

Australian Custodial Services Association Limited
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Sydney NSW 2000

19 April 2024

Tax Treaties Branch
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600

By email: taxtreatiesbranch@treasury.gov.au

Dear Sir/Madam,

Treasury consultation on expanding Australia's tax treaty network

The Australian Custodial Services Association ("ACSA") is the peak industry body representing members of Australia's custodial and investment administration sector. Our mission is to promote efficiency and international best practice for members, our clients and the market. Collectively, the members of ACSA hold securities and investments in excess of AUD \$4.7 trillion* in value in custody and under administration. Members of ACSA include NAB Asset Servicing, J.P. Morgan, HSBC, State Street, BNP Paribas Securities Services, Bank of America, Netwealth, Bank of New York Mellon, Citi Security Services and Northern Trust.

ACSA welcomes the opportunity to engage in Treasury's consultation on expanding Australia's tax treaty network, with a plan to enter into new or updated tax treaties with Brazil, New Zealand, South Korea, Sweden and the Ukraine.

ACSA supports the Government's plan to ensure that Australia's tax treaty network will cover 80 per cent of foreign investment in Australia and about \$6.3 trillion of Australia's two-way trade and investment.

Please note that the views expressed in this letter are prepared by ACSA for the purposes of consideration by Treasury in the consultation on expanding Australia's tax treaty network and should not be relied upon for any other purpose. The comments in this letter do not comprise financial, legal or taxation advice and should not be regarded as the views of any particular member of ACSA.

Key Industry Feedback

Australia became the 12th largest economy in the world in 2022 and has the 10th highest GDP per capita according to the World Bank, IMF figures and statistics of the Australian Government. As far as total foreign direct investments are concerned, AUD 3,742 billion at the end of 2022 (in 2012 around EUR 550 billion) has been invested from all over the world, with the United States, Japan and United Kingdom being the leading investor countries.

* ACSA December 2023 Assets Under Custody

Access to tax treaties for collective investment vehicles

ACSA respectfully submits that one of the key outcomes Australia should seek in negotiating tax treaties is to achieve greater certainty on the application of tax treaties to collective investment vehicles. This includes Australia's Division 6 trusts, Managed Investment Trusts, Attribution Managed Investment Trusts, and the newly proposed Corporate Collective Investment Vehicles.

ACSA respectfully submits that new, and existing, tax treaties should include a definition of a collective investment vehicle in Article 3. These entities should then be included within the definition of a "resident" under article 4.

For example, in the Australia and Germany tax treaty, a collective investment vehicle is defined as follows:

4 Notwithstanding the other provisions of this Agreement, a collective investment vehicle which is established in a Contracting State and which receives income (including profits and gains) arising in the other Contracting State shall be treated, for the purposes of applying the Agreement to such income, as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of the income it receives (provided that, if an individual who is a resident of the first-mentioned State had received the income in the same circumstances, such individual would have been considered to be the beneficial owner thereof), but only to the extent that the beneficial interests in the collective investment vehicle are owned by residents of the Contracting State in which the collective investment vehicle is established and equivalent beneficiaries. However, if:

(a) in the case of a collective investment vehicle established in Australia, the principal class of shares, units or other comparable interests in the collective investment vehicle is listed and regularly traded on a recognised stock exchange in Australia;

(b) at least 75 per cent of the value of the beneficial interests in the collective investment vehicle is owned by residents of the Contracting State in which the collective investment vehicle is established; or

(c) at least 90 per cent of the value of the beneficial interests in the collective investment vehicle is owned by equivalent beneficiaries,

the collective investment vehicle shall be treated as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of all the income it receives (provided that, if an individual who is a resident of that State had received the income in the same circumstances, such individual would have been considered to be the beneficial owner thereof).

5 For purposes of paragraph 4, the term "equivalent beneficiary" means:

(a) a resident of the Contracting State in which the collective investment vehicle is established; and

(b) a resident of any other State with which the Contracting State in which the income arises has a tax agreement that provides for effective and comprehensive information exchange who would, if such resident received the particular item of income for which benefits are being claimed under this Agreement, be entitled under that agreement, or under the domestic law of the Contracting State in which the income arises, to a rate of tax with respect to that item of income that is at least as low as the rate claimed under this Agreement by the collective investment vehicle with respect to that item of income.

ACSA suggests the definition of the term “resident” should generally cover collective investment vehicles established in both countries.

The existing New Zealand tax treaty contains in Article 3 (1) a reference to managed Investment trusts but this needs to be updated. The existing Swedish and South Korean treaties contain no mention of MITs at all.

It is suggested that the five new treaties should include Division 6 trusts, MITs and AMITs within the definition of Australian taxpayer.

Access to tax treaties for Australian Superannuation funds

Australia’s superannuation system (approximately AUD 3.7 trillion) is the fifth largest pension scheme in the world. There are also currently over a hundred different industry, retail, corporate and public sector superannuation funds. Australian superannuation funds hold significant investments offshore and this trend is expected to continue in the future. It is therefore important for Australian superannuation funds to have access to tax treaty relief.

ACSA respectfully submits that a consistent definition of an Australian superannuation fund be included in new, and existing, tax treaties. In particular it is suggested that the five treaties under discussion should include a definition.

To facilitate tax treaty access, and double taxation relief, being available to an Australian superannuation fund, ACSA respectfully submits that a definition of a superannuation fund should be inserted into Article 3. An appropriate definition could be drawn from the existing tax treaty between the Swiss Confederation and Australia. A further example is the tax treaty between Australia and Israel, which includes the following definition:

“the term “recognised pension fund” of a Contracting State means an entity or arrangement established in that State that is treated as a separate person under the taxation laws of that State or, in the case of Australia, an Australian superannuation fund for the purposes of Australian tax,

- (i) and that is established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary or incidental benefits to individuals and that is regulated as such by that State or one of its political subdivisions or local authorities; or*
- (ii) that is established and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements referred to in sub subparagraph (i) or, in the case of Australia, to invest such funds, or the complying superannuation assets or segregated exempt assets of a life insurance company that is a resident of Australia, or any combination thereof.”*

In addition, ACSA proposes to add to the list a generic sentence such as “any entity with a similar regime” in order to cover new type(s) of funds which could be created in the future.

ACSA suggests that the specific fund entities mentioned above from both jurisdictions are included in the residency article (or in a protocol of the tax treaty) and are granted access to the double tax treaty.

Future Developments

The countries that make up the European Union have proposed the development of a “digital certificate of residency”. Where an entity has a digital certificate then that is prima facie evidence of tax residency for the purposes of obtaining treaty relief for income or investments in another country. A digital certificate process would alleviate the need for the ATO to administer the cumbersome “certificate of Australian tax residency” process. This would reduce administrative costs for both the ATO and Australian investment entities. Additionally, it would mean that Australian taxpayers receive the full benefit of treaty relief that they are entitled to. Currently relief is sometimes denied on administrative grounds, and this effectively results in Australian taxpayers losing the treaty entitlements to the benefit of the overseas Revenue authority.

We are drawing this to your attention in case the current treaty negotiations could include a reference to treaty partners accepting digital certificates of residency in the future. It is ACSA’s expectation that if the proposal is implemented it will become the default approach in OECD countries including Australia. This may necessitate changes to double tax treaties in the future where digital certificates are not currently mentioned. For example, we note that the DTA with Italy (Article 28) currently refers to certificates of residency although does not expressly mention digital certificates.

Contact Information

ACSA welcomes the opportunity for further dialogue with Treasury representatives on the views of ACSA.

If you have any questions in relation to this letter, please direct them to Duncan Lyon on email duncan.lyon@jpmorgan.com.

Yours faithfully,



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