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4 October 2023

Director  
Tax Agent Regulation Unit  
Personal and Indirect Tax and Charities Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Sir/Madam,

#### **RESPONSE TO PWC - REFORM OF PROMOTER PENALTY LAWS**

BDO refers to the invitation by The Treasury to provide comments and feedback on the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC Response - promoter penalty laws reform* (exposure draft legislation) released to deliver part of the government's response to the PwC matter, announced on 6 August 2023. The draft Bill is part of the Federal Government's efforts to strengthen the integrity of our tax system and increase the power of Australia's tax regulators. BDO has provided responses to select areas in relation to the exposure draft legislation and associated documents in the pages overleaf.

Please see the BDO comments in the attached Appendix.

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 [lance.cunningham@bdo.com.au](mailto:lance.cunningham@bdo.com.au).

Yours sincerely

Lance Cunningham

BDO National Tax Technical Leader

## **BDO Submission to the Treasury Exposure Draft Legislation - Response to PwC - Reform of promoter penalty laws**

BDO has considered the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC Response - promoter penalty laws reform* (exposure draft legislation), Explanatory Memorandum (EM) and associated documents that amends the *Taxation Administration Act 1953* (TAA) to deliver part of the government's response to the PwC matter, announced on 6 August 2023. BDO has confined its comments to Treasury's response to the PwC matter to the Exposure Draft legislation concerning proposed changes to the promoter penalty regime contained in Schedule 1 of the *Taxation Administration Act 1953* (TAA 1953).

### **Promoter penalty reform**

#### **Wide application of promoter penalty laws to apply to all ATO rulings**

Currently, the promoter penalty laws apply where a scheme has been promoted on the basis of conformity with a product ruling, but implemented in a way that is materially different from that described in the product ruling. This is proposed to be expanded to prohibit the misrepresentation of a tax scheme's conformance with all types of ATO rulings (i.e. public rulings, private rulings or oral rulings), whether the scheme is implemented or not. The proposed amendments will make schemes that have been promoted on the basis of conformity with all types of rulings actionable.

Our concerns in relation to the proposed amendments are as follows:

#### **Distinguishing between advice and scheme promotion will be more difficult**

Leaving aside the difficulty of distinguishing between advice and conduct that is promotion under the current rules, the change introduces a further level of jeopardy to 'normal' advisory activities. While it is very clear when one is advising or promoting a scheme covered by a product ruling (and, indeed, a class ruling) due to the nature of that type of ruling, it is significantly less clear when advice will be in relation to conformity with other types of ruling.

For example, unless specifically limited, it would be normal to imply into the scope of an adviser's retainer that it was based on all relevant authorities (including rulings) at the date of its issue. It is therefore possible to argue that all advice is potentially actionable on the basis that unless specifically stated otherwise, it is in accordance with all **relevant** rulings - whether called out in the advice or not. If this is the case, it raises conduct that would otherwise be negligence to the realms of being actionable under civil penalty provisions - which seems overreach.

#### **Edited Versions of Private Rulings**

The EM to the exposure draft legislation extends coverage of this provision to edited versions of private rulings. BDO can understand such an extension where the edited version is specifically referenced as being endorsed by the ATO. However, the changes proposed in the exposure draft legislation and comments in EM could appear to cover promotion of a scheme that refers to an

edited version of a private ruling as giving some support for the position taken under the scheme (see paragraph 1.42 of the EM).

We understand that the ATO specifically states in all edited versions of private rulings on the ATO website that “You cannot rely on this record in your tax affairs. It is not binding and provides you with no protection from under paid tax, penalty or interest” i.e. they are not endorsed by the ATO. Therefore we agree that if a promoter promotes a scheme on the basis that the ATO have endorsed a similar arrangement in an edited version of a private ruling, they should be subject to penalties. However, the way the exposure draft legislation and the EM are drafted it could be interpreted that an adviser who refers to an edited version of a private ruling as giving some support for the tax effect of an arrangement, they may inappropriately fall foul of the promoter penalty provisions. BDO suggests there be some clarification in the final EM what sort of qualification should advisers include in tax advice that mentions edited versions of private rulings in support of a proposed arrangement in order for the promoter penalties not to apply. As a suggestion, such a qualification could be

“While the edited version of the private ruling may give some support for the tax consequences for the arrangement, the edited version of the private ruling cannot be relied upon and is not endorsed by the ATO”.

Further in relation to private rulings we note that edited versions of private rulings do not contain all the relevant information that was in the original private ruling, therefore it would be difficult to say any scheme is being promoted as being in conformity with a private if the promoted has not received a copy of the original ruling issued by the ATO ruling.

BDO requests that further consideration and clarification be provided in relation to these proposed amendments. We would also request Treasury consider whether there is any empirical evidence which can be shared of the types of behaviours targeted by this amendment? BDO believes it would be useful to consider the drafting in relation to that evidence.

### **Reconsider alternative maximum penalty turnover based calculation**

The exposure draft legislation proposes to significantly increase the maximum civil penalties for promoters of tax exploitation schemes, consistent with the penalties in the *Corporations Act 2001*. BDO acknowledges that the new alternative maximum penalty applicable to bodies corporate and Significant Global Entities (SGEs) ensures that the civil penalties, able to be imposed by the Federal Court, are material for these entities to deter them from treating such penalties as a mere cost of doing business. Specifically, the proposed amendments insert subsections 290-50(4A)(c)(i) and subsection 290-50(4B)(e)(i) for an alternative maximum civil penalty for bodies corporate and SGEs (this includes partnerships and trust that are SGE’s) being:

*‘10% of the aggregated turnover of the entity for the most recent income year to end before the entity contravened, or began to contravene, the provision;’*

We note that the turnover based calculation references the turnover for the income year ending before the actionable conduct begins. BDO questions the relevance of the year prior to contravention, particularly given the time generally required to investigate promotion activity. Why would that not be

the year in which the actionable conduct occurs, such that the turnover from the actionable conduct (or some part of it) was included in the calculation?

**Extension of actionable conduct to all partners in partnerships and all trustees of a trust that are SGE's**

In relation to the extension of actionable conduct to all partners in a partnership that is an SGE and all trustees of a trust that is an SGE, BDO is concerned that this seems to be overkill to provide no defence at all for not knowing and not being involved. The proposed provisions impose quasi-criminal consequences on persons merely by association. We consider that this is not consistent with the general understanding of the rule of law. It is also unnecessary, as pecuniary liability for actions of the partnership or trust will be effectively imposed on all partners or trustees in any event.