



# **Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1) 2012**

**No. 115, 2012**

**An Act to amend the law relating to taxation, and  
for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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## **An Act to amend the law relating to taxation, and for related purposes**

*[Assented to 8 September 2012]*

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1) 2012*.

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## **2 Commencement**

This Act commences on the day this Act receives the Royal Assent.

## **3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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## Schedule 1—Amendments

### *Income Tax Assessment Act 1936*

#### **1 At the end of subsection 136AB(1)**

Add:

Note: This Division is subject to Subdivision 815-A of the *Income Tax Assessment Act 1997* (about cross-border transfer pricing): see section 815-40 of that Act.

#### **2 Subsection 170(9B)**

Omit “or a relevant provision”, substitute “, a relevant provision, or Subdivision 815-A of the *Income Tax Assessment Act 1997*”.

#### **3 At the end of subsection 170(9B)**

Add:

Note: Subdivision 815-A of the *Income Tax Assessment Act 1997* is about cross-border transfer pricing.

#### **4 Paragraph 170(9C)(b)**

Omit “or the relevant provision”, substitute “, the relevant provision, or Subdivision 815-A of the *Income Tax Assessment Act 1997*”.

### *Income Tax Assessment Act 1997*

#### **5 Section 10-5 (table item headed “profits”)**

Before:

profit-making undertaking or plan..... 15-15

insert:

cross-border transfer pricing ..... 815-30

#### **6 After Division 802**

Insert:

## **Division 815—Cross-border transfer pricing**

### **Table of Subdivisions**

815-A Treaty-equivalent cross-border transfer pricing rules

### **Subdivision 815-A—Treaty-equivalent cross-border transfer pricing rules**

#### **Guide to Subdivision 815-A**

##### **815-1 What this Subdivision is about**

The cross-border transfer pricing rules in this Subdivision are equivalent to, but independent of, the transfer pricing rules in Australia's double tax agreements.

#### **Table of sections**

##### **Operative provisions**

815-5	Object
815-10	Transfer pricing benefit may be negated
815-15	When an entity gets a <i>transfer pricing benefit</i>
815-20	Cross-border transfer pricing guidance
815-25	Modified transfer pricing benefit for thin capitalisation
815-30	Determinations negating transfer pricing benefit
815-35	Consequential adjustments
815-40	No double taxation

#### **Operative provisions**

##### **815-5 Object**

The object of this Subdivision is to ensure the following amounts are appropriately brought to tax in Australia, consistent with the arm's length principle:

- (a) profits which would have accrued to an Australian entity if it had been dealing at \*arm's length, but, by reason of non-arm's length conditions operating between the entity and its foreign associated entities, have not so accrued;



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- (b) profits which an Australian permanent establishment (within the meaning of the relevant \*international tax agreement) of a foreign entity might have been expected to make if it were a distinct and separate entity engaged in the same or similar activities under the same or similar conditions, but dealing wholly independently.

### **815-10 Transfer pricing benefit may be negated**

- (1) The Commissioner may make a determination mentioned in subsection 815-30(1), in writing, for the purpose of negating a \*transfer pricing benefit an entity gets.

#### *Treaty requirement*

- (2) However, this section only applies to an entity if:
  - (a) the entity gets the \*transfer pricing benefit under subsection 815-15(1) at a time when an \*international tax agreement containing an \*associated enterprises article applies to the entity; or
  - (b) the entity gets the transfer pricing benefit under subsection 815-15(2) at a time when an international tax agreement containing a \*business profits article applies to the entity.

### **815-15 When an entity gets a *transfer pricing benefit***

#### *Transfer pricing benefit—associated enterprises*

- (1) An entity gets a ***transfer pricing benefit*** if:
  - (a) the entity is an Australian resident; and
  - (b) the requirements in the \*associated enterprises article for the application of that article to the entity are met; and
  - (c) an amount of profits which, but for the conditions mentioned in the article, might have been expected to accrue to the entity, has, by reason of those conditions, not so accrued; and
  - (d) had that amount of profits so accrued to the entity:
    - (i) the amount of the taxable income of the entity for an income year would be *greater* than its actual amount; or
    - (ii) the amount of a tax loss of the entity for an income year would be *less* than its actual amount; or

- (iii) the amount of a \*net capital loss of the entity for an income year would be *less* than its actual amount.

The amount of the ***transfer pricing benefit*** is the difference between the amounts mentioned in subparagraph (d)(i), (ii) or (iii) (as the case requires).

*Transfer pricing benefit—business profits*

- (2) A foreign resident entity gets a ***transfer pricing benefit*** if:
  - (a) the entity has a permanent establishment (within the meaning of the \*international tax agreement) in Australia; and
  - (b) the amount of profits attributed to the permanent establishment falls short of the amount of profits the permanent establishment might be expected to make if it were a distinct and separate entity engaged, and dealing, in the manner mentioned in the \*business profits article; and
  - (c) had the profits attributed to the permanent establishment included that shortfall:
    - (i) the amount of the taxable income of the entity for an income year would be *greater* than its actual amount; or
    - (ii) the amount of a tax loss of the entity for an income year would be *less* than its actual amount; or
    - (iii) the amount of a \*net capital loss of the entity for an income year would be *less* than its actual amount.

The amount of the ***transfer pricing benefit*** is the difference between the amounts mentioned in subparagraph (c)(i), (ii) or (iii) (as the case requires).

*Nil amounts*

- (3) For the purposes of working out whether an entity gets a \*transfer pricing benefit, and of negating that benefit under subsection 815-30(1):
  - (a) treat an entity that has no taxable income for an income year as having a taxable income for the year of a nil amount; and
  - (b) treat an entity that has no tax loss for an income year as having a tax loss for the year of a nil amount; and
  - (c) treat an entity that has no \*net capital loss for an income year as having a net capital loss for the year of a nil amount.

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*Multiple transfer pricing benefits*

- (4) To avoid doubt, an entity may get 2 or more \*transfer pricing benefits, in one or more income years, in relation to one amount of profits, or one shortfall of profits.

*Meaning of associated enterprises article*

- (5) An *associated enterprises article* is:
- (a) Article 9 of the United Kingdom convention (within the meaning of the *International Tax Agreements Act 1953*); or
  - (b) a corresponding provision of another \*international tax agreement.

*Meaning of business profits article*

- (6) A *business profits article* is:
- (a) Article 7 of the United Kingdom convention (within the meaning of the *International Tax Agreements Act 1953*); or
  - (b) a corresponding provision of another \*international tax agreement.

**815-20 Cross-border transfer pricing guidance**

- (1) For the purpose of determining the effect this Subdivision has in relation to an entity:
- (a) work out whether an entity gets a \*transfer pricing benefit consistently with the documents covered by this section, to the extent the documents are relevant; and
  - (b) interpret a provision of an \*international tax agreement consistently with those documents, to the extent they are relevant.
- (2) The documents covered by this section are as follows:
- (a) the Model Tax Convention on Income and on Capital, and its Commentaries, as adopted by the Council of the Organisation for Economic Cooperation and Development and last amended on 22 July 2010;
  - (b) the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as approved by that Council and last amended on 22 July 2010;

- (c) a document, or part of a document, prescribed by the regulations for the purposes of this paragraph.
- (3) However, a document, or a part of a document, mentioned in paragraph (2)(a) or (b) is not covered by this section if the regulations so prescribe.
- (4) Regulations made for the purposes of paragraph (2)(c) or subsection (3) may prescribe different documents or parts of documents for different circumstances.

### **815-25 Modified transfer pricing benefit for thin capitalisation**

- (1) This section modifies the \*transfer pricing benefit an entity gets, or apart from this section would get, in an income year if:
  - (a) Division 820 (about thin capitalisation) applies to the entity for the income year; and
  - (b) the transfer pricing benefit relates to profits, or a shortfall of profits, referable to costs that are \*debt deductions of the entity for the income year.
- (2) If working out what those costs might have been, or might be expected to be, involves applying a rate to a \*debt interest:
  - (a) work out the rate by applying section 815-15, having regard to section 815-20; but
  - (b) apply the rate to the debt interest the entity actually issued.

Note: Division 820 may apply to further reduce debt deductions.

### **815-30 Determinations negating transfer pricing benefit**

- (1) The determinations the Commissioner may make are as follows:
  - (a) a determination of an amount by which the taxable income of the entity for an income year is increased;
  - (b) a determination of an amount by which the tax loss of the entity for an income year is decreased;
  - (c) a determination of an amount by which the \*net capital loss of the entity for an income year is decreased.
- (2) If the Commissioner makes a determination under subsection (1), the determination is taken to be attributable, to the relevant extent, to such of the following as the Commissioner may determine:

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- (a) an increase of a particular amount in assessable income of the entity for an income year under a particular provision of this Act;
  - (b) a decrease of a particular amount in particular deductions of the entity for an income year;
  - (c) an increase of a particular amount in particular capital gains of the entity for an income year;
  - (d) a decrease of a particular amount in particular capital losses of the entity for an income year.
- (3) If the Commissioner makes a determination under subsection (1), the Commissioner must make a determination under subsection (2), unless it is not possible or practicable for the Commissioner to do so.
- Example: If section 815-25 is relevant in working out the transfer pricing benefit an entity gets, this subsection requires the Commissioner to make a determination relating to the debt deductions of the entity.
- (4) Nothing done under subsection (2) affects the validity of a determination made under subsection (1).
- (5) The Commissioner may take such action as the Commissioner considers necessary to give effect to a determination under this section.
- (6) The Commissioner must give a copy of a determination under this section to the entity.
- (7) A failure to comply with subsection (6) does not affect the validity of the determination.
- (8) To avoid doubt, the Commissioner may include all or any determinations under this section in relation to a particular entity, including determinations of different kinds, in the same document.

### **815-35 Consequential adjustments**

#### *Consequential adjustment—associated enterprises*

- (1) The Commissioner may make a determination under subsection (4) in relation to an entity (the *disadvantaged entity*) if:

- (a) the Commissioner makes a determination under subsection 815-30(1) in relation to a \*transfer pricing benefit an entity gets under subsection 815-15(1); and
- (b) the Commissioner considers that, but for the conditions mentioned in the \*associated enterprises article:
  - (i) the amount of the taxable income of the disadvantaged entity for an income year might have been expected to be *less* than its actual amount; or
  - (ii) the amount of a tax loss of the disadvantaged entity for an income year might have been expected to be *greater* than its actual amount; or
  - (iii) the amount of a \*net capital loss of the disadvantaged entity for an income year might have been expected to be *greater* than its actual amount; or
  - (iv) an amount of \*withholding tax payable in respect of interest or royalties by the disadvantaged entity might have been expected to be *less* than its actual amount; and
- (c) the Commissioner considers that it is fair and reasonable that the actual amount mentioned in subparagraph (b)(i), (ii), (iii) or (iv) (as the case requires) be adjusted accordingly.

*Consequential adjustment—business profits*

- (2) The Commissioner may make a determination under subsection (4) in relation to an entity (the *disadvantaged entity*) if:
  - (a) the Commissioner makes a determination under subsection 815-30(1) in relation to a \*transfer pricing benefit an entity gets under subsection 815-15(2); and
  - (b) the Commissioner considers that, if the permanent establishment were a distinct and separate entity engaged, and dealing, in the manner mentioned in the \*business profits article:
    - (i) the amount of the taxable income of the disadvantaged entity for an income year might have been expected to be *less* than its actual amount; or
    - (ii) the amount of a tax loss of the disadvantaged entity for an income year might have been expected to be *greater* than its actual amount; or

- 
- (iii) the amount of a \*net capital loss of the disadvantaged entity for an income year might have been expected to be *greater* than its actual amount; or
  - (iv) an amount of \*withholding tax payable in respect of interest or royalties by the disadvantaged entity might have been expected to be *less* than its actual amount; and
- (c) the Commissioner considers that it is fair and reasonable that the actual amount mentioned in subparagraph (b)(i), (ii), (iii) or (iv) (as the case requires) be adjusted accordingly.

*Nil amounts*

- (3) For the purposes of this section:
- (a) treat an entity that has no taxable income for an income year as having a taxable income for the year of a nil amount; and
  - (b) treat an entity that has no tax loss for an income year as having a tax loss for the year of a nil amount; and
  - (c) treat an entity that has no \*net capital loss for an income year as having a net capital loss for the year of a nil amount.

*Consequential adjustment—determinations*

- (4) The Commissioner may make one or more of the following determinations, in writing, for the purpose of adjusting an amount as mentioned in paragraph (1)(c) or (2)(c):
- (a) a determination of an amount by which the taxable income of the disadvantaged entity for an income year is decreased;
  - (b) a determination of an amount by which the tax loss of the disadvantaged entity for an income year is increased;
  - (c) a determination of an amount by which the \*net capital loss of the disadvantaged entity for an income year is increased;
  - (d) a determination of an amount by which the \*withholding tax payable by the disadvantaged entity in respect of interest or royalties is decreased.
- (5) The Commissioner may take such action as the Commissioner considers necessary to give effect to a determination under this section.

- (6) The Commissioner must give a copy of a determination under this section to the disadvantaged entity.
- (7) A failure to comply with subsection (6) does not affect the validity of the determination.
- (8) To avoid doubt, the Commissioner may include all or any determinations under this section in relation to a particular entity, including determinations of different kinds, in the same document.
- (9) An entity may give the Commissioner a written request to make a determination under this section relating to the entity. The Commissioner must decide whether or not to grant the request, and give the entity notice of the Commissioner's decision.
- (10) If an entity is dissatisfied with the Commissioner's decision, the entity may object, in the manner set out in Part IVC of the *Taxation Administration Act 1953*, against that decision.

#### **815-40 No double taxation**

- (1) The amount of a \*transfer pricing benefit that is negated under this Subdivision for an entity is not to be taken into account again under another provision of this Act to increase the entity's assessable income, reduce the entity's deductions or reduce a \*net capital loss of the entity.
- (2) Subsection (1) has effect despite section 136AB of the *Income Tax Assessment Act 1936*.
- (3) Nothing in this Subdivision limits Division 820 (about thin capitalisation) in its application to further reduce \*debt deductions of an entity.

#### **7 At the end of section 820-30**

Add:

Note: This Division applies in relation to debt deductions of an entity as reduced, if required, in accordance with Subdivision 815-A (about cross-border transfer pricing).

#### **8 Subsection 995-1(1)**

Insert:

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*associated enterprises article* has the meaning given by subsection 815-15(5).

**9 Subsection 995-1(1)**

Insert:

*business profits article* has the meaning given by subsection 815-15(6).

**10 Subsection 995-1(1)**

Insert:

*international tax agreement* means an agreement (within the meaning of the *International Tax Agreements Act 1953*) to which that Act gives the force of law.

**11 Subsection 995-1(1)**

Insert:

*transfer pricing benefit* has the meaning given by section 815-15.

***Income Tax (Transitional Provisions) Act 1997*****12 After Division 770**

Insert:

**Division 815—Cross-border transfer pricing****Table of Subdivisions**

815-A Treaty-equivalent cross-border transfer pricing rules

**Subdivision 815-A—Treaty-equivalent cross-border transfer pricing rules****Table of sections**

815-1	Application of Subdivision 815-A of the <i>Income Tax Assessment Act 1997</i>
815-5	Cross-border transfer pricing guidance
815-10	Scheme penalty applies in pre-commencement period as if only the old law applied

**815-1 Application of Subdivision 815-A of the *Income Tax Assessment Act 1997***

Subdivision 815-A of the *Income Tax Assessment Act 1997* applies to income years starting on or after 1 July 2004.

**815-5 Cross-border transfer pricing guidance**

Despite section 815-20 of the *Income Tax Assessment Act 1997*, the documents covered by that section for an income year that starts before 1 July 2012 are taken to be as follows:

- (a) the Model Tax Convention on Income and on Capital, and its Commentaries, as adopted by the Council of the Organisation for Economic Cooperation and Development and last amended before the start of the income year;
- (b) the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as approved by that Council and last amended before the start of the income year.

**815-10 Scheme penalty applies in pre-commencement period as if only the old law applied**

- (1) This section applies if:
  - (a) a determination under subsection 815-30(1) of the *Income Tax Assessment Act 1997* has effect in relation to an entity in an income year; and
  - (b) the income year starts before 1 July 2012.
- (2) Subdivision 284-C in Schedule 1 to the *Taxation Administration Act 1953* applies in relation to the entity and the income year as if:
  - (a) Subdivision 815-A of the *Income Tax Assessment Act 1997* had not been enacted; and
  - (b) each other provision of a taxation law applied in relation to the entity in the way it would have if that Subdivision had not been enacted.

***Taxation Administration Act 1953***

**13 After subsection 284-145(2) in Schedule 1**

Insert:

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- (2A) You are also liable to an administrative penalty if:
- (a) you would, apart from a determination under section 815-30 of the *Income Tax Assessment Act 1997* (also the ***adjustment provision***), get a \*scheme benefit from a \*scheme; and
  - (b) subparagraph (1)(b)(i) is not satisfied for the scheme.

#### **14 Application**

The amendment made by item 13 applies to income years starting on or after 1 July 2012.

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*[Minister's second reading speech made in—  
House of Representatives on 24 May 2012  
Senate on 20 June 2012]*

(83/12)

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