16 August 2024

Director International Tax Unit
Corporate and International Tax Division
The Treasury
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Dear Director

UDIA National Non-Resident CGT Submission

Thank you for the opportunity to provide our comments on the Non-Resident CGT paper, "Strengthening the foreign resident capital gains tax regime – July 2024" (**Non-Resident CGT Paper**).

We note, the current paper does not provide a lot of the necessary specifics around the proposals and so we reserve our position on the detail.

UDIA National strongly supports a smooth transition to effective reform on Non-Resident CGT to ensure:

1) the rules recognise our reliance on foreign capital and especially its unique role in establishing new/greenfield markets and projects in Australia where domestic capital is more risk averse;
2) any new rules do not reduce the investment in infrastructure we need for liveable, sustainable cities, due to potentially extensive expansion of CGT tax for non-resident investors; and
3) the rules operate to ensure there is a transparent, accountable and reviewable methodology for determining non-resident CGT tax payable that does not rely solely on one Government agency.

The Urban Development Institute of Australia (UDIA) National is the development industry's most broadly representative peak body with more than 2,000 member organisations - spanning top tier global enterprises, consultants, small and large-scale developers, Community Housing Providers and local governments.

The development and construction industry delivers 9% of Australia's GDP and creates jobs for 1.307 million Australians. Every dollar invested in housing delivers $2.90 in broader economic activity.

Our members deliver the majority of affordable market housing across Australia. Most housing created by our members is sold near or below median house prices.

Delivery of housing depends heavily on major and enabling infrastructure that is critical to building our cities, housing communities as well as supporting, industries, jobs and economic development.

The issue

The current CGT settings were said (in 2006) to be designed to encourage foreign investment. As with any set of laws, issues and uncertainties have arisen which need to be resolved.

Given the scope of the Non-Resident CGT Paper, it is reasonable to suggest however that the current proposals go well beyond resolving these issues and uncertainties. The proposed outcomes have the potential to actively discourage foreign investment including investment in key renewable and similar projects.

So whilst UDIA is broadly supportive of the concept of amending Australia CGT provisions to provide a more consistent set of outcomes, it is vital that the proposals:

- contain an appropriate transitional regime;
- create an appropriate concessional outcome for renewables, other Green related buildings and projects, other than those which fall within scope of the green building MIT rules;
- provide for clearly defined outcomes which are not over-burdened with harsh, unworkable, integrity and reporting provisions; and
- do not result in the ATO becoming a final, decision making, regulator.

It is also important that the interaction of the rules with Australia's double tax treaties be fully considered. As has been seen in other contexts, changes in law can lead to quite different outcomes under Australia's double tax treaties (which are now also subject to the MLI).

Further the UDIA supports a clearly drafted set of rules dealing with synthetic disposals. Any changes in this respect need to reflect the fact that they are a wide range of existing provisions which tax various financial transactions and any synthetic disposal provisions need to be properly aligned with, and ordered with, these provisions to avoid any double tax outcomes and any uncertainty. Further, any such provisions much also appropriately resolve the interaction between a synthetic disposal and an actual disposal without either double taxation or, in the case of an actual disposal reflecting an earlier synthetic disposal, any further taxation based on any increased in value.

The following short comments provide some further detail on the points in our summary above.

1. Transition

There will be arguments around transition. Some will argue that the changes reflect the original intention of the provisions such that no transitional regime is required.

Even if that is true (which, in our view, is not the case), **it is necessary and appropriate to provide a transitional regime**. Major capital has been invested based on a common, although often disputed, set of outcomes, and that capital should not be subject to revised (or more defined) set of outcomes without such transitional relief. Commerce relies on certainty of outcomes and orderly markets.

2. Renewables and Green Projects

If these changes become law, we will have no operative concession for such projects beyond the green building MIT rules. This will create a strange outcome where general real estate investments are taxed more concessionally than renewable projects.

Whether in drafting these provisions or through the MIT rules, we need to provide an effective set of rules for such projects.

The MIT provisions are currently not easily applicable to such projects due an uncertainty in defining the assets the MIT can hold and the lack of any stapling outcome which facilitates the operation of the project.

3. Drafting of the rules

Reporting to the ATO is not itself an issue provided that the ATO process does not effectively determine the operation of the law and does not unduly delay commercial transactions.

However there is a danger that the ATO effectively becomes a law-maker as a failure to obtain an ATO clearance might prevent a transaction from proceeding. Parties might be forced to accept an

ATO view of the law in order to proceed. In these circumstances, the ATO view becomes the law without any process allowing for it to be reviewed. This is a dangerous precedent for tax policy.

Otherwise, the rules must be clear and certain and not subject to various levels of ATO discretion and a raft of new reporting and integrity measures which make them a disincentive for foreign investment.

4. Other Issues

a) The Threshold

Our initial view is that the $20m threshold feels low and may result in difficulties in the timely processing of ATO responses. We would like to see some analysis of the number and value range of transactions and a considered decision which balances the various considerations including risk, timing etc

There is perhaps some logic in aligning these threshold with the FIRB thresholds but we need more information to make an informed decision.

b) Timeframes

As a general proposition, **where the transaction is subject to a FIRB process, we suggest that those FIRB timelines apply, as the ATO is already part of that process.**

When a transaction falls outside of the FIRB process but reporting under these proposals is required, we think that there is little benefit in advising the ATO of a transaction until a contract has been exchanged such that the transaction terms are settled.

From an ATO perspective, reviewing transaction steps prior to their finalisation would be inefficient. As noted above, it is critical that the ATO process be short and effective. It is not commercially viable to have otherwise commercial contracts held in suspense pending ATO review.

Purchaser - the purchaser should be entitled to rely on the outcome of the ATO review process.

Penalties - the existing penalty framework provides ample precedent for a similar outcome in relation to these proposals.

We need substantially more information to make informed recommendations to support your initiative and we are keen to meet at your earliest time to discuss the points raised in the Non-Resident CGT Paper.

Please contact the UDIA National Head of Policy and Government Relations - Andrew Mihno on 0406 454 549 to arrange a time and discuss this further.

Yours sincerely

Col Dutton
UDIA National President