

Via email: MNETaxIntegrity@treasury.gov.au

Treasury  
International Tax Unit  
Corporate and International Tax Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

20 August 2024

Dear Sir/Madam

## **BDO SUBMISSION - STRENGTHENING THE FOREIGN RESIDENT CAPITAL GAINS TAX REGIME**

BDO refers to the invitation by Treasury to provide feedback following the recent release of the Consultation Paper in relation to proposed measures to strengthen the foreign resident capital gains tax regime (**Consultation Paper**). Our feedback in response to the Consultation Paper is set out below.

### **365-day Principal Asset Test (PAT)**

BDO notes Treasury's intention to implement a 365-day Principal Asset Test to replace the existing point-in-time test applicable at the time of the relevant CGT event. Measuring and assessing satisfaction of the PAT during the 365-day period prior to the CGT event may be burdensome in some circumstances. One such circumstance may arise for infrastructure and construction projects in relation to assets sufficiently connected to Australian land. Challenges may arise in valuing infrastructure and construction assets as construction progresses over time. The market value associated with such assets can vary constantly and may fluctuate widely in some instances. Obtaining a valuation may also be difficult due to a market not being readily available or less available during some or all of the construction phase.

BDO acknowledges Treasury's intention to prevent taxpayers from undertaking pre-transaction manipulations in order to satisfy the existing point-in-time PAT. BDO does however suggest that measurement concessions or guidelines may be useful in achieving a balance between integrity and ensuring that the valuation requirements on vendors to determine whether they satisfy the PAT is not overly burdensome.

In implementing a test covering a period of time, BDO suggests that Treasury should consider allowing taxpayers to periodically test over a given period. As an example, where a taxpayer is contemplating a disposal of the relevant membership interests in more than 12 months' time, they could be allowed to prospectively test on a quarterly basis to identify whether they pass the PAT. It follows that modifications will be required where a taxpayer's income year is less than 12 months.

Alternatively, if the contemplation of disposing of the membership interests is over a shorter time frame, the valuations would have to be conducted retrospectively each quarter over the 12 month period before the CGT event.

Implementation of periodic testing, with a mechanism similar to the examples above may assist in reducing the compliance burden whilst maintaining the integrity of the proposed measures.

#### **ATO notification of non-IARPI vendor declarations**

##### *Appropriateness of the \$20 million threshold*

BDO submits that the \$20 million transaction threshold be increased to at least \$100 million. Whilst we acknowledge Treasury's intention to obtain maximal oversight over high value transactions undertaken by foreign residents, the \$20 million threshold is likely too low and would be catching many transactions that would not be considered to be "high value transactions". The example of an incorrect non-IARPI vendor declaration given in the consultation paper dealt with disposal of membership interests worth approximately \$2.8 billion. It is suggested that in this context the \$20 million PAT threshold would be seen as small to middle value transaction.

BDO appreciates the importance of oversight over transactions but suggests that a balance must be achieved between oversight and creating and maintaining Australia as an attractive place to invest foreign capital. An increase in this threshold to at least \$100 million may assist in achieving Treasury's objective of optimising visibility over high value transactions undertaken by foreign resident vendors whilst not adversely impacting transaction flow via an excess compliance burden for smaller value transactions.

BDO notes that further guidance will be required in relation to the measurement date in applying the threshold. Our comments in relation to timing of making the notification below are relevant in considering this matter. Additionally, further guidance should be provided where the CGT event is transacted in a foreign currency and the timing of the foreign exchange conversion to AUD in determining whether the threshold has been breached.

##### *Time frame for foreign resident vendors to notify the ATO in advance of a transaction*

BDO recommends that the timeframe adopted for foreign resident vendors to notify the ATO ahead of the transaction be as short as possible. With regard to the length of the review period, BDO recommends that the review period be as short as possible, say 28 days, so as to not obstruct transaction activity. The review undertaken by the ATO should be a high-level review such that the ATO can ascertain the nature of the transaction, not an audit or formal review. As such, any larger time frame would appear unreasonable and excessive.

Additionally, BDO notes Treasury's reference to the review period being '*before the relevant CGT event or settlement (whichever is earlier)*'. We note that, for CGT Events in Division 104 of the Income Tax Assessment Act 1997, the timing of CGT events can vary widely, depending on the circumstances. For most CGT events, the time of a CGT event is different to when the CGT event happens. For example, for CGT event A1, the CGT event happens when there is a change of ownership of the asset, but if the transaction is made under a contract, the time of the CGT event is deemed to be the date of making the contract, which is usually some time before the change of ownership. The consultation

paper does not indicate which of these times is the relevant time where it refers to “*before the relevant CGT event*”.

BDO suggests that the appropriate time for the review period to end in such situations is the date of the change of ownership, which would generally coincide with the date of settlement. BDO therefore suggests that the review period commence 28 days prior to settlement of a transaction in all instances. The reasoning of this is to provide taxpayers with certainty as to timing. Settlement is widely understood commercial and legal event, not requiring in depth analysis of when a particular CGT event actually occurs. The decision tree diagram in the Consultation Paper appears to support this suggestion as it refers to the ATO, being able to “*intervene before settlement*”.

Certainty in relation to timing of lodgement and reporting requirements such as this is essential in improving taxpayer compliance.

*The information the purchaser should be required to consider in determining whether a declaration is false (and if so, to withhold)*

The current requirement for the purchaser to determine know whether a vendor’s Non-IARPI declaration is false is problematic as it assumes the purchaser has information that may not be available to them available to them at that time. With the introduction of the requirement for vendors to notify the ATO of the non-IARPI declaration, it may not be necessary for a purchaser to determine whether a vendor’s non-IARPI declaration is false.

*Administrative penalties for failure to lodge and providing false and misleading statements*

The Taxation Administration Act 1953 contains administrative penalties applicable in circumstances where taxpayers fail to lodge documents with the ATO on time and make false and misleading statements. These measures are tiered ranging from smaller penalties applying to small and medium-sized taxpayers to those applicable to Significant Global Entities.

Whilst there may be some administrative challenges in implementing the proposed rules, BDO is of the view that the existing penalty regime is sufficient to apply to the notification requirement. The implementation of further administrative measures seems unnecessary and would contribute to further complexity within an already complex penalty framework.

*Assisting taxpayers in complying with their obligations and when to withhold tax*

Guidance will be required to assist purchasers in navigating the requirements. Of particular importance is providing clarity in relation to situations where a purchaser is required to withhold tax, and those where a purchaser is not required to withhold tax. Guidance materials may include process diagrams, flowcharts and summaries. BDO suggests that a combination of resources on the ATO’s website and more formal publications such as a Law Administration Practice Statement (PSLA) or similar would be ideal.



Should you have any questions or wish to discuss any of the comments made in our submission, please do not hesitate to contact me on 02 9240 9736 or via email ([lance.cunningham@bdo.com.au](mailto:lance.cunningham@bdo.com.au)).

Yours faithfully

**BDO Services Pty Ltd**

Lance Cunningham

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## Appendix