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28 February 2011

The Board of Taxation
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Dear Sir / Madam

REVIEW OF TAX ARRANGEMENTS APPLYING TO COLLECTIVE INVESTMENT VEHICLES DISCUSSION PAPER

We welcome the opportunity to make a submission to the Board of Taxation on the discussion paper for the review of tax arrangements applying to collective investment vehicles (CIV) ("the Discussion Paper").

Moore Stephens commends the Federal Government on their initiative to improve the international competitiveness of the Australian funds management industry. However, considering the short period for consultation we have only provided our broad comments.

1. Submission

This submission follows up our Managed Investment Trust (MIT) submissions to Treasury dated 22 December 2009 and 10 July 2009 and the Board of Taxation dated 2 December 2008 and 15 November 2010.

1.1 Impediments to investment into Australia by foreign investors through CIV's

It is well-documented that the primary impediment to foreign investment into the Australian funds management industry is the uncertain and uncompetitive application of the current Australian income tax legislation. This has been partially addressed through the MIT capital account election and reduced rates of withholding tax for non-resident investors of MIT's. However, it is widely acknowledged that more needs to be done and this review (with the broad objective of one tax treatment for all Australian CIV's) is a positive step in the right direction.

Our competitors in the funds management industry, such as the European Union (EU), the United States, the United Kingdom, Singapore and Hong Kong, have already implemented measures to attract foreign investment. These measures include stand-alone regimes specifically dedicated to the achievement of this objective and reduced or no rates of tax imposed on investment returns for non-resident investors. Australia is therefore playing 'catch-up' and the rapid introduction of our own laws that are attractive to non-resident investors will enable us to increase our share of the global funds management industry.

The concern that some non-resident investors are not familiar with the trust structures commonly used in Australia would be addressed if the overall goal of one tax treatment for all Australian CIV's is achieved.

1.2 CIV's for the purpose of this review

The widely held definition contained in the MIT legislation is appropriate as a characteristic for a wider range of CIVs.

However, as noted in our submission dated 2 December 2008 on the review of tax arrangements applying to MIT's, our recommendation is that the same rules be available to all funds (whether wholesale or retail) that issue a prospectus, information memorandum (IM) or similar document. The current start-up provisions for MIT's are not sufficient for some of our clients to make the MIT capital account election. Accordingly, the widely-held / closely-held dichotomy still creates a barrier to entry for small wholesale funds, which provides an advantage for large established funds over new entrants, and in turn inhibits the operation of efficient capital markets.

1.3 MIT's

As noted at 1.1 above, the impediments to investments into Australia by foreign investors through MIT's were the uncertain and uncompetitive application of the current Australian income tax legislation and the lack of understanding about trusts among certain non-resident investors.

To alleviate the complexity of character and source retention under flow-through taxation through alternative CIV vehicles so that they are more attractive or user-friendly to non-resident investors, we suggest a flat rate of withholding tax on all non-capital gain distributions from CIV's (irrespective of income class).

1.4 Listed Investment Companies (LIC's)

As noted in our submissions dated 2 December 2008, 10 July 2009 and 22 December 2009, we recommend the same rules to apply to both MIT's and LIC's to ensure parity between these two types of investment vehicles as the only essential difference between them are their legal structures. In particular, we note that LIC's are not currently able to make the capital account election that has been introduced for MIT's.

To implement this recommendation would necessitate either further changes to the existing LIC regime or the introduction of a new stand-alone CIV regime, applicable to all types of CIV's. We support the latter as the best way of achieving policy principle 1[1].

If flow-through is the basis of a new CIV regime, transitional rules could include the requirement for distributions to be made on a First-In-First-Out (FIFO) basis so that pre-CIV profits are all distributed to shareholders as dividends and post-CIV profits are paid out as CIV distributions on a flow-through basis.

We act for a number of widely held non-listed investment companies and accordingly recommend that an amended collective investment company regime should be applied more broadly to include other widely held non-listed investment companies defined in a similar way as the widely-held rules for MIT's.

[1] The tax treatment of a CIV should be determined by the nature of its investment activities rather than the legal nature of the entity through which the funds are pooled

There is a trade-off between preserving character and source of income and simplifying distribution statements for investors that are more familiar with a dividend distribution statement. As mentioned at 1.3 above, to preserve character and source of income under a new corporate CIV regime, we recommend a flat rate of withholding tax on all non-capital gain distributions from CIV's (irrespective of income class).

1.5 Design of a new CIV regime

The flow-through model is the most appropriate to achieve tax neutrality for designing a corporate CIV regime that would enhance industry's ability to attract funds under management in Australia. Examples of transparent CIV's that have attracted significant funds under management from offshore investors are the Common Contractual Fund (CCF) in Ireland and the Luxembourg Fonds Commun de Placement (FCP).

We support the suggestion made in submissions to the Board during the MIT review (detailed in paragraph 4.38 of the Discussion Paper) as the most appropriate method to achieve an outcome similar to tax flow-through for a corporate CIV.

We support the suggestion made in submissions to the Board during the CIV review (detailed in paragraph 4.41 of the Discussion Paper) as the most appropriate method to determine the tax liabilities of investors in a corporate CIV.

While extending the MIT regime to corporate entities (by deeming qualifying corporate entities to be trusts for tax purposes) is a possibility, as noted at 1.4 above we recommend the introduction of a new stand-alone CIV regime (applicable to all types of CIV's) as the best way of achieving policy principle 1[2]. The possible options for amending the tax legislation are feasible without adding undue complexity to the tax and company law.

1.6 Investment Manager Regime (IMR)

The exemption-based approach is the most appropriate option for the design of an IMR.

The IMR should contain a 'managed in Australia' requirement. The economic benefits and growth in the Australian financial services industry can be maximised without a minimum spend requirement because the Federal Government's drive to address the current tax impediments (including this proposed IMR) will provide the impetus for foreign investment into an Australian funds management industry that already benefits from such factors as a strong and resilient economy, a world-class regulatory environment, and an innovative, multilingual and skilled workforce.

A reasonable reporting and approval process necessary to ensure that the IMR exemption is being appropriately claimed by qualifying foreign managed funds is for such funds to complete an initial application form which will provide details to be maintained on a national database from which annual statements will be produced and sent. Similar to the current requirement for the Annual Company Statements issued by the Australian Securities and Investments Commission (ASIC), the regulatory body should only be notified for any changes that need to be made to the details on the database.

The IMR could also cover foreign managed funds holding non-portfolio interests in non-Australian assets to provide further certainty on the operation of the Australian taxing rules.

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[2] The tax treatment of a CIV should be determined by the nature of its investment activities rather than the legal nature of the entity through which the funds are pooled

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2. Moore Stephens - sector experience

We recognise that there is huge diversity in the investment specialties of MIT's. These include Australian and foreign equities, property and private equity.

Moore Stephens member firms[3] provide taxation services to more than 100 managed funds, fund managers and LIC's primarily investing in Australian equities and 10 property fund managers who manage over 60 listed and unlisted Real Estate Investment Trusts (REIT's) and their subsidiaries that invest in property located in Australia and over 10 foreign countries. Moore Stephens member firms have been advising the financial services sector in relation to financial reporting, taxation, corporate governance and general advice for over 10 years. Our involvement with these entities encompasses a diverse range of investment activities and structures.

Thank you for considering our submission. If you have any questions regarding the above, please do not hesitate to contact me.

Yours faithfully
MOORE STEPHENS

Allan Mortel
Chairman
National Tax Group

[3] Moore Stephens is a network of independent firms