Mr. Andrew Harnisch
Australian Taxation Office
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19 May 2017

Taxation Ruling TR 2017/D2

Dear Andrew

Thank you for the opportunity to comment of TR 2017/D2 which covers topics of much interest to FSC's membership. We also thank you for granting the FSC an extension to make this submission.

We understand that TR 2017/D2 was issued to update the Commissioner's views on how to apply the central management and control test following the Bywater case. We note that the Commissioner's former ruling on these matters TR 2004/15 has been withdrawn with the issue of this draft ruling.

We believe that TR 2004/15 was a well-constructed and useful ruling which clearly and in some detail stated the relevant principles in this area and importantly provided certainty for taxpayers. In part this is because it set out ten examples of how the Commissioner viewed the central management and control test would apply to a wide range of circumstances and types of taxpayers. Because these examples set out the ATO views on a wide range of relevant scenarios, the ruling provided clear guidance and certainty for taxpayers.

Although we generally accept the technical accuracy of the statements and principles embodied in TR 2017/D2 we believe there are some marked omissions and incorrect emphasis in the draft ruling which we strongly request be remedied before the ruling is issued in final. These omissions are as follows:

(i) The Draft Ruling does not provide sufficient certainty or useful safe harbours for taxpayers as it stands. The Draft Ruling should contain a list of examples of how the Commissioners views would be applied in practice similar to the 10 examples set out in TR 2004/D15

While the Draft Ruling discusses the relevant factors in determining the place of central management and control at a high level it does not highlight which factors should be given precedence in this decision. For instance at paragraph 29 it sets out 10 relevant factors. There is no identification as to which of these factors should be given more weight than others.

It would be helpful to put these considerations into at least two categories (i) important considerations and (ii) less important considerations. This is consistent with the High Court's decision in Bywater at paragraphs 61 and 183 which noted that administrative decisions such as appointment of auditors, adoption of accounts or declaration of dividends are largely irrelevant to the question of where central management and control is located.

The absence of practical examples of the Commissioner's view of how the central management and control test operates in practice is of significant concern. We strongly suggest that the examples in TR 2004/15 should be incorporated in the Draft Ruling and updated with any changes that the ATO considers necessary given the Bywater decision. At the very least we request Examples 3, 4, 5 and 9 be included in the ruling as they are relevant to the investment management industry.

Furthermore, we would welcome the inclusion of a new example dealing with a common scenario faced by our industry which is the residence of foreign collective investment vehicles located in the most commonly used offshore fund jurisdictions – Luxembourg and the Cayman Islands which have Australian investment managers. We would welcome the opportunity to provide you with a typical fact pattern in this regard.

(ii) The ATO emphasis in paragraphs 14-16 of the Draft Ruling is inconsistent with the judgment in Bywater.

While paragraph 14 of the Draft Ruling is consistent with the Bywater decision, paragraph 15 in stating that actions of directors are only a "useful starting point" is inconsistent with the Bywater decision. At paragraph 41 of Bywater the High Court states that;

Ordinarily, the board of directors of a company makes the higher-level decisions which set the policy and determine the direction of operations and transactions of the company. Ordinarily, therefore, it will be found that a company is resident where the meetings of its board are conducted.

We believe it is important that these statements or the principles contained in them are stated more clearly in the Draft Ruling. Only in unusual or extreme circumstances, such as those present in the Bywater cases, with its usurpation of the directors' role by the Australian resident accountant will the above ordinary position be overturned.

(iii) The Draft Ruling does not distinguish between companies which carry on a trading business versus those companies which solely carry on investment management activities and which act as collective investment vehicles

The factors relevant to the determination of central management and control differ depending on the type of company and business it carries on. For example, in the case of collective investment vehicles, where a company's business is management of its investment assets and it undertakes only minor operational activities, the factors determining where a company is carrying on a business may be similar to those determining where it is exercising central management and control.

We request that the Commissioner provide further details in the ruling to help distinguish the factors relevant to collective investment vehicles vs ordinary trading companies, many of which can be found at paragraphs 7, 11, 12 and 27 of TR 2004/15.

(iv) The Draft Ruling does not address sufficiently the situations of Delegated Authority

The Draft ruling mentions Company outsiders but does not properly address the position where part of the Company decision making is outsourced to a third party. Typically foreign company investors into Australia may delegate certain decision making to an Australian agent. For example a US Delaware Company may delegate its management of its Australian investments to a local fund manager. It would be useful for the Ruling to address those situations where decision making by

local agents may cause central management and control issues. For instance is there a difference between a discretionary mandate to invest funds in the Australian market which may involve in part, a local agent making strategic decisions about investments as opposed to a situation where the agent may have very confined limits to the decision making. Further it would be useful if the Ruling provided commentary on the difference (in a delegated authority context) between a dependent agent and an agent of independent status.

(v) Treaty Application

There is no discussion of the operation of Treaties in terms of central management and control and the impact of for example the tie breaker rules. The Ruling should acknowledge how the approach to central management and control specified in the Ruling would be modified by the operation of Treaties and where relevant the OECD Model Commentary.

Should you have any questions in relation to this submission please do not hesitate to contact me.

Yours sincerely

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