Australia introduces multinational anti-avoidance legislation into parliament

September 21, 2015

In brief

On September 16, 2015, *Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015* (the Bill) was introduced into Australian parliament.

The Bill includes the Australian government's own version of the diverted profits tax and would be effective on January 1, 2016. The multinational anti-avoidance legislation (MAAL) was originally announced on May 12, 2015 as part of the 2015-16 Federal Budget. The legislation seeks to tax certain non-residents as if they have a permanent establishment (PE) in Australia where certain conditions are satisfied. In addition, where the MAAL applies and the taxpayer does not have a reasonably arguable position, penalties of 100% will apply.

The government has explained that the rules are specifically targeted at 30 large foreign multinational corporations (MNCs). However, we expect that other taxpayers will be inadvertently caught and that many more will need to examine and document why the MAAL is not expected to apply in their circumstances.

The Bill also doubles the penalties that would otherwise be imposed on 'significant global entities' (i.e., members of a group with annual global income of AUD 1 billion or more) that enter into tax avoidance or profit-shifting schemes in circumstances where a taxpayer adopts a position that is not reasonably arguable (from July 1, 2015). Further, the Bill introduces country-by-country reporting for income years starting on or after January 1, 2016).

In detail

Multinational anti-avoidance

The Explanatory Memorandum (EM) to the MAAL explains that the multinational anti-avoidance rules are "*designed to counter the erosion of the Australian tax base by MNCs using artificial or contrived arrangements to avoid the attribution of business profits to Australia through a taxable presence in Australia*" because "*some MNCs engage in deliberate tax avoidance, exploiting legal loopholes to pay less tax than the law intended*". As a result, the MAAL is "*targeted at 30 large MNCs, though up to 100 companies may need to review their arrangements to make sure they comply with the law*".

- a foreign entity supplies goods or services (other than equity or debt interests) to an unrelated customer in Australia

- activities are undertaken in Australia directly in connection with the supply
- an Australian entity that is an associate of, or commercially dependent on, the foreign entity undertakes some or all of those activities in Australia
- some or all of the income is not attributable to an Australian PE of the foreign entity and
- the foreign entity is a 'significant global entity'.

However, the MAAL will only apply when the government concludes that the scheme was entered into for the principal, or for more than one principal purpose that includes the purpose of, enabling a taxpayer to reduce Australian taxes or reduce Australian and foreign taxes. For these purposes, a deferral of foreign taxes is deemed to be a reduction of foreign taxes unless there are reasonable commercial grounds for the deferral.

If the MAAL applies, it is necessary to assume that the foreign resident had a PE in Australia and that all, or some of the activities of the foreign resident were undertaken in Australia by that postulated PE. Accordingly, the PE's arm's-length profits will be deemed sourced in Australia and subject to corporate tax in Australia. In addition, any interest or royalties paid by the foreign resident and attributed to the notional PE may also be subject to Australian withholding tax.

Administrative penalties of 100% of any shortfall, plus interest, may be imposed in addition to the base tax liability when the MAAL applies.

According to the EM, "the gain to revenue is unquantifiable" because "it is extremely difficult to quantify the amount of profit that would become taxable in Australia (either as a result of ATO enforcement or behaviour change)".

The takeaway

The Australian government has decided to move ahead of the G20 BEPS project by, in effect, overriding existing bi-lateral tax treaty undertakings. The MAAL has been drafted as an anti-avoidance provision which is intended to unilaterally override Australia's tax treaty obligations.

The MAAL applies broadly and may affect some arrangements that were not intended to be covered. At the very least, all foreign residents selling goods or services to unrelated Australian customers should consider whether the MAAL could apply and should document these findings.

Although the MAAL is not yet law, there is limited time to prepare because the MAAL applies to any tax benefits obtained from January 1, 2016, regardless of when the arrangements were first established. In practice, it could be difficult to assess whether the MAAL could apply to existing arrangements (particularly those that have been in place for some time) and, where necessary, to develop and assess the costs and benefits of alternative options for restructuring.

Let's talk

For a deeper discussion, please contact:

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