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TaxTalk Monthly

Keeping you up to date on the latest Australian and international tax developments

February 2020

Corporate Tax Update

ATO's Report on Top 100 Interim Findings

The Australian Taxation Office (ATO) has published its key findings from 80 tax assurance reviews in the Top 100 Program which covers public and multinational businesses and superfunds that have substantial economic activity related to Australia. They form the largest contributors to tax collections with the largest 100 corporate groups reporting AUD 30.9 billion or 42 per cent of all corporate income tax for the 2016-17 income tax year.

According to the report, most taxpayers reviewed obtained an overall medium assurance rating, with an expectation that many will transition from medium to high assurance. This level of assurance is based on an objective view (having regard to objective evidence) of whether the taxpayer is considered to have paid the right amount of tax.

Tax governance is a key focus area under the justified trust methodology for large public and multinational businesses, with an effectively operating tax governance framework said to provide the ATO with greater confidence in reported tax outcomes. The ATO continues to see taxpayers make an investment in tax governance, or take steps to improve their tax risk governance and they are using the available ATO guidance.

Transfer pricing is a common assurance area with approximately 85 per cent of Top 100 taxpayers reporting related party dealings. Common issues arising in relation to transfer pricing analyses include:

- changes in transfer pricing policy/methodologies without an underlying change to taxpayer functional analysis
- for related party financing transactions, the ATO expects to see evidence supporting the taxpayer's self-assessment of the risk indicators and risk zone rating pursuant to PCG 2017/4
- in relation to services transactions, the beneficial nature of services and appropriateness of allocation keys is not well documented or evidenced, and
- in relation to royalty/licensing/intellectual property arrangements, the performance of development, enhancement, maintenance, protection and exploitation activities is not well documented or evidenced.

The report also provides some useful insights on the common areas that continue to attract ATO attention (such as tax consolidation, Research and Development Incentive claims, and losses) and the key areas that this group will need to focus on to improve their future assurance rating.

Corporate Tax Transparency report released

The ATO has released its corporate tax transparency report for the 2017-18 income year which contains the name, Australian Business Number (ABN), total income, taxable income and tax payable for:

- Australian public and foreign-owned companies with an income of AUD100 million or more
- Australian-owned resident private companies with an income of AUD200 million or more, and

It also contains the name, ABN and tax payable for nine entities that had a petroleum resource rent tax (PRRT) payable amount for the 2017-18 income year.

The report shows that the number of large companies paying no tax continues to decline. According to Deputy Commissioner Rebecca Saint, while there is a positive trend of companies having used up their prior year losses and are expected to begin to pay tax in the coming years, the ATO continues to focus on companies that consistently report sustained losses.

Global standard for tax transparency

The Global Sustainability Standards Board has released the Global Tax Standard GRI 207: Tax 2019 for comprehensive tax disclosure at the country-by-country level, aimed at ensuring multinationals are much clearer about how much, and where, they pay their taxes.

The GRI Tax Standard is the first global standard for comprehensive tax disclosure at the country-by-country level and builds on the aims of the OECD Framework on Base Erosion and Profit Shifting, which requires large multinationals (in OECD countries) to provide country-by-country data to tax administrations.

The standard applies from 1 January 2021, with early adoption encouraged.

R&D tax incentive changes reintroduced

The Government has reintroduced legislation giving effect to its 2018-19 Federal Budget proposal to reform the Research and Development (R&D) Tax Incentive, but has made some changes to the levels of intensity and also deferred the start date of the reforms to 1 July 2019 (instead of 1 July 2018). In addition to measures to enhance the integrity of the incentive (including extending the general anti-avoidance provisions directly to R&D tax offsets) and to improve its administration, the following changes are proposed:

- increase the R&D expenditure threshold from AUD 100 million to AUD 150 million (and a permanent feature of the law)
- link the R&D tax offset for refundable R&D tax offset claimants (a corporate tax entity with an aggregated turnover of less than AUD 20 million) to the claimants' corporate tax rates plus a 13.5 percentage point premium
- cap the amount of the refundable R&D tax offset at AUD 4 million per annum (however, offset amounts that relate to expenditure on clinical trials do not count towards the cap), and
- target the non-refundable offset to larger R&D entities who have high levels of R&D intensity, while reducing the benefits provided to others (according to the table below).

Tier	R&D intensity range	Intensity premium
1	Notional deductions representing up to and including 4% of total expenses	4.5 percentage points
2	Notional deductions representing greater than 4% and up to and including 9% of total expenses	8.5 percentage points
3	Notional deductions representing greater than 9% of total expenses	12.5 percentage points

Further details are included in this TaxTalk Alert.

Small Business Ombudsman calls for changes to administration of R&D tax Incentive

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) Kate Carnell has recommended a suite of reforms to the administration of the R&D tax incentive, as part of a comprehensive report released. The review found that the R&D tax incentive 'significantly improves the incentive for smaller firms to undertake R&D' and the program should be retained for this purpose. However, some recommendations were made in relation to the administration of the program including, among others:

- any compliance examinations or audits should take place as close as possible to the first year of registration of a project, and not be retrospective beyond one year unless fraud is suspected
- guidance material needs to be comprehensive, clearer and up-to-date and developed in consultation with small business, and
- substantiation and record keeping requirements should be simplified and take into account commercial practicality for a small business.

Reduced company tax rate – Final guidance on 'base rate entity passive income'

The ATO has released its final Law Companion Ruling LCR 2019/5 on what is 'base rate entity passive income' (BREPI) which is relevant for determining a company's eligibility for the lower corporate tax rate and the maximum franking credits attached to dividends. Broadly, with effect from the 2017-18 income year, companies with an aggregated turnover of less than the relevant threshold (AUD 50 million for the 2018-19 and 2019-20 income years) and with no more than 80 per cent of assessable income as BREPI may qualify for a reduced 27.5 per cent tax rate.

Key differences to the ATO's previous draft guidance include some new examples and clarification of the ATO's views that franked dividends flowing through a trust cannot be 'non-portfolio dividends' in the hands of any ultimate corporate beneficiary (and are therefore included as BREPI) and that although rent is BREPI only when received by a landlord for exclusive possession and use of land or premises, other equipment hiring fees and the like may be BREPI under the broader tax definition of royalties.

Board of Taxation Report on asset merger rollover relief released

The Board of Taxation's final report on its review of a proposed asset merger rollover relief has been released. The Board recommends that the Government introduce an optional roll-over which defers tax liability for the disposal of a company's interests in assets in a merger with interests in assets of another company and for asset for scrip mergers between companies. Other recommendations noted in the report include raising with the States and Territories complementary stamp duty roll-over relief for similar transactions and replacing existing roll-overs with a smaller number of principle-based roll-overs. The government is yet to formally respond to the Board's recommendations.

Let's talk

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Employment Taxes Update

Increased application of superannuation guarantee penalty

The Australian Taxation Office (ATO) has issued Practice Statement Law Administration PS LA 2019/1 which sets out the ATO's updated internal guidance in relation to remission of the 200 per cent penalty imposed under the *Superannuation Guarantee (Administration) Act 1992 (Cth)* for failure to provide a superannuation guarantee (SG) statement (or related information) on time.

Of particular note is the increased likely application of the penalty going forward, with eligible employers generally looking at a maximum of 90 per cent of the penalty being remitted for unprompted self-assessment (notwithstanding the ability to increase remission further with good compliance history or for exceptional facts and circumstances).

The increased likely application of penalties for prompted and enforced self-assessment, especially through the increased use of Single Touch Payroll reporting data, demonstrates the ATO's focus in this space.

For further insights on the penalty remission guidance, refer to our TaxTalk Alert.

This more stringent approach serves to re-emphasise the value of the proposed once-off SG amnesty to be provided under the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019. Specifically, if this measure is passed, the amnesty period gives employers the opportunity to come forward with any underpayments with a full remission of the 200 per cent penalty. For further information about the amnesty, refer to this TaxTalk Alert.

Jockeys found to be employees for superannuation guarantee purposes

The Full Federal Court in Commissioner of Taxation v Scone Race Club Limited [2019] FCAFC 225 and Commissioner of Taxation v Racing Queensland Board [2019] FCAFC 224 has held that the Scone Race Club and Racing Queensland Board respectively were liable for superannuation guarantee (SG) charges relating to riding fees paid to jockeys.

Both racing clubs argued that they were not liable for superannuation payments because the owner or trainer had employed or engaged the jockey to ride in the race and they only made the payments of riding fees to the jockeys on behalf of the owners for administrative purposes.

The Full Federal Court disagreed with this, holding that the club/board failed to demonstrate that it was not liable to pay riding fees to jockeys for riding in a horse race and were therefore deemed to be their employers for the purposes of the SG legislation.

Employee or independent contractor?

The Administrative Appeals Tribunal (AAT) has found in Toowong Pastures Pty Ltd as trustee for the DB Family Trust v FC of T [2019 AATA 4897 that the taxpayer was liable to pay SG charges for failing to make SG contributions in respect of services its worker performed as a common law employee under section 12(1) of the *Superannuation Guarantee (Administration) Act 1992 (Cth)*. The Tribunal found that, based on an objective assessment of the totality of the parties' relationship with reference to the relevant indicia of whether a person is an employee or an independent contractor (as noted in SGR 2005/1 and applied in the decision in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366*), the evidence was not sufficient to establish that the worker was an independent contractor. Accordingly, the Tribunal found that the worker was a common law employee because he:

- did not perform the work as an entrepreneur operating his own business; and
- he performed the work in and for the business of the taxpayer.

FBT exemption for ride sharing services

Legislative amendments have been introduced into Federal Parliament to the existing fringe benefits tax (FBT) exemption for certain taxi travel to include a broader range of transport services including ride sharing services. Specifically, Treasury Laws Amendment (2019 Measures No. 3) Bill 2019 proposes to amend the FBT law to replace the references to a 'taxi' with 'a motor vehicle used for taxi travel (other than a limousine)'. The term 'taxi travel' is defined as having the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*, namely, 'travel that involves transporting passengers by taxi or limousine, for fares'.

The change is proposed to apply to the 2019-20 FBT year onward.

Update to FBT Guide on car parking

Further to the ATO's Draft Taxation Ruling TR 2019/D5 which considers the FBT treatment of car parking benefits, the ATO released for comment a draft update to its FBT Guide for Employers. To recap, of particular note is that the view expressed in TR 2019/D5 means that there is now potentially greater FBT exposure on employer provided car parking where there is a special purpose car park within a one kilometre radius, regardless of whether the rate structure discourages all day parking. The updated Chapter to the FBT Guide provides employers with more information and examples that relate to the practical application of the views in the draft Ruling and the calculation of the taxable value of car parking fringe benefits.

For further information concerning the ATO's latest views on car parking benefits, refer to this TaxTalk Alert.

It is also worth noting that the ATO has indicated that from February 2020, it may be contacting employers who have engaged an arm's length valuer as required under the market value method to determine the taxable value of car parking fringe benefits. The ATO has observed that in some instances valuers have prepared reports using a daily rate that does not reflect the market value.

Final guidance on employee share trusts

The ATO has released its final tax determination TD 2019/13, which sets out the Commissioner's interpretation on when a trust is an 'employee share trust' (EST) for the purpose of an employee share scheme (ESS). Certain tax concessions are available to the trustee and beneficiaries of such trusts, and the employer company, but only where the trust meets the definition of an EST. Satisfaction of the "sole activities" test is necessary in order for a trust to be considered an EST under subsection 130-85(4) of the *Income Tax Assessment Act 1997 (Cth)* and obtain these tax concessions.

According to TD 2019/13, the relevant 'sole activities' test is not intended to be interpreted broadly and the Determination outlines various examples of activities which would cause a failure of the test. In particular, the ATO's view is that a dividend waiver activity is not an incidental activity because it does not occur as part of, or in conjunction with, obtaining shares and ensuring that the beneficial interests in those shares are provided to the employees. The ATO also suggests that once a failure of the test is triggered the trust cannot regain its status as an EST.

It is recommended that companies which operate employee share plans involving trusts review their actual trust activities and trust documentation in order to identify whether the ATO would consider there to be a breach of the "sole activities" test. This is particularly important as the ATO's view is that if a breach has occurred post 1 January 2020, the trust will not be considered an EST, and this will impact the tax concessions available on all ESSs facilitated through that trust going forward.

Further details are included in this TaxTalk Alert.

Single Touch Payroll and child support payments

In response to the Government's 2019-20 Federal Budget announcement to expand the data collected through Single Touch Payroll (STP) by the ATO, Treasury has released draft legislation for comment. The proposed law will allow employers to voluntarily report under the STP rules, employer withholding of child support deductions from salary or wages and child support garnishee amounts from salary or wages that are paid to the Child Support Registrar.

The expansion of STP reporting to include remittance of child support and the introduction of an automated data sharing solution is designed to reduce the compliance burden on employers by removing duplicate reporting requirements and manual processes for employers. An automated data sharing solution will commence from 1 July 2020 which will enable the sharing of data in near real-time between the ATO and other Commonwealth agencies where the law already allows for the sharing of data.

Comments can be made on the draft legislation by 5 February 2020.

Victoria updates ruling on contractor payroll tax exclusion

The State Revenue Office of Victoria has redrafted its ruling on the Victorian payroll tax exclusion for contractors who ordinarily provide services to the public – Draft Revenue Ruling PTA-021v2 which is open for public comment until 3 February 2020.

The updated ruling addresses the decision in Nationwide Towing & Transport Pty Ltd & Ors v Commissioner of State Revenue [2018] VSC 262 where the Supreme Court of Victoria found that, contrary to PTA-021, the Commissioner of State Revenue does not need to be satisfied that a contractor conducts a 'genuine independent business' in order for the relevant payroll tax exclusion to apply.

In determining whether a contractor meets the requirement for services to be performed by a person "who ordinarily performs services of that kind to the public generally ...", the draft ruling provides a non-exhaustive list of factors that the Commissioner will take into consideration based on the particular circumstances.

WA payroll tax exemption threshold

The Pay-roll Tax Assessment Amendment (Thresholds) Bill 2019 (WA), which was introduced into the Western Australian (WA) Parliament on 28 November 2019, proposes to amend the *Pay-roll Tax Assessment Act 2002 (WA)* to increase the payroll tax exemption threshold from AUD850,000 to AUD950,000 on 1 January 2020 and to AUD1 million on 1 January 2021.

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Global Tax Update

Latest news from international tax and transfer pricing

Draft legislation tweaks the hybrid mismatch rules

Treasury has released draft legislation in relation to the Federal Government's 2019-20 Budget announcement to make a number of technical amendments to the hybrid mismatch rules in Division 832 of the *Income Tax Assessment Act 1997* (Cth). Specifically, the draft legislation seeks amendments designed to:

- ensure that the rules apply to multiple entry consolidated (MEC) groups in the same way as tax consolidated groups,
- clarify that the definition of 'foreign income tax' does not include foreign municipal or State taxes,
- clarify the operation of the rules for trusts and partnerships,
- ensure that the unilateral low tax lender integrity rule (which operates in relation to certain interest payments subject to foreign tax at 10% or less) can apply where other hybrid mismatch provisions have applied and will apply to payments by subsidiaries (not just the head company) of tax consolidated groups,
- clarify the operation of the dual inclusion income on-payment rule, and
- allow franking benefits on distributions made on Additional Tier 1 capital instruments in certain circumstances.

The proposed amendments, once enacted, are generally intended to apply to assessments made for income years starting on or after 1 January 2019 (i.e. retroactively from the time that the hybrid mismatch rules started to apply) but some of the proposed amendments are intended to apply to assessments made for income years starting on or after 2 April 2019 (i.e. date of the Federal Government announcement).

ATO rethinks compliance approach for corporate tax residency and Board of Tax continues review

The ATO has updated its Practical Compliance Guideline PCG 2018/9 which contains guidance to assist foreign incorporated companies apply the principles set out in Taxation Ruling TR 2018/5 regarding the 'central management and control' test of corporate residency for Australian income tax purposes.

By way of background, in 2017 the ATO dramatically altered its approach in relation to the residency test for companies not incorporated in Australia under the 'central management and control' test and provided transitional relief, until 30 June 2019, designed to provide taxpayers with time to adjust to this new ATO approach. This update extends the transitional relief period for companies that are taking active and timely steps to change their governance arrangements in line with the new ATO approach. In general terms, the transitional period has been extended until 31 December 2020 (for 31 December tax year-end) and until 30 June 2021 (for 30 June tax year-end).

In addition, the PCG now indicates that "it is unlikely the Commissioner would apply resources to review the residence" of a foreign company that "has its operating business wholly offshore".

In a related development, the Board of Taxation has released a second consultation paper for stakeholder review and input as part of its review of the residency rules for companies. This latest paper summarises the comments and feedback that have been collected by the Board to date from its initial consultations and sets out a number of proposed reform options. It also includes additional consultation questions for stakeholder consideration.

The following primary reform options have emerged from the Board's consultation to date:

- retention of the existing 'carrying on business and central management and control' test, but with some form of legislative modification; and
- adoption of an incorporation-only test.

The Board welcomes submissions on the issues raised in the consultation paper. The closing date for submissions was 31 January 2020.

Applying a principal or main purpose test in tax treaties

The Australian Taxation Office (ATO) has released Draft Law Administration Practice Statement PS LA 2019/D2 which provides guidance to ATO staff on the administrative process of applying a principal or main purposes test included in Australia's tax treaties (including those modified by the Multilateral Instrument or MLI). Of particular note is that the draft includes framing questions that may be relevant to the ATO to better understand an arrangement and the documentation that should generally be considered in the application of a purpose test.

Comments are due by 14 February 2020.

ATO reviewing arrangements with Australian taxable property

The ATO has noted it has concerns around foreign residents disposing of taxable Australian property (TAP) and that although most foreign residents get it right, it has identified problems whereby foreign residents are claiming assets are not TAP and, as such, are reviewing arrangements where foreign residents are:

- structuring investments in indirect Australian real property interests in such a way that each entity holds an interest of less than 10 per cent (i.e the non-portfolio interest test)
- attributing significant value to non-taxable Australian real property assets (relevant to the principal asset test), and
- dissipating funds by transferring them offshore prior to meeting Australian tax obligations.

Tax treaty between Australia and Israel enters into force

The Australian government has ratified the new double tax treaty between Australia and Israel. This treaty also provides a framework for the revenue authorities of Australia and Israel to cooperate and tackle tax avoidance practices by giving effect to the Base Erosion and Profit Shifting (BEPS) recommendations made by the G20 and the Organisation for Economic Co-operation and Development (OECD).

The benefits of the treaty will apply in Australia from the following dates:

- for withholding taxes – on income derived on or after 1 January 2020
- for fringe benefits tax – on benefits provided on or after 1 April 2020
- for all other taxes – for income years starting on or after 1 July 2020.

Non-arm's length arrangements involving intangible assets

The ATO has issued Taxpayer Alert TA 2020/1 which addresses the ATO's concerns with international arrangements that mischaracterise Australian activities connected with the development, enhancement, maintenance, protection and exploitation (DEMPE) of intangible assets.

The ATO is specifically concerned with whether the arrangements appropriately recognise and remunerate Australian entities for functions performed, assets used and risks assumed in connection with the DEMPE of intangible assets. These arrangements may also involve the migration of Australian intangible assets and associated rights to international related parties on non-arm's length terms or in a manner intended to avoid tax in Australia. The ATO is also concerned that parties to these arrangements may fail to properly comply with the capital gains tax, capital allowances, transfer pricing, general anti-avoidance and diverted profits tax provisions. Refer to this TaxTalk Alert for further details.

Unilateral tax measures targeting digital activities

The 2020 calendar year has started with new digital services taxes (DSTs) coming into effect in Italy and Austria, with more on the horizon in the coming months, including agreed legislative provisions from Turkey beginning in March 2020.

The pace of countries considering DSTs continues to accelerate, even as discussions by the OECD Inclusive Framework move forward, driven in part to mitigate the rationale for DST implementation.

Refer to this Global Tax Policy Alert for more detail.

US tax policy outlook

This comprehensive PwC publication provides a useful outline of the current tax, trade, economic and political landscape in the United States (US), including the progress of US tax reform and key tax proposals of the leading US presidential candidates.

US Treasury releases final and proposed BEAT regulations

On 2 December 2019, the US Treasury released Final Regulations and Proposed Regulations under 'the base erosion and anti-avoidance tax' or 'BEAT'. BEAT requires certain corporations doing business within the US to pay a minimum tax on taxable income as computed without certain deductions for designated payments to foreign related parties.

The Final Regulations provide additional guidance related to the mechanics of determining a taxpayer's BEAT liability and clarify the application of the rules to partnerships, banks, registered security dealers, and US consolidated groups. These regulations also provide an anti-abuse rule that generally disregards certain transactions undertaken with a principal purpose of avoiding the provisions.

Further details are included in this Global Tax Insights.

Japanese tax reform proposals

The ruling parties in Japan published their 2020 tax reform proposals on 12 December 2019, including the introduction of a new group tax relief system to replace the existing consolidated tax rules. Most of the provisions in these proposals are expected to be passed into law in March 2020. A summary of the major proposals is set out in this Global Tax Insights.

Germany's anti-hybrid proposals

The German Federal Ministry of Finance on 10 December 2019 circulated for consultation a draft bill providing for the implementation of the Anti-Tax Avoidance Directive (ATAD) in Germany. The draft bill, in particular, includes the implementation of anti-hybrid rules into German tax law, as well as the amendment of existing German controlled foreign company (CFC) rules. Based on the draft bill, both the anti-hybrid rules and CFC changes would enter into force as of 1 January 2020. Further details are included in this Global Tax Insights

French Budget measures now law

The French Parliament on 19 December 2019 approved its Finance Act for 2020, which includes corporate tax measures designed to transpose ATAD into French law. The Finance Act also includes other EU-compliant measures and postpones, for large companies, the scheduled reduction of the corporate income tax rate. Most of the measures apply for tax years beginning on or after 1 January 2020. Further details are included in this Global Tax Insights

OECD developments

In OECD developments since our last monthly update:

- The Inclusive Framework on BEPS has released additional interpretative guidance to give greater certainty to tax administrations and multinational groups on the implementation and operation of Country-by-Country (CbC) Reporting (BEPS Action 13). The new guidance makes clear that, under the BEPS Action 13 minimum standard, the automatic exchange of CbC reports filed under local filing rules is not intended.
- the 2019 edition of the OECD's annual Revenue Statistics publication shows that tax revenues in advanced economies have reached a plateau during 2018 with the OECD average tax-to-GDP ratio at 34.3 per cent in 2018, virtually unchanged since the prior year. Detailed country notes provide further data on national tax-to-GDP ratios and the composition of the tax mix in OECD countries
- the OECD has released documents from the public consultation meeting held on 9 December 2019 on the Global Anti-Base Erosion (GloBE) Proposal under Pillar Two including the meeting agenda, presentations and public submissions on the consultation document
- Jordan, Kenya and Oman have signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).
- Montenegro and Honduras have joined the Inclusive Framework on BEPS.

New free trade agreements

The new Free Trade Agreement between Australia and Hong Kong and the Peru-Australia Free Trade Agreement entered into force on 17 January 2020 and 11 February 2020 respectively. The Indonesia-Australia Comprehensive Economic Partnership Agreement is to yet to come into force 60 days after Indonesia formally advises Australia it has ratified the agreement.

To give effect to these trade agreements, the following customs regulations have been introduced to largely prescribe the rules used to determine whether a good is originating in the respective location and valuation rules for different types of goods:

- Customs (Hong Kong Rules of Origin) Regulations 2019
- Customs (Indonesian Rules of Origin) Regulations 2019, and
- Customs (Peruvian Rules of Origin) Regulations 2019

Other related regulations introduced include:

- Customs (International Obligations) Amendment (Peru-Australia Free Trade Agreement Implementation) Regulations 2019 and Customs (International Obligations) Amendment (Free Trade Agreement Implementation) Regulations 2019, which allow a refund of any excess duties paid on Peruvian, Indonesian and Hong Kong originating goods in specified circumstances and amend provisions in respect of the refund of

duties paid on goods that are originating goods under the Korea-Australia Free Trade Agreement
- Customs Tariff Amendment (Peru-Australia Free Trade Agreement Implementation) Regulations 2019 which amends the *Customs Tariff Regulations 2004* to prescribe goods as required in new Schedule 6A of the *Customs Tariff Act 1995*

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Indirect Tax Update

Determining if an intangible is connected with the 'indirect tax zone'

For a supplier to be liable for goods and services tax (GST) on a taxable supply, one of the requirements is that the supply must be connected with the 'indirect tax zone' – essentially Australia. The Australian Taxation Office (ATO) has issued GST Ruling GSTR 2019/1 which discusses when a supply of anything other than goods or real property (an intangible) is connected with the indirect tax zone, together with exclusions to the 'connected with Australia' rules.

The Ruling broadly applies both before and after its date of issue and it updates and replaces GSTR 2000/31.

GST input tax credits for credit card business

The ATO has finalised GST Ruling GSTR 2019/2 which is relevant to any taxpayer that issues credit cards or charge cards in a four-party (open loop) payment system and provides the Commissioner's view on the analysis required to determine whether acquisitions are made solely or partly for a creditable purpose.

The Ruling acknowledges that as the application of the relevant provisions requires the precise identification of the relevant acquisition and a factual enquiry into the connection between the acquisition and the making of supplies that would be input taxed, it is not possible to address every potential variation in individual circumstances. Instead, the Ruling relies largely on a series of examples to illustrate how input tax credits are determined in the context of a credit card issuing business.

The Ruling applies from the start of the first tax period commencing on or after 1 January 2020.

Compliance approach to GST apportionment of acquisitions relating to financial supplies

The ATO has issued Practical Compliance Guideline PCG 2019/8 setting out its compliance approach for GST apportionment of acquisitions that relate to certain financial supplies. The Guideline sets out the framework used by the ATO to assess the risk associated with methods to determine the extent of creditable purpose of these acquisitions under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). The Guideline takes effect from 1 January 2020.

Similar to the compliance approaches adopted in recent years for many cross-border arrangements (eg PCG 2017/4 in relation to related party financing arrangements), the Guideline comprises two parts:

- the main body, which sets out general principles relevant to the risk assessment framework for the apportionment of acquisitions that relate to the making of financial supplies; and
- schedules, which currently consists only of Schedule 1 relating to credit cards, which will expand on these principles giving more specific details and indicators relevant to different types of financial supplies.

The risk assessment framework is made up of five zones. Taxpayers falling in the high risk ‘red zone’ for example, can expect ATO reviews to be commenced as a matter of priority. The ATO may ask taxpayers to advise them in writing whether they have reviewed their risk rating under the Guideline and which risk zone their arrangements fall within.

There is an expectation that the publication of the Guideline may prompt and encourage willing and cooperative compliance and taxpayers to self-review their GST apportionment methods. This may cause some taxpayers to adjust their apportionment methods to come within the ‘green zone’(i.e. low risk) prospectively. In this regard, the Guideline also proposes a transitional approach for the first six months following the date of effect of a Schedule, for those taxpayers who actively engage with the ATO to transition arrangements to the green zone and who make a voluntary disclosure of any amendments to applicable business activity statements.

Updated guidance for providers of financial supplies

The ATO has issued an addendum to GST Ruling GSTR 2006/3 which deals with determining the extent of creditable purpose for providers of financial supplies. The Addendum clarifies existing principles set out in GSTR 2006/3, including how a direct estimation system operates as part of an apportionment method, re-emphasising that apportionment methods must be fair and reasonable, and make other minor updates.

It applies both before and after its date of issue, subject to the commencement and application provisions of each amending Act or Regulation to which it refers.

GST treatment of government land development arrangements in the ACT

Draft GST Determination GSTD 2019/D1 explains the Commissioner of Taxation’s preliminary views on the GST treatment of arrangements between government agencies and private developers in the context of land development in the Australian Capital Territory (ACT). In particular, this draft Determination considers whether ‘building works’ and ‘associated site works’ carried out by developers on land they have acquired under a long-term Crown lease, are non-monetary consideration for the supply of that lease by a government agency.

According to the draft, in the building arrangements that it covers, the nature of a Crown lease in the ACT means that effectively the developer is constructing buildings on its own land. As such, undertaking the building works and the associated site works is for the developer’s own benefit and the works are not a supply to the government agency and therefore also not non-monetary consideration for any relevant supply.

Comments are due 14 February 2020.

Determining the extent of creditable purpose for car expenses

The ATO has issued an addendum to GST Ruling GSTR 2006/4 to include methodologies for determining the extent of creditable purpose for car expenses. In particular, for those taxpayers who use the cents per kilometre method for income tax purposes and accordingly not otherwise required to calculate the specific extent of business use of a car, the addendum provides that to work out the extent of creditable purpose for GST purposes, the following formula is acceptable:

> *reasonable estimate of business kilometres per tax period ÷ reasonable estimate of total kilometres per tax period*

where the estimate of business kilometres is the same as that used for income tax purposes, excluding any travel in respect of employment or making input taxed supplies. The addendum also notes that the 5,000 kilometre limitation on the cents per kilometre method for income tax will not apply for GST purposes, provided records are sufficient to show that the extent of creditable purpose you use is a fair and reasonable approximation of the actual use of the car.

For taxpayers who maintain a logbook and all of the business use of their car is for a creditable purpose, the Commissioner will accept that the percentage of business use obtained for income tax can also be used as reflecting the extent of creditable purpose for GST purposes. If business use is not entirely for a creditable purpose (for instance, business use includes travel employment or travel in respect of input taxed supplies), the extent of creditable purpose needs to be reduced accordingly.

This Addendum applies on and from 22 January 2020. Goods and Services Tax Bulletin GSTB 2006/1 is withdrawn from 22 January 2020.

Guidance on environmental criteria for FTC claims

Under the *Fuel Tax Act 2006,* a taxpayer is not entitled to claim a fuel tax credit for fuel used in a motor vehicle that does not meet specified environmental criteria. The ATO has issued final Fuel Tax Determination FTD 2019/1 which explains the ATO's views on satisfying the environmental criteria in relation to a motor vehicle for fuel tax credit purposes. The Determination considers the term 'motor vehicle', when a motor vehicle is used 'primarily' on an agricultural property, and how to account for any fuel used in a motor vehicle which no longer satisfies the environmental criteria.

According to the Determination, a motor vehicle is considered to be used primarily on an agricultural property when the motor vehicle:

- travels more than half its total kilometres on an agricultural property, and/or
- was used on an agricultural property for an amount of time equating to more than half of the time that the vehicle was used during the calendar year.

The Determination applies both before and after its date of issue. For further information, contact Gary Dutton.

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Personal Tax Update

Removal of the main residence CGT exemption for foreign residents

The Government's proposal to remove the main residence capital gains tax (CGT) exemption for Australian tax non-residents was passed in Parliament in December 2019 and is now operative.

This now means that the main residence CGT exemption is not available for foreign residents in respect of a CGT event at any time from 7:30pm (AEST) on 9 May 2017, subject to certain exceptions. For a foreign resident, the two main exceptions are:

- the transitional rule which applies to a property held as at 7:30pm (AEST) on 9 May 2017, where the main residence exemption may still apply in relation to a disposal of the property up until 30 June 2020.
- disposals resulting from certain life events, e.g. terminal medical conditions, death or divorce within six years of becoming a foreign resident.

For further details, refer to our TaxTalk Alert for further insight.

ATO view on Harding residency case

As previously reported (see our TaxTalk Alert), the High Court of Australia dismissed the Commissioner of Taxation's application for special leave to appeal against the decision of the Full Federal Court in *Harding v Commissioner of Taxation [2019] FCAFC 29* which held that the taxpayer, who was an

Australian citizen living outside of Australia in a temporary and furnished apartment overseas, was not an Australian tax resident. In this decision, the Federal Court ruled that the concept of a “permanent place of abode” should be interpreted more widely to consider whether a person is living permanently in a particular “country or state”, and not just the permanence of a specific house, flat or dwelling.

In response to the finalisation of this matter, the Australian Taxation Office (ATO) has now released a decision impact statement. The Commissioner has said it will adopt the Full Federal Court’s construction of a “permanent place of abode” for purposes of determining an individual’s tax residency status and will review Taxation Ruling IT 2650 to reflect the view of the Full Federal Court. The ATO also stressed that each case would be dependent on its individual circumstances.

Dual residency and tie-breaker rules

In the case Pike v Commissioner of Taxation [2019] FCA 2185, the Federal Court has considered the tax residency of an individual.

The taxpayer, originally from Zimbabwe, worked and lived in Thailand from 2006 to 2014 before relocating to Tanzania in 2014 and to the United Arab Emirates (UAE) from 2016. While he never worked in Australia, his de facto wife did and moved to Brisbane in 2005. Furthermore, the couple purchased vacant land in 2010 with the intention to build a family home before selling the property in 2013. The individual supported his family financially during all these years. The wife was granted Australian permanent residency in 2009 then citizenship in 2010, and the taxpayer was granted Australian citizenship in 2013.

The Court partly allowed the taxpayer’s appeal and found that the taxpayer was a tax resident of Australia because he had the intention to continue to make a home with his family in Australia, which was especially so after the taxpayer’s de facto wife and their sons became Australian citizens, and the couple’s joint acquisition of land in Australia.

As the taxpayer was a dual resident both in Australia and Thailand from 2009 to 2014, the Court then applied the tie-breaker rule in the double tax agreement (DTA) between Thailand and Australia and found that since the taxpayer’s personal and economic relations were closer to Thailand than Australia, that he was deemed to be a tax resident of Thailand only for those years. Therefore, his income was not assessable in Australia.

However, for the 2015 and 2016 income tax years, as there is no DTA between Australia and Tanzania or the UAE, the taxpayer was considered to be a tax resident of Australia and his income was assessable in Australia for those years.

Board of Taxation: Reforming individual tax residency rules

The journey on the prospect of reforms to Australia’s individual tax residency rules started in 2016 when the Board of Taxation commenced a self-initiated review of the current tax rules. A first report was provided to the Government in 2017 and publicly released in 2018.

The Board has now released its preferred model for simplifying and modernising the current individual tax residency rules in a second report provided to the Government in March 2019 – Reforming individual tax residency rules – A model for modernisation. The Government has not responded to the Board’s recommendations.

The Board’s proposed residency rules adopt a two-step approach:

1. A 183-day test for all individuals, i.e. any individual who spends 183 days or more in Australia would be a tax resident of Australia; and
2. A day-count test together with a new factor test based on the individual’s prior year residency status (commencing/ceasing residency tests). This secondary test applies more targeted and objective rules depending on each individual’s circumstances, and which set out clear criteria as to when an individual who is in Australia for less than 183 days in an income year commences or ceases residency.

Under the secondary factor test, individuals would be required to conclude whether they satisfy any two or more of the following four factors:

- the right to reside permanently in Australia (including citizenship and permanent residency);
- Australian accommodation;
- Australian family; or
- Australian economic connections.

The Board also recommends that the uncertainty for Australians undertaking expatriate employment opportunities and becoming Australian tax non-resident be resolved by legislation. Broadly, the new law would codify the streamlined version of the existing practice for work assignments of longer than two years.

New ATO guidance on deducting employee transport expenses

The ATO has provided new guidance for employees claiming tax deductions on transport expenses. The new Draft Taxation Ruling TR 2019/D7 explains the ATO's current view on when transport costs for work-related travel are tax-deductible, specifically in relation to transport costs associated with flights, taxis, trains, cars, buses, boats or other vehicles. Generally, travel expenses are deductible where they are incurred in gaining or producing assessable income. In this regard, the draft ruling observes that this involves consideration of the scope of the particular employee's work activities to determine if the circumstances of the transport expense have a sufficiently close connection to earning the employment income (refer to our TaxTalk Alert for further insight).

Draft Taxation Ruling TR 2019/D7 partially overlaps the guidance in TR 2017/D6 and to the extent there are any inconsistencies, TR 2019/D7 will prevail.

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State Taxes Update

Queensland to provide land tax surcharge relief for commercial activities

The Queensland Government in its 2019-20 Mid-Year Fiscal and Economic Review announced that land tax revenue has been revised down by AUD 291 million over the period 2019-20 to 2022-23, following consultation with industry regarding implementation of the Foreign Land Tax Surcharge.

To help Queensland continue to be an attractive destination for investment, the Government has committed to establish guidelines (not yet released), in consultation with stakeholders, that provide ex gratia relief from the Queensland Foreign Land Tax Surcharge for certain commercial activities that make a significant contribution to the state economy.

Queensland extends duty exemption for certain deceased estate distributions

The Queensland Office of State Revenue has issued Public Ruling DA124.3.2 (Exemption for deceased person's estate – extension to certain statutory vestings), which discusses an administrative arrangement to extend the transfer duty exemption under section 124 of the *Duties Act 2001* (Qld) to include dutiable transactions where property vests in a person under certain statutes to give effect to a distribution in a deceased estate.

Update on NSW Surcharge Land Tax for discretionary trusts

The State Revenue Legislation Further Amendment Bill 2019 contains provisions which clarify when a trustee of a discretionary trust is liable for surcharge land tax (or surcharge purchaser duty, as the case may be).

Trustees that may have inadvertently incurred surcharge land tax may receive an exemption (or refund) if their trust deeds were amended in accordance with the legislation, currently by 31 December 2019. As the Bill was not passed by the NSW Parliament in 2019, the Government announced in December 2019 its intention to extend the 31 December 2019 deadline to a later date in 2020. The exact date is yet to be announced.

Land failed to satisfy NSW primary production land tax exemption

The Civil and Administrative Tribunal (NSW) in Settler's Rise Pty Ltd ATF Maison Dieu Road Unit Trust v Chief Commissioner of State Revenue [2019] NSWCATAD 238 has held that over 76 hectares of land zoned general residential and used for cattle grazing and stud cattle breeding activities was not eligible for the land tax primary production exemption despite its use for primary production purposes.

Although the Tribunal conceded that the use of the land was "…intensive as could be expected in the circumstances…" and that stock levels were appropriate given the size and nature of the property, it was not satisfied that the use of the land during the relevant period had a significant and substantial commercial purpose or character on the basis that, despite these factors, the use of the land failed to generate a profit that contributing in any meaningful way to the farmer's income.

NSW land tax Rulings on guidelines for exemptions

Revenue NSW has issued the following Rulings that outline the guidelines applying to certain land tax exemptions for the 2020 land tax year:

- LT 106 – land used and occupied primarily for a boarding house
- LT 107 – land used and occupied primarily for low cost accommodation that is situated within a 5 kilometre radius of 1 Martin Place, Sydney (the former Sydney GPO Building).

Victorian stamp duty payable on settlement deed creating trust

The Supreme Court of Victoria has held in Versaci v Rechich [2019] VSC 747 that a trust was created by a settlement deed which was an 'instrument of settlement' that would attract stamp duty of AUD200 and that while the deed of settlement remains unstamped it could not be used as evidence in any legal proceeding.

Reminder: Victorian property owners to notify vacant land details

Vacant residential land tax applies to homes in certain inner and middle Melbourne that were vacant for more than six months in the preceding calendar year. Affected property owners were required to notify the Victorian State Revenue Office online by 15 January 2020 if their property was in one of the listed 16 Melbourne council areas and unoccupied for more than six months in 2019.

To minimise any penalties and interest, owners who have missed the deadline are encouraged to notify the State Revenue Office about vacant property as soon as possible.

It is important to note that this tax, which is set at 1 per cent of the capital improved value of taxable land, is separate to normal land tax, the absentee owner surcharge and the federal annual vacancy fee.

Updated ACT circulars on interest, principal place of residence and land tax exemptions

The ACT Revenue Office has updated the following guidance circulars on interest, principal place of residence and land tax exemptions:

- GEN009.4 Interest which provides details of the interest provisions under ACT tax laws. It also sets out how the Commissioner administers discretionary powers under these interest provisions.
- GEN011.1 Principal Place of Residence which explains how the ACT Revenue Office determines a person's principal place of residence for purposes of the various relevant laws.
- LTA001.2 Land Tax Exemptions which explains the circumstances in which an exemption from land tax can be applied when a parcel is occupied by a person under a nil or nominal rent arrangement or when a parcel is, or has become, unfit for occupation as a place of residence.

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Superannuation Update

SMSF quarterly statistical report for September 2019

The Australian Taxation Office (ATO) has issued its Self-managed super fund (SMSF) quarterly statistical report provides the latest statistics on the SMSF sector based on extracted data to extrapolate for the period to June 2019. Highlights include:

- there are 598,582 SMSFs and 1,124,699 members of SMSFs
- the total estimated value of assets of SMSFs are just over AUD 746 billion
- the average SMSF asset value per SMSF member is AUD 678,621
- the top asset types held by SMSFs (by value) are listed shares (31 per cent of total estimated SMSF assets) and cash and term deposits (21 per cent).

Updated guidance on the calculation of total superannuation balance

The ATO has issued an Addendum to Law Companion Ruling LCR 2016/12 to provide the Commissioner's view on how recent changes enacted by the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019 to amend the definition of 'total superannuation balance' to, in certain circumstances, take into account the outstanding balance of a limited recourse borrowing arrangement, affect the calculation of an individual's total superannuation balance. Total superannuation balance is relevant for determining, among other things, eligibility for unused concessional contributions cap carry forward, eligibility for a non-concessional contributions cap and, for self-managed superannuation funds and small APRA funds, for determining their eligibility to use the segregated assets method to determine their exempt current pension income.

The Addendum also reflects changes in the rules that determine when a transition to retirement income stream is in the retirement phase, as enacted by the Treasury Laws Amendment (2018 Measures No. 4) Act 2019.

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Legislative Update

Federal Parliament finished sittings for the 2019 calendar year on 5 December 2019. The following new Commonwealth tax and superannuation legislation has been introduced into Federal Parliament since the December edition of TaxTalk Monthly:

- Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019, which was introduced into the House of Representatives on 27 November 2019, reintroduces amendments to the *Superannuation Guarantee (Administration) Act 1992* that were previously introduced into Parliament in a lapsed Bill. The proposed amendments ensure employees under workplace determinations or enterprise agreements have an opportunity to choose the superannuation fund for their compulsory employer contributions and apply to new workplace determinations and enterprise agreements made on or after 1 July 2020.
- Treasury Laws Amendment (Research and Development Tax Incentive) Bill 2019, which was introduced on 5 December 2019, seeks to implement amendments to better target the research and development tax incentive (as was first announced in the 2018-19 Federal Budget). Although the Bill substantially reintroduces the Research and Development (R&D) proposals that were previously introduced to Parliament in the lapsed Bill from 2018, several changes were made including a later application date (income years commencing on or after 1 July 2019) and refinements to the intensity-based R&D tax offset for large R&D entities. Further details are included in this month's Corporate Tax update.
- Commonwealth Registers Bill 2019 and associated Bills, which were introduced into the House of Representatives on 4 December 2019, propose to create the *Commonwealth Registers Act 2019* and make related amendments to a suite of existing laws in relation to a new Commonwealth business registry, and amend the *Corporations Act* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* to introduce a director identification number requirement.
- Treasury Laws Amendment (2019 Measures No. 3) Bill 2019, which was introduced into the House of Representatives on 5 December 2019, makes amendments to the taxation of income from testamentary trusts and proposes to defer the transitional timeframes for existing financial advisers to comply with new education and training standards, and make a number of minor and technical amendments to laws relating to taxation and superannuation.

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019 makes minor and technical amendments, among other things, to tax and superannuation regulations to correct typographical errors and unintended outcomes, increase thresholds and repeal inoperative provisions. These changes include amendments to the *Taxation Administration Regulations 2017* to give the force of law to treaty obligations relating to the service of documents in Article 17 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, and to the *Income Tax Assessment Regulations 1997* (Cth) to prescribe the additional circumstances in which a transfer balance debit arises in an individual's transfer balance account and the amount of the debit for certain defined benefit superannuation income streams.

Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019 has completed its passage through Parliament since our last monthly update. This Bill includes measures to:

- remove the entitlement to the Capital Gains Tax (CGT) main residence exemption for foreign residents in respect of a CGT event happening at or after 7.30 pm (legal time in ACT) on 9 May 2017
- modify the foreign resident CGT regime to clarify that, for the purpose of determining whether an entity's underlying value is principally derived from Taxable Australian Real Property, the principal asset test is applied on an associate inclusive basis (applicable for CGT events happening on or after 7.30 pm (ACT time) on 9 May 2017)
- provide an additional affordable housing capital gains discount of up to 10 per cent if a CGT event occurs to an ownership interest in residential premises that has been used to provide affordable housing (applicable to CGT events occurring on or after 1 January 2018 for affordable housing tenancies that start before, on or after 1 January 2018), and
- create a reconciliation mechanism by which developers pay additional fees for selling dwellings to foreign persons under a near-new dwelling exemption certificate.

Federal Parliament is next scheduled to sit from 4 February 2020.

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Other News

Relief and assistance for taxpayers affected by bushfires

All of us at PwC Australia have been shocked and devastated by the bushfire crisis, and grieve for those who have been directly impacted and we will do all we can to support our community.

Federal and State governments have and continue to announce additional tax concessions and financial relief measures to assist those affected by the devastating bushfires across Australia. Some of the key measures currently announced include:

- Federal Government has announced grant funding (up to AUD50,000) and concessional loans (up to AUD 500,000)
- Support from the Australian Taxation Office (ATO) for taxpayers in one of the identified impacted postcodes, including an automatic deferral of most ATO lodgments or payments until 28 May 2020 and fast-tracked refunds, the ability to vary PAYG installments to zero for the December 2019 quarter and claim a refund for any installments made in the September 2019 quarter and support to reconstruct lost records
- Tax exemption for Government payments made to eligible rural fire service volunteers (see this media release), Disaster Recovery Allowance payments made to individuals and payments that would otherwise be taxable under the Disaster Recovery Funding Arrangements
- A Victorian government relief package including relief for 2020 land tax for affected property and land transfer duty (up to AUD55,000) on replacement homes as well as a fully-funded clean-up program (see this media release)
- A NSW government relief package including extended payment and lodgment deadlines and payroll tax exemption for wages paid or payable to an employee for bushfire-fighting activities or emergency operations
- A South Australian relief package including ex-gratia tax relief for the stamp duty (up to AUD 48,830) payable on the purchase of replacement properties and motor vehicles and relief for 2019-20 and 2020-21 land tax liabilities for properties destroyed or substantially damaged by bushfires in South Australia.

Legislative amendments for the exemptions will be introduced in upcoming parliamentary sittings.

Mid-Year Economic and Fiscal Outlook 2019-20

The Federal Government released the 2019-20 MidYear Economic Fiscal Outlook (MYEFO) on 16 December 2019. The majority of the tax and superannuation measures announced in the MYEFO have previously been announced or implemented by the Government, although of particular note were:

- a new third party reporting regime applicable to online sharing platforms to report identification and income information regarding participating sellers to the ATO for data matching purposes. Under this measure, the reporting regime will apply to ride-sourcing and short-term accommodation platforms from 1 July 2022 and to asset sharing, food delivery, tasking-based platforms, and other platforms (except for marketplaces) from 1 July 2023, and

- a proposal to ensure that no tax is payable on the refund of large-scale generation certificate (LGC) shortfall charges.

Draft ATO guidance for sovereign immunity and superannuation funds for foreign residents exemptions

The ATO has released Draft Law Companion Ruling LCR 2019/D4 which provides the Commissioner of Taxation's preliminary views on key components of the new tax rules that limit the withholding tax exemption for superannuation funds for foreign residents and codify and restrict the scope of the sovereign immunity tax exemption. Subject to the transitional rules, both of these measures apply to income derived on or after 1 July 2019.

The draft LCR contains guidance on the "influence test" (which has relevance to both the entitlement to the exemption for foreign superannuation funds and sovereign immunity) and guidance on key terms and definitions relevant to the sovereign immunity rules. Although the guidance is welcome, there still remain a number of uncertainties and questions about the practical application of these rules by the ATO which may mean some entities will be required to seek private rulings from the ATO to confirm their eligibility to apply the exemptions. Comments on the draft LCR can be made by 21 February 2020.

Further details are included in this TaxTalk Alert.

ATO rules on trust split arrangement

The ATO has provided its views in Taxation Determination TD 2019/14 on arrangements where parties to an existing trust functionally split the operation of the trust so that some trust assets are controlled by and held for the benefit of a subset of trust beneficiaries, and other trust assets are controlled and held for the benefit of others.

It is the Commissioner's view that the split will result in the creation by declaration and/or settlement of a new trust over the transferred assets and a taxable capital gain will arise to the extent that the capital proceeds from the transfer (or if there are none, or the parties are not dealing at arm's length, the asset's market value at the time) is more than the asset's cost base.

Although the ruling applies both before and after its date of issue, in recognition of the uncertainty over the matter prior to the release of the predecessor draft determination, the Commissioner will not devote compliance resources to apply the views expressed in this final Determination to arrangements entered into before 11 July 2018.

Eligibility for DGR status – the 'in Australia' condition

Taxation Ruling TR 2019/6 provides the Commissioner's views on the condition that certain deductible gift recipients (DGRs) be 'in Australia' before a gift or contribution to them is tax-deductible and certain income tax-exempt entities have a 'physical presence in Australia' for their income to be exempt or, where applicable, qualify for a refund of excess franking credits.

Broadly, the Ruling confirms that the phrase carries its ordinary meaning. Whether a fund, authority or institution is located in Australia is a question of fact, to be determined based on the circumstances in each case. A DGR would typically satisfy this requirement where it is established or legally recognised in Australia and makes operational or strategic decisions mainly in Australia.

Testamentary trust changes impact tax concessions for minors

New law currently before Parliament seeks to ensure that the tax concessions available to minors in relation to income from a testamentary trust only apply in respect of income generated from assets of the deceased estate that are transferred to the testamentary trust (or the proceeds of the disposal or investment of those assets).

Currently, income provided to a minor from a testamentary trust that is unrelated to assets of the deceased estate can be excepted trust income and therefore taxed at individual marginal tax rates rather than the higher rates generally imposed on minors. The proposed amendments will require that in order for income to be 'excepted' the assessable income must be derived by the trustee of the testamentary trust estate from property, and the property must satisfy any of the following three requirements:

- the property was transferred to the trustee of the trust estate to benefit the beneficiary from the estate of the deceased person as a result of the will, codicil, intestacy or order of a court
- the property represents accumulations of income or capital from property that satisfies the first requirement, or
- the property represents accumulations of income or capital from property that satisfies the second

requirement or property that has already satisfied this requirement.

The amendments apply in relation to assets acquired by, or transferred to, the trustee of a testamentary trust estate on or after 1 July 2019. Income from assets and accumulations held in a testamentary trust prior to 1 July 2019 can continue to be excepted trust income under existing provisions.

Value of goods taken from stock for private use

The ATO has updated the amounts that it will accept as estimates of the value of goods taken from trading stock for private use by taxpayers for certain named industries in the 2019/20 year (refer to TD 2020/1).

ATO to data match lifestyle assets

As part of the ATO's lifestyle assets data matching program, the ATO will request a further five years' worth of policy information (from 2015/16 to 2019/20) from insurance companies about taxpayers who own marine vessels, thoroughbred horses, fine art, high-value motor vehicles, and aircraft. The information provided will be used in the ATO's compliance profiling activities, to identify taxpayers that understate income, including capital gains, or claim GST credits incorrectly.

Lump sum payments to doctors were on revenue account

The Federal Court in Healius Ltd v Commissioner of Taxation [2019] FCA 2011 has held that lump sum payments made by the operator of medical centres to doctors to conduct their practice at the medical centres for a certain period (usually five years) were deductible.

The question before the Court was whether the lump sum outgoings were of 'capital or a capital nature' or whether they were on revenue account and accordingly deductible. The Federal Court held that lump sum payments made by the operator of the medical centres to doctors were not capital or capital in nature, but recurrent and ongoing, as the taxpayer consistently tried to engage doctors to meet its ongoing demand for them. It accepted that each payment was made for the winning of a customer.

While some documentation suggested that the taxpayer was to acquire the practice of the doctor comprising the goodwill of the practice and certain medical equipment, a detailed analysis of the Sale Deed and commercial reality indicated that this was not the case. The payments were rather for the doctors' promise to conduct their practice exclusively from the taxpayer's medical centre for five years – ongoing payments in pursuit of a five-year revenue stream.

Small business CGT concession denied on sale of land

The Federal Court in Commissioner of Taxation v Eichmann [2019] FCA 2155 has held that a taxpayer was not entitled to a small business capital gains tax (CGT) concession on the sale of land used for the storage of business tools and materials for a construction business as the land was not an 'active asset' used in the course of carrying on a business.

The taxpayer and his wife ran a business of building, bricklaying and paving and used two sheds and an open space on a property to store work tools, equipment and materials. Tools and other items were collected from the site on a daily basis, and work vehicles were parked on the property. On occasion, some preparatory work was done at the property in a limited capacity and the site was visited several times per day between jobs.

The Court found that for a use of an asset to be 'in the course of carrying on a business', it must have direct functional relevance to the carrying on of the normal day-to-day activities of the business directed to the gaining or production of assessable income. In that sense, the use must be a constituent part or component of the day-to-day business activities, and might in that way be described as 'integral' to the carrying on of the business. The Court also agreed that for an asset to be 'used' in the course of carrying on a business, it must be wholly or predominantly so used, such that any other use can only be minor or incidental.

Based on these requirements, the Court held that the land was not an 'active asset'. The land's use was held to be preparatory to undertaking day-to-day activities in the ordinary course of business. It was at best a use 'in relation to' the carrying on of the business but it was not, of itself, an activity in the course of carrying on the business activities which were directed to the gaining or production of assessable income.

Reports of Board of Taxation released

The Board of Taxation's final reports following its reviews of the following tax issues have been released:

- Review of Small Business Tax Concessions – recommendations include a single AUD 10 million aggregated turnover test apply for all small business tax concessions, repeal the maximum net asset value test and collapse the existing small business CGT concessions into one exemption, subject to a cap
- Income Tax Treatment of Certain Forms of Deferred Consideration – recommendations include the provision of further binding guidance on the meaning of 'contingent on economic performance', amendment of the Taxation of Financial Arrangements (TOFA) rules to clarify the exclusion of 'look-through earnout rights' from its scope and various other changes to address failure of the rules to align tax consequences with the commercial outcomes of transactions.

The government is yet to formally respond to the Board's recommendations:

Board of Taxation to review rollovers

The Board of Taxation has also been requested by the Government to undertake a review into Australia's system of capital gains tax rollovers and associated provisions, focusing on considering practical ways to simplify existing rollovers (refer to the terms of reference). The Board is to finalise its review and report to the Government by 30 November 2020.

Let's talk

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Editorial

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