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Our Ref: 3123L JCF:mfp

via email: selfassessment@treasury.gov.au

The Review of Self Assessment
The Treasury
Langton Crescent
CANBERRA ACT 2600

Dear Sir/Madam

Re Review of Self Assessment

We refer to the Discussion Paper issued by the Treasurer in March 2004 and entitled 'Review of Aspects of Income Tax Self Assessment'. In particular we refer to the invitation in that Paper for submissions to be made on the ideas set out in the Paper or on other matters that might be relevant to the issue of improving the self assessment process.

This submission addresses two issues, first the question for consultation raised in question 3.G in Part 3.5 at the end of Chapter 3. That question related to 'what amendment periods should apply to cases that currently have an unlimited period'. Secondly, that the powers of the Commissioner of Taxation (**Commissioner**) to issue private rulings should be extend beyond the present powers contained in the *Taxation Administration Act 1953* that only enable the Commissioner to rule on the way in which a tax law applies to particular transactions to require the Commissioner to rule on matters of fact, reasonableness or satisfaction where such issues are relevant to a determination of a taxpayer's liability to income tax.

Time frame within which the Commissioner may amend assessments

We submit that in the absence of fraud or misrepresentation, the time within which the Commissioner may amend an assessment where, under the present law there is no limit as to time, should be limited to the standard time period of 4 years within which the Commissioner may issue an amended assessment or at the very longest the time period under which an amended assessment may issue where the general anti-avoidance provisions of the *Income Tax Assessment Act 1936 or 1997* are applied. There appears to be no or little justification for the Commissioner to have unlimited time to amend when his ability to amend where he invokes the general anti avoidance powers in not so limited.

While we submit that the Commissioner's power to amend should be limited as to time in all cases where, under the present law he has unlimited time to do so, the power to amend should particularly be limited as to time in cases where, under the present law, that power is able to be exercised to amend an assessment to deny a deduction otherwise available because the Commissioner is or is not satisfied that the parties are acting on an arms length basis, as to the 'reasonableness' of the amount in question or as to one or more other factors. Clearly, the taxpayer is unable to put him or her self into the position of the Commissioner to make such a determination and it is unreasonable that the taxation law requires a taxpayer to do so..

For example, under Section 73B(31) of the *Income Tax Assessment Act 1936*, if the Commissioner is **satisfied** that having regard to any connection between the taxpayer seeking the relevant deduction and the person to whom the expenditure was incurred and to any other relevant circumstances that the company and that person were not acting at arm's length in relation to the incurring of the expenditure and the amount of the expenditure would have been less had those parties been dealing at arm's length, then a deduction is only allowed for so much of that expenditure as the Commissioner **may consider reasonable**.

Section 170(10A) of the *Income Tax Assessment Act 1936* provides that the Commissioner may amend an assessment **at any time** to reduce the deduction claimed under section 73B where he is satisfied in the manner outlined in the preceding paragraph.

The ability of the Commissioner at some future point in time, which recent experience shows may be over a decade after the expenditure concerned is incurred, to raise an amended assessment which may carry significant penalty and general interest charges places taxpayers, including companies like Vision Systems Limited, in jeopardy. This is particularly the case where, as with the example set out above, the amendment arises because the Commissioner is 'not satisfied' as to a particular fact or circumstance or considers the amount of the expenditure not to be reasonable.

Leaving aside the question of whether such provisions correctly have a place in the legislation relating to a self assessment regime (how can a taxpayer determine when and on what grounds the Commissioner will or will not be satisfied or what he considers to be reasonable), it is unconscionable for taxpayers to be placed in a situation where their tax affairs are **never** closed.

Invariably in reaching a decision to amend in circumstances where he has an unlimited time within which to make an amended assessment, the Commissioner or his officers will apply hindsight in reaching his decision to be satisfied or not and may, more importantly, take into account decisions of courts and tribunals that have occurred well after the relevant transaction has been completed.

While both of these issues will arise if the time period within which the Commissioner's ability to amend is limited to the standard period or that applicable to the general anti-avoidance provisions, at least taxpayers will benefit from knowing that the Commissioner must complete a review of the relevant transactions and issue amended assessments within a specific timeframe.

One significant difficulty that faces taxpayers who enter into transactions where the Commissioner has an unlimited time within which to amend arises because the burden of proof in respect of the matters that gave rise to the amendment is on the taxpayer and not the Commissioner. Given the difficulty that faces taxpayers in ensuring that their rights to object and appeal against the amended assessment are properly pursued, particularly as the recollections of parties involved will dim over time, the fact that documents and other records supporting one position or the other may not be available and indeed the fact that the parties involved in the transaction may no longer be available to provide evidence before a court, the inclusion of unlimited time for amendment in a self assessment regime in circumstances where the making of the amendment is dependent upon the Commissioner's satisfaction (a matter upon which taxpayers cannot determine) the risk to taxpayers of unintended consequences and unintended tax liabilities is significant.

This company and its subsidiaries has conducted significant research and development activities for over 20 years and claimed deductions under section 73B in respect of the expenditure it has incurred.. Under the current law, its taxation affairs for those years remain open.

In making this submission, we in no way suggest that the Commissioner's ability to amend should be limited by time where fraud or misrepresentation occurs on behalf of the taxpayer or a party involved in the particular transaction. Our submission in this respect is consistent with the timeframes and limitations in other countries set out in Table 3.1 of the Paper in relation to taxpayers in Canada, New Zealand, the United Kingdom and the United States.

Expansion of the private ruling system

While not specifically raised as a question in the Paper, one limiting factor for taxpayers in obtaining private binding rulings is that under the terms of the *Taxation Administration Act 1953* the Commissioner is only able to issue a private ruling on the basis upon which a tax law will apply to a transaction or to a proposed transaction.

The Commissioner has, in issuing private binding rulings in the past, declined to rule on questions of fact and in the past has not been prepared to rule on whether Part IVA or other anti-avoidance provisions will apply (although he has somewhat tempered this blanket refusal in more recent times) on the basis that he does not have legislative power to do so.

In circumstances where the application of a tax law depends upon the satisfaction of the Commissioner or what the Commissioner considers to be reasonable and while such provisions continue to exist, the power of the Commissioner to issue private binding rulings should be amended so that he can, in relation to a particular set of facts or assumptions that he has asked to make, rule as to whether he would or would not be satisfied or as to what would be reasonable.

Such a ruling would, as is presently the case, only be binding on the Commissioner if the transaction or arrangements took place as outlined in the application for private binding ruling and on the basis that the full and complete material was made available to the Commissioner. Moreover, the ruling would not be binding on the Commissioner if there was fraud or misrepresentation occurring.

In essence, the extension of the ability of the Commissioner to rule on whether he would be satisfied, for example in relation to the arm's length nature of a transaction set out in Section 73B(31) as outlined above, would give greater certainty to taxpayers entering into transactions.

Conclusion

In essence, the submission of this company is that absence of fraud and misrepresentation, a proper, fair and balanced self assessment regime requires the Commissioner to complete his review of transactions in a timely manner and that the law should not provide an unlimited time within which he can raise an amended assessment to increase a taxpayer's liability. This is particularly the case where his ability to do so depends upon concepts that involve his satisfaction or his view of what is reasonable in all of the circumstances.

We would be pleased to discuss this submission with you at your convenience.

Yours sincerely



James C Fox
Managing Director