

Via email: carolyn.billett@ato.gov.au

Attention: Carolyn Billett

Australian Taxation Office
GPO Box 9977
Albury NSW 2640

16 February 2018

LAW COMPANION GUIDELINE LCG 2017/D7

Dear Carolyn,

BDO welcomes the opportunity to provide feedback in response to Law Companion Guideline LCG 2017/D7 - Diverted profits tax ("the LCG"), which was released by the Australian Taxation Office (ATO) on 18 December 2017. We provide the flowing comments that we trust will be taken into account in the finalisation of the LCG.

The Amount of the tax benefit mentioned in paragraph 177(1)(b)

Paragraphs 13 to 17 of the LCG indicates that when considering whether a scheme had the purpose of obtaining a tax benefit, account has to be taken of tax benefits of any other taxpayers that may also have received tax benefits under the scheme. The issue here is that the benefit received by the other taxpayers may not have any relevance to the tax benefit received by the taxpayer. This may be particularly onerous where the taxpayer and the other taxpayers receiving the tax benefits are not associated but also could be inappropriate where the taxpayers are related.

We understand that the reasoning for this approach in the LCG is that when looking at the matters that need to be considered in determining whether the scheme was entered into with the principle purpose of obtaining a tax benefit, paragraph 177J(2)(d) says the "tax benefits" that need to be considered are the "tax benefits" mentioned in paragraph 177J(1)(b). The tax benefits mentioned in paragraph 177J(2)(b) refer to the tax benefits obtained by the relevant taxpayer and also tax benefits obtained by any other taxpayer under the scheme.

However, we submit that this is the wrong interpretation of paragraphs 177J(2)(d) and 177J(1)(b) because we consider the tax benefits that are being identified in paragraph 177(1)(b) are being identified just for the purpose of identifying the relevant scheme. Paragraph 177(1)(b) is reproduced below:

“(b) it would be concluded (having regard to the matters in subsection (2)) that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a principal purpose of, or for more than one principal purpose that includes a purpose of:

- (i) enabling the relevant taxpayer to obtain a tax benefit, or both to obtain a tax benefit and to reduce one or more of the relevant taxpayer’s liabilities to tax under a foreign law, in connection with the scheme; or
- (ii) enabling the relevant taxpayer and another taxpayer (or other taxpayers) each to obtain a tax benefit, or both to obtain a tax benefit and to reduce one or more of their liabilities to tax under a foreign law, in connection with the scheme;

We submit that the better view is that the reference to tax benefits obtained by other taxpayers under the scheme in sub paragraph 177J(1)(b)(ii) is that they are only referred to for the purposes of identifying the relevant scheme and, in particular, to ensure that schemes that the taxpayer is not the only participant in are included.

We understand that the rationale in the LCG is supported by paragraph 177(1)(b) referring to “having regards to the matters in subsection (2)” [177J(2)] and that paragraph 177J(2)(b) refers to the amount of the tax benefit mentioned in paragraph 177J(1)(b), as referred to above.

However, we consider that the better interpretation is that the tax benefit referred to in paragraph 177(1)(b) should only be the tax benefit of the relevant taxpayer and not include the tax benefits of other taxpayers that are party to the scheme.

This interpretation avoids the problem of including tax benefits that do not have any relevance to the tax benefit received by the taxpayer.

The interpretation in the LCG seems to create unjustified redundancy in the analysis of the scheme and whether a relevant taxpayer has obtained a DPT tax benefit for the principle purpose, or one of the principle purposes as stated in section 177J(1)(b).

According to the LCG, the relevant taxpayer (taxpayer A) could fail the analysis under 177J(1)(b) even if non-tax financial benefits are sufficiently significant compared to the tax benefit of the relevant taxpayer, i.e. where another taxpayer’s tax benefit is significantly greater than the non-tax financial benefit, all else being equal. Under circumstances like this, it seems more logical to simply perform the analysis on the other taxpayer (taxpayer B), such that the other taxpayer is the relevant taxpayer.

If the Commissioner can issue a DPT assessment to both taxpayer A and taxpayer B, it is possible for the Commissioner to issue DPT assessments to both taxpayer A & B even though taxpayer A’s tax benefit is justified in the circumstances after consideration of the matters referred in subsection 177J(2) in relation to taxpayer A’s tax benefit only.

Accordingly, BDO recommends that in the final version of LCG 2017/D7, that the matter under subsection 177J(2) should only apply in respect of analysing the DPT tax benefit for the relevant taxpayer.



Should you wish to discuss any of our comments, please feel free to contact me on +61 2 9240 9736, or via email: Lance.Cunningham@bdo.com.au.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Lance Cunningham', written over a light blue horizontal line.

Lance Cunningham
BDO National Tax Director