to make clear whether this section is incorporating a definition from Division 13A or it is merely referring to a share or right that is acquired under an employee share scheme for the purposes of Division 13A.

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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 Tax Counsel, Angie Ananda, on 02 8223 0011.

Yours sincerely



Joan Roberts
President