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The patchwork landscape: Where Art 13(4) of the OECD Model and Div 855 meet rugged terrain – *Tim Russell*

The enactment of Tax Laws Amendment (2006 Measures No 4) Act 2006 (Cth) brought substantial changes to the imposition of Australian tax on capital gains derived by non-resident taxpayers. Supported by concepts embodied in the OECD Model Tax Convention, the rules in Div 855 of the Income Tax Assessment Act 1997 (Cth) introduced the concept of "indirect Australian real property interests" as the basis for imposing tax on capital gains arising from the disposition of interests in entities possessing an economic value attributable to Australian real property. It was a conscious policy initiative that the rules could apply to non-residents disposing of interests in non-Australian vehicles which trace a majority of their value to Australian real property. In this article, the author considers the origins of the rule changes rooted in both domestic case law and Art 13(4) of the OECD Model Tax Convention. The article then considers the efficacy of the revised rules in delineating Australia's imposition of capital gains tax on transactions involving "indirect Australian real property interests". Arising from this consideration, the article challenges the appropriateness of the central design feature of Div 855 which uses a valuation tracing methodology to both identify the object by reference to which taxation is triggered and then to quantify the consequent gain or loss. Finally, and in light of the identified problems, the article addresses the question of whether the jurisdiction to tax which Australia asserts in respect of indirect Australian real property interests may be constrained by its network of double tax agreements. Whilst the author is supportive of the broader policy objective behind Div 855 in improving the attractiveness of Australia as a destination for foreign capital, the conclusion is reached that some of the narrower policy objectives underpinning the so-called "integrity measures" are counterintuitive and that policy-makers have failed to recognise that Art 13(4) of the OECD Model Tax Convention addresses the wrong problem. 205

Are advance pricing agreements the transfer pricing controversy management tool of the future? – *Dr Michelle Markham*

This article examines the worldwide changes that have taken place in relation to transfer pricing regulation and enforcement as a background to investigating the reasons for the rise in popularity of advance pricing agreements as a transfer pricing controversy management tool. It also considers various new developments impacting the effectiveness of these agreements, including the introduction of a new Advance Pricing Arrangement Program by the Australian Taxation Office in March 2011. 222

The legislative origin of present entitlement in Australia – *Alex Evans*

The concept of a beneficiary being "presently entitled to income of the trust estate" is central to Div 6 of the Income Tax Assessment Act 1936 (Cth) in allocating the tax liability on trust income as between the trustee and beneficiary. Because "present entitlement" is not defined in the income tax legislation, its meaning has developed at common law. However, the origin of the term is unclear. This article traces the legislative origin of present entitlement in Australia back to the Income Tax Act 1896 (Vic) and shows that it was adopted in that Act to address the decision in Crowley v Commissioner of Taxes (1896) 21 VLR 593. It further identifies that, prior to 1896, present entitlement was used in the Succession Duty Act 1853 (UK), and concludes that it is a tax law and not a trust law concept. 235

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