

19 October 2007

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

Finance & Administration
Taxation

8/231 Elizabeth Street
Sydney NSW 2000
Australia

Dear Sir

REVIEW OF UNLIMITED AMENDMENT PERIODS IN THE INCOME TAX LAWS – DISCUSSION PAPER

At Attachment 1 please find our comments on the Treasury Discussion Paper.

If you require further information please contact Craig Grellman (02 9298 4287).

Yours faithfully



John Burke
Director Taxation

Attachment 1

Review of unlimited amendment periods

All of the comments below are to be read subject to the comments made at Question 4 below.

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.*

Agree.

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 amendment period.*

Partially agree, subject to serious refinement/qualification.

The paper states that the 2/4 year amendment period is likely to be insufficient in cases of transfer pricing due to the complexity of those transactions and the difficulty in obtaining verification information. It then suggests a compromise of 8 years.

We strongly oppose that period as it is excessive, it does little to promote ATO effectiveness and efficiency and leaves taxpayers with risk and uncertainty.

We alternatively propose that the Commissioner be required to issue a taxpayer with a 'transfer pricing discovery notice' within 3 years from the date of the original assessment and that the Commissioner then be allowed to amend the relevant assessment within 2 years from the date the transfer pricing discovery notice is issued. If the Commissioner fails to issue the transfer pricing discovery notice then, unless fraud or evasion are involved, the original assessment should be final and closed upon the expiration of the normal 4 year period from the date of the original assessment. If the Commissioner fails to amend the relevant assessment within the further 2 year period following the issue of a transfer pricing discovery notice then, unless fraud or evasion are involved, the original assessment should be final and closed upon the expiration of the normal 4 year period from the date of the original assessment.

We believe this alternative proposal is reasonable and balances the competing ATO and taxpayer interests as the Commissioner should have ample intelligence and resource on transfer pricing issues built up over many years eg. the data from the ever expanding Schedule 25A. A period of 8 years skews the playing field too heavily to the Commissioner's favour against extended uncertainty and risk for the taxpayer.

An obvious exception would be to allow any amendments which are required due to the correlative provisions in International Tax Agreements.

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 the event has occurred.*

The ATO submits that an amendment period of 2 years from the time that the Commissioner is notified that an event has occurred may be suitable. The paper states that this approach places the onus on the taxpayer to ensure that the Commissioner has been advised that the contingent event has occurred, in order to trigger the benefit of the limited review period.

The paper also refers to receipt of specific information from third parties (being the future contingent event) that would also trigger the further 2 years from the date of receipt of the information. In this context, should the receipt happen within the normal 4 year period then the maximum further period for amendment should be 2 years from the date of receipt. In the circumstances where third party information is the trigger, the Commissioner should have a positive obligation to advise the taxpayer of the extended amendment period.

The Government should identify those bodies likely to produce such information and introduce rules requiring them to issue notices within 4 years of the project being registered with the IRDB (Ausindustry). (The IRDB probably needs to be better resourced and administered to achieve this). The date of R&D registration should be brought forward to align with the date of lodgement (and assessment) of the taxpayers tax return for the year in which the eligible R&D expenditure is incurred. Should the IRDB then issue a notice the ATO should then be given 1 year from the date of that IRDB notice to amend the relevant assessment.

It is not clear how a ruling scenario would be affected where information has been supplied to the ATO who then issues a ruling but later changes its position due to a change in interpretation of law or by taking a different interpretation of the information supplied. This also raises performance level considerations viz, what obligations are there on the ATO and other bodies (eg. IRDB) regarding the extent and competency of their assurance activities.

It is unclear as to what is really intended regarding time periods and CGT events, ie. does the period operate from the time the ATO is informed of the CGT event? Does it mean that the period would only start when the ATO has *all* the information required to calculate a taxpayer's liability, which may or may not be at the time it is notified of the CGT event? If it is the latter a significant increase in the period allowed for amendments is likely. Notification, rather than full information, should be the time trigger. Further details on the information and notification requirements are required before meaningful feedback can be provided in this regard. Furthermore, it is not clear what this would mean in practice – tax returns are not currently required to identify and report on individual CGT events. Increasing the amount of ATO annual reporting would be strongly resisted as it is contrary to the principles of self-assessment.

These proposals look like rekindling concepts of full and true disclosure, and begs the question do we need legislation or guidance to describe what is full and true disclosure of the relevant contingent event?

We note that Table A2 refers to a number of sections triggered where there is a recoupment of the expenditure which originally generated the tax deduction (eg. Sections 73E, 82KL, 73C). We suggest that such recoupments be dealt with under recoupment provisions, ie. the recoupment be characterised as an assessable amount in the year of recoupment.

Where there was an associated benefit in a prior year (eg. the concessional R&D deduction) then the taxpayer will be required to return an additional assessable amount in the year of recoupment. The additional assessable amount would be equal to the prior year concessional deduction. No additional tax or late

payment interest would be applicable as the recoupment is contingent and unpredictable. Making an adjustment in the current year when the event occurs and is quantifiable obviates the need to go back and amend prior years.

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

Agree subject to comments at question 4 below.

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

Prima facie agree but this proposal needs clarification.

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

Agree.

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

Strongly disagree. Keep it simple. Our preference is cut over to the new periods straight away, which would mean all assessments which at that time are open would be subject to the new rules, as if those rules had always applied in respect of those open assessments.

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

No.

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

No.

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

The paper concentrates on amendments by the Commissioner but does not address the amendment following voluntary disclosure (not involving Part IVA tax avoidance and not involving fraud or evasion) made by a taxpayer where the voluntary disclosure is made more than 2 or 4 years after the assessment.

Australian tax law is extremely complex, is user unfriendly (having a 1936 and a 1997 Act!) and is constantly changing which means there is a great propensity for genuine mistake of law (misunderstanding/misinterpretation) and/or error of fact to occur. The tax laws are more complex, harder to understand and extremely challenging for taxpayers to keep up to date with, than it is for the ATO which develops and administers those laws. Taxpayers should be afforded a much longer period to amend where voluntary disclosure is made outside the time limits constraining the Commissioner, irrespective of whether there will be an increasing or decreasing adjustment to the amount of tax assessed. This ensures fairness in the tax system.

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

Please refer to the discussion above.

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

Yes, consolidating with the Taxation Administration Act is a better option as it is the logical place for all tax administration issues (such as assessment, amendments, objections, appeals, etc).