New International Tax Arrangements (Managed Funds and Other Measures) Act 2005

No. 21, 2005

An Act to amend the law relating to taxation, and for related purposes

Note: An electronic version of this Act is available in SCALEplus (http://scaleplus.law.gov.au/html/comact/browse/TOCN htm)

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New International Tax Arrangements (Managed Funds and Other Measures) Act 2005

No. 21, 2005

An Act to amend the law relating to taxation, and for related purposes

[*Assented to 21 March 2005*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *New International Tax Arrangements (Managed Funds and Other Measures) Act 2005.*

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—CGT and foreign residents

Income Tax Assessment Act 1997

1 Section 12-5 (at the end of table item headed "capital gains")

Add:

see also *foreign residents*

2 Section 12-5 (table)

Insert in its appropriate alphabetical position, determined on a letter-by-letter basis:

foreign residents

company beneficiary of fixed trust, offsetting share of net income that includes a capital gain 768-615

3 Section 12-5 (table item headed "trusts")

After "see also", insert "*foreign residents*,".

4 At the end of section 104-70

Add:

(9) ***CGT event E4*** does not happen for a payment made to a foreign resident to the extent that the payment is reasonably attributable to *ordinary income or *statutory income from sources other than an *Australian source. However, this exception does not apply if the trust is a *corporate unit trust or a *public trading trust.

5 At the end of section 121-30

Add:

(2) However, the exceptions in this section do not apply to a *CGT event as a result of which a *capital gain or *capital loss is disregarded under Subdivision 768-H (about capital gains and losses of foreign residents through fixed trusts).

6 At the end of Division 768

Add:

Subdivision 768-H—Capital gains and losses of foreign residents through fixed trusts

Table of sections

768-600 Purpose of this Subdivision
768-605 Effect of capital gain or loss from underlying fixed trust assets
768-610 Conditions
768-615 Foreign resident companies

768-600 Purpose of this Subdivision

The purpose of this Subdivision is to provide comparable taxation treatment as between direct ownership, and indirect ownership through a *fixed trust, by foreign residents of *CGT assets not having the *necessary connection with Australia.

768-605 Effect of capital gain or loss from underlying fixed trust assets

(1) A *capital gain or *capital loss you make from a *CGT event happening to your interest in a *fixed trust is disregarded if:
  (a) you are a foreign resident at the time of the CGT event; and
  (b) your interest has the *necessary connection with Australia at that time; and
  (c) the conditions in section 768-610 are satisfied.

(2) A *capital gain you make in respect of your interest in a *fixed trust is disregarded if:
  (a) you are a foreign resident when you make the gain; and
  (b) the gain is attributable to a *CGT event happening to a *CGT asset of that trust or of another fixed trust in which that trust has an interest (directly, or indirectly through a *chain of fixed trusts); and
  (c) either:
    (i) the asset does not have the *necessary connection with Australia at the time of the CGT event; or

(ii) the asset is an interest in a fixed trust and the conditions in section 768-610 are satisfied.

Note: Section 115-215 treats a portion of a trust's capital gain as a capital gain made by a beneficiary, and applies the CGT discount to that portion as if the gain were made directly by the beneficiary.

(3) You are not liable to pay tax as a trustee of a *fixed trust in respect of an amount to the extent that:

(a) the amount gives rise to a *capital gain that is disregarded for a beneficiary under subsection (2); or

(b) the amount gives rise to a deduction for a beneficiary under section 768-615.

(4) To avoid doubt, subsection (3) does not affect the operation of subsection 98A(1) of the *Income Tax Assessment Act 1936* (about taxing beneficiaries who are foreign residents at the end of an income year).

768-610 Conditions

(1) The conditions in this section must be satisfied if the relevant *CGT event happens to an interest in a *fixed trust (the ***first trust***) and the interest has the *necessary connection with Australia at the time of the CGT event.

(2) At least 90% (by *market value) of the *CGT assets of:

(a) the first trust; or

(b) a *fixed trust in which the first trust has an interest (directly, or indirectly through a *chain of fixed trusts);

must not have the *necessary connection with Australia at the time of the relevant *CGT event.

(3) If the condition in subsection (2) is not satisfied for the first trust (but is satisfied for a trust covered by paragraph (2)(b)), the condition in subsection (4) must be satisfied for the first trust, and for each other trust in the *chain of trusts between the first trust and the trust that satisfied the condition in subsection (2).

(4) The condition is that, assuming any interest in a *fixed trust in that *chain not to have the *necessary connection with Australia, at least 90% (by *market value) of the *CGT assets of the trust must not have the necessary connection with Australia.

768-615 Foreign resident companies

If a company's assessable income for an income year includes an amount under subsection 98A(1) of the *Income Tax Assessment Act 1936* because it is a beneficiary described in subsection 98(3) of that Act, the company can deduct for the income year the amount of a *capital gain that would be disregarded for it under this Subdivision for that year had section 115-215 of this Act applied to it for that year.

Note 1: Section 98A of the *Income Tax Assessment Act 1936* deals with taxing beneficiaries who are foreign residents at the end of an income year.

Note 2: Subsection 98(3) of that Act makes the trustee liable for tax on the share of the income of the trust to which a foreign resident company is presently entitled.

Note 3: Section 115-215 treats a portion of a trust's capital gain as a capital gain made by a beneficiary, and applies the CGT discount to that portion as if the gain were made directly by the beneficiary.

7 Application

(1) The amendments made by items 1 to 3, and 5 and 6, of this Schedule apply to capital gains or capital losses made on or after the day on which this Act receives the Royal Assent.

(2) The amendment made by item 4 of this Schedule applies to payments made on or after the day on which this Act receives the Royal Assent.

Schedule 2—Treaty source rules

International Tax Agreements Act 1953

1 After section 3

Insert:

3AA Source of income from funds management activities

(1) This section applies to a beneficiary of a widely held unit trust if:
  (a) the beneficiary is a resident of a country (other than Australia) for the purposes of an agreement that is given the force of law under this Act; and
  (b) the beneficiary is presently entitled, either:
    (i) directly; or
    (ii) indirectly through fixed entitlements in one or more interposed trust estates (whether widely held unit trusts or not);

  to a share of the income of the widely held unit trust derived from the carrying on by the trustee in Australia of funds management activities through a permanent establishment in Australia (the ***funds management income***).

(2) In working out for the purposes of the Assessment Act whether the funds management income of the beneficiary is attributable to sources in Australia, these provisions (the ***source of income provisions***) do not apply:
  (a) Article 21 of the 2003 United Kingdom convention;
  (b) a corresponding provision of another agreement;
  (c) subsections 11(3), 11S(2) and 11ZF(2) of this Act, and any provision of this Act of similar effect enacted after the commencement of this section.

(3) However, the source of income provisions do apply to the extent to which the income derived from the carrying on by the trustee of funds management activities is adjusted under:
  (a) Article 7(2) or 9(1) of the 2003 United Kingdom convention; or
  (b) a corresponding provision of another agreement.

(4) In this section:

closely held has the meaning given by section 272-105 in Schedule 2F to the *Income Tax Assessment Act 1936*.

funds management activities means activities carried on by:

(a) a managed investment scheme (as defined by section 9 of the *Corporations Act 2001*) that is a widely held unit trust; or

(b) a managed investment scheme (as so defined) that is a unit trust that is closely held by one or more of these:

(i) a managed investment scheme (as so defined) that is a widely held unit trust;

(ii) a complying superannuation entity;

(iii) a life insurance company.

permanent establishment, in relation to an agreement, has the same meaning as in the agreement.

widely held unit trust has the meaning given by section 272-105 in Schedule 2F to the *Income Tax Assessment Act 1936*.

2 Application

The amendments made by this Schedule apply, for any particular taxpayer, to assessments for the year of income of the taxpayer in which this Act receives the Royal Assent and later years of income.

Schedule 3—Interest withholding tax

Part 1—Updating certain concepts

Income Tax Assessment Act 1936

1 Section 121C (definition of *security*)

After “debenture,”, insert “debt interest,”.

2 Subsection 128A(1B)

Repeal the subsection, substitute:

(1B) Subsection (1A) applies as if:

(a) paragraph (c) of the definition of ***qualifying security*** in subsection 159GP(1) were omitted; and

(b) paragraph (a) of the definition of ***security*** in that subsection included a reference to debt interests.

3 Paragraph 128A(5)(a)

After “debentures”, insert “or debt interests”.

4 Subsection 128AE(1) (definition of *security*)

After “debenture,”, insert “debt interest,”.

5 Paragraph 128AE(2)(ba)

Omit “shares”, substitute “equity interests”.

6 Subsection 128F(1)

After “debenture” (first occurring), insert “or debt interest in the company”.

Note: The heading to section 128F is altered by adding at the end “**or debt interests**”.

7 Paragraph 128F(1)(a)

After “debenture”, insert “or debt interest”.

8 Paragraph 128F(1)(e)

After “debenture”, insert “or debt interest”.

9 Subsection 128F(1A)

After “debenture” (first occurring), insert “or debt interest in the company”.

10 Paragraphs 128F(1A)(a), (c) and (d)

After “debenture”, insert “or debt interest”.

11 Paragraphs 128F(1B)(a) and (b)

After “debenture”, insert “or debt interest”.

12 Subsection 128F(1B) (note)

After “debenture”, insert “or debt interest”.

13 Subsection 128F(3)

Repeal the subsection, substitute:

Public offer test

(3) The issue of a debenture or debt interest by a company ***satisfies the public offer test*** if the issue resulted from the debenture or debt interest being offered for issue:

(a) to at least 10 persons each of whom:

(i) was carrying on a business of providing finance, or investing or dealing in securities, in the course of operating in financial markets; and

(ii) was not known, or suspected, by the company to be an associate (see subsection (9)) of any of the other persons covered by this paragraph; or

(b) to at least 100 persons whom it was reasonable for the company to have regarded as either:

(i) having acquired debentures or debt interests in the past; or

(ii) being likely to be interested in acquiring debentures or debt interests; or

(c) as a result of being accepted for listing on a stock exchange, where the company had previously entered into an agreement with a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, requiring the company to seek such listing; or

(d) as a result of negotiations being initiated publicly in electronic form, or in another form, that was used by financial markets for dealing in debentures or debt interests; or

(e) to a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, who, under an agreement with the company, offered the debenture or debt interest for sale within 30 days in a way covered by any of paragraphs (a) to (d).

14 Subsection 128F(4)

After “debenture” (wherever occurring), insert “or debt interest”.

15 Subsection 128F(5)

After “debenture” (first occurring), insert “or debt interest”.

16 Paragraph 128F(5)(a)

Omit “, or an interest in the debenture,”, substitute “, an interest in the debenture or the debt interest”.

17 Subparagraphs 128F(5)(b)(i) and (ii)

After “debenture or interest”, insert “, or the debt interest,”.

18 Paragraph 128F(5)(c)

Repeal the paragraph, substitute:

(c) the debenture or interest, or the debt interest, was not being, or would not be, acquired by the associate in the capacity of:

(i) a dealer, manager or underwriter in relation to the placement of the debenture or debt interest; or

(ii) a clearing house, custodian, funds manager or responsible entity of a registered scheme.

19 Subsection 128F(5A)

After “debenture”, insert “or debt interest”.

20 Subsection 128F(6)

After “debenture” (wherever occurring), insert “or debt interest”.

21 Subsection 128F(7)

After “debenture”, insert “or debt interest”.

22 Paragraph 128F(8)(a)

Omit “shares”, substitute “equity interests”.

Note: The heading to subsection 128F(8) is altered by inserting “*or debt interests*” after “*Debentures*”.

23 Subsection 128F(8)

After “debenture” (wherever occurring), insert “or debt interest”.

24 Subsection 128F(10)

Repeal the subsection, substitute:

Global bond

(10) A debenture or debt interest issued by a company is a ***global bond*** if:

(a) it describes itself as a global bond or a global note; and

(b) it is issued to a clearing house (see subsection (9)) or to a person as trustee or agent for, or otherwise on behalf of, one or more clearing houses; and

(c) in connection with the issue, the clearing house or houses:

(i) confer rights in relation to the debenture or debt interest on other persons; and

(ii) record the existence of the rights; and

(d) before the issue:

(i) the company; or

(ii) a dealer, manager or underwriter, in relation to the placement of debentures or debt interests, on behalf of the company;

announces that, as a result of the issue, such rights will be able to be created; and

(e) the announcement is made in a way or ways covered by any of paragraphs (3)(a) to (e) (reading a reference in those paragraphs to “debentures or debt interests” as if it were a reference to such a right, and a reference to the “company” as if it included a reference to the dealer, manager or underwriter); and

(f) under the terms of the debenture or debt interest, interests in the debenture or debt interest are able to be surrendered,

whether or not in particular circumstances, in exchange for other debentures or debt interests issued by the company that are not themselves global bonds.

25 Subsection 128FA(1)

After “debenture” (wherever occurring), insert “or debt interest”.

Note: The heading to section 128FA is altered by adding at the end “**or debt interests**”.

26 Paragraphs 128FA(2)(a) and (b)

After “debenture”, insert “or debt interest”.

27 Subsection 128FA(2) (note)

After “debenture”, insert “or debt interest”.

28 Subsection 128FA(4)

After “debenture” (wherever occurring), insert “or debt interest”.

29 Paragraph 128FA(5)(a)

Omit “shares”, substitute “equity interests”.

30 Subsection 128FA(5)

After “debenture” (wherever occurring), insert “or debt interest”.

Note: The heading to subsection 128FA(5) is altered by inserting “*or debt interests*” after “*Debentures*”.

31 Subsection 128FA(6)

After “debenture”, insert “or debt interest”.

Note: The heading to subsection 128FA(6) is altered by inserting “*or debt interest*” after “*debenture*”.

Income Tax Assessment Act 1997

32 Subparagraph 820-570(1)(b)(i)

After “*debentures”, insert “or *debt interests”.

33 Subparagraph 820-570(1)(b)(i)

After “debentures” (last occurring), insert “or debt interests”.

34 Subparagraph 820-570(1)(b)(ii)

After “debentures”, insert “or debt interests”.

35 Subsection 820-570(1)

After “debentures” (last occurring), insert “or debt interests”.

36 Subparagraph 820-591(1)(b)(i)

After “*debentures”, insert “or *debt interests”.

37 Subparagraph 820-591(1)(b)(i)

After “debentures” (last occurring), insert “or debt interests”.

38 Subparagraph 820-591(1)(b)(ii)

After “debentures”, insert “or debt interests”.

39 Subsection 820-591(2)

Omit “debentures”, substitute “*debentures or *debt interests”.

40 Section 820-595 (note)

After “debentures” (wherever occurring), insert “or debt interests”.

41 Subparagraph 820-617(1)(b)(i)

After “*debentures”, insert “or *debt interests”.

42 Subparagraph 820-617(1)(b)(i)

After “debentures” (last occurring), insert “or debt interests”.

43 Subparagraph 820-617(1)(b)(ii)

After “debentures”, insert “or debt interests”.

44 Subsection 820-617(2)

Omit “debentures”, substitute “*debentures or *debt interests”.

Part 2—Interests that are debt interests under the regulations

Income Tax Assessment Act 1936

45 Subsection 128A(1AB) (after paragraph (d) of the definition of *interest*)

Insert:

or (e) if regulations under the *Income Tax Assessment Act 1997* are made having the effect that instruments known as upper tier 2 capital instruments, or a class of instruments of that kind, are debt interests—that is paid on such a debt interest and is not a return of an investment;

Part 3—Transfer of assets and debts from Australian subsidiaries of foreign banks

Financial Corporations (Transfer of Assets and Liabilities) Act 1993

46 Paragraphs 23(2)(ca), (cb), (cc) and (cd)

Repeal the paragraphs, substitute:

(ca) the transferor issued the debentures or debt interests;".

Part 4—Application

47 Application

(1) The amendments made by Part 1 of this Schedule apply to interest paid on debentures or debt interests issued on or after the day on which this Act receives the Royal Assent (the ***Assent day***).

(2) The amendment made by Part 2 of this Schedule applies to payments made on instruments referred to in paragraph (e) of the definition of ***interest*** in subsection 128A(1AB) of the *Income Tax Assessment Act 1936* issued on or after the Assent day.

(3) The amendment made by Part 3 of this Schedule applies to debentures or debt interests that:

(a) are issued after 18 June 1993; and

(b) are transferred on or after the Assent day.

[*Minister's second reading speech made in—*
House of Representatives on 18 November 2004
Senate on 7 March 2005]

(177/04)