



AUSTRALIAN BANKERS' ASSOCIATION INC.

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The Hon. Douglas H Shulman
Commissioner
Internal Revenue Service
CC:PA:LPD:PR (NOT-121556-10)
Room 5203
PO Box 7604, Ben Franklin Station
WASHINGTON DC 20044

Dear Mr Shulman,

Re: Notice 2010-60

The Australian Bankers Association ("ABA") appreciates the opportunity provided by Notice 2010-60 to comment on the implementation of information reporting and withholding under Chapter 4 of the Internal Revenue Code. While the ABA agrees broadly with the comments submitted by the International Bankers Federation, it offers these comments concerning financial institutions in jurisdictions such as Australia that share a set of characteristics that make them so inhospitable to tax evasion by U.S. taxpayers as to render the application of Chapter 4 unnecessary and unjustifiable.

The ABA represents the Australian banking industry. It works with its members to provide analysis, advice and advocacy and contributes to the development of public policy on banking and other financial services. The ABA also works to ensure the banking system can continue to deliver the benefits of competition to Australian banking customers. In communicating the industry's views, the ABA works with National, State and Territory Governments, regulators, international organisations, other industry associations, the public, community groups and the media. The ABA has 23 members, including the four major Australian commercial banks, regional banks, and international banks holding an Australian banking licence.

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Chapter 4 Should Not Be Applied to Banks Domiciled in Highly Tax Compliant, Tax Transparent Jurisdictions that are Inhospitable to Tax Evasion

The Association recognises the importance of the objectives of Chapter 4 in preventing U.S. taxpayers from evading taxation by hiding their funds and foreign investment income in accounts outside the United States. Because Australian residents are taxed on their overseas investment earnings, the Australian Tax Office ("ATO") shares many of these same concerns and the Australian banking industry has worked closely with the ATO to address them. Given our experience, we believe that there are some jurisdictions, such as Australia, that are so hostile to tax evasive activities that the concerns addressed by Chapter 4 are not implicated for institutions domiciled in them.

Such jurisdictions are the antithesis of tax secrecy havens. They require a high degree of disclosure, impose taxes at rates comparable to the United States, and demonstrate high levels of cooperation globally in the fight against tax evasion. Imposing the reporting requirements of Chapter 4 on financial institutions domiciled in such jurisdictions will produce very little, if any, revenue for the United States, and far less revenue than the costs that would be imposed on the institutions.

For example, Australia taxes investment income in much the same manner as the United States, and at a higher top marginal rate of 46.5 percent. It has long had tax treaties with the United States providing for tax information sharing and is in the forefront of sharing tax information with tax authorities around the world. Indeed, Australia currently serves as chair of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes. Like the United States, it requires its financial institutions to report at least annually on the investment income of all account holders, resident and non-resident. Investment income of non-residents is subject to mandatory withholding at various rates depending on the treaty status of the non-resident.

All account holders are subject to customer identification procedures and Australian institutions must review accounts for suspicious activity. Residents must either provide a tax file number (TFN) or Australian Business Number (ABN) or face mandatory withholding at the highest marginal rate of 46.5 percent.

Account holders that make a declaration as non-residents or have provided an overseas address are reported to the Australian Tax Office (ATO) along with information on their account earnings.¹ Finally, Australia has stringent requirements for reporting incoming and outgoing electronic transfers of funds, and is among the very few jurisdictions that report on **all** such transaction, by means of International Funds Transfer Instruction Reports (IFTIs) to the anti-money laundering regulator, AUSTRAC. More than 18 million IFTIs were filed in 2009-10.

¹ There are some de minimis exemptions available under Australian law.

The ATO has access to these reports, which enables it to identify activities that may be indicative of tax evasion. In sum, it is hard to find any reason why a U.S. taxpayer seeking to avoid U.S. taxes would use an account at an Australian-domiciled institution, where funds may be taxed at even higher rates than in the United States and there exists a great likelihood that U.S. authorities will be informed of the existence of their account.

It is relatively simple to construct a list of criteria that the IRS should consider in identifying such highly compliant and cooperative jurisdictions. Such a jurisdiction would meet most, if not all, of the following criteria:

- It has a comprehensive income tax regime and tax rates comparable to those of the United States.
- It is not and never has been designated as a tax secrecy jurisdiction or tax haven by the OECD or any similar organisation.
- It has a tax treaty with the U.S. that provides for the routine sharing of tax information necessary for each country to administer and enforce its tax laws.
- It requires financial institutions to implement customer identification and verification procedures that meet peer-reviewed internationally acceptable standards.
- It requires financial institutions to file with the tax authorities at least annually reports of investment income paid to all account holders, whether resident or non-resident.
- It requires all resident account holders to provide sufficient information to identify them by means of an individual identifier or face mandatory withholding at the highest marginal rate.
- It requires account holders claiming non-resident status to be subject to local withholding tax at tax treaty rates.
- It requires account holders claiming non-resident status to provide identifying information, including an address, and the reporting of that information to the tax authority.
- It requires reporting of incoming and outgoing wire transfers and makes that information accessible to its tax authority.

The costs of implementing Chapter 4 are grossly disproportionate to any possible additional revenue that could be recovered from U.S. tax evaders in such jurisdictions

Institutions subject to such tax and regulatory systems will rarely, if ever, implicate the concerns that are addressed by Chapter 4 and for that reason should not be subject to the heavy and costly burden of reporting that the Chapter will impose.

The four major banks in Australia currently have approximately 8 to 10 million customers each. The costs of implementing the anti-money laundering and counter-terrorism financing laws ("AML/CTF") in Australia, which provided some level of grandfathering for existing accounts, was in excess of AUD 100 million for each of the major banks. These costs included system changes and the requirement to contact only a small proportion of existing customers.

There was no requirement under AML/CTF or any other Australian law, for a bank to retrospectively verify the identity, or any attribute of identity, for all their existing customers, nor is this required by the international standards for AML/CTF issued by the Financial Action Taskforce (FATF).

Complying with all the requirements of Chapter 4 will be complex and expensive. Given the magnitude and complexity of the required task for implementation, it is expected that the costs would be at least as much as, and potentially significantly more than the total costs incurred for AML/CTF.² This is without any consideration of the costs that will be incurred by the bank's customers, very few of whom are U.S. taxpayers, in assisting the banks to comply with U.S. tax law.

To put this in perspective, in the 2008-2009 tax year the total amount of non-resident withholding tax collected from customer accounts by all four major banks is estimated to be AUD 150 million³. This withholding is for all persons with an overseas address; non-residents who are U.S. persons represent a very small proportion of the banks' non-resident customers.⁴ Consequently, the cost to Australian banks of complying with the requirements of Chapter 4 would be grossly disproportionate to the potential tax revenue that might be recovered by the IRS. Despite these facts the current rules do not distinguish between Australian banks and banks resident in jurisdictions with less effective and transparent tax regimes.

The legal difficulties of implementation

Other than the significant costs of implementation, there remain significant conflicts of law which may force the banks to an impossible choice between obeying Australian law or implementing Chapter 4. If chapter 4 is implemented

² Likely additional steps and costs include the following at a minimum:

- Solicitation of information not collected previously from millions of customers;
- Changes of all product systems to capture existing and new customer data, including citizenship;
- Customers using multiple products may receive multiple requests which will cause confusion;
- Given the scale of the customer contact, dedicated call centres will need to be established to deal with customer concerns, and call centre and branch staff will need to be trained on the new rules and how to identify customers.
- If face-to-face identification and verification took only 10 minutes per customer, then to identify 8 million customers, the exercise would likely take over 190,000 work days to complete.

These costs will be even higher if the United States does not provide an extensive public relations campaign to explain to the Australian public why they must provide information to their banks to establish that they are not U.S. taxpayers.

³ The Australian Government has recently published a figure of AUD165 million for total IWT collected for the 2007-2008 tax year.

⁴ As noted, there is no appreciable tax benefit to a U.S. person who claims Australian residency because of the high Australian tax rates.

by Australian banks, then Australian law may be breached; if chapter 4 is not implemented, then the banks will be penalised by the withholding.

In particular, compliance would require every identified U.S. person to consent to disclosure of their personal information under the Australian Privacy Act. If such consent is not forthcoming then Chapter 4 seems to require that those accounts be closed.

In taking such an action, the bank would violate Australia's anti-discrimination legislation⁵ as the bank would be closing accounts on the basis that the customer could be a U.S. citizen. This is a direct breach of the legislation which cannot be waived by customers.

Even the collection of information with consent would not be consistent with the design principles of the Australian AML/CTF regime, which does not require collection of nationality and together with the racial discrimination legislation, protects customers of banks and all other providers of goods and services from discrimination on the grounds of race, colour, descent, national or ethnic origin, and immigration status.

This situation is complicated further by the negative identification test that requires all accounts are assumed to be held by U.S. persons unless the FFI can prove otherwise. This requires the collection and provision of data even in the absence of indicia of U.S. citizenship, and again banks cannot compel customers retrospectively to provide further information other than the information provided under required statutory identification checks. As such it would seem likely that the result will be a requirement to report most of the banks customers (again numbering in the millions) as it will not be possible to prove holders are not U.S. citizens.

The intention of this provision cannot be to require the reporting of all Australian account holders, but this would likely be its ultimate effect.

Solutions

The Secretary of the Treasury is authorised to exempt classes of "institutions with respect to which the Secretary has determined that the application of [section 1471] is not necessary to carry out the purposes of [section 1471]."⁶ We believe that the banks domiciled in jurisdictions like Australia that meet the criteria listed above form such a class and should be exempted. The exemption would be applicable to any member of the expanded affiliated group of the FFI (as defined in section 1471(e)) and any branch of the FFI located outside the home country of the FFI (collectively a "Qualified Group") if the branch and or the member is either subject to comprehensive supervision in the home country of the FFI, or is

⁵ The Racial Discrimination Act 1975 (Cth) adopts the International Convention on the Elimination of All Forms of Racial Discrimination.

⁶ I.R.C. § 1471(b)(2)(B).

located in a jurisdiction that has a tax information exchange agreement or a double taxation treaty with the United States.⁷

Not only is the application of these requirements to such institutions not necessary to carry out the purposes of the section, recognising such an exempt class might further the purposes of Chapter 4 by encouraging other jurisdictions to adopt more rigorous tax administration and full transparency in the sharing of tax information. This solution would eliminate any concern about conflicts between Chapter 4 and the laws of the exempt jurisdictions.

As an alternative to a complete exemption, the Secretary could exercise the authority granted by section 1471(b)(2)(B) to provide for a balancing between what will otherwise inevitably be unwarranted and disproportionate compliance costs and recovery of additional revenue from non-compliant tax payers, particularly in respect of existing account holders. This could be accomplished through the use of an alternative agreement format providing for more tailored requirements that must be met by a qualified group of foreign financial institutions from highly tax compliant, highly tax transparent jurisdictions. The conflicts of law issue would still however be present and would require resolution for this alternative to be feasible.

Under this alternative, for example, in the case of pre-existing individual accounts (as that term is defined in Notice 2010-60), a qualified group of foreign financial institutions could be deemed to satisfy the relevant statutory requirements if it adhered to the following steps:

- (1) it treats an account as "other than a U.S. account" if the balance in the account on the relevant measurement date is less than USD 1 million (with no requirement that accounts be aggregated), or if the account is non-interest bearing or dormant (eg, no deposits or withdrawals for a specified period);
- (2) from among the accounts not addressed in step (1), all account holders already documented as U.S. persons for other U.S. tax purposes are treated as specified U.S. persons and their accounts are treated as covered U.S. accounts;
- (3) from the accounts not addressed in steps (1) or (2), accounts will be treated as "other than U.S. accounts" if the electronically searchable (by automated means) information maintained by the institution and associated with the account does not include any of the indicia of potential U.S. status set forth in Notice 2010-60, and these accounts for all intent and purposes would be grandfathered in, no longer be under scrutiny and would not be subject to further review again (unless there was an actual change of circumstance –

⁷ Branches or affiliates located outside an exempt jurisdiction could be permitted to opt into Chapter 4 reporting if allowed by the law of the jurisdiction in which they are operating.

such as an account holder moving to the US, but maintaining the local account).; and

- (4) for the accounts identified in step 3 as containing the indicia of potential U.S. status, notice thereof is provided to the Secretary, but the institution will have no further obligations with respect to such accounts (and the two year and five year updating requirement of Notice 2010-60 will not apply) except to the extent the Secretary requests further information with respect to a specific account and such information is not otherwise available to the Secretary pursuant to a government to government treaty or other information sharing agreement.

The ABA would welcome the opportunity to work with you on the development of these or similar alternatives, in particular with respect to: an exemption for banks domiciled in highly tax compliant jurisdictions; a streamlined reporting system for covered U.S. accounts, if necessary; and a mechanism for dealing with conflicts of laws issues arising from applicable home country laws. We look forward to a continuing and constructive dialogue with the U.S. Treasury, the Internal Revenue Service, and other interested parties on these vitally important issues.

Yours sincerely



Tony Burke