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General Manager
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The Treasury
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14 April 2014

Dear Sir/Madam

EXPOSURE DRAFT LEGISLATION - TAX AND SUPERANNUATION LAWS AMENDMENT (2014 MEASURES NO. 2) BILL 2014: PREVENTING DISTRIBUTION WASHING

BDO welcomes the opportunity to provide a submission on the Exposure Draft Legislation: Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014: Preventing Distribution Washing (Exposure Draft), released by Treasury for public consultation on 24 March 2014.

We make the submissions set out below in respect of the matters addressed in the Exposure Draft.

Uncertainty in respect of the requisite elapse of time between disposal of original interest and acquisition of “washed interest” - proposed s207-157(1)(a)

It is apparent from the Discussion Paper (Discussion Paper), *Preventing Dividend Washing*, released by Treasury 3 June 2014 and the Explanatory Materials accompanying the Exposure Draft (Explanatory Materials) that the proposed distribution washing measures are intended to address the disposal of a parcel of shares (the first interest) ex-dividend and the subsequent acquisition of a substantially identical parcel of shares (the washed interest) on a cum-dividend basis on a “special market” in respect of those shares. We further understand that such “special markets” will only exist for a maximum period of 48 hours after the shares have gone ex-dividend.

In light of this, proposed s207-157(1)(a) does not adequately limit the relevant elapse of time between the first interest going ex-dividend and the closure of the relevant special market. In providing:

*“the washed interest was acquired after the member, or a *connected entity of the member, disposed of a substantially identical membership interest”,*

s207-157(1)(a) would apply to a parcel of shares acquired a year after the relevant disposal, or, indeed, 10 years after the relevant disposal of the first interest. In addition, there is no requirement that the washed interest be acquired on a “special market”. In light of the limitations imposed by s15AB of the Acts Interpretation Act 1901 (Cth) on the circumstances where a court can have regard to extrinsic materials in interpreting legislation, we would submit that our concerns would not be adequately addressed by an assertion that such deficiencies are addressed in the Explanatory

Materials.

Uncertainty implicit in the reference to “corresponding distribution” - proposed s207-157(1)(b)

It is apparent from the Discussion Paper and the Explanatory Materials that the proposed measures are intended to apply where the dividend paid on the washed interest is the subject of the same declaration as that paid on the first interest. It is not certain that such intention is conveyed in the language of “a corresponding franked distribution” used in proposed s207-157(1)(b). The uncertainty introduced by this language is exacerbated by the issues raised in our submissions in respect of proposed s207-157(1)(a).

Question in respect of necessity of proposed measures in light of recent activities of the ATO

In our submissions in respect of the Discussion Paper we submitted that new measures were not necessary in light of the powers already conferred on the Australian Taxation Office under s177EA of the *Income Tax Assessment Act 1936*. In response to such submission, Treasury in its summary of submissions stated:

“Not agreed. Advice from the ATO indicates that the existing law is very difficult to apply and would not necessarily apply in all circumstances.”

Subsequent conduct of the ATO in releasing Draft Taxation Determination TD 2014/D1 and undertaking a mass mail out to taxpayers who allegedly participated in dividend washing casts doubt on the correctness of Treasury’s response. In addition, the ATO have, in asserting the applicability of s177EA, ignored both:

- The starting date of the proposed new measures (1 July 2013); and
- The *de minimis* exemption under the proposed new measures,

contrary to Government announcements in respect of the application of measures directed towards dividend washing.

In light of the ATO’s conduct, we again question the necessity of the new measures.

Should you have any questions, or wish to discuss any of the comments made in the above submissions, please do not hesitate to contact Lance Cunningham on 02 9240 9736 or lance.cunningham@bdo.com.au or Matthew Wallace on 02 9240 9760 or matthew.wallace@bdo.com.au.

Yours sincerely



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