

28 January 2016

Tax Transparency Code
The Board of Taxation
c/- The Treasury
Langton Crescent
Canberra ACT 2600

By email: taxtransparency@taxboard.gov.au

Re: Submission - Consultation Paper on the Voluntary Tax Transparency Code (TTC) dated 11 December 2015

Dear Board of Taxation, Revenue Team and Working Group,

Thank you for the opportunity to comment on the consultation paper on the Voluntary Tax Transparency Code (TTC) dated 11 December 2015.

I agree with the view of the consultation paper - that the TTC ought to set minimum standards to guide disclosure of tax information by business. As the consultation paper notes, "there is a high level of community interest in ensuring that tax transparency continues to develop as an integral part of Australian business culture" (p1). The question for consideration then, is whether the TTC could do more to create a "business culture in which greater value is attached to transparency and disclosure" (p4).

I would suggest that if the ATO were nominated the "responsible agency" for the administration of the TTC, it may be useful for it to award a "corporate taxpayer of the year for disclosure". The award recipient would be a taxpayer that submits the weblink to its publicly available tax disclosure documents by a nominated date and time (eg. the best disclosure documents out of the first 20 taxpayers that submit their disclosures on 1 September). This taxpayer would have provided disclosure documents which clearly state information that is designed to "meet the information needs of [General Users and Interested Users]" (p9).

The detailed reasons for the suggestion of an award for an effective disclosure of tax information follow in the appendix below. Briefly those reasons are:

- it appears that taxpayers attach value to positive recognition. This is perhaps best evidenced by a practice that has been recently reported in the English press. In the UK, coffee shops are currently displaying signs on their counters saying

“100% taxes paid” as a means of generating customer loyalty.

Positive incentives for tax compliance are used in various jurisdictions. While such programs have been criticised for sending a message to compliant taxpayers that a significant proportion of taxpayers are not complying, and that compliant taxpayers are therefore "chumps" - I would submit that a positive incentive operates differently in the context of voluntary disclosures than it does in the tax compliance context, because it is voluntary; and

- the consultation paper states that there should not be a prescribed template precisely dictating the form of the disclosure (p12). At the same time, research by American scholars indicates, albeit in the context of mandatory disclosure of tax shelters (not voluntary disclosure), that there can be "overdisclosure". Overdisclosure is used by tax avoiders to conceal aggressive tax structures by hiding avoidance transactions within legitimate transactions. There is also overdisclosure by overly cautious taxpayers trying to ensure compliance with disclosure requirements. In this context, and in the interests of ensuring that tax transparency develops as an integral part of Australian business culture, it may be useful to have the disclosures of an award recipient to hold up as an example of the ideal form of disclosure.

The importance of having examples of taxpayers making appropriate disclosures is noted on p4 of the consultation paper: " The Board is aware of a number of examples of voluntary 'taxes paid' reports that have assisted it in developing the TTC. It is expected that, upon the release of the TTC, there will already be a core group of industry leaders that can demonstrate compliance with its principles with minimal additional cost. The Board believes this will assist in the development of a business culture in which greater value is attached to transparency and disclosure".

In short, I would suggest that further research be undertaken as to the benefits of having an annual award by the ATO commending voluntary disclosure where such an award is appropriate (ie. assuming that there is an exemplary taxpayer disclosure each year).

If you wish to discuss this submission, please contact me on (02)9739 2659.

Yours sincerely

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Appendix

1. Should the TTC just be about shaming taxpayers who do not voluntarily disclose?

Perhaps the first point to note about the TTC is that it is part of the Federal Government response to multinational tax avoidance (as indicated by the Terms of Reference provided by the former Treasurer on 14 July 2015). Professor Brauner has noted that action against multinational tax avoidance has "...evolved through a political response to media frenzy".¹ There has been public outrage to the avoidance schemes of multinationals as reported in the media. The English press have noted that people are agitating for action against multinational tax avoidance, for example, small businesses in English towns are working with other businesses to mimic the tax avoidance schemes used by multinationals in an attempt to pressure the government take greater measures against multinational tax avoidance.² Disclosure of taxation information by business to the public is therefore said to be very important, as it allows civil society to be involved in the government response to multinational tax avoidance.³

The Consultation Paper states (p4) that the responsible agency (the ATO or another government agency) should establish a central website providing a link to TTC reports (ie. businesses make the TTC report publicly available, for example, by publishing it on the business's website, and then the business provides the responsible agency with a link to the report). Presumably, the centralised website will allow journalists, bloggers - or anyone with a social media account, to scan the list on the website and discover which businesses have not provided a link to their disclosure documents in accordance with the voluntary TTC. And perhaps then the shaming of those that have not made disclosures will begin.⁴ This will no doubt be effective in forcing businesses to make disclosures, as corporate taxpayers appear to fear negative publicity.⁵ However, it may not ensure that there is quality disclosure, or disclosure that meets the needs of general users (ie. the community at large) and interested users (eg. shareholders, social justice groups and the media).

¹ Brauner Y, "What the BEPS?" 16 *Florida Tax Review* Volume 16, No 2, 2014, 55, at p112.

² Robinson M., "It's the Powys revolution! An entire Welsh town is going 'offshore' to avoid tax on local business" 11 November 2015.

³ Brauner Y, "What the BEPS?" 16 *Florida Tax Review* Volume 16, No 2, 2014, 55, at p112.

⁴ Blank J., "What's Wrong with Shaming Corporate Tax Abuse" 62 *Tax Law Review* 539 2008-9 at 540.

⁵ Lavermicocca and Buchan, "Role of Reputational Risk in Tax Decision Making by Large Companies" *eJournal of Tax Research* Vol 13 No 1, March 2015.

The consultation paper notes that the responsible entity which establishes the central website linking to disclosures "will not review or provide any assurance as to the completeness or accuracy of the information contained in the TTC reports" (p4). However in the next paragraph, the consultation paper notes the importance of having examples of businesses demonstrating compliance with the principles of the voluntary TTC. These TTC ready businesses are expected to "... assist in the development of a business culture in which greater value is attached to transparency and disclosure" (p4). It therefore seems that it may be useful to have an award, so that the award recipient may be used as an example of well provided voluntary disclosures.

In addition to creating a culture of transparency, there seems to be some evidence that businesses value recognition for good tax practices. There are reports of UK coffee shops currently displaying signs on their counters saying "100% taxes paid" as a means of generating customer loyalty.⁶ Further, the Fair Tax Mark⁷ has established a website on which it produces a "Fair Tax Pledge".⁸ It notes that the pledge is open to anyone (and operates via an honour system), and "[I]n exchange for signing we'll send you images to display, in your business, at work or wherever you wish including on your web site or Facebook". Further, the Fair Tax Mark website lists businesses that have taken the fair tax pledge.⁹

2. Positive incentives to encourage appropriate disclosure

The consultation paper states that an important role of the ATO in improving confidence in the tax system is to assure the public that Australia "has a robust legislative and administrative framework in place to address international tax avoidance" (p8). Any advantages of positive incentives adopted in the process of combating multinational tax avoidance need to be weighed against their impact on taxpayer morale.

Various types of incentives may be used to encourage tax compliance, for example, monetary rewards for filing early, and, lotteries with prizes for

⁶ Houlder V., "Tax avoidance leaves coffee drinkers with bitter taste; Ethics: Beverage chains" *Financial Times* (London) 17 June 2015.

⁷ <http://www.fairtaxmark.net/>

⁸ <http://www.taxresearch.org.uk/Blog/2016/01/21/you-can-make-a-difference-to-tax-in-your-town-sign-the-fair-tax-pledge/>

⁹ Currently there are 16 businesses listed as having taken the pledge. See: <http://www.fairtaxmark.net/whos-got-it/>

taxpayers who volunteer to be in the drawing for audits in order to win prizes if found compliant.¹⁰ However, positive programs focusing on reducing non-compliance have been criticised as sending a message to compliant taxpayers that a significant proportion of taxpayers are not paying their fair share of tax (the "chump" argument). It should surely be more difficult to level such criticism at rewards for voluntary disclosure (as opposed to legal compliance) simply because voluntary acts are not required. Rewarding voluntary acts does not create the impression that there is poor tax compliance, rather it is recognising those that are doing more than they have to. Much research indicates that rewards increase the performance and learning of a desired behaviour¹¹ - suggesting there may be advantages for rewarding voluntary disclosures if there is no broader downside for general taxpayer morale.

Further, the research by Smith and Stalans on positive incentives encouraging taxpayer compliance, discusses the "norm of reciprocity".¹² The "norm of reciprocity" refers to the tendency to try to reciprocate behaviours, "...through a sense of obligation, people repay respectful treatment with respect, and cooperation with cooperation".¹³ It would perhaps be worthwhile then to research whether the ATO publicising an award for a voluntary disclosure may foster more cooperative arrangements between businesses and the ATO under the principle of "norm reciprocity". That is, the taxpayer perception of the ATO may improve if it is seen recognising taxpayers, instead of just providing a website drawing attention to businesses that have not made voluntary disclosures.

3. The problem of "overdisclosure" in the USA

At this point it is necessary to consider whether the regime proposed by the consultation paper is likely to lead to overdisclosure. American scholar, Joshua Blank, has written extensively on the issue of overdisclosure, albeit in the context of mandatory disclosure of tax shelters in the USA.¹⁴ Blank argues, in the context of mandatory disclosure of tax shelters, that overdisclosure (both

¹⁰ Smith and Stalans, "Encouraging Tax Compliance with Positive Incentives: A Conceptual Framework and Research Directions" 36 *Law and Policy* January 1991 at 38.

¹¹ *Ibid.*

¹² *Ibid.*, p41.

¹³ *Ibid.*

¹⁴ Blank J., "Overcoming Overdisclosure: Toward Tax Shelter Detection" 56 *UCLA Law Review* (2009) 1629.

deliberately to "burry" avoidance, and also overdisclosure due to over-caution) is problematic for governments seeking to investigate tax shelters. It is very difficult for the revenue authority to find the transactions it wishes to investigate in the heaviness of the overdisclosed documents. The question then arises here as to whether taxpayers will make voluntary over-disclosures - either deliberately or due to over caution.

In the context of mandatory disclosure of tax shelters, Blank proposes a three pronged solution to the problem of overdisclosure.¹⁵ First, Blank proposes the introduction of anticipatory angel lists - that is lists of transactions that the revenue authority is not concerned with. This solution does not directly apply to voluntary overdisclosure of a business's tax position. It perhaps does suggest that a pro-forma for disclosure may reduce the problem of overdisclosure. It is noted that the consultation paper states that there should not be a prescribed template precisely dictating the form of the disclosure (p12).

Second, Blank recommends the enactment of targeted overdisclosure penalties for taxpayers making overdisclosures in the context of mandatory disclosure of tax shelters. The consultation paper notes that the voluntary TCC is intended to provide general principles, rather than to prescribe penalties. The paper states that the consultation paper does not recommend penalties for misleading statements (p18). In any case, penalties for misleading statements are likely unnecessary as misleading statements may already fall foul of s18 of the *Australian Consumer Law*.¹⁶ In addition, the threat of negative publicity would likely prevent businesses from making misleading statements in their tax disclosure documents.

Third, Blank recommends a non-tax documentation requirement for business taxpayers. That is - instead of businesses providing so many technical documents relating to a transaction - taxpayers ought to be able to submit a written explanation of the transactions. The consultation paper appears to adopt this solution to the problem of overdisclosure as it notes that voluntary tax disclosure is not for the ATO, but rather, disclosure should be about meeting the informational needs of general users (ie. the community at large) and interested users (eg. shareholders, social justice groups and the media).

While not all of of Blank's solutions for overdisclosure of tax shelters in the USA appear to offer a neat solution to the potential problem of voluntary

¹⁵ Ibid.

¹⁶ in Schedule Two of the *Competition and Consumer Act 2011 (Cth)*. Section 18 of the *Australian Consumer Law* prohibits a person from engaging in misleading and deceptive conduct in trade and commerce.

overdisclosure of a business's tax position - the consultation paper does clearly note that the information voluntarily disclosed is to be presented in such a way as its meaning is clear to general users (ie. the community at large) and interested users (eg. shareholders, social justice groups and the media). This is a further reason for submitting that an award winning "voluntary disclosure" could be used as an example of how to make disclosures, particularly in the absence of a pro-forma.

4. Conclusions

For the reasons above it is submitted that the consultation paper methods ought to improve transparency of tax in business. Further research should be undertaken to determine whether a culture of transparency would be greater enhanced by recognising a business each year which has made tax disclosures that should serve as a model disclosures for the business community.