



Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017

No. 27, 2017

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

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

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Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017

No. 27, 2017

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

[Assented to 4 April 2017]

The Parliament of Australia enacts:

1 Short title

This Act is the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017*.

No. 27, 2017 *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017* 1

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|---|--|---------------------|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. | 4 April 2017 |
| 2. Schedule 1, items 1 to 6 | The first 1 January, 1 April, 1 July or 1 October to occur after the day this Act receives the Royal Assent. | 1 July 2017 |
| 3. Schedule 1, item 7 | At the same time as Part 2 of Schedule 4 to the <i>Treasury Laws Amendment (Enterprise Tax Plan) Act 2017</i> commences. However, the provisions do not commence at all if that Part does not commence. | |
| 4. Schedule 1, items 8 to 52 | The first 1 January, 1 April, 1 July or 1 October to occur after the day this Act receives the Royal Assent. | 1 July 2017 |
| 5. Schedules 2 and 3 | The first 1 January, 1 April, 1 July or 1 October to occur after the day this Act receives the Royal Assent. | 1 July 2017 |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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

Administrative Decisions (Judicial Review) Act 1977

1 Paragraph (e) of Schedule 1

After “*Taxation Administration Act 1953*, but only so far as the decisions are made under Part 2-35, 3-10”, insert “, 3-30”.

Income Tax Assessment Act 1936

2 Subsection 6(1) (at the end of the definition of assessment)

Add:

; or (k) the ascertainment of the amount payable under subsection 177P(1) (diverted profits tax).

3 Subsection 6(1)

Insert:

diverted profits tax has the meaning given by the *Income Tax Assessment Act 1997*.

4 After subsection 170(11)

Insert:

- (12) Nothing in this section prevents the amendment, at any time, of an assessment to increase the liability of a taxpayer if:
- (a) the Commissioner amends a DPT assessment to decrease the liability of the taxpayer to diverted profits tax; and
 - (b) that increase is attributable to that decrease.

5 Subsection 170(14)

Insert:

DPT assessment has the meaning given by the *Income Tax Assessment Act 1997*.

6 Subsection 177A(1)

Insert:

DPT base amount has the meaning given by subsection 177P(2).

DPT provisions means sections 177H, 177J, 177K, 177L, 177M, 177N, 177P, 177Q and 177R.

DPT tax benefit has the meaning given by subsection 177J(1).

standard corporate tax rate means the rate of tax in respect of the taxable income of a company covered by paragraph 23(2)(b) of the *Income Tax Rates Act 1986*.

7 Subsection 177A(1) (definition of *standard corporate tax rate*)

Omit “covered by paragraph 23(2)(b)”, substitute “under subsection 23(2)”.

Note: This item commences on 1 July 2023, at the same time as Part 2 of Schedule 4 to the *Treasury Laws Amendment (Enterprise Tax Plan) Act 2017*.

8 Subsection 177A(5)

Omit “section 177DA”, substitute “sections 177DA and 177J”.

9 Paragraph 177CB(5)(a)

Omit “section 177DA”, substitute “section 177DA or 177J”.

10 Paragraph 177CB(5)(b)

Omit “section 177DA”, substitute “section 177DA or 177J”.

11 Subsection 177F(3)

After “in relation to a scheme to which this Part applies,”, insert “or the Commissioner has made a DPT assessment in respect of a taxpayer in relation to a scheme to which this Part applies,”.

12 After subsection 177F(5)

Insert:

(5A) Subsection (5B) applies if the taxpayer considers that the Commissioner ought to make the determination under

subsection (3) because the Commissioner has made a DPT assessment in respect of a taxpayer in relation to a scheme to which this Part applies.

- (5B) Despite subsection (5), the request may be posted to or lodged with the Commissioner only after the end of the period of review (within the meaning of section 145-15 in Schedule 1 to the *Taxation Administration Act 1953*) for the DPT assessment.

13 At the end of Part IVA

Add:

177H Diverted profits tax—objects

- (1) The primary objects of the DPT provisions are:
 - (a) 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; and
 - (b) to prevent those entities from reducing the amount of Australian tax they pay by diverting profits offshore through contrived arrangements between related parties.
- (2) In addition, the DPT provisions (in combination with Division 145 in Schedule 1 to the *Taxation Administration Act 1953*) have the object of encouraging significant global entities to provide sufficient information to the Commissioner to allow for the timely resolution of disputes about Australian tax.

177J Diverted profits tax—application

Scheme for a purpose including obtaining a tax benefit etc.

- (1) This Part also applies to a scheme, in relation to a tax benefit (the **DPT tax benefit**) if:
 - (a) a taxpayer (a **relevant taxpayer**) has obtained, or would but for section 177F obtain, the DPT tax benefit in connection with the scheme, in a year of income; and
 - (b) it would be concluded (having regard to the matters in subsection (2)) that the person, or one of the persons, who entered into or carried out the scheme or any part of the

scheme did so for a principal purpose of, or for more than one principal purpose that includes a purpose of:

- (i) enabling the relevant taxpayer to obtain a tax benefit, or both to obtain a tax benefit and to reduce one or more of the relevant taxpayer's liabilities to tax under a foreign law, in connection with the scheme; or
- (ii) enabling the relevant taxpayer and another taxpayer (or other taxpayers) each to obtain a tax benefit, or both to obtain a tax benefit and to reduce one or more of their liabilities to tax under a foreign law, in connection with the scheme;

whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers; and

- (c) the relevant taxpayer is a significant global entity for the year of income mentioned in paragraph (a); and
- (d) a foreign entity is an associate (within the meaning of section 318) of the relevant taxpayer at any time in the year of income mentioned in paragraph (a); and
- (e) that foreign entity:
 - (i) is the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme; or
 - (ii) is otherwise connected with the scheme or any part of the scheme; and
- (f) the relevant taxpayer is not any of the following:
 - (i) a managed investment trust (within the meaning of the *Income Tax Assessment Act 1997*);
 - (ii) an entity covered by paragraph 275-20(4)(f) of that Act (foreign collective investment vehicle with a wide membership);
 - (iii) an entity covered by paragraph 275-20(4)(h) of that Act (entity owned by foreign government etc.) that is a foreign entity;
 - (iv) a complying superannuation entity (within the meaning of that Act);
 - (v) a foreign pension fund (within the meaning of that Act); and

- (g) it is reasonable to conclude that none of the following sections apply in relation to the relevant taxpayer, in relation to the DPT tax benefit:
 - (i) section 177K (\$25 million income test);
 - (ii) section 177L (sufficient foreign tax test);
 - (iii) section 177M (sufficient economic substance test).

Have regard to certain matters

- (2) For the purposes of paragraph (1)(b), have regard to the following matters:
 - (a) the matters in subsection 177D(2);
 - (b) without limiting subsection 177D(2), the extent to which non-tax financial benefits that are quantifiable have resulted, will result, or may reasonably be expected to result, from the scheme;
 - (c) the result, in relation to the operation of any foreign law relating to taxation, that (but for this Part) would be achieved by the scheme;
 - (d) the amount of the tax benefit mentioned in paragraph (1)(b).

Deferral of foreign tax liabilities

- (3) For the purposes of paragraph (1)(b), a deferral of a taxpayer's liabilities to tax under a foreign law is taken to be a reduction of those liabilities, unless there are reasonable commercial grounds for the deferral.

Modification where thin capitalisation provisions apply

- (4) Subsection (5) applies if:
 - (a) Division 820 of the *Income Tax Assessment Act 1997* (about thin capitalisation) applies to the relevant taxpayer for the year of income mentioned in paragraph (1)(a); and
 - (b) the DPT tax benefit includes all or part of a debt deduction (within the meaning of that Act); and
 - (c) the calculation of the amount of the DPT tax benefit involves applying a rate to a debt interest (within the meaning of that Act).

-
- (5) For the purposes of the DPT provisions, in calculating the amount of the DPT tax benefit, apply the rate to the debt interest the entity actually issued (rather than the debt interest that would have existed if the scheme had not been entered into or carried out).

Modification where foreign entity is CFC

- (6) Subsection (6A) applies if:
- (a) the foreign entity mentioned in paragraph (1)(d) is a CFC (within the meaning of Part X); and
 - (b) an amount of attributable income (within the meaning of that Part) of the foreign entity has been included as a result of the operation of that Part in the assessable income of:
 - (i) the relevant taxpayer; or
 - (ii) an associate (within the meaning given by section 318) of the relevant taxpayer, if the associate is a Part X Australian resident (within the meaning of that Part) and is not a trust or partnership.
- (6A) For the purposes of the DPT provisions, reduce the DPT tax benefit to the extent to which the amount included in assessable income as mentioned in paragraph (6)(b):
- (a) would not have been so included if the scheme had not been entered into or carried out; and
 - (b) is directly referable to the DPT tax benefit.

Schemes outside Australia

- (7) This section applies whether or not the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia.

Non-limitation in relation to other provisions in this Part

- (8) This section:
- (a) does not limit section 177D, 177DA, 177E, 177EA or 177EB; and
 - (b) is not limited by those sections.

177K Diverted profits tax—\$25 million income test

- (1) This section applies in relation to the relevant taxpayer, in relation to the DPT tax benefit, if the sum of the following does not exceed \$25 million:
 - (a) the assessable income of the relevant taxpayer for the year of income mentioned in paragraph 177J(1)(a);
 - (b) the exempt income of the relevant taxpayer for that year of income;
 - (c) the non-assessable non-exempt income of the relevant taxpayer for that year of income;
 - (d) the assessable income of each entity covered by subsection (2) for that year of income;
 - (e) if the DPT tax benefit is a tax benefit mentioned in paragraph 177C(1)(a)—the amount of the DPT tax benefit.
- (2) An entity is covered by this subsection if for the year of income mentioned in paragraph 177J(1)(a):
 - (a) the entity is an associate (within the meaning given by section 318) of the relevant taxpayer; and
 - (b) both the entity and the relevant taxpayer:
 - (i) are members of the same global group; and
 - (ii) are significant global entities because they are members of that group.

177L Diverted profits tax—sufficient foreign tax test

- (1) This section applies in relation to the relevant taxpayer, in relation to the DPT tax benefit, if the amount worked out under subsection (2) (foreign tax liability) equals or exceeds 80% of the amount worked out under subsection (6) (reduced Australian tax liability).

Foreign tax liability

- (2) The amount is the total of the increases in liability for foreign income tax (within the meaning of the *Income Tax Assessment Act 1997*) of each entity covered by subsection (5) that results, will result, or may reasonably be expected to result, from the scheme

during a foreign tax period that corresponds to the year of income mentioned in paragraph 177J(1)(a).

- (3) The regulations may provide for a method of working out increases in foreign tax liability for the purposes of subsection (2):
 - (a) for all situations; or
 - (b) for specified situations.
- (4) If the regulations provide for such a method, apply that method in working out increases in foreign tax liability for the purposes of subsection (2) in relevant situations.
- (5) An entity is covered by this subsection if:
 - (a) the entity is a foreign entity; and
 - (b) the entity is the relevant taxpayer or an associate (within the meaning given by section 318) of the relevant taxpayer; and
 - (c) the entity:
 - (i) is the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme; or
 - (ii) is otherwise connected with the scheme or any part of the scheme.

Reduced Australian tax liability

- (6) The amount is:
 - (a) if the DPT tax benefit is a tax benefit mentioned in paragraph 177C(1)(a), (b), (ba) or (bc)—the amount of the tax benefit multiplied by the standard corporate tax rate; or
 - (b) otherwise—the amount of the DPT tax benefit.
- (7) If the relevant taxpayer must withhold an amount in respect of withholding tax as a result of the tax benefit, reduce the amount worked out under subsection (6) by the amount withheld.

177M Diverted profits tax—sufficient economic substance test

- (1) This section applies in relation to the relevant taxpayer, in relation to the DPT tax benefit, if the profit made as a result of the scheme by each entity covered by subsection (2) reasonably reflects the economic substance of the entity's activities in connection with the scheme.

- (2) This subsection covers an entity if:
 - (a) the entity is the relevant taxpayer or an associate (within the meaning given by section 318) of the relevant taxpayer; and
 - (b) any of the following apply:
 - (i) the entity entered into or carried out the scheme or any part of the scheme;
 - (ii) the entity is otherwise connected with the scheme or any part of the scheme.
- (3) However, subsection (2) does not cover an entity if the entity's role in the scheme is minor or ancillary.
- (4) In determining whether the profit made as a result of the scheme by an entity reasonably reflects the economic substance of the entity's activities in connection with the scheme, have regard to:
 - (a) the functions that the entity performs in connection with the scheme, taking into account assets used and risks assumed by the entity in connection with the scheme; and
 - (b) the documents covered by section 815-135 of the *Income Tax Assessment Act 1997*, to the extent that they are relevant to the matters mentioned in paragraph (a) or to any other aspect of the determination; and
 - (c) any other relevant matters.

177N Diverted profits tax—consequences

If this Part applies to a scheme because of section 177J:

- (a) section 177P applies to the relevant taxpayer mentioned in section 177J; and
- (b) the Commissioner cannot make a determination under subsection 177F(1) or (2A) in relation to the scheme merely because of section 177J.

177P Diverted profits tax—liability

- (1) The relevant taxpayer is liable to pay tax at the rate declared by the Parliament on:
 - (a) if this Part applies to a scheme in respect of the relevant taxpayer for the year of income mentioned in
-

paragraph 177J(1)(a), in relation to one DPT tax benefit—the DPT base amount for that DPT tax benefit; or

- (b) if this Part applies to a scheme in respect of the relevant taxpayer for the year of income mentioned in paragraph 177J(1)(a), in relation to more than one DPT tax benefit—the sum of the DPT base amounts for those DPT tax benefits.

Note: The tax is imposed by the *Diverted Profits Tax Act 2017* and the rate of the tax is set out in that Act.

- (2) The **DPT base amount** for a DPT tax benefit is:
- (a) if the DPT tax benefit is a tax benefit mentioned in paragraph 177C(1)(a), (b), (ba) or (bc)—the amount of the DPT tax benefit; or
- (b) otherwise—the amount of the DPT tax benefit divided by the standard corporate tax rate.
- (3) The tax is due and payable at the end of 21 days after the Commissioner gives the relevant taxpayer notice of the assessment of the amount of the tax for the year of income mentioned in paragraph 177J(1)(a).

Note: For assessments of the amount of the tax see Divisions 145 and 155 in Schedule 1 to the *Taxation Administration Act 1953*.

177Q Diverted profits tax—general interest charge on unpaid diverted profits tax or shortfall interest charge

If an amount of diverted profits tax or shortfall interest charge that an entity is liable to pay remains unpaid after the time by which it is due to be paid, the entity is liable to pay the general interest charge on the unpaid amount for each day in the period that:

- (a) starts at the beginning of the day by which the amount was due to be paid; and
- (b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:
- (i) the diverted profits tax or shortfall interest charge;
- (ii) general interest charge on any of the diverted profits tax or shortfall interest charge.

Note: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953*.

177R Diverted profits tax—when shortfall interest charge is payable

An amount of shortfall interest charge that an entity is liable to pay under section 280-102C in Schedule 1 to the *Taxation Administration Act 1953* is due and payable 21 days after the day on which the Commissioner gives the entity notice of the charge.

Income Tax Assessment Act 1997

14 Subsection 205-15(1) (at the end of the table)

Add:

- | | | | |
|---|--|---|---|
| 8 | the entity *pays diverted profits tax; and the entity satisfies the *residency requirement for the income year for which the tax is paid; and the entity is a *franking entity for the whole or part of that income year | that part of the payment that is attributable to the period during which the entity was a franking entity, multiplied by the proportion worked out under subsection (5) | on the day on which the payment is made |
|---|--|---|---|

15 At the end of section 205-15

Add:

- (5) The proportion is the standard corporate tax rate (within the meaning of Part IVA of the *Income Tax Assessment Act 1936*) divided by 40%.

16 Section 205-20 (heading)

Repeal the heading, substitute:

205-20 Paying a PAYG instalment, income tax or diverted profits tax

17 After subsection 205-20(3)

Insert:

- (3A) An entity *pays diverted profits tax* if and only if:
- (a) the entity has a liability to pay the *diverted profits tax; and
 - (b) either:
 - (i) the entity makes a payment to satisfy the liability (in whole or in part); or
 - (ii) a credit, or an *RBA surplus, is applied to discharge or reduce the liability.

18 Subsection 205-20(4)

Omit “Subparagraphs (1)(b)(ii) and (3)(b)(ii)”, substitute “Subparagraphs (1)(b)(ii), (3)(b)(ii) and (3A)(b)(ii)”.

19 Subsection 205-30(1) (at the end of the table)

Add:

| | | | |
|----|--|---|---|
| 13 | <p>the entity *receives a refund of diverted profits tax; and</p> <p>the entity satisfies the *residency requirement for the income year to which the refund relates; and</p> <p>the entity was a *franking entity during the whole or part of the income year to which the refund relates</p> | <p>that part of the refund that is attributable to the period during which the entity was a franking entity, multiplied by the proportion worked out under subsection (3)</p> | <p>on the day on which the refund is received</p> |
|----|--|---|---|

20 At the end of section 205-30

Add:

- (3) The proportion is the standard corporate tax rate (within the meaning of Part IVA of the *Income Tax Assessment Act 1936*) divided by 40%.

21 Section 205-35 (heading)

Repeal the heading, substitute:

205-35 Refund of income tax or diverted profits tax

22 After subsection 205-35(1)

Insert:

- (1A) An entity *receives a refund of diverted profits tax* if and only if:
- (a) either:
 - (i) the entity receives an amount as a refund; or
 - (ii) the Commissioner applies a credit, or an *RBA surplus, against a liability or liabilities of the entity; and
 - (b) the refund of the amount, or the application of the credit, represents in whole or in part a return to the entity of an amount paid or applied to satisfy the entity's liability to pay *diverted profits tax.

23 Subsection 205-35(2)

Omit "paragraph (1)(b)", substitute "paragraph (1)(b) or (1A)(b)".

24 Section 208-115

Before "The following table", insert "(1)".

25 Section 208-115 (at the end of the table)

Add:

- | | | | |
|---|---|--|---|
| 9 | the entity *pays diverted profits tax; and the entity satisfies the *residency requirement for the income year for which the tax is paid; and the entity was an *exempting entity for the whole or part of that income year | an amount equal to that part of the payment that is attributable to the period during which the entity was an exempting entity, multiplied by the proportion worked out under subsection (2) | on the day on which the payment is made |
|---|---|--|---|

26 At the end of section 208-115

Add:

- (2) The proportion is the standard corporate tax rate (within the meaning of Part IVA of the *Income Tax Assessment Act 1936*) divided by 40%.

27 Section 208-120

Before “The following table”, insert “(1)”.

28 Section 208-120 (at the end of the table)

Add:

- | | | | |
|---|---|--|--|
| 8 | the entity *receives a refund of diverted profits tax; and the entity was an *exempting entity during all or part of the income year to which the refund relates; and the entity satisfies the *residency requirement for the income year to which the refund relates | an amount equal to that part of the refund that is attributable to the period during which the entity is an exempting entity, multiplied by the proportion worked out under subsection (2) | on the day on which the refund is received |
|---|---|--|--|

29 At the end of section 208-120

Add:

- (2) The proportion is the standard corporate tax rate (within the meaning of Part IVA of the *Income Tax Assessment Act 1936*) divided by 40%.

30 Section 208-130 (table item 9, column headed “If:”)

Omit “item 3 or 5”, substitute “item 3, 5 or 8”.

31 Section 208-145 (table item 3, column headed “If:”)

Omit “item 5 or 6”, substitute “item 5, 6 or 9”.

32 Paragraph 214-45(1)(a)

After “*receives a refund of income tax”, insert “or *receives a refund of diverted profits tax”.

33 Paragraph 214-45(2)(a)

After “*receives a refund of income tax”, insert “or *receives a refund of diverted profits tax”.

34 Paragraph 214-150(4)(a)

After “*receives a refund of income tax”, insert “or *receives a refund of diverted profits tax”.

35 Subsection 219-15(2) (at the end of the table)

Add:

- | | | | |
|---|---|---|---|
| 9 | the company *pays diverted profits tax; and the company satisfies the *residency requirement for the income year for which the tax is paid; and the company is a *franking entity for the whole or part of that income year | that part of the payment that is attributable to: | on the day on which the payment is made |
| | | (a) the *shareholders’ share of the income tax liability of the company for that income year; and | |
| | | (b) the period during which the company was a franking entity; | |
| | | multiplied by the proportion worked out under subsection (4) | |

36 At the end of section 219-15

Add:

- (4) The proportion is the standard corporate tax rate (within the meaning of Part IVA of the *Income Tax Assessment Act 1936*) divided by 40%.

37 Subsection 219-30(2) (at the end of the table)

Add:

| | | | |
|---|---|--|---|
| 4 | <p>the company *receives a refund of diverted profits tax; and</p> <p>the company satisfies the *residency requirement for the income year to which the refund relates; and</p> <p>the company was a *franking entity for the whole or part of that income year</p> | <p>that part of the refund that is attributable to:</p> <p>(a) the *shareholders' share of the income tax liability of the company for that income year; and</p> <p>(b) the period during which the company was a franking entity;</p> <p>multiplied by the proportion worked out under subsection (3)</p> | <p>on the day on which the refund is received</p> |
|---|---|--|---|

38 At the end of section 219-30

Add:

- (3) The proportion is the standard corporate tax rate (within the meaning of Part IVA of the *Income Tax Assessment Act 1936*) divided by 40%.

39 Paragraph 709-100(1)(b)

After “*receives a refund of income tax”, insert “or *receives a refund of diverted profits tax,”.

40 Subsection 721-10(2) (at the end of the table)

Add:

| | | |
|-----|---|--|
| 115 | <p>Subsection 177P(3) of the <i>Income Tax Assessment Act 1936</i> (diverted profits tax)</p> | <p>the income year to which the diverted profits tax relates</p> |
|-----|---|--|

41 Subsection 995-1(1)

Insert:

diverted profits tax means tax imposed by the *Diverted Profits Tax Act 2017*.

DPT assessment has the meaning given by section 145-10 in Schedule 1 to the *Taxation Administration Act 1953*.

pays diverted profits tax has the meaning given by subsection 205-20(3A).

42 Subsection 995-1(1) (at the end of the definition of *period of review*)

Add:

Note: For the purposes of diverted profits tax, this definition is modified in respect of a DPT assessment (see section 145-15 in Schedule 1 to the *Taxation Administration Act 1953*).

43 Subsection 995-1(1)

Insert:

receives a refund of diverted profits tax has the meaning given by subsection 205-35(1A).

restricted DPT evidence has the meaning given by subsection 145-25(2) in Schedule 1 to the *Taxation Administration Act 1953*.

Taxation Administration Act 1953

44 At the end of Chapter 3 in Schedule 1

Add:

Part 3-30—Diverted profits tax

Division 145—Assessments of diverted profits tax

Guide to Division 145

145-1 What this Division is about

| |
|---|
| <p>The Commissioner can make an assessment of diverted profits tax. The entity that is the subject of the assessment can appeal to the Federal Court against the Commissioner's decision to make the assessment. Such an appeal can be made generally no earlier than</p> |
|---|

12 months after the day on which the Commissioner first gives notice of the assessment to the entity.

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145-5 DPT assessments—modified application of Division 155

In applying Division 155 in relation to an amount of *diverted profits tax:

- (a) apply the provisions of that Division with the modifications set out in sections 145-10 to 145-25; and
- (b) disregard sections 155-15, 155-20, 155-25, 155-30, 155-40, 155-45, 155-50, 155-55 and 155-70.

145-10 When DPT assessments can be made

Despite subsection 155-5(1), the Commissioner can make an assessment (the ***DPT assessment***) of the amount of *diverted profits tax only at a time in the period:

- (a) starting on the day on which the Commissioner first gives the entity that is the subject of the assessment a notice of assessment under Part IV of the *Income Tax Assessment Act 1936* for the income year mentioned in paragraph 177J(1)(a) of the *Income Tax Assessment Act 1936* (as that paragraph applies in relation to the amount of diverted profits tax); and
- (b) ending on the last day of the period of 7 years starting the day after that day.

145-15 Period of review of DPT assessments

- (1) Despite subsection 155-35(2), the ***period of review***, for the *DPT assessment, is:

- (a) the period:

- (i) starting on the day on which the Commissioner first gives notice of the assessment to the entity that is the subject of the assessment under section 155-10; and
 - (ii) ending on the last day of the period of 12 months starting the day after that day; or
 - (b) if:
 - (i) the entity, by written notice given to the Commissioner, specifies a shorter period in accordance with subsection (2); and
 - (ii) the Federal Court of Australia has not made an order under subsection (3) in respect of the written notice; that shorter period; or
 - (c) if the period of review is extended under subsection 155-35(3) or (4)—the period as so extended.
- (2) For the purposes of subparagraph (1)(b)(i), the shorter period must:
- (a) start on the day mentioned in subparagraph (1)(a)(i); and
 - (b) end on a day that is at least 30 days after the day on which the entity gives the written notice to the Commissioner.
- (3) For the purposes of subparagraph (1)(b)(ii), the Federal Court of Australia may make an order under this subsection in respect of the written notice if:
- (a) the Commissioner has started to examine the entity's affairs in relation to the assessment; and
 - (b) the Commissioner has not completed the examination within the shorter period specified in the written notice; and
 - (c) the Commissioner, within 30 days after the day on which the entity gives the written notice to the Commissioner, applies to the Court for the order; and
 - (d) the Court is satisfied that it was not reasonably practicable, or it was inappropriate, for the Commissioner to complete the examination within the shorter period specified in the written notice, because of:
 - (i) any action taken by the entity; or
 - (ii) any failure by the entity to take action that it would have been reasonable for the entity to take.
- (4) Despite subsection 155-35(5), in relation to the *DPT assessment:
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- (a) an order may be made under subsection 155-35(3) only once; and
 - (b) consent may be given under subsection 155-35(4) only once.

145-20 Review of assessments

- (1) Section 155-90 does not apply during the *period of review mentioned in section 145-15.
- (2) In applying Part IVC of this Act as a result of section 155-90 after the end of that *period of review:
 - (a) have regard only to the provisions of that Part mentioned in subsection (3); and
 - (b) apply those provisions with the modifications set out in subsection (4); and
 - (c) disregard the other provisions of that Part; and
 - (d) apply section 145-25 (restricted DPT evidence).
- (3) For the purposes of paragraph (2)(a), the provisions of that Part are as follows:
 - (a) sections 14ZL and 14ZP;
 - (b) subsection 14ZR(1);
 - (c) subsection 14ZZ(1);
 - (d) Division 5 (apart from section 14ZZS).
- (4) For the purposes of paragraph (2)(b), the modifications are as follows:
 - (a) treat the Commissioner's decision to make the *DPT assessment as an objection decision;
 - (b) treat subsection 14ZZ(1) as reading "The entity that is the subject of the DPT assessment may appeal to the Federal Court of Australia against the objection decision.";
 - (c) treat the reference in section 14ZZN to "within 60 days after the person appealing is served with notice of the decision" as being a reference to "within 60 days after the end of the period of review mentioned in section 145-15 in Schedule 1";
 - (d) disregard paragraph 14ZZO(a);
 - (e) treat paragraph 14ZZO(b) as reading "the appellant has the burden of proving that the DPT assessment is excessive or

otherwise incorrect and what the DPT assessment should have been”;

- (f) treat the reference in section 14ZZR to a taxation decision as being a reference to the Commissioner’s decision to make the DPT assessment.

145-25 Restricted DPT evidence

- (1) *Restricted DPT evidence is not admissible in evidence in proceedings under Part IVC on an appeal to the Federal Court of Australia related to the *DPT assessment.
- (2) **Restricted DPT evidence** means information or documents that:
- (a) the entity that is the subject of the *DPT assessment (or an associate (within the meaning of section 318 of the *Income Tax Assessment Act 1936*) of that entity), had in its custody or under its control at a time before, during or after the *period of review; and
 - (b) the Commissioner did not have in his or her custody or under his or her control at any time in the period of review.
- (3) Subsection (1) does not prevent *restricted DPT evidence from being admissible in evidence in the proceedings if:
- (a) the Commissioner consents to the admission of the restricted DPT evidence in accordance with subsection (4); or
 - (b) the court in which the proceedings take place considers that the admission of the restricted DPT evidence is necessary in the interests of justice; or
 - (c) the restricted DPT evidence is expert evidence that:
 - (i) comes into existence after the *period of review; and
 - (ii) is based on evidence that the Commissioner had in his or her custody or under his or her control at any time in the period of review.
- (4) For the purposes of paragraph (3)(a), the Commissioner may give the consent if the Commissioner considers that it is reasonable to do so.
- (5) In making a decision under paragraph (3)(a) or (b), the Commissioner or the court must have regard to:
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- (a) whether, if the *restricted DPT evidence were not admissible in evidence in the proceedings, the remaining information or documents that are relevant to the proceedings are, or are likely to be, misleading; and
- (b) whether it would have been reasonable for the entity that is the subject of the *DPT assessment (or the associate of that entity mentioned in paragraph (2)(a)) to have given the Commissioner the restricted DPT evidence within the *period of review.
- (6) The Commissioner must give a consent for the purposes of paragraph (3)(a) if failure to do so would have the effect, for the purposes of the Constitution, of making any tax or penalty incontestable.
- (7) A consent for the purposes of paragraph (3)(a) is to be in writing.
- (8) If the Commissioner gives a consent for the purposes of paragraph (3)(a), the Commissioner must give the entity that is the subject of the *DPT assessment a copy of the consent as soon as practicable afterwards.

45 At the end of subsection 155-5(2) in Schedule 1

Add:

; (j) an amount of *diverted profits tax.

Note: This Division has a modified operation in relation to diverted profits tax (see Division 145).

46 Subsection 250-10(1) in Schedule 1 (after table item 70)

Insert:

| | | |
|----|--|--------------------|
| 80 | diverted profits tax | subsection 177P(3) |
| 85 | shortfall interest charge for diverted profits tax | section 177R |

47 Section 280-1 in Schedule 1

Omit “or Division 293 tax”, substitute “, Division 293 tax or diverted profits tax”.

48 Section 280-50 in Schedule 1

Omit “or *Division 293 tax”, substitute “, *Division 293 tax or *diverted profits tax”.

49 After section 280-102B in Schedule 1

Insert:

280-102C Liability to shortfall interest charge—diverted profits tax

- (1) Subsection (2) applies if:
 - (a) the Commissioner has given an entity an assessment of income tax for an income year; and
 - (b) the Commissioner subsequently gives the entity a *DPT assessment for that income year.
- (2) The entity is liable to pay *shortfall interest charge equal to the amount of shortfall interest charge that the entity would be liable to pay under section 280-100 if:
 - (a) the Commissioner amended the assessment of income tax mentioned in paragraph (1)(a) on the day that the Commissioner gave the entity the *DPT assessment mentioned in paragraph (1)(b); and
 - (b) the entity were liable to pay an additional amount of income tax because of that amendment; and
 - (c) the Commissioner made that amendment on the basis that the *tax benefit or tax benefits to which the DPT assessment related were cancelled.
- (3) An entity is also liable to pay *shortfall interest charge on an additional amount of *diverted profits tax that the entity is liable to pay because the Commissioner amends the entity’s *DPT assessment in respect of an income year.
- (4) The liability is for each day in the period:
 - (a) beginning at the start of the day on which *diverted profits tax under the entity’s first *DPT assessment for that income year was due to be paid, or would have been due to be paid if there had been any; and

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- (b) ending at the end of the day before the day on which the Commissioner gave the entity notice of the amended *DPT assessment.
- (5) However, if an amended *DPT assessment reinstates all or part of a liability in relation to a particular that had been reduced by an earlier amended DPT assessment, the period for the reinstated liability begins at the start of the day on which *diverted profits tax under the earlier amended DPT assessment was due to be paid.

Note 1: See subsection 177P(3) of the *Income Tax Assessment Act 1936* for when the amount of diverted profits tax becomes due and payable.

Note 2: Section 177Q of the *Income Tax Assessment Act 1936* provides for general interest charge on any part of the additional amount (plus any shortfall interest charge) that remains unpaid after the additional amount is due and payable.

Note 3: See section 177R of the *Income Tax Assessment Act 1936* for when the amount of shortfall interest charge becomes due and payable.

Taxation (Interest on Overpayments and Early Payments) Act 1983

50 Subsection 3(1)

Insert:

diverted profits tax has the same meaning as in the *Income Tax Assessment Act 1997*.

51 Section 3C (after table item 25)

Insert:

30 Diverted profits tax

52 Application

The amendments made by this Schedule apply in relation to DPT tax benefits for a year of income that starts on or after 1 July 2017 (whether or not the DPT tax benefit arises in connection with a scheme that was entered into, or was commenced to be carried out, before 1 July 2017).

Schedule 2—Increasing penalties for significant global entities

Taxation Administration Act 1953

1 Subsection 3CA(2)

After “give to the Commissioner”, insert “in the approved form”.

2 Subsection 284-90(1) in Schedule 1

After “using this table”, insert “and subsections (1A) to (2),”.

3 After subsection 284-90(1) in Schedule 1

Insert:

- (1A) The *base penalty amount in an item of the table in subsection (1) that applies to you is taken to be doubled if:
- (a) on or before the day (your *trigger day*) applying to you under subsection (4) for that table item:
 - (i) the Commissioner has made an assessment of your income tax for one or more income years; or
 - (ii) the Commissioner has made a determination under subsection 960-555(3) of the *Income Tax Assessment Act 1997* in relation to you, or in relation to the *global parent entity for the group of which you are a member, for a period; or
 - (iii) you have given the Commissioner statements in accordance with Subdivision 815-E of that Act for an income year or another 12 month period; and
 - (b) you were a *significant global entity for:
 - (i) whichever of those income years or periods that ends on the most recent day; or
 - (ii) if more than one of them ends on that most recent day—any of those income years or periods that ends on that most recent day.

Note: For subparagraph (a)(iii), you may be allowed to give statements for a 12 month period other than an income year (see section 815-360 of the *Income Tax Assessment Act 1997*).

(1B) However, subsection (1A) is taken never to have applied to you in relation to your trigger day if:

- (a) the Commissioner makes an assessment of your income tax for the income year that includes your trigger day; and
- (b) you are not a *significant global entity for that income year.

4 At the end of section 284-90 in Schedule 1

Add:

- (4) For the purposes of paragraph (1A)(a), the following day applies to you for the relevant item of the table in subsection (1):
 - (a) for any of table items 1 to 3C—the day you made the statement referred to in that item;
 - (b) for any of table items 4 to 6—the day you made the statement to which that item relates and that is referred to in subsection 284-75(2);
 - (c) for table item 7—the day the return, notice or other document to which that item relates, and that is referred to in subsection 284-75(3), was required to be given.

5 Paragraph 286-80(1)(b) in Schedule 1

Omit “subsection (3) or (4)”, substitute “subsection (3), (4) or (4A)”.

6 After subsection 286-80(4) in Schedule 1

Insert:

- (4A) Neither subsection (3) nor (4) applies to the entity, and the *base penalty amount is multiplied by 500, if:
 - (a) the failure referred to in subsection (2) is a failure to give a return, notice or other document on time or in the *approved form, as mentioned in subsection 286-75(1); and
 - (b) on or before the day the return, notice or other document is required to be given:
 - (i) the Commissioner has made an assessment of the entity’s income tax for one or more income years; or
 - (ii) the Commissioner has made a determination under subsection 960-555(3) of the *Income Tax Assessment Act 1997* in relation to the entity, or in relation to the

*global parent entity for the group of which the entity is a member, for a period; or

(iii) the entity has given the Commissioner statements in accordance with Subdivision 815-E of that Act for an income year or another 12 month period; and

(c) the entity was a *significant global entity for:

(i) whichever of those income years or periods that ends on the most recent day; or

(ii) if more than one of them ends on that most recent day—any of those income years or periods that ends on that most recent day.

Note: For subparagraph (b)(iii), an entity may be allowed to give statements for a 12 month period other than an income year (see section 815-360 of the *Income Tax Assessment Act 1997*).

(4B) However, subsection (4A) is taken never to have applied to the entity in relation to the day the return, notice or other document is required to be given if:

(a) the Commissioner makes an assessment of the entity's income tax for the income year that includes that day; and

(b) the entity is not a *significant global entity for that income year.

7 Application of amendments

(1) The amendment made by item 1 of this Schedule applies in relation to general purpose financial statements required to be given to the Commissioner at or after the application time.

(2) The amendments made by items 2, 3 and 4 of this Schedule apply in relation to any of the following:

(a) statements referred to in section 284-75 in Schedule 1 to the *Taxation Administration Act 1953* that are made at or after the application time;

(b) returns, notices or other documents referred to in that section that are required to be given at or after the application time.

(3) The amendments made by items 5 and 6 of this Schedule apply in relation to any returns, notices or other documents referred to in

subsection 286-75(1) in Schedule 1 to the *Taxation Administration Act 1953* that are required to be given at or after the application time.

(4) In this item:

application time means the start of the day that is the later of:

- (a) 1 July 2017; and
- (b) the day this Schedule commences.

Schedule 3—Transfer pricing guidelines

Income Tax Assessment Act 1997

1 Paragraph 815-135(2)(a)

Before “the Transfer Pricing Guidelines”, insert “subject to paragraph (aa),”.

2 After paragraph 815-135(2)(a)

Insert:

(aa) the Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports, of the Organisation for Economic Cooperation and Development, published on 5 October 2015;

3 Subsection 815-135(3)

After “paragraph (2)(a)”, insert “or (aa)”.

4 Application of amendments

The amendments made by this Schedule apply in relation to income years starting on or after 1 July 2016.

[Minister’s second reading speech made in—
House of Representatives on 9 February 2017
Senate on 23 March 2017]

(10/17)
