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American Chamber of Commerce in Australia

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Friday, 26 October 2018

Board of Taxation Secretariat
The Treasury – Sydney Office
100 Market Street
Sydney NSW 2000

Also by Email: taxboard@treasury.gov.au

Dear Secretariat,

Review of the Income Tax Residency Rules for Individuals

The American Chamber of Commerce in Australia is writing in response to the request for submissions by the Board of Taxation, with respect to the reform of the Australian Income Tax Residency Rules for Individuals.

The American Chamber of Commerce in Australia – better known as AmCham Australia – was founded in 1961 by Australian and American businesses to encourage the two-way flow of trade and investment between Australia and the United States, and to assist its members in furthering business contacts with other nations. In pursuing this goal, AmCham Australia has grown and diversified. It finds itself not only representing the United States' business view, but also speaking increasingly for a broad range of members involved in the Australian business community.

AmCham Australia represents the interests of American organisations undertaking business activities in Australia. American investment accounts for more than 27 percent of all foreign investment in Australia which makes it, by far, the single largest foreign investor in Australia. We also have significant membership by Australian companies and endeavour to represent their interests whenever appropriate, as well.

American and Australian organisations have employees that undertake travel and work related assignments to Australia and United States that are impacted by the residency rules of each jurisdiction. We therefore, support the reform process to modernise the residency rules with the objective to provide simplicity, certainty, equality and integrity to both individuals and organisations that employ a globally mobile workforce.

We provide our comments in **Appendix 1** to this letter and note that we have not provided our response to all questions, as we have commented only where required. We welcome any queries you may have regarding our submission and any opportunities to further engage in the consultation process.

Kind Regards,

April Palmerlee
Chief Executive Officer



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*Nova Group***Question 2**

The Board's report suggested that the statement should identify how the residency rules address the tax policy objectives of simplicity, equity, efficiency and integrity (in particular, the prevention of tax avoidance) to help taxpayers and the ATO understand whether taxation (or its absence) in any given context is an intended outcome or the result of tax avoidance.

Do you consider that this statement achieves this standard? If not, how may it more accurately do so?

AmCham Australia is of the view that the statement is not necessary to mitigate tax avoidance. The existing anti-avoidance rules contained in Part IVA of the *Income Tax Assessment Act 1936* are sufficient and the new statement does not add clarity or provide assistance in applying the residency rules.

Question 3

To what extent does a bright-line test provide balance between certainty, simplicity and integrity? Are other measures needed to provide integrity – for example, those discussed under design principle 5?

The bright-line test being a quantitative test (i.e. the 183 days count) would be simple to understand and apply to a large majority of individuals. If any other non-quantitative measures are added, it would increase the complexity and application.

AmCham Australia recommends that the definition of 'day' is clarified to mean a complete day and any part days (i.e. arrival day and departure day) are excluded.

AmCham Australia also recommends that the Board consider whether any exceptions should be made available to inbound individuals that meet the bright-line test. Under the U.S. tax rules there are certain exceptions available to individuals that meet the U.S. Substantial Presence test and we would support similar exceptions to the bright-line test.

Question 4

Are there any other bright-line tests that you think should be included (whether as alternatives to a day count test, or in some form of combination)? For example, should you be a resident if:

- a. Your only home is located in Australia; or**
- b. You work full-time in Australia.**

Adding other tests is likely to increase complexity and application resulting in dispute and possible litigation.

- a) Presently, it is very common for individuals to have a home in more than one country. Therefore, the 'only home' test could be difficult to apply.
- b) In the current global business environment, it very common for individuals to work in more than one location and hence the 'work full-time' test, could be difficult to understand and apply to each individual's facts and circumstances.

If additional tests are introduced, AmCham Australia recommends that Treasury provide an Explanatory Memorandum relevant to common cross-border employment situations.



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Question 5

Should an individual spending 183 days or more in any 12-month period spanning two income years be considered a tax resident in both periods?

Under the U.S. tax rules, an individual is considered to be a resident of the U.S. in the year in which they meet the Substantial Presence Test. Therefore for the purposes of simplicity and consistency in application of the rules between the U.S. and Australia, AmCham Australia recommends that an inbound individual be considered a resident only in that tax year that the 183 day test is met.

Question 6

What consequences (if any) will arise for the temporary residency and working holiday maker rules if these changes were adopted? How should these issues be addressed?

While the Board has not specifically sought comments on Recommendation 10 in their Review of the Income Tax Residency Rules for Individuals, AmCham Australia would like to submit the following in the context of applicability to U.S. citizens and residents that are considered temporary residents for Australian tax purposes:

- a) AmCham Australia would not support the limiting of temporary resident tax concessions for a period of 4 years and recommend that the temporary resident tax concessions continue to apply in its current form.
- b) AmCham Australia does not support that temporary residents should be subject to non-resident income tax rates as this would be against the principles of Non-discrimination in Article 23 of the U.S.-Australia Double Tax Agreement.

Question 8

Do the proposed day-count tests appropriately balance simplicity and integrity? Is it too complex? Alternatively, are other measures needed to provide integrity – for example, those discussed under design principle 5?

AmCham Australia recommends that the definition of 'day' is clarified to mean a complete day and any part days (i.e. arrival day and departure day) are excluded.

Question 9

Should the outbound individual test apply over a 12-month period, per income year or on some other basis? Why?

As with the case for inbounds in Question 5, for outbound individuals, AmCham Australia recommends for simplicity and certainty that the test applies on a tax year basis.

Question 10

How does this test interact with the limited foreign employment income tax exemption (section 23AG of the *Income Tax Assessment Act 1936*)?

While AmCham Australia does not have any particular comment on the interaction of the test with section 23AG, we recommend the reinstatement of section 23AG of the *Income Tax Assessment Act 1936* more broadly to apply to Australian residents working on short term assignments, including in the U.S.

This would provide simplicity for individuals in dealing with tax compliance in two countries and also assist organisations with administering payroll obligations (e.g. U.S. tax withholding and PAYG withholding) in two locations.



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Question 11

Are the factors proposed for the secondary test the most appropriate factors?

Since it is now common for individuals to be a citizen or permanent resident of more than one country, the 'Immigration Status' solely based on Australian citizenship or residency may not be an appropriate relevant factor. AmCham Australia recommends that an individual's tax residency of another country should be a relevant factor for dual citizens and/or permanent residents.

As commented in 4a, it is common for individuals to maintain accommodation in more than one country. Therefore, AmCham Australia recommends that the Australian accommodation should be a relevant factor only when the individual does not own accommodation in any other country.

Question 21

At what level should the resident and non-resident 'time spent' factor be set (i.e. how should they interact with the primary bright-line tests)? Should they be spread over a medium term (i.e. 2 to 3 years)?

AmCham Australia recommends that the time spent factor is spread over a 3 year period similar to the U.S. Substantial Presence Test. However, these should apply only if the individual spends more than 30 days in the current year of testing.

Question 27

Should the new residency rules include a provision to align domestic and treaty residency for dual residents, eliminating potentially inconsistent outcomes?

Yes, as this would be consistent to the U.S. tax approach. However, AmCham Australia acknowledges the complexities/disadvantages that this position may bring especially with the proposed rules on the main residence exemption being unavailable to non-residents. Therefore, AmCham Australia recommends that additional proposals be considered to address the tax disadvantages to non-residents resulting from the treaty tie breaker tests.

Question 38

Should there be any transitional relief for any affected individuals? If so, please identify the affected type of individuals and relevant relief.

AmCham Australia notes that the current residency rules have been in place for a long time and where there is a fundamental change in these rules, individuals and organisations should be given sufficient time to deal with the changes. AmCham Australia therefore recommends a period of at least 18 months to allow for the enforcement of the new residency rules. Transitional rules should be available for individuals affected.