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Review of Australia's corporate tax residency rules
Board of Taxation Secretariat
C/-The Treasury
Langton Crescent
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POWERCO

Re: Corporate Tax Residency – Reform Options

Thank you for the opportunity to provide further input in relation to the application of corporate tax residence in Australia following the recent Australian Tax Office publications TR 2018/5 and PCG 2018/9 and the Board's Consultation Guide (Sept 2019) and Reform Options (Dec 2019) papers.

This submission is provided by Powerco Limited (Powerco) on behalf of Powerco New Zealand Holdings Limited (PNZHL) and Powerco. Both of these entities are incorporated and operate in New Zealand, have no business activity in Australia and, under any conventional sense of the test, do not carry on business in Australia. As such, they have always been and remain solely tax resident of New Zealand.

In our submission to the Board's review dated 3 October 2019 we noted that:

- The approach adopted by the ATO in TR 2018/5 to corporate tax residence has now effectively precluded the use of modern communications technology by the board to assist in holding meetings, incurring additional (and in our view unnecessary) extra time, financial and environment cost in governing the New Zealand business.

- The current rules set out in TR 2018/5 and PCG 2019/9 have resulted in significant commercial uncertainly for PNZHL and Powerco, as well as for many other organisations and that the rules do not align with modern day governance practices; do not in this case further assist protection or integrity of the Australian tax base; and do not seem consistent with the modernisation of tax systems in line with technology developments.

- This uncertainty has been compounded by the recent implementation in Australia and New Zealand of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) which has effectively removed access to the tie breaker tests contained in the double tax agreement between Australia and New Zealand except in the context of a mutual agreement process.

We are pleased to see these issues acknowledged in the Board's Corporate Tax Residency Reform Options paper and that they are consistent with other feedback. We are also pleased to see two potential solutions proposed and thank the Board for its work to date.

Discussion

In response to the consultation questions raised in your Reform Options we provide the following feedback:

> *Consultation question 1 – How can the CMAC test best be modified in order to ensure that having central management and control in Australia cannot, by itself, be taken to also constitute the carrying on of business in Australia for tax residency purposes?*

Consultation question 2 – If the CMAC test is modified to be a two-step test then the Board seeks stakeholder comment on whether it is necessary to define (by legislative amendment) either the first limb or the second limb of the test.

We support clarifying by legislative amendment the corporate residence centre of management and control (CMAC) test. If this is done, the requirement to carry on business in Australia could perhaps be removed and the focus be on whether the company's centre of management and control located in Australia. We submit that the legislative change required is to the specific the definition of CMAC. We suggest that the requirements of paragraphs 15 to 18 of withdrawn ruling TR 2004/14 should be reflected in an amended definition of CMAC. This would mean that CMAC would be the place where the majority of board meetings are held, and where a board meeting is held would be determined by where the majority of the directors were physically present for the meeting. Further, matters dealt with between meetings by way of circulating resolutions would not be determinative of the location of CMAC. This would, we think, give the following outcomes (which suggests that the single test of a revised CMAC definition could be used):

Test		**Outcome**	**Outcome**	**Outcome**	**Outcome**
1.	Carrying on business in Australia.	No	Yes	Yes	No[1]
2.	Minority MAC exercised in Australia.	Yes	Yes	No	No
3.	Majority MAC exercised in Australia.	No	No	Yes	Yes
Australian Residence		Not Resident	Not Resident	Resident	Resident

If this approach is adopted, we believe that would provide much greater certainty to corporates and the ability to use modern governance practices and communications technology lowering the financial and environmental cost of governance. As this approach would essentially restore the Corporate residence position to that understood prior to the issue of TR 2018/5 and PCG 2018/9, this option is likely to have low transition complexity and should not raise significant tax integrity issues.

Consultation question 3 – would an adoption of an incorporation only test be more effective at reducing taxpayer uncertainty as compared with the retention of a modified CMAC test.

Consultation question 6 – would integrity rules be required to supplement an incorporation only test.

The adoption of an incorporation only test of corporate residence would prima facies be very effective at reducing uncertainty and would provide certainty and clarity for PNZHL and Powerco as New Zealand incorporated companies. As a result of that approach, we would be unconstrained to deliver governance via the board through any means of physical meetings in any location, circulating resolutions and modern communications and meeting technology. As such, we would, prima facie, support this approach.

However, we do expect that such a certain and simple test would require buttressing with integrity rules. In addition, there would need to be transitional rules as it would be a more significant change than simply amending the CMAC test. To the extent that the integrity rules are necessarily broad, coupled with the likely complexity of

[1] In a conventional sense rather thank applying the extended view of MAC constituting carrying on business in Australia.

the transitional rules, means that the absolute certainty provided by the incorporate test would be eroded. On balance, while we would support this approach, we prefer the amended CMAC approach as set out above.

> *Additional submission – Reinstate the tie-breaker tests in the Australia and New Zealand double tax agreement.*

As we noted in our original submission and as acknowledged in your Reform Options paper, where dual residence arises, it will now need to be resolved by reference to the New Zealand and Australian competent authorities (subject to coming within the thresholds for the helpful administrative guidelines issued). This significantly reduces the certainty for corporate groups operating trans-Tasman. We submit that in the short term the administrative guidance could be expanded to cover a wider range of corporate groups and in the medium term the tie-breaker tests should be reinstated into the treaty as part of Australia and New Zealand's periodic treaty updates.

Thank you for the ongoing opportunity to contribute to this review.

Please do not hesitate to if you have any further questions, either via phone +64 21 489 980 or email anna.tootill@powerco.co.nz.

Yours faithfully

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