The Institute of Chartered Accountants in Australia

19 October 2007

General Manager
Tax System Review Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: uap@treasury.gov.au.

Dear Sir,

Review of Unlimited Amendment Periods

The Institute of Chartered Accountants in Australia is pleased to provide the following comments on the Discussion Paper entitled "Review of Unlimited Amendment Periods in the Income Tax Laws" and, in particular, the specific questions asked in that Paper.

The Institute is Australia's premier accounting body which represents over 44,000 members who are fully qualified Chartered Accountants working in diverse roles within private practice, business, industry, government and education, both in Australia and overseas.

Questions for consultation

1. Do you support/agree with the following principles discussed in this paper?

Principle 1: Unlimited Amendment Periods for circumstances that can be dealt with within the general rules should be removed.

We agree with this general principle. We have not attempted to determine whether, in our view, all provisions that should fall into this category have been identified in Appendix A.

Principle 2: Unlimited Amendment Periods for circumstances that will take more than four years to verify because of unusual complexity or other factors should have a longer fixed amendment period.

The only provisions identified by the Review as warranting more than 4 years to verify are in relation to transfer pricing and, in particular:

- The anti-profit shifting provisions of sections 136AD (arm's length consideration deemed to be received or given) and 136AE (determination of source of income etc) of the *Income Tax Assessment Act 1936* (ITAA36)

- A double taxation agreement and Timor Sea Treaty transfer pricing provisions (section 170(9B)).

33 Erskine Street
Sydney NSW 2000
GPO Box 3921
Sydney NSW 2001
service> 1300 137 322
phone> 61 2 9290 1344
fax> 61 2 9262 1512

27–29 Napier Close
Deakin ACT 2600
phone> 61 2 6282 9600
fax> 61 2 6282 9800

L32, 345 Queen Street
Brisbane Qld 4000
phone> 61 7 3233 6500
fax> 61 7 3233 6555

L11, 1 King William Street
Adelaide SA 5000
phone> 61 8 8113 5500
fax> 61 8 8231 1982

TCCI, 30 Burnett Street
North Hobart Tas 7000
phone> 1800 014 555
fax> 61 3 9670 3143

L3, 600 Bourke Street
Melbourne Vic 3000
phone> 61 3 9641 7400
fax> 61 3 9670 3143

Grd, 28 The Esplanade
Perth WA 6000
phone> 61 8 9420 0400
fax> 61 8 9321 5141

Instead, the Review suggests an 8 year amendment period. The rationale for this is that it is often difficult to verify information in respect of such transactions.

We agree with the general principle. However, in its proposed application to the transfer pricing provisions, we question the underlying premise that it is reasonable for a transfer pricing audit to take twice as long as an audit in respect of the anti-avoidance provisions. In our view, an audit involving the anti-avoidance provisions is likely to be as complex as an audit involving the transfer pricing provisions. In these circumstances, even if a longer fixed amendment period is warranted in respect of the transfer pricing provisions, it should in our view be no longer than 6 years.

We also note that the proposed 8 year amendment period appears to be at odds with comments made by the Treasurer at a joint press conference with Japan's Finance Minister on the proposed new Australia/Japan income tax treaty that there would be a time limit of 7 years for transfer pricing audits unless there is evidence of fraud or evasion.

Principle 3: Unlimited Amendment Periods for circumstances that arise because of a future event should be based upon a set time after the Commissioner is notified that the event has occurred.

The Discussion Paper draws a distinction between the following two scenarios in which a taxpayer's ultimate tax liability for a particular year is dependent on the happening of a future event, namely:

- provisions which expressly require that the Commissioner be notified that an event has occurred, eg notification by the Industry Research & Development Board (IR&D Board)

- provisions which vary a taxpayer's liability for an earlier income year based on subsequent events, eg the expenditure recoupment example on page 13 of the Discussion Paper involving section 51AH of the ITAA36 or certain contracts settled in a year but in respect of which a capital gain is required to be included in the assessable income of an earlier year in which the sale contract was made,

In the latter case, there is no express requirement for the taxpayers to notify the Commissioner that the event has occurred. Rather, taxpayers would ordinarily notify the Commissioner of the happening of the event via a request for an amended assessment (a self amendment).

The Review proposes that:

- where the Commissioner is notified that a contingent event has occurred - allowing the Commissioner a set period after that time in which to amend an assessment. As indicated in the Discussion Paper "This would enable the Tax Office to assess risk and, if necessary, carry out verification procedures on the same basis as if the event had occurred during the period to which the return relates." The Review suggests an amendment period of 2 years for all taxpayers.

- where no such notification is given – continuing to allow the Commissioner an unlimited amendment period.

From a drafting perspective it is proposed that, but for CGT provisions impacted by a contingent event, any amended legislation would identify the contingent event, eg as indicated in Appendix A, Table A1, the contingent event for section 51 AH is the reimbursement of the expense incurred. By contrast, it is not proposed that the contingent event relevant to each CGT provision impacted by such an event be identified in the amending legislation. Rather, the amendment period for CGT provisions impacted by a contingent event would be covered by one generic provision.

Provisions involving contingent events (other than CGT provisions)

In relation to the abovementioned proposals we make the following comments:

- The general principle that the Commissioner be granted a set period after an event is notified in which to amend does not distinguish between whether notification is given by the taxpayer, another federal Government agency or some other third party. Thus, for example, the Commissioner would have a set period after the issue to it by the IR&D Board of a certificate denying a deduction in which to amend a taxpayer's assessment. This means that the Commissioner effectively has an unlimited amendment period in which to amend a taxpayer's assessment because there are no time constraints imposed on the IR&D Board.

  In our view, there is no justification for allowing *any* federal government agency charged with a function having income tax consequences to have an unlimited period in which to perform that function. Consistent with principles 1 and 2, in our view the general 2 or 4 year amendment period should apply in these circumstances unless, because of unusual complexity or other factors, a longer fixed amendment period is more appropriate.

  In the context of the R&D provisions, instead of applying a contingent amendment period, it would be preferable to require the IR&D Board to issue a certificate denying or revoking deductions within a specified time period and setting a fixed amendment period which has regard to the role of the IR&D Board.[1] In our view, a fixed 6 year amendment period (instead of the general 4 year period for business taxpayers) may be an appropriate amendment period.

  We have not sought to determine what an appropriate amendment period might be for other provisions impacted by contingent events involving federal government agencies other than the IR&D Board.

- Section 170(10A) currently provides an unlimited amendment period for the Commissioner to increase a taxpayer's liability to give effect to the following R&D provisions - sections 73B, 73BH, 73BA, 73BF, 73BM, 73C, 73CB, 73I or 73Y. The denial of a deduction under those provisions will not always be the consequence of a notification to the Tax Office by the IR&D Board. For example, where an eligible company incurs certain expenditure and the Commissioner is satisfied that the parties to the transaction were not dealing with each other at arm's length and the expenditure would have been less had they been so dealing, section 73B(31) allows the Commissioner to reduce the expenditure taken into account under the section.

  We would expect that, in respect of these R&D provisions, Principle 1 and 2 would apply so that the unlimited amendment period will be replaced by the general amendment period unless, because of unusual complexity or other factors, a longer fixed amendment period should apply.

  We have not reviewed all of the R&D provision not involving notification by the IR&D Board to determine whether any of them would warrant an amendment period longer than the general 4 year period applicable to business taxpayers.

- We are concerned that circumstances may arise where, notwithstanding that the Commissioner is notified of the happening of the contingent event, an amended assessment does not issue within the proposed 2 year period. Where the amendment sought is favourable to the taxpayer, it is not clear what options are available to the taxpayer other than to object against the assessment.

[1] We note that *Tax Laws Amendment (2007 Measures No 5) Act 2007* amended the Industry Research and Development Act 1986 by establishing a new statutory body, Innovation Australia, to consolidate the administration and oversight of the Government's innovation and venture capital programs as previously prescribed in the IR&D Act, the Pooled Development Funds Act 1992 and the Venture Capital Act 2002.

We therefore recommend that, where a taxpayer requests an amended assessment within the 2 year period and the amendment is favourable to the taxpayer, the Commissioner be empowered to amend the assessment even if the 2 year period has expired (akin to section 170(5)).

- It is not clear from the Discussion Paper whether the amendment of an assessment as a consequence of the happening of a contingent event will refresh the assessment in respect of that particular.

CGT provisions involving contingent events

Rather than identify each contingent event contained in the CGT rules which, when notified to the Commissioner, would trigger the limited amendment period, the Review proposes that there be one generic provision which would apply to all such contingent events. For simplicity, the Review proposes a 2 year amendment period commencing from when the Commissioner has the information to determine a taxpayer's final liability. We assume that this rule would apply regardless of whether the amendment was initiated by the Commissioner or the taxpayer.

While we have not examined each of the CGT provisions identified in Appendix A Table A3 we note that:

- to the extent that an amendment would be favourable to a taxpayer but it is not made within the 2 year timeframe, the Commissioner should be empowered to amend an assessment outside the limited review period

- we do not find compelling the reasons given for differentiating all CGT events involving contingent or future events. A number of provisions listed in the Appendix involve CGT events, eg a change ownership of a CGT asset, which are taken to occur in an earlier year, eg when the contract for disposal was made. In these circumstances we see no reason in principle why the limited amendment period should not commence upon notification of these circumstances to the Commissioner. There may be other CGT provisions that can be similarly grouped because they have the same contingent event so that any additional volume or complexity to the tax laws is minimised.

Principle 4: Unlimited Amendment Periods (other than for fraud or evasion) should only be retained in exceptional circumstances.

We agree with the general principle that unlimited amendment periods should only be retained in exceptional circumstances. In addition to fraud or evasion, the Review proposes the retention of an unlimited amendment period in order to provide correlative relief.

We note that the ITAA36 also provides unlimited amendment period, which we assume is to be retained, to give effect to a decision on a review or appeal or as a result of an objection made by the taxpayer or pending a review or appeal (item 6 of subsection 170(1)).

Principle 5: Amendments to prior year assessments to give effect to changes in the law brought about by amending Acts should be made within 2 years of Royal Assent of the amending Act.

We agree with this general principle.

Principle 6: A finite period of review should apply even though taxpayers who have lodged a return do not receive a notice of assessment.

We agree with this general principle.

The only circumstance specifically identified in the Discussion Paper relates to trusts where the existing practice of the Tax Office is not to issue a notice of assessment to the trustee unless there is a positive amount of tax for which the trustee is to be assessed.

The legislative solution proposed is to only allow the Commissioner to raise an (original) assessment for a particular year within 4 years from the later of the due date for lodgment of the return or the actual lodgment of the return to effectively provide a limited “amendment” period for trustees who have not received an assessment.

In relation to this proposal we make the following comments:

- It is not clear from the Discussion Paper whether the solution proposed is intended to cover not only situations where the trustee is not issued with a notice of assessment because the income of the trust is fully distributed to presently entitled beneficiaries but also situations where, for example, the trustee is not issued with a nil notice of assessment in respect of a minor or non-resident beneficiary who was not beneficially entitled to any income in a particular year.
- We are not aware of whether in practice the Tax Office issues assessments to the trustee in all circumstances where he is assessed and liable to pay tax as trustee. For example, does the trustee of a large managed fund who is assessed and liable to pay tax on behalf of a number of non-residents receive a separate assessment in respect of each non-resident beneficiary or one aggregate assessment?
- section 170(1) currently provides a 2 and not a 4 year amendment period for trusts which are STS taxpayers (regardless of the status of beneficiaries) and is therefore inconsistent with the proposed solution.

We believe that this particular measure may benefit from additional consultation and/or the release of draft legislation for comment on a confidential basis.

Principle 7: Transitional arrangements should close off amendments to assessments from previous years, after allowing the Tax Office sufficient time to review past assessments.

As a general principle we agree that transitional arrangements should close off assessments from previous years, after giving the Tax Office time to complete reviews of past assessments.

2. Are you aware of any other provisions that are subject to an unlimited amendment period and should be considered in this Review?

We have not separately sought to identify provisions that are subject to an unlimited amendment period.

3. Are you aware of any other Acts affecting income tax that give effect to unlimited amendment periods? Could they be replaced or removed?

We are not aware of any other Acts affecting income tax that give effect to unlimited amendment periods.

4. Are there other alternatives that should be used to replace particular unlimited amendment periods?

Refer comments above.

5. Are the suggested amendment periods, as listed in the Appendices, appropriate for each provision?

Refer comments above.

6. Should the tax assessment and amendment provisions be consolidated into a single location in the tax laws, and if so, where?

We agree that tax assessment and amendment provisions should be consolidated into a single location in the tax laws, possibly the ITAA97, providing that there are notes in the operative provisions indicating the existence of special amendment periods.

Alternatively, where an amendment period is currently contained outside section 170, there could be included in section 170 a subsection which cross references to other sections containing amendment periods. For example, there are a number of instances in the ITAA97 where this sort of approach is adopted, eg Subdivision 11-A – Lists of classes of exempt income.

Other matters

Amendment period for nil and tax loss returns

In a submission made to Treasury on 15 July 2005 in respect of Recommendation 3.4 of the Report on Aspects of Income Tax Self-Assessment (ROSA) we noted that, whereas the recommendation was to limit the period of review for loss an nil liability cases to the review period for positive assessments, the then draft did not do this. Instead, it limited the period of review for loss and nil liability cases to the period for amendment of positive assessments only where an amendment would create a positive tax liability. The submission recommended that, as the intention of the ROSA recommendation was to limit the period of review of nil and loss years 4 years, the draft legislation should be amended to give effect to this point.

That recommendation was not taken up in *Tax Laws Amendment (Improvements to Self Assessment) Act (No 2) 2005*. Accordingly, we recommend that Treasury reconsider as part of this Review whether a 4 year amendment period should apply in these circumstances which is consistent with the objectives of ROSA and would also limit the number of years loss companies are required to retain records.

We attach a copy of our submission which deals with this issue in more detail.

Penalty assessments

Since 1 July 2000 penalty assessments have been removed from the definition of "assessment" in subsection 6(1) of the ITAA36. Prior to this removal, the inclusion of penalty assessments in the definition provided a link back to section 170 of ITAA36. Subsection 298(3) of Schedule 1 of the *Taxation Administration Act 1953* (TAA) now allows the Commissioner to make assessments of administrative penalties. However, the provisions in the ITAA36 relating to assessments, including amending assessments, do not apply to penalty assessments.

The raises a question regarding how the Commissioner would amend penalty assessments if required to do so (as well as when an amendment period for such an assessment would expire). A Treasury officer has previously indicated that any such power lies within subsection 33(3) of the *Acts Interpretation Act 1901*. We would suggest, however, that a more appropriate process should be considered.

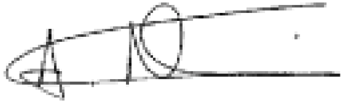
Audits of large taxpayers

Pursuant to item 2 of subsection 170(7) of the ITAA 1936, the Commissioner can seek a taxpayer's agreement to extend limited amended periods. There is some anecdotal evidence that, when the end of the limited amendment period approaches, the Tax Office may issue a protective assessment or alternatively, request that taxpayers agree to an extension of the limited amendment period to avoid being issued with a protective assessment.

We recommend that consideration be given to whether this is an appropriate process as it effectively means that limited amendment periods have some real practical limitations.

If you would like to discuss any aspect of our submission please call Ali Noroozi on 02 9290 5623 or Susan Cantamessa on 02 9290 5625.

Yours faithfully



Ali Noroozi
Tax Counsel

APPENDIX

The Institute of Chartered Accountants in Australia

15 July 2005

Mr P McCullough
General Manager
Tax system Review Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: self assessment@treasury.gov.au

Dear Sir,

Draft legislation – Report on Aspects on Income Tax Self Assessment – Tranche 3

The Institute of Chartered Accountants in Australia welcomes the opportunity to provide comments on the Exposure Draft legislation in respect of the third tranche of amendments arising from the Report on Aspects of Income Tax Self Assessment (ROSA) dealing with the amendment of assessments.

Our comments are set out in the Appendix under the following headings:

- Amending assessments
- Nil assessments
- Making assessments for nil liability returns for the 2003-04 year of income and earlier income years
- Other matters.

Whilst our detailed comments contain a number of comments which we regard as important, we wish to highlight particular concerns we have with the draft legislation as it relates to recommendations 3.4 and 3.5.

27–29 Napier Close
Deakin ACT 2600
Tel: 1300 137 322
Fax 02 6282 9800

TCCI, 30 Burnett Street
North Hobart TAS 7000
Tel: 1800 014 555
Fax 03 9670 3143

L1/200 Mary Street
Brisbane QLD 4000
Tel: 07 3233 6500
Fax 07 3221 0856

L3/600 Bourke Street
Melbourne VIC 3000
Tel: 03 9641 7400
Fax 03 9670 3143

L11/1 King William Street
Adelaide SA 5000
Tel: 08 8113 5500
Fax 08 8231 1982

Grd/28 The Esplanade
Perth WA 6000
Tel: 08 9420 0400
Fax 08 9321 5141

The Institute of Chartered Accountants in Australia
ABN 50 084 642 571
Incorporated in Australia Members' Liability Limited
Level 14, 37 York Street Sydney NSW 2000
GPO Box 3921 Sydney NSW 2001
Tel: 1300 137 322 / 61 2 9290 1344
Fax 61 2 9262 1512
www.icaa.org.au

Recommendation 3.4

Recommendation 3.4 states that:

From the 2004-05 income year, the period of review for loss and nil liability cases should be equivalent to the period for the Tax Office to amend assessments creating liabilities.

In reality, what the draft legislation purports to do is limit the period of review for loss and nil liability cases where an amendment would *create a tax liability* to the period for the amendment of assessments. As a consequence, the Commissioner appears to be prevented from converting a tax loss for the 2005 or a subsequent income year to a positive tax liability after the expiration of four years from lodgment of a loss return.

However, the limitation period in respect of 2005 and subsequent tax loss years otherwise appears to commence running, not from the loss year, but the year in which the loss is recouped and a (tax positive) assessment issues. This is in line with the current rules. In the past, this feature of the law has meant that the Australian Taxation Office (the Tax Office) tended to ignore loss returns until the loss entity returned to a taxable position which could be many years later.

The proposed change should encourage the Tax Office to review loss returns within a four year period to determine whether the return should in fact disclose a taxable income. However where, having reviewed the loss return, the Tax Office is unable to issue an amended assessment showing a positive tax liability, it is not locked in to the loss as returned by the taxpayer (or indeed as recalculated by it as a result of its review).

In our view, the dice remains heavily loaded in favour of the Tax Office. In most cases a loss return remains open until four years after the loss is recouped and an assessment issues.

We understand that the intention of the ROSA recommendation is to effectively limit the period of review of loss years to four years (this is drawn from both this recommendation and implications which flow from the approach in recommendation 3.5). This should mean that once four years have elapsed, the Tax Office should not be allowed to revisit the validity of the losses (other than in the case of fraud or evasion). The Tax Office should be able to amend the carry forward loss within this period, but once that period has elapsed, the validity of the losses should not be open to further review.

We therefore believe the legislation should be amended to give effect to this point.

Recommendation 3.5

Recommendation 3.5 states that:

Where a taxpayer's 2004-05 return discloses relevant loss information about any earlier loss years, the Tax Office should have six years from lodgment of that return to issue an assessment for those prior year losses. For other (non-loss) nil liability returns for years ended 30 June 2004 and earlier, the Tax Office should have until 31

October 2008 (or four years from the date of lodgment, whichever is later) to issue an assessment.

The way in which this recommendation has been implemented in the legislation is to limit the period in which the Commissioner may amend a pre-2005 nil liability return to create a positive tax liability as follows:

- nil liability (loss return)
    - losses fully recouped prior to 2005 – six years from the later of the date of the lodgment of the loss return and the 2005 return
    - all or part of losses carried forward to 2005 – six years from the later of the date of notification of losses to the Commissioner and the date of lodgment of the 2005 return
- nil liability (loss recoupment return) – six years from the later of the date of lodgment of the nil liability return and the 2005 return
- other nil liability returns – 30 September 2008 (or four years from the date of lodgment of the nil liability return if later).

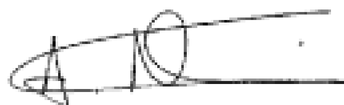
Thus, with the exception of the last case, the Commissioner generally has until 30 September 2011 at the earliest to amend a pre 2005 nil liability return to create a positive tax liability. Otherwise, the rules as they relate to losses are the same as they are currently, i.e. time only commences to run from the year in which a loss is recouped and an assessment issues.

In effect, other than in limited circumstances, taxpayers will continue to face an effectively unlimited review period in respect of pre 2005 loss years.

In our view, the draft legislation in relation to nil returns falls far short of delivering the certainty that taxpayers require in a self assessment regime. The provisions should close the period for review of returns in the above timeframes, both in the situations where an amendment would give rise to a positive tax liability and also to alter the quantum of losses brought forward.

If you have any questions in relation to our submission please call me on (02) 9290 5623 or Susan Cantamessa on (02) 9290 5625.

Yours faithfully



Ali Noroozi
Tax Counsel

AMENDING ASSESSMENTS

In relation to the amendments to s170 of the Income Tax Assessment Act 1936 (ITAA 36) we make the following comments:

- **Proposed subsection 170(1), generally**: the limitation periods in items 1 to 4 of the table commence when the Commissioner "gives notice of the assessment". On the face of the draft legislation, even in the case of companies, the Commissioner must positively act in order for the limitation period to commence (i.e. deeming does not appear to be sufficient). If the Commissioner is required to act in a positive manner (e.g. provide the taxpayer with a piece of paper), we suggest the legislation be amended so as to require the Commissioner to give an assessment. If it is not intended that the Commissioner be required to so act to start the limitation period, we suggest that the legislation be amended accordingly. Further comment is made in this regard under the bullet point 'Proposed subsection 170(1), item 2.
- **Proposed subsection 170(1), item 1:** item 1 does not contain the qualification that "This item is subject to items 5 and 6". We recommend that, consistent with items 2-4, item 1 be similarly qualified.
- **Proposed subsection 170(1), item 1(a):** the proposed two year review period for individuals does not apply to an individual who carries on a business at any time during the year of income. The question as to when a business is being carried on is complex. While subsection 6(1) of the ITAA 36 defines business to include "any profession, trade, employment, vocation or calling" other than "occupation as an employee", the definition is wide and consequently the qualification contained in item 1(a) causes uncertainty as to whether an individual qualifies for the two year review period. In the absence of a more certain definition some example, by way of notes, as to common instances when an individual's activities do not amount to a business for the purpose of s170 would be welcome, e.g. an individual with one or more investment properties.
- **Proposed subsection 170(1), item 1(d):**
    - an individual does not qualify for a two year review period in respect of a year if a beneficiary of a trust estate at any time in the year (unless the trust is an STS or full self-assessment taxpayer for that year, e.g. a superannuation fund). The consequence of this exclusion is that an individual with units in a managed fund (even a cash management trust which for all intents and purposes operates as a bank account) will not qualify for a two year review period. Nor will individuals with units in a listed trust although, if the individuals had instead invested in a different type of account or bought shares instead of listed units, they would have qualified. We recommend that the scope of this exclusion be reconsidered so that, at a minimum, an individual will not be disqualified as a result of holding units in a listed or widely held unit trust.
    - there is also some concern as to whether an individual who falls within the class of beneficiaries of a trust may be precluded from obtaining a two year review period even though they do not actually receive anything from the trust. We recommend that it be made clear by note or otherwise that an individual who is a potential beneficiary of a non fixed trust is precluded from

a two year review period only if the trustee exercises his discretion in favour of the individual during the year, i.e. simply being included in a class of potential beneficiaries is not sufficient.

- is there a reason why reference is made to a trust which is an STS taxpayer, as opposed to the trustee of a trust (in that capacity) which is an STS taxpayer? In relation to full self assessment taxpayers, the reference is the trustee of the trust (in that capacity) being a full self assessment taxpayer.

- **Proposed subsection 170(1), item 2:** subject to qualifications, this item allows the Commissioner to amend an assessment for a company which is an STS taxpayer with two years after the day on which the Commissioner "gives notice of the assessment to the company". As companies, including corporate STS taxpayers, are full self assessment taxpayers, we recommend that the proposed section pick up on the wording of s166A(3), e.g. "The Commissioner may amend an assessment of a company …within 2 years after the day on which a notice of assessment arises under s166A". This may be covered in the proposed consequential amendments.

  To the extent that there are provisions in item 2 which mirror item 1, the same comments apply to those provisions.

- **Proposed subsection 170(1), item 6(b):** this provision is currently contained in subsection 170(7). However, under subsection 170(7), the Commissioner can only amend an assessment in pursuance of an objection made by a taxpayer by way of *reduction* in any particular. To increase the assessment in respect of any particular, the Commissioner must rely on other amendment powers, whether within section 170 or elsewhere in the tax legislation. The proposed amendment would enable the Commissioner to amend the assessment, whether to increase or reduce it, as a result of a taxpayer objection at any time. The draft Explanatory Material (EM) and, in particular, the table in paragraph 2.25 and paragraph 2.35 does not refer to any intent to change the policy in this instance. Assuming that this is an oversight, we suggest the section be amended to include the relevant qualification. Otherwise, to the extent it is intended to be a change in policy (and law), this should be spelt out in the EM.

- **Subsection 170(2):**

  - this appears to say that once the time limits have expired for an original assessment (that has been amended within the time limits in s170(1) items 1,2,3 or 4), the amended assessment cannot be further amended under proposed subsection 170(1), items 1, 2, 3 or 4. However, the note suggests that items 5 and 6 could permit such an amendment. The note should also refer to the Commissioner's power to amend amended assessments contained in proposed subsection 170(3) (see draft EM paragraphs 2.39 to 2.43).

  - does the reference to the "limited amendment period" for the original assessment in this subsection add anything over and above the amendment period for the original assessment as set out in items 1-4 of proposed s170(1). In this regard we note that it is only paragraph (a) of the proposed definition of that term (see clause 9) which is relevant to an original assessment. If the reference to the limited amendment period is not essential, the subsection would be much clearer if it was reworded. If reference to the term "limited amendment period" is to be retained, we

recommend that a note be added to the section to indicate that the term is defined in s170(14).

- this subsection should also be subject to subsections (5) and (6), so that an amended assessment may be amended due to extensions granted by the Commissioner upon application by a taxpayer or extensions ordered by the Federal Court.

- **Proposed paragraph 170(5)(a)**: subsection 170(5) allows the Commissioner to amend an assessment outside the limited amendment period providing that the taxpayer applies for an amendment in the approved form and satisfies paragraph (b) of this subsection. The term "approved form" is defined to have the meaning given by s388-50 in Schedule 1 to the Taxation Administration Act (TAA). The first requirement is that the document be "in the form approved in writing by the Commissioner for that kind of return, notice …". Anecdotal evidence indicates that there are a number of instances where the legislation prescribes the use of an approved form where subsequent investigation reveals that one does not exist, e.g. s14ZU of the TAA requires that objections be lodged in the prescribed form which to date does not exist. Therefore, unless it is intended that the Commissioner approve a form in writing, we recommend that this requirement be removed to avoid unnecessary compliance costs or, at a minimum, altered to refer not to an amendment requested in the approved form but in a manner specified by the Commissioner.

- **Proposed paragraph 170(5)(b):** this requirement is currently contained in subsection 170(6). However, the requirement that "*all* the information" be given within the limited amendment period could be oppressive for taxpayers. We query the policy for this requirement. A taxpayer should be allowed to provide information after an amendment request has been lodged (where the request was lodged within the limited amendment period) notwithstanding that the information is to be provided after that period has ended. This would be similar to the position that currently exists with objections – the Commissioner is able to seek further information once an objection has been lodged (see, for example, section 14ZYA of the TAA) without impacting either the validity of the objection or the ability of the Commissioner to amend the assessment as a consequence of it (see s170(7) and proposed new subsection 170(1) item 6(b)).

- **Proposed subsection 170(7):** should the words following paragraph (b) and preceding the table refer to the limited amendment period, or simply "that period" being the period referred to in paragraph (b), i.e. the limited amendment period or that period as extended?

- **Proposed subsection 170(10)/amended subsection 170(10AA)**

  - given the rewrite of section 170 and the Commissioner's amendment powers, in our view it would be desirable to provide a link to (or a table referencing) all the other areas of the tax legislation that affect the Commissioner's power to amend or the time limits to do so (see for example section 177G of the ITAA 36 and sections 170-70 and 170-170 of the Income Tax Assessment Act 1997 I(TAA 97). The draft EM at paragraph 2.32 infers such provisions will continue to exist outside proposed section 170.

  - in a similar vein, is there a reason why the unlimited period to amend conferred under those sections specified in s170(10A) cannot be incorporated into the table in proposed s170(10)?

- legislative recommendation 3.7 is to the effect that Treasury should conduct a detailed review of the specific provisions with unlimited amendment periods to identify those that could have a set amendment period in line with the current general rules (or longer with good reason). By contrast, the EM at paragraph 2.48 simply states that in rewriting s170, existing s170(10)[1] (which contains sections of the ITAA 1936 giving unlimited review periods) has been converted to tabular style as for existing s170(10AA) which deals with provisions of the ITAA 1997 which confer unlimited review periods. The only provisions which have been removed are described as those which are clearly inoperative or redundant. We seek clarification as to whether the thrust of recommendation 3.7 is reflected in the draft legislation or whether this task has been postponed.
- it is our understanding that the intention is that amendments under Part IVA should be now be governed by the operation of these provisions rather than through s177G. We trust that this is in the consequential amendments which we are yet to see, but wish to ensure this is kept on the agenda.
- in addition to the change in the limitation period applicable to Part IVA we consider that any anti-avoidance provision which confers an unlimited review period, or a period in excess four years, should be limited to the proposed four year period applicable to Part IVA, otherwise this will result in provision shopping rather than focusing on substantive issues.

- **Consequential amendments:** the draft legislation does not include any consequential amendments. Paragraph 2.58 of the draft EM only seems to contemplate, relevantly, the removal of some redundant “unlimited” amendment periods. There will be other consequential amendments needed, such as amending s177G to reduce the six year period to four years or to repeal it altogether so that s170 provides the limitation.

NIL ASSESSMENTS

- **Scope:** Paragraph (a) of the definition covers taxable income/tax, taxable income/no tax and no taxable income/no tax. A “no taxable income/no tax” case would include a tax loss year. It does not cover a “no taxable income/tax” case. We recommend that you ensure that no such cases can arise under the tax legislation.
- **Application to trustees:** the redrafted definition would give rise to “nil assessments” on trustees where the beneficiaries of the trust were presently entitled to all of the net income of the trust. As a result, the Commissioner may amend the assessment within four years (two years for certain trustees which are STS taxpayers) after the day on which the Commissioner gives notice of the assessment. This has two potential consequences:
  - the review period for the trustee in its capacity as trustee of the trust may differ from the review period of the beneficiaries in respect of the same year and
  - we would anticipate that trustees will require “nil assessments” to be issued to them to commence the review period.

[1] We have assumed that the actual reference in the EM to s170(10A) should in fact be to s170(10).

- **Consequential amendments:** the exposure draft legislation does not make consequential amendments to other relevant provisions, such as sections 166, 166A, 167, 168, 169 and 174 of the ITAA 36. That is, the Commissioner's power to make an assessment currently depends upon taxable income and tax payable being present (under sections 166, 167 and 168) or a liability to pay tax existing (section 169). Section 174 currently contemplates a tax liability being owed by the person upon whom the assessment is to be served. Similarly, a deemed assessment will only arise under section 166A where taxable income and tax payable thereon are present. The consequential amendments contemplated by paragraph 2.58 of the draft EM do not appear to extend to these provisions. Amendments are required to facilitate the making and serving of nil assessments, whether actual or deemed. Further, amendments are required to deem nil assessments for trustees on lodgement of the trust's return (similar to section 166A).
- **Non-assessment liabilities:** importantly, the exposure draft legislation does not currently deal with non-assessment liabilities. In our view, there is a need to similarly amend the amendment periods and to provide for "nil assessments" for liabilities not the subject of the assessment regime, e.g. foreign tax credit determinations made under Division 19 of the ITAA 1936. The drafting of the provisions in Division 19 is based on that of section 166, 166A, 169A and 170 (see sections 160AI, 160AJA, 160AIB, and 160AK respectively).
- **Policy of certainty and finality for nil assessments:** as indicated in the first dot point, the proposed definition of an assessment includes a "no taxable income/no tax" case that should result in a nil assessment arising in respect of a tax loss year. It is unclear from the draft legislation whether a nil assessment (where it arises from the incurrence of a tax loss in the year) has the effect of quantifying the amount of that tax loss such that it can be altered only by amending that nil assessment or by objecting against it (in the limited circumstances currently prescribed in proposed subsection 175A(2)). Paragraphs 2.3, 2.24, 2.44 and 2.45 of the draft EM suggest a policy that nil assessments are to have the same period of review as taxable assessments.

  However, paragraph 2.46 of the draft EM suggests that a nil assessment, where the taxpayer has a tax loss for that year, does not crystallises the quantum of the tax loss incurred in that year. Thus, no amendment of the nil assessment is required to alter the amount of the loss incurred in that year. The loss amount for that nil year can be altered at any time prior to the expiration of the amendment period for the taxable year in which that loss is claimed as a deduction. (The current practice is usually to claim the amount of the altered loss in the loss company's assessment in a year where a taxable assessment arose. That taxable assessment, and the calculation and amount of the loss claimed as a deduction in that assessment, are matters that are the subject of amendment powers and objection rights).

  The EM and, in particular, example 2.5 suggest that the current practice is maintained despite the recognition of nil assessments and introduction of amendment periods in respect of them. If this is the policy intention, this should clearly be stated in the legislation. Furthermore, example 2.5 of the EM should also show that an increase in the amount of the year one loss can be claimed in year five.

We consider that the correct policy outcome of certainty means that tax losses should be “locked in” once the relevant review period has expired. The draft legislation does not reflect this but leaves the current policy unchanged except where there is a nil assessment which cannot be amended to create a positive tax liability for that year if the relevant review period has expired. This is illustrated in example 2.5 by the inability of the Commissioner to raise an amended assessment for year one in respect of $8m taxable income.

- **Proposed subsection 175A(2):** we do not understand the purpose of this provision, which prevents a taxpayer from objecting against a nil assessment unless the taxpayer seeks to increase liability. (This may occur with timing differences arising and reversing over a number of years, otherwise it is hard to see when a taxpayer would lodge such an objection.)

The Commissioner can amend a nil assessment under proposed s170 (see, for example, item 4 of proposed subsection 170(1)). This power to amend will not be dependent upon increasing or decreasing a taxpayer’s liability (with the exception of amending amended assessments). The power is limited solely by the time limits from when the notice of assessment was given to the taxpayer, with that assessment now capable of being a nil assessment. The partial removal of the objection rights of a taxpayer (where the objection would not result in an increase of liability and therefore not be within subsection 175A(2)) may render it difficult for a taxpayer to have certain particulars of the nil assessment altered. The decision of the Federal Court in *Brownsville Nominees Pty Limited v FCT* 88 ATC 4513 (Northrop J) held that a taxpayer could not force the Commissioner to make a section 170 amendment.

Consequently, if a four year amendment period is to apply to a nil assessment and a taxpayer is precluded from objecting against such an assessment to reduce liability, what rights does the taxpayer have if the Commissioner simply refuses to amend that nil assessment as requested by the taxpayer (by way of reduction). (Perhaps the answer is that liability under a nil assessment cannot be reduced.)

However, it also raises the question of the effectiveness of the amendment period for nil assessments and the finality it is meant to deliver. Based on example 2.5 of the EM, a tax loss arising in a nil assessment year can be “altered” or amended up to the expiration of the (four year) amendment period of the later year taxable assessment in which that loss was claimed as a deduction – the four year amendment period for the nil assessment can be readily circumvented. As a tax loss is the result of taking items of allowable deductions away from items of assessable and net exempt income, the question may be asked what particular of a nil assessment becomes final once the amendment period for that nil assessment expires. Perhaps this issue is only relevant for nil assessments as a result of a tax loss having been incurred in that year. If so, it seems an odd policy outcome to differentiate between nil assessments based on whether they arise because of tax losses. (Certainly, the proposed finality, in section 171A, for 2004 and earlier nil years does not suggest such a distinction exists other than in respect of the time finality commences.)

In our view, a nil assessment should have the effect of crystallising the quantum of a taxpayer’s tax loss such that the amount of that loss can only be altered by amending that nil assessment or by objecting against it. The policy outcome of certainty and finality is not achieved where that loss can be altered and that nil

assessment "amended" in an indirect way via an adjustment in a later year taxable assessment when that loss is utilised.

As a result of proposed subsection 175A(2), a consequential amendment to the objection and appeals provision of Part IVC of the Taxation Administration Act is required to change the burden of proof, when a taxpayer objects against a nil assessment seeking to *increase* liability, from a need to show the assessment is "excessive" (see subparagraphs 14ZZK(b)(i) and 14ZZO(b)(i) of the TAA).

MAKING ASSESSMENTS FOR NIL LIABILITY RETURNS FOR THE 2003-04 AND EARLIER INCOME YEARS

- **Proposed subsection 171A(1):**
  - in broad terms the Commissioner has until 31 October 2008 to raise an original (taxable) assessment unless the nil liability return reflects a tax loss or the utilisation of a tax loss in which event the period is generally six years after the lodgment of the 2005 tax return. As under the current law, it would appear that the Commissioner may adjust the amount of a prior year tax loss up until four years after the year in which a loss is utilised and an assessment issues. If so, similar "finality" difficulties to those set out above seem to arise here.
  - leaving aside nil liability returns reflecting a tax loss or the utilisation of a tax loss, the subsection covers a no taxable income case but only where deductions equal assessable income. Thus, the subsection does not appear to apply where an entity has no taxable income/no tax payable for prior years because, for example, it is exempt from income tax. In our view such entities should also be provided with a finite period within which the Commissioner may issue an original assessment.
- **Proposed subsection 171A(1) Item 1:** Example 2.7 of the EM relates to a taxpayer who lodges a 2002 nil return (taxable income/no tax payable/no loss utilisation) in July 2005. In these circumstances, the Commissioner may only make an original assessment by the later of 31 October 2008 and four years after the date of lodgment of the return, i.e. July 2009 (and not four years after the date the Commissioner issues a notice that no tax is payable in respect of that return, i.e. 1 September 2005 plus four years or 1 September 2009).
- **Proposed subsection 171A(1) Item 4:** in Example 2.8, the taxpayer notifies the Commissioner in his 2005 return lodged on 1 February 2006 that he has 2004 carry forward losses which reduced his 2005 taxable income below the tax free threshold. He lodges his 2004 loss return on 1 September 2006. Pursuant to item 4 the Commissioner has 6 years from the later of the date of receipt of the notice (1 February 2006) and the lodgment of the 2004 return (1 September 2006) in which to issue an original assessment for the 2004 year. The relevant date is therefore 1 September 2012 and not 1 February 2012.j

OTHER

- **Status of legislative recommendation 3.9:** this recommendation is that, subject to one exception, the Tax Office should generally accept a request for an extension of time to lodge an objection from individual or very small taxpayers

where the request is received within four years of the original assessment and the taxpayer has at least an arguable case for the objection to be allowed in whole or part. The exception is where the Commissioner is out of time to amend an assessment of an associated taxpayer to include income that was incorrectly included in the individual/very small taxpayer's assessment. Would you please clarify the status of this recommendation as it does not appear to be reflected in the legislation as drafted.