LCR 2017/D7 - Diverted profits tax

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Diverted profits tax

Relying on this draft Guideline

This Law Companion Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

This Guideline describes how the Commissioner will apply the law as amended by Schedule 1 to the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017. The paragraphs within the 'Specific Issues for Guidance' section of this Guideline constitute a public ruling to entities that rely on them in good faith.

If you rely on these paragraphs of the Guideline in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by those paragraphs if they do not correctly state how a relevant provision applies to you.

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What this draft Guideline is about

1. This draft Guideline addresses Schedule 1 to the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017* (the Act), which introduces a new diverted profits tax for significant global entities (the DPT). This draft Guideline is provided to assist you with understanding the new law.

Outline of the new law

2. The DPT is designed to ensure that significant global entities do not reduce the amount of Australian tax they pay by diverting profits offshore through arrangements with related parties.

3. Schedule 1 to the Act amends Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936)[1] by inserting sections 177H to 177R. There are also consequential amendments to the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Taxation Administration Act 1953*.

4. The objects of the DPT provisions are set out in section 177H and are as follows:

- to ensure that the Australian tax payable by significant global entities properly reflects the economic substance of the activities that those entities carry on in Australia (paragraph 177H(1)(a))
- to prevent those entities from reducing the amount of Australian tax they pay by diverting profits offshore through contrived arrangements between related parties (paragraph 177H(1)(b)), and
- to encourage those entities to provide sufficient information to the Commissioner to allow for the timely resolution of disputes about Australian tax (subsection 177H(2)).[2]

5. Where Part IVA applies to a scheme by virtue of subsection 177J(1)[3], the Commissioner may make an assessment of the taxpayer's liability to diverted profits tax. The tax is imposed at the rate of 40% on the diverted profit and is due and payable at the end of 21 days after the Commissioner gives the relevant taxpayer notice of the assessment.[4]

6. The revised explanatory memorandum to the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017 (the EM) contains a detailed outline of the measure (with paragraphs 1.9 to 1.15 of the EM providing a summary of the new law).

[1] All legislative references in this draft Guideline are to the ITAA 1936 unless otherwise stated.
[2] Subsection 177H(2) makes it clear that Division 145 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) is also relevant to achieving this object.
[3] Part IVA cannot apply to a scheme by virtue of subsection 177J(1) if the relevant taxpayer is a type of entity referred to in paragraph 177J(1)(f). In addition, in order for Part IVA to apply to a scheme by virtue of subsection 177J(1), the relevant taxpayer must obtain a tax benefit (the 'DPT tax benefit') in connection with the scheme – refer to paragraph 177J(1)(a).
[4] Section 177P; section 4 of the *Diverted Profits Tax Act 2017*. For assessments of the amount of the tax see Divisions 145 and 155 in Schedule 1 to the TAA 1953.

Specific issues for guidance

Principal purpose test

Consistency with the test in the multinational anti-avoidance legislation (MAAL)

7. The principal purpose test in paragraph 177J(1)(b) is the same test that applies under section 177DA for the purposes of the MAAL provisions except that the list of matters to which regard must be had is different. Therefore the views expressed at paragraphs 11-16 in Law Companion Guideline LCG 2015/2 *Section 177DA of the Income Tax Assessment Act 1936 : schemes that limit a taxable presence in Australia* are relevant to the interpretation of the phrase '…for a principal purpose of, or for more than one principal purpose that includes a purpose of…' in paragraph 177J(1)(b).

Consideration of the eleven matters

8. In applying the principal purpose test, subsection 177J(2) directs the Commissioner to consider the eight matters listed in subsection 177D(2) and the three additional matters listed in paragraphs 177J(2)(b) (the scheme's quantifiable non-tax financial benefits), 177J(2)(c) (the scheme's foreign tax results), and 177J(2)(d) (the amount of the tax benefit mentioned in paragraph 177J(1)(b)).[5]

9. Consistent with the application of Part IVA generally, all of the eleven matters referred to in subsection 177J(2) must be considered in applying the principal purpose test.

10. Although it is necessary for all of the matters in subsection 177J(2) to be considered in applying the principal purpose test, not all of the matters will be relevant in every case and some may be more relevant than others. As with the application of Part IVA generally, the matters may be considered individually or globally and it is not essential in reaching a conclusion as to purpose that each matter should indicate the requisite purpose.[6]

Quantifiable non-tax financial benefits

11. Paragraph 1.52 of the EM states that the relevance of the quantifiable non-tax financial benefits that have resulted (or that will or may reasonably be expected to result) from the scheme relates to the value of those benefits relative to the amount of the tax benefit. The EM also explains that if the scheme produces significant quantifiable non-tax financial benefits (in comparison to the amount of the tax benefit and, where relevant, the reduction in liability to foreign tax), this could provide a strong indication that the scheme was not entered into or carried out for a principal purpose of obtaining a tax benefit. However, this factor must be considered and given appropriate weight alongside the other factors which taken together may lead to a different conclusion.

12. Consistent with the approach to considering the matters outlined in paragraphs 177D(2)(e), (f) and (g), this matter requires identifying the consequences that may reasonably be expected to result from the scheme, not just changes that have resulted or that will result from the scheme.

[5] Paragraph 1.90 of the EM provides that the facts and circumstances surrounding the use of foreign tax losses, foreign tax credits or other foreign tax attributes may be taken into account in considering the principal purpose test.

[6] *Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd* [2001] HCA 32 at 94; 207 CLR 235 at 263; 179 ALR 625 at 643; 2001 ATC 4343 at 4360; 47 ATR 229 at 246; *Peabody v. Federal Commissioner of Taxation* (1993) 40 FCR 531 at 543; 112 ALR 247 at 258; 93 ATC 4104 at 4113-4114; 25 ATR 32 at 42.

The amount of the tax benefit mentioned in paragraph 177J(1)(b)

13. In applying the principal purpose test, paragraph 177J(2)(d) requires regard to be had to the amount of the tax benefit mentioned in paragraph 177J(1)(b).

14. Paragraph 177J(1)(b) refers to a tax benefit obtained by the relevant taxpayer (subparagraph 177J(1)(b)(i)) and it also refers to a tax benefit obtained by another taxpayer or other taxpayers (subparagraph 177J(1)(b)(ii)).

15. Where the scheme involves an entity (or entities) other than the relevant taxpayer obtaining a tax benefit, the amount of the tax benefit referred to in paragraph 177J(2)(d) includes the tax benefit(s) obtained by the other taxpayer (or taxpayers), in addition to the tax benefit obtained by the relevant taxpayer.

16. This is of particular relevance when considering the relative significance of the quantifiable non-tax financial benefits that have resulted, will result, or may reasonably be expected to result from the scheme. That is, their significance should not be considered in relation to the DPT tax benefit but rather to each relevant tax benefit covered by paragraph 177J(1)(b).

17. Any modification made to the amount of the DPT tax benefit under subsection 177J(5) (where the thin capitalisation provisions apply) or subsection 177J(6A) (where the associate foreign entity is a CFC) do not affect the amount of the tax benefit mentioned in paragraph 177J(1)(b).

Sufficient foreign tax test

Foreign tax liability: determination of amount

18. The foreign tax liability is determined by quantifying the total of the increases in the amount of foreign income tax that is liable to be paid or that is reasonably expected to be liable to be paid as a result of the scheme. This requires that a legally enforceable obligation to pay the tax has arisen, or may reasonably be expected to arise at some point in the future.

19. The increases in liability for foreign income tax (however those increases arise) must result, or reasonably be expected to result from the scheme, and the increases must arise or reasonably be expected to arise in a period that corresponds to the income year in which the DPT tax benefit is obtained.

20. The 'increases in liability for foreign income tax' are determined by quantifying the increases of each relevant entity's liability for foreign income tax as a result of the scheme. An entity's liability for foreign income tax is the foreign income tax[7] that is or may reasonably be expected to be imposed and payable in the relevant foreign jurisdiction(s).

Foreign tax liability: recognised entities – groups of entities

21. The calculation of the foreign tax liability may require the Commissioner to consider tax liable to be paid by an entity on behalf of or in place of the relevant foreign entity. This may include tax liable to be paid by a head entity or a single taxpayer for a group of entities within a particular jurisdiction.

[7] As defined in section 770-15 of the ITAA 1997.

22. Where the scheme involves fiscally transparent or flow-through entities (such as partnerships or trusts), the increases in liability for foreign income tax may include the liabilities of members of those entities for the purposes of calculating the foreign tax liability. For example, a scheme could involve a partnership making distributions of foreign income to its partners. In such a case, any related foreign income tax liabilities of the partners may be considered for the purposes of determining the foreign tax liability (provided they are covered by subsection 177L(5)).

Meaning of foreign income tax

23. The term 'foreign income tax' is defined in section 770-15 of the ITAA 1997 as a tax on income, profits or gains (of a revenue or capital nature) or any other tax that is subject to a double tax agreement.

24. The definition of foreign income tax is intended to cover taxes that are substantially equivalent to Australian income tax. The tax must be imposed by a law other than an Australian Commonwealth, state or territory law. The foreign law may be at the level of a national or sub-national government. The ATO has issued a list of foreign taxes imposed by Australia's major trading partners (see *ATO guide to foreign income tax offset rules 2009/10*) for which a foreign income tax offset may be available. While not exhaustive, this list may provide guidance in determining the taxes that would qualify as foreign income tax for the purposes of the sufficient foreign tax test.

Reduced Australian tax liability: interaction with the thin capitalisation rules

25. The rule in subsection 177J(5) modifies the way in which the amount of the DPT tax benefit is worked out. The modification preserves the role of the thin capitalisation rules in Division 820 of the ITAA 1997 as a comprehensive regime with respect to an entity's level of debt.[8]

26. For entities that are subject to the thin capitalisation rules, the modification allows the Commissioner to adjust the return on a debt interest to a rate that would have applied had the scheme not been entered into or carried out, but the rate must be applied to the amount of debt actually issued (and still on issue from time to time) in determining the amount of the DPT tax benefit.

27. Therefore, by applying the rate to the debt interest actually issued in determining the amount of the DPT tax benefit, the DPT will not alter the debt levels used to fund Australian operations that are allowed under the thin capitalisation rules. This ensures that the DPT does not defeat the object of the thin capitalisation rules.

28. The thin capitalisation modification changes what would otherwise be the amount of the DPT tax benefit. The modification may affect the taxpayer's liability to diverted profits tax under section 177P and the sufficient foreign tax test.

[8] In this respect subsection 177J(5) applies in a similar way to the way that section 815-140 of the ITAA 1997 applies in the context of the transfer pricing rules.

Foreign tax liability: recognition of losses and foreign credits

29. Paragraphs 1.89 and 1.90 of the EM explain that even though a foreign associate is resident in a jurisdiction with a comparable tax rate to Australia's corporate tax rate, a reduced or nil amount of foreign tax could be liable to be paid during all or some of the years to which the scheme relates, due to the availability of a foreign tax loss, foreign tax credit or other foreign tax attributes. These paragraphs of the EM confirm that it is the actual foreign tax liability payable (after a reduction for foreign tax losses, foreign tax credits or other foreign tax attributes) in the period commensurate with the income year in which the DPT tax benefit is obtained which is the relevant measure for the sufficient foreign tax test.[9]

30. Other foreign tax attributes which may be taken into account in determining whether the total of the increases in liability for foreign income tax is at least 80 per cent of the reduced Australian tax liability include:

- any refunds that may be received for tax paid (or tax that will be paid at some point in the future)
- the operation of any tax relief in the foreign jurisdiction
- any law in the foreign jurisdiction that allows income of the kind received in connection with the scheme to be exempt from or otherwise not subject to tax, and
- any law in the foreign jurisdiction that allows deferral of a tax liability.

31. Tax may be treated as refunded to the extent that a refund of tax, or a credit for tax, is made, or is reasonably expected to be made in the future, to any relevant entity, directly or indirectly in respect of the foreign tax payable.

32. This may extend to any refunds or credits to an entity (that meets subsection 177L(5)) that is a shareholder, beneficiary, partner, or other equity holder in another entity. For example, the Commissioner may obtain information that the global value chain involves a structure whereby a foreign entity is held by a holding company in a different foreign jurisdiction. Under this structure, the shareholders of the holding company may be able to claim a refund on the tax assessed to the foreign entity. After taking into account the refund of taxes, the sufficient foreign tax test may not be satisfied.

Sufficient economic substance test

33. The sufficient economic substance test in section 177M is an exception to the application of the DPT. The test is satisfied where the profit made as a result of the scheme by each relevant entity reasonably reflects the economic substance of the entity's activities in connection with the scheme. In determining whether section 177M is satisfied, it is necessary to first identify the relevant entity's activities in connection with the scheme and ascertain the economic substance of those activities. It can then be determined whether the profit made by the entity in respect of those activities represents a reasonable reward in respect of those activities.

[9] Paragraph 1.91 of the EM explains that the facts and circumstances surrounding the use of those foreign tax losses, foreign tax credits or other foreign tax attributes may be taken into account in considering the principal purpose test.

Concept of economic substance

34. The term 'economic substance' describes the economic reality or essence of the relevant activities. It is determined by examining all of the relevant facts and circumstances, such as the conduct of the parties, the economic and commercial context of the relevant activities, and the object and the effect of those activities from a practical and business point of view. Subsection 177M(4) also requires regard to be had to the assets used, the functions performed and the risks assumed in relation to the activities. This encompasses an examination of an entity's activities in the context of a wider transaction or arrangement.

Relevance of the OECD Guidelines

35. Subsection 177M(4) requires regard to be had to the 2010 OECD Transfer Pricing Guidelines (the OECD Guidelines) and other documents covered by section 815-135 of the ITAA 1997[10], to the extent that they are relevant to the matters mentioned in paragraph 177M(4)(a) or to any other aspect of the determination.[11]

36. The OECD Guidelines require the accurate delineation of actual transactions between associated enterprises, which typically includes a 'broad-based understanding of the industry sector in which the MNE group operates…and of the factors affecting the performance of any business operating in that sector.'[12] Examples of such factors include 'business strategies, markets, products, [the group's] supply chain, and the key functions performed, material assets used, and important risks assumed.'[13] Where relevant, the sufficient economic substance test utilises the same concepts in considering transactions or arrangements involving associated entities (to determine whether the profits made by those entities reasonably reflect the economic substance of their activities in connection with the scheme). Therefore a functional analysis is used in delineating the actual transaction by determining whether any contractual agreement governing the transaction reflects its economic substance, having regard to the conduct of the parties and the functions performed, assets used and risks assumed by them.

Profit must reasonably reflect the economic substance of the entity's activities

37. It is a question of fact whether the profit made by an entity as a result of a scheme reasonably reflects the entity's activities in connection with the scheme.

38. In determining whether the profit made by any entity reasonably reflects the economic substance of the entity's activities, it is necessary to have regard to:

- the relative economic significance of the functions performed by the entity in connection with the scheme (including their frequency, nature and value), and
- the entity's relative contribution within the context of the overall value chain, to generating the total profit made as a result of the scheme.

[10] These documents include the Aligning Transfer Pricing Outcomes with Value Creation, Action 8-10 – 2015 Final Reports, of the Organisation for Economic Cooperation and Development, published on 5 October 2015.

[11] This could include consideration of the wider question as to whether the profit made by an entity reasonably reflects the economic substance of the entity's activities in connection with the scheme – refer to paragraph 1.108 of the EM.

[12] OECD Guidelines at paragraph 1.34.

[13] OECD Guidelines at paragraph 1.34.

39. In applying the test, it is the economic substance of the entity's activities in connection with the scheme that is relevant, not the overall economic substance of the entity itself. Entities may have multiple operations and business lines interacting across multiple jurisdictions. The focus will be on the quantum of the profit made relative to the economic substance of the entity's activities undertaken in connection with the scheme. For example, as set out in the EM at paragraph 1.111, an entity may have significant operations and employees, but the actual activities and functions undertaken by those employees in connection with the scheme may be small relative to the profit made by that entity in connection with the scheme.

40. Whereas the $25 million income and sufficient foreign tax tests (in sections 177K and 177L) are considered with respect to the income year in which the DPT tax benefit is obtained by the relevant taxpayer, the sufficient economic substance test is not so confined. For example, where a taxpayer obtains a DPT tax benefit in the 2017-18 income year in connection with a scheme that commenced in the 2015/16 income year, it is necessary, in applying the sufficient economic substance test, to have regard to the profit made by each relevant entity as a result of the scheme commencing from the 2015/16 income year onwards.

41. For the purposes of the DPT, it will be necessary to examine the functions, assets and risks not only of the relevant Australian taxpayer, but also other entities connected to the scheme. All entities that are a party to or connected with the scheme are tested for sufficient economic substance unless the entity's role in the scheme is minor or ancillary.[14]

42. The economic substance test may not be satisfied where, for example:

- the entity's role in the scheme does not make commercial sense
- the scheme as a whole does not make commercial sense
- the scheme does not produce a real economic effect because the transactions under the scheme are self-cancelling, offsetting or circular, and
- the entity's role is primarily explicable by the tax consequences which arise as a result of the scheme, for example re-invoicing schemes, outsourcing arrangements, sale and leaseback arrangements, sale and licence back arrangements, and arrangements involving interposed or fiscally transparent entities.

43. In determining whether the profit made as a result of the scheme by each relevant entity reasonably reflects the economic substance of the entity's activities in connection with the scheme, it will be necessary to consider the income and related expenses arising from the entity's activities (which cumulatively form the profit made as a result of the scheme), with reference to the functions performed, assets used and risks assumed by the entity.

44. In determining whether a risk assumed under a contract by an entity has economic substance, it is relevant to consider whether the entity to which the risk is allocated has:

- the functional capability to assume and manage that risk, by having personnel who are both capable of performing, and actually perform, the 'risk control functions' involving making decisions to take on the risk and whether and how to manage the risk, and
- the financial capacity to assume that risk.[15]

[14] Paragraphs 1.104 and 1.105 of the EM discuss matters relevant to deciding whether an entity's role in the scheme is minor or ancillary.
[15] OECD Guidelines at paragraphs 1.60-1.67.

45. For example, the control functions in respect of the economically significant risks in relation to internally developed intellectual property (IP) are those related to the development, enhancement, maintenance, protection and exploitation of the IP. An entity that acts simply as the legal owner of IP but does not perform any of these control functions by actively exercising decision making related to taking on and managing these risks is not ultimately entitled to any portion of the return derived from exploitation of the IP (other than arm's length compensation, if any, for holding title).[16]

46. This is illustrated by Example 1.12 in the EM, in which a newly incorporated entity in a foreign jurisdiction (Foreign IP Co) purchases and holds IP rights. The example concludes that the amount of product sales income derived from exploiting the IP rights that is attributed to Foreign IP Co does not reasonably reflect the functions undertaken and risks actively managed by it, and therefore does not reasonably reflect the economic substance of its activities in connection with the scheme.

47. It is not expected that in all cases the passive holding of an asset will, of itself, indicate a lack of economic substance. It is a question of fact and degree in each case having regard to all the relevant circumstances including the broader setting in which the arrangement took place. The assessment of whether an entity's profit reasonably reflects the economic substance of its activities is not a narrow inquiry, but can examine the wider circumstances of the scheme. The mere passive holding of an asset may indicate a lack of economic substance if the arrangement in question does not accord with well understood commercial behaviour or is contrary to the taxpayer's own separate commercial and economic interests.

Further ATO guidance

48. We intend to publish further guidance products about the DPT to provide those taxpayers that could be impacted by the measure with greater certainty.

49. This will include the release of a Practical Compliance Guideline addressing what we consider are the relative risks associated with particular arrangements and structures in the context of the DPT.

50. This will be done by highlighting key risk factors associated with scenarios involving different fact patterns and industry segments. This guidance will be provided to assist taxpayers in identifying the relative risk of their arrangements in order to understand the likelihood that their arrangements will be subject to review by the ATO.

Administrative matters

51. We are establishing an administrative framework to support the introduction of the DPT. This will include a new Law Administration Practice Statement which will provide a set of internal processes aimed at addressing when a DPT assessment may be issued by the Commissioner including:

- the escalation and sign off processes that will apply to the issue of a DPT assessment
- the role of the GAAR Panel in the DPT assessment and review process, and
- a process map to outline and support our administrative procedures.

[16] OECD Guidelines at paragraph 6.42.

Commissioner of Taxation
18 December 2017

Your comments

52. You are invited to comment on this Draft Law Companion Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

Due date: **16 February 2018**

Contact officer details have been removed following publication of the final ruling.

References

ATOlaw topic(s)	Tax integrity measures ~~ Part IVA ~~ Other
Legislative references	DPTA 2017 DPTA 2017 4 ITAA 1936 ITAA 1936 Pt IVA ITAA 1936 177D(2) ITAA 1936 177D(2)(e) ITAA 1936 177D(2)(f) ITAA 1936 177D(2)(g) ITAA 1936 177DA ITAA 1936 177H ITAA 1936 177H(1)(a) ITAA 1936 177H(1)(b) ITAA 1936 177H(2) ITAA 1936 177I ITAA 1936 177J ITAA 1936 177J(1) ITAA 1936 177J(1)(a) ITAA 1936 177J(1)(b) ITAA 1936 177J(1)(b)(i) ITAA 1936 177J(1)(b)(ii) ITAA 1936 177J(1)(f) ITAA 1936 177J(2) ITAA 1936 177J(2)(b) ITAA 1936 177J(2)(c) ITAA 1936 177J(2)(d) ITAA 1936 177J(5) ITAA 1936 177J(6A) ITAA 1936 177K ITAA 1936 177L ITAA 1936 177L(5) ITAA 1936 177M ITAA 1936 177M(4) ITAA 1936 177M(4)(a) ITAA 1936 177N ITAA 1936 177O ITAA 1936 177P ITAA 1936 177Q ITAA 1936 177R ITAA 1997 ITAA 1997 770–15 ITAA 1997 815–135 ITAA 1997 815–140 ITAA 1997 Div 820 TAA 1953 TAA 1953 Div 145 Sch 1 TAA 1953 Div 155 Sch 1

	TLAA 2017 Sch 1
Related Rulings/Determinations	LCG 2015/2
Case references	Federal Commissioner of Taxation v. Consolidated Press Holdings Ltd [2001] HCA 32; 207 CLR 235; 179 ALR 625; 2001 ATC 4343; 47 ATR 229 Peabody v. Federal Commissioner of Taxation (1993) 40 FCR 531; 112 ALR 247; 93 ATC 4104; 25 ATR 32
Other references	PS LA 2005/24 Explanatory Memorandum to the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017 ATO guide to foreign income tax offset rules 2009/10 2010 OECD Transfer Pricing Guidelines
ATO references	1-AN371U0
BSL	PGI