

20 December 2016

The Manager
Base Erosion and Profit Shifting Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: BEPS@treasury.gov.au

Dear Sir / Madam,

Submission to Diverted Profits Tax Exposure Draft legislation and explanatory memorandum

Thank you for the opportunity to provide our response to the Diverted Profits Tax (DPT) Exposure Draft legislation and Explanatory Memorandum released by the Treasury on 28 November 2016.

Cochlear Limited's global headquarters are located on campus at Macquarie University in Sydney, Australia, with regional sales and marketing headquarters located across the globe in Asia Pacific, Europe and the Americas. Cochlear has direct operations in over 20 countries and employs nearly 3000 people. For the financial year ended 30 June 2016, Cochlear's global turnover exceeded A\$1 billion.

As previously noted in prior submissions and public statements, Cochlear is very supportive of an open and transparent corporate tax environment where multinationals and large businesses provide information to the public and ATO regarding their tax affairs. Cochlear will continue to be transparent in relation to its Australian and offshore transactions by providing detailed information in its annual tax transparency report.

With respect to the DPT, whilst Cochlear is generally supportive of a tax regime that gives powers to the ATO to deal with taxpayers diverting profits to low tax jurisdictions for no reason other than to obtain a tax benefit, Cochlear does have some observations on the practical implications of how the DPT exposure draft as currently drafted may impact taxpayers such as Cochlear.

We make our comments accordingly.

Yours sincerely,



Neville Mitchell
Chief Financial Officer
Cochlear Limited



Kimberley Simpson
Group Tax Manager
Cochlear Limited

Observations on the DPT Exposure Draft and explanatory memorandum

Treasury has stated that the DPT is intended to target entities with annual global income of \$1 billion or more that shift profits to offshore associates where:

- the resulting increase in the foreign tax liability is less than 80 per cent of the corresponding decrease in the Australian tax liability;
- there is insufficient economic substance; and
- one of the principal purposes is to obtain a tax benefit.

Cochlear makes the following observations on each of those intentions:

Resulting increase in foreign tax liability is less than 80% of the decrease in Australia's tax liability

Cochlear does not agree with the rate of 80% as the benchmark rate for determining if a sufficient amount of tax has been paid in the foreign jurisdiction. Whilst we appreciate this rate has been taken directly from the UK DPT legislation, the rate of 80% does not have comparability with Australia when considering the corporate tax rate in Australia is 30% and the corporate tax rate in the UK will be reducing to 17%. If left at 80%, this would broadly capture transactions in countries where the tax rate is less than 24%. A more comparable figure would be to use 50% as the benchmark for the increase in the foreign tax liability compared to the reduction in Australia. Then only jurisdictions that have tax rates of 15% or less would be captured, which would be more comparable to the jurisdictions caught under the UK regime.

Leaving the rate at 80% would capture most multinationals who have operations located in the UK, Asia Pacific and other parts of Europe. Cochlear has operations in a number of jurisdictions globally where the corporate tax rate is less than 24%.

Sufficient economic substance test

The draft explanatory memorandum makes reference to the OECD transfer pricing guidelines however there is no specific reference to the guidelines in the exposure draft.

Taxpayers are required to prepare contemporaneous transfer pricing documentation in accordance with the OECD TP Guidelines and Subdivision 815 and with the country by country reporting requirements coming into effect for Cochlear for the year ended 30 June 2017 there is already a significant amount of documentation required to support the fact that transactions are undertaken at arm's length. Introducing this test and not aligning it with the transfer pricing guidelines will introduce a new and untested concept into legislation. Taxpayers who have prepared documentation that demonstrates the arm's length nature of their transactions in accordance with the OECD transfer pricing guidelines and Subdivision 815 should automatically satisfy this test.

More guidance is needed on how the sufficient economic substance test would operate and how this applies where a taxpayer is already compliant with the transfer pricing guidelines. The draft explanatory memorandum contains limited examples of how the test would operate and further detailed examples / case studies are needed.

Principal purpose

The DPT is drafted as part of Part IVA yet uses a principal purpose test for determining whether a scheme is to obtain a tax benefit, rather than a dominant purpose test as contained in the general Part IVA provisions. This is a much broader concept and guidance is needed on how this interacts with the established principles of dominant purpose in Part IVA and settled case law.