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TaxTalk Monthly

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

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Corporate Tax Update

Release of the Corporate Tax Transparency Report

The Australian Taxation Office (ATO) released on 9 December 2016 its Corporate tax transparency report for 2014-15 which covers Australian public and foreign-owned companies with an income of AUD 100 million or more, and Australian-owned resident private companies with an income of AUD 200 million or more.

This is the second annual report that the Commissioner has published setting out certain tax information about relevant companies as extracted from their lodged tax returns including: total income, taxable income and income tax payable. It also includes those entities with Petroleum Resource Rent tax (PRRT) payable.

Refer also to the statement by the Commissioner of Taxation Chris Jordan AO setting out some further observations about the data and the ATO's compliance efforts.

In an interesting statistic, the companies covered in the transparency population account for $42 billion or around 63% of total company income tax payable for 2014-15.

Taxation Determination on beneficiary's entitlement to bad debt deduction

Taxation Determination TD 2016/19 sets out the ATO's final view that the beneficiary of a trust is not entitled to a bad debt deduction (under section 25-35 of the *Income Tax Assessment Act 1997* (ITAA 1997) for the amount of an "unpaid present entitlement" that the beneficiary has purported to write off as a bad debt.

Further ATO guidance on foreign equity distributions through interposed entities

The ATO issued the following draft tax determinations dealing with the application of the Subdivision 768-A exemption, which applies to certain foreign equity distributions made to a corporate tax entity, in the context of an interposed partnership and trust:

- Draft Taxation Determination TD 2016/D6 - a partnership can 'hold' a direct control interest (as defined in section 350 of the *Income Tax Assessment Act 1936* (ITAA 1936)) in a foreign company for the purposes determining whether an Australian corporate tax entity that is a partner in the partnership has satisfied the participation test as required for purposes of applying the exemption.

- Draft Taxation Determination TD 2016/D7 - a trust can be taken to 'hold' a direct control interest (as defined in section 350 of the ITAA 1936) in a foreign company for the purposes determining whether an Australian corporate tax entity that is a beneficiary of the trust has satisfied the participation test.

When the final Determinations are issued, they will apply to foreign equity distributions made on or after 17 October 2014, being the date Subdivision 768-A commenced operation.

Draft taxation ruling on natural resource payments

The ATO has released draft taxation ruling TR 2016/D3 which deals with the application of section 6CA of the ITAA 1936 and Australia's tax treaties and payer's withholding obligations in relation to payments, typically made by the holder of a mining right to an entity that does not have an interest in the right, based upon the value of natural resources produced and/or sold. Such payments are commonly known as 'override royalties'.

The definition of 'natural resource income' in subsection 6CA(1) of the ITAA 1936 includes income that is calculated, in whole or in part, by reference to the value or quantity of resources produced where the calculation is based on the level of production. According to the draft ruling, in working out whether the calculation of a payment is based on the level of production, it is appropriate to have regard to the contractual terms of the override royalty agreement and any related agreements, and the substance of the arrangement. A direct causal connection between the amount of income and the level of production is not required. This means that in some circumstances, income calculated by reference to a value or measure other than production (such as sales or shipping volume), may be natural resource income.

The draft ruling also indicates that 'natural resource income' under subsection 6CA(1) of the ITAA 1936 will be income from real property under the majority of tax treaties. The Australian treaty with the United States of America is an exception. Recipients of override royalty payments who do not hold the right to exploit or explore for natural resources do not derive income from real property for the purposes of the US treaty.

Comments can be made on the draft ruling by 10 February 2017.

Review of Petroleum Resource Rent Tax

The Treasurer on 30 November 2016 announced a review of the operation of the Petroleum Resource Rent Tax (PRRT), crude oil excise and associated Commonwealth royalties. The review will advise the Government as to the extent the taxes are operating as originally intended, and address the reasons for the rapid decline of Australian PRRT revenues.

In addition, an issues note which was prepared by the review was released on 20 December 2016. The note provides some background on the relevant taxes and outlines views on key design and administration issues. Submissions in response to the note are due by 3 February 2017.

The review team is due to report back to the Government by April 2017 on recommendations for reform of the PRRT.

R&D and Specific Issues Guidance products

In recognition of common errors being made by companies undertaking research and development (R&D) activities in certain industries, the following new Specific Issues Guidance documents, which are designed to enable companies to correctly self-assess and register eligible R&D, avoid compliance reviews and potential penalties, have been issued:

- Getting software development R&D Tax Incentive claims right
- Getting building and construction R&D Tax Incentive claims right
- Getting mining R&D Tax Incentive claims right
- Getting farming R&D Tax Incentive claims right

Trust providing benefits to employees was not a unit trust

On 21 December 2016 the High Court of Australia handed down its decision in ElecNet (Aust) Pty Ltd v Commissioner of Taxation [2016] HCA 51. The Court unanimously dismissed the appeal from the Full Federal Court, holding that the Electrical Industry Severance Scheme was not a unit trust for the purposes of Division 6C of Part III of the ITAA 1936 because any interest created by the deed in favour of employees could not be characterised as a "unit".

The Court also held that the meaning of "unit trust" in Division 6C of the ITAA 1936 accorded with the common usage of the expression "unit trust" - that is, a trust where the beneficial interest in the trust estate is divided into units as discrete parcels of rights, analogous to shares, which, when created or issued, are to be held by the persons for whose benefit the trustee maintains and administers the trust estate. Refer to this previous edition of TaxTalk monthly for background to the case.

New Reportable Tax Position Schedule

The ATO has published an updated guide to reportable tax positions (RTPs). Substantial changes have been made to RTP Category C which now covers a number of specific issues that ATO finds concerning, most of these having been highlighted in Taxpayer Alerts issued last year. Taxpayers with income years ending on or after 30 June 2017 are required to answer the new Category C questions if they have been notified by the ATO that they must complete the RTP schedule.

The ATO will use the reported information for risk identification, case selection, and identification of unclear tax laws, and is expecting that one of the outcomes of the new reporting regimes is improved tax governance by corporates.

Additionally, for income years ending on or after 30 June 2018, the ATO is extending the RTP schedule to companies in economic groups with turnovers above $250 million. Taxpayers covered by the extension will be notified in writing that they must complete the RTP Schedule with their tax return next year.

Tax transparency in financial statements

Given the global focus on improving the tax transparency of multinational enterprises, the Australian Accounting Standards Board has prepared a Paper that recommends that the accounting standard-setters take a leadership role in improving income tax disclosures in financial reports.

The paper considers the case for amending *IAS 12 Income Taxes* to address user needs for greater transparency with respect to an entity's tax practices, including disclosures to enable financial statement users to understand the relationship between income tax amounts reported in financial statements; and why reported tax expense deviates from corporate income tax rate.

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Employment Taxes Update

New interpretation of employment agency contract payroll tax provisions (NSW)

In UNSW Global Pty Ltd v Chief Commissioner of State Revenue [2016] NSWSC 1852, the NSW Supreme Court set aside assessments issued by the Chief Commissioner of State Revenue under the employment agency provisions of the *Pay-roll Tax Act 1971* (NSW) and *Payroll Tax Act 2007* (NSW).

The case dealt with UNSW's Unisearch business unit which arranged for the provision of expert opinion to clients by subject matter experts for purposes such as litigation, laboratory testing, and the provision of expert reports. In challenging the assessments issued by the Chief Commissioner, UNSW contended that the underlying purpose of the employment agency provisions was to capture indirect arrangements which would be characterised as employment arrangements if entered into directly by the service provider and client, rather than capturing services provided by a genuine independent contractor through an arrangement with an intermediary. UNSW submitted that services provided directly by an independent contractor to a client would generally not be subject to payroll tax, due to the existence of a range of payroll tax exemptions available under the relevant contract provisions.

In considering the positions put forward and the construction of the key provisions, the Supreme Court found that the employment agency contract provisions were intended to apply to arrangements where the employment agent provided individuals who would comprise, or who would be added to, the workforce of the client for the conduct of the client's business. Whether the service provider operates as an individual or through an interposed entity, or as a genuine independent contractor, did not matter for this purpose. The Court did, however, draw a distinction between services provided for a client's benefit and services provided in a client's business. Specifically, where the services are not provided by the service provider working in the client's business, the Court found that the arrangement would not fall within the intended scope of the employment agency contract provisions. On this basis, while the work performed by the experts was provided for the benefit of the client, it was not carried out in the client's business and was therefore not subject to payroll tax under the employment agency contract provisions.

Backpacker Tax comes into force (Cth)

Following much debate and publicity, the Federal Government's "Backpacker Tax" bill (ie. Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (No. 2)) received Royal Assent in December 2016.

The Bill amends the personal income tax rates applying to 'working holiday makers' to 15% for those employees with taxable incomes of up to $37,000. The bills also amends PAYG withholding rates applying to working holiday makers and requires that the employee obtain a Tax File Number in order to work in Australia.Working holiday makers include individuals holding a subclass 417 (Working Holiday) visa, a subclass 462 (Work and Holiday) visa, and a bridging visa permitting the individual to work in Australia.

The new tax rates came into force from 1 January 2017, however, the ATO has provided an extension to 31 January 2017 for employers to register as an employer of working holiday makers via the ATO website. Penalties may apply where employers do not register by this date. There are also a number of other tools available on the ATO website, including a Visa Entitlement Verification system, which can be used by employers to confirm whether their workers hold a visa that would result in them being classified as a working holiday maker for the purpose of the new rules.

Penalties for failure lodge FBT returns (Cth)

In GSLL and Commissioner of Taxation [2016] AATA 954, the Administrative Appeals Tribunal affirmed the Commissioner's decision to impose 75% penalties under section 284-90(1) of Schedule 1 to the *Taxation Administration Act 1953* in respect of the taxpayer's failure to lodge fringe benefits tax (FBT) returns across a number of FBT years. The taxpayer argued that the penalty should be either remitted in full or in part, based on mitigating circumstances including the fact that the management of all taxation affairs were entrusted to the company's external accountant, the general lack of understanding of FBT compliance obligations by the company director, and the behaviour by the parties involved amounting only to a failure to take reasonable care rather than demonstrating an intentional disregard of the law or recklessness in regard to its FBT obligations.

The Tribunal found that the required circumstances for full remission of the penalty were not satisfied, and further, the relevant legislative provisions provided no scope for a partial remission of the 75% base penalty amount where a taxpayer fails to lodge a return by the required due date. Accordingly, the decision of the Commissioner to impose the penalties was affirmed in full.

Recovery of tax debts from moneys held on trust for the taxpayer (Qld)

In Commissioner of State Revenue v Can Barz Pty Ltd & Anor [2016] QCA 323, the Supreme Court dismissed the appeal of the Commissioner, finding that payroll tax debts owed by a taxpayer could not be recovered through garnishee notices issued to third parties in respect of amounts that were to be held on trust by the taxpayer's superannuation fund.

Following the sale of a property by a superannuation fund for which the taxpayer was acting in the capacity of trustee, the Commissioner sought to recover an outstanding tax debt from third parties, including real estate agents and the purchaser of the property, using sale proceeds that were set to be received by the superannuation fund. The Court found that the Commissioner's interpretation of the garnishee provisions of the *Taxation Administration Act 2001* (Qld) would have resulted in an operational inconsistency with the laws of the Commonwealth, which do not allow the application of superannuation funds for the payment of tax debts. As the money in question could not be lawfully applied by the taxpayer in the payment of the tax debt due to the operation of the *Superannuation Industry (Supervision) Act 1993* (Cth), they were also unavailable to be recovered by the Commissioner from third parties via garnishee notice.

New decision on the application of payroll tax exemption for work performed in connection with a charitable purpose (NSW)

The Supreme Court of NSW - Court of Appeal in Grain Growers Limited v Chief Commissioner of State Revenue (NSW) [2016] NSWCA 359 has disallowed the appellant's application for a payroll tax exemption and refund of payroll tax pursuant to section 48 of the *Payroll Tax Act 2007* (NSW). The Court determined the proper construction of subsection 48(2) finding that for a non-profit

organisation to be entitled to an exemption from payroll tax, it has to establish that the wages must be paid or payable for work of a kind that is like or similar to that which is ordinarily (that is, regularly or commonly or customarily) performed in connection with the charitable purposes of the organisation.

Application of payroll tax exemption to certain facilities operated by local councils (NSW)

In Snowy Monaro Regional Council v Chief Commissioner of State Revenue [2017] NSWCATAD 14, the Tribunal revoked the decision of the Chief Commissioner to disallow the payroll tax exemption applicable to local councils, finding that an Aged Care Facility operated by the council should not fall within the definition of a "hostel" and should therefore fall outside of the excluded services listed in section 60 of the *Payroll Tax Act 2007* (NSW) for which the local council payroll tax exemption does not apply. In reaching this decision, the Tribunal gave consideration to the legislative intention of the term "hostel" and also the ordinary meaning of this term, being facilities providing temporary accommodation, with minimal services and basic comforts at a low cost and low level of care from the operator. Ultimately, as the Aged Care Facility operated by the council was primarily occupied by permanent residents, and occupants incurred both high costs and received high levels of care from qualified staff, it was determined that it would not be appropriate to treat this facility as a hostel under the Payroll Tax Act.

New decision on the characterisation of an organisation's charitable purpose in relation to payroll tax exemption (Vic)

In Victorian Farmers Federation v Commissioner of State Revenue [2017] VCAT 19, the Victorian Civil and Administrative Tribunal found that the applicant's purpose was to advance the private interests of those engaged in the business of agriculture, rather than the promotion of agriculture generally, and therefore the organisation's purpose was not charitable. Whilst a benefit to the community resulted from the profitability of farming businesses, this was found to not be the purpose of the Victorian Farmers Federation.
The case confirms when an organisation applies for payroll tax exemption status under s48 of the Payroll Tax Act 2007 (Vic), a holistic approach is applied, which considers the objects in the Constitution, the activities undertaken in pursuit of those objects, and other relevant factors.

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Global Tax Update

Latest news from international tax and transfer pricing

Draft law released on the Diverted Profits Tax

The Federal Treasurer on 29 November 2016 announced the release of exposure draft legislation on the Diverted Profits Tax (DPT). The draft legislation gives effect to the Australian Government's announcement in the 2016-17 Federal Budget to impose a 40 per cent penalty tax on profits that have been artificially diverted from Australia by multinationals. The measure is intended to target entities with annual global income of $1 billion or more that shift profits to offshore associates where:

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

To ensure that the DPT does not apply where the Australian operations of the global group are relatively small, there is a carve-out for groups that have $25m or less Australian turnover.

Once enacted, the DPT will apply to income years commencing on or after 1 July 2017, whether or not the scheme was entered into, or was commenced to be carried out, before that day. PwC has lodged a submission with Treasury on the draft legislation. Refer to this TaxTalk Alert from Global Tax Insights for a detailed analysis.

US Tax Reform

One of the top priorities for the Trump administration and Republican Congressional leaders is comprehensive tax reform that lowers business and individual tax rates, simplifies the tax code, and makes US business more competitive in the global economy. PwC 2017 US Tax Policy outlook publication, and webcast US Tax Policy and US inbound issues, provides an overview and in-depth discussion of the US Tax Policy outlook in 2017.

Exchange of Information with foreign revenue authorities about indirect taxes

The Australian Taxation Office (ATO) issued Law Practice Statement PS LA 2016/6 on 9 December 2016 which provides guidance on the exchange of information with foreign revenue authorities about indirect taxes under Australia's international tax agreements such as the Mutual Convention on the Mutual Administrative Assistance in Tax Matters, a bilateral tax treaty, or a taxation information exchange agreement. The Practice Statement importantly outlines the manner in which requests for information from foreign authorities are handled by the ATO. The Law Practice Statement has effect from 16 December 2016. The following Law Practice Statements were withdrawn as a result of the issuing of the new law Practice Statement:

- PS LA 2007/13 - Exchange of Information with foreign revenue authorities in relation to goods and services tax, under international tax agreements
- PS LA 2007/14 - Gathering and use of information from foreign agencies or sources in relation to goods and services tax, wine tax and luxury car tax administration.

Foreign Investment Review Board update

The Foreign Investment Review Board (FIRB) has revised its Guidance Note on Tax Conditions for foreign investments [GN47]. The Guidance Note outlines circumstances in which the Federal Treasurer will consider tax-related conditions, and serves as advice to potential foreign investors of the tax conditions that in certain circumstances may be applied to a no objection notification. A reporting template has been provided for applicants that are required to report to FIRB on compliance with tax conditions.

New tax treaty with Germany enters into force

The Australian Government announced on 13 December 2016 that instruments of ratification were exchanged between Australia and Germany on 7 December 2016, bringing the new Australia-Germany tax treaty into force. The treaty, which was signed on 12 November 2015, replaces the previous Australia-Germany tax treaty which was signed in 1972. Some of the treaty's new rules came into effect from 1 January 2017, including those relating to withholding tax rates on non-resident income and with respect to certain pensions first paid from 1 January 2017. Refer to this TaxTalk article for detailed information about the new treaty.

New Zealand IRD focus on multinationals

The New Zealand Inland Revenue Department (IRD) has released its 2016 Compliance Focus for multinationals which highlights the areas of potential risk including transfer pricing, international financing, controlled foreign companies and BEPS. In relation to BEPS, New Zealand will be consulting on hybrid mismatch arrangements, interest limitation rules, signing up to the OECD's multilateral instrument and applying the revised OECD Transfer Pricing Guidelines.

Cayman Islands approve regulatory amendments related Common Reporting Standard

The Cayman Islands government recently approved regulatory amendments for compliance with and enforcement of the Common Reporting Standard (CRS) by financial institutions. The amendments include clarifications and additions relating to the notification requirement for Cayman Financial Institutions (FIs), CRS policies and procedures, return filing requirements for Cayman Reporting FIs and offense and penalties for contravening the CRS regulation. Refer to Tax Insights from Global Information Reporting & Withholding for further information.

Luxemburg issues new Transfer pricing circular for the fiscal treatment of intra-group financial transactions

The Luxembourg Tax Authorities issued a new Circular providing guidance for the fiscal treatment of intra-group financial transactions. The Circular, which is effective from 1 January 2017 follows the application of the arm's-length principle of the OECD Transfer Pricing Guidelines. All existing transfer pricing rulings are no longer valid from that date. Refer to Tax Insights from Transfer Pricing for further information.

OECD and BEPS developments

The Organisation for Economic Co-operation and Development (OECD) has released the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS and its accompanying Explanatory Statement. The Convention has two main aims:

- to transpose a series of tax treaty measures from the OECD/G20 Base Erosion and Profit Shifting Project (BEPS) into more than 2000 existing bilateral and multilateral tax agreements
- to set a new standard for mandatory binding arbitration in relation to resolving double tax

More than 100 jurisdictions have concluded negotiations on the multilateral instrument that will swiftly implement a series of tax treaty measures to update international tax rules and lessen the opportunity for tax avoidance by multinational enterprises. The first high-level signing ceremony will take place in the week beginning 5 June 2017, with the expected participation of a significant group of countries during the annual OECD Ministerial Council meeting. For further information refer to this Tax Policy Bulletin.

On 19 December 2016, the Australian Treasury released a discussion paper on the Multilateral Convention. Interested stakeholders are invited to make submissions by 6 February 2017.

In addition, the OECD has released the following:

- discussion draft examples included in a discussion draft on the follow-up work on the interaction between the treaty provisions of the report on BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) and the treaty entitlement of non-collective investment vehicle funds. Comments can be made until 3 February 2017.
- an updated version of the BEPS Action 4 Report (Limiting Base Erosion Involving Interest Deductions and Other Financial Payments), which includes further guidance on two areas: the design and operation of the group ratio rule, and approaches to deal with risks posed by the banking and insurance sectors.

- further BEPS guidance which provides key details of jurisdictions' domestic legal frameworks for Country-by-Country (CbC) reporting (including the status of the legislation, first reporting periods, availability of surrogate filing and voluntary filing, and whether local filing can be required) and additional interpretive guidance on the CbC reporting standard.

- the 2016 edition of Revenue Statistics which presents detailed and internationally comparable tax data in a common format for all OECD countries, including Australia, from 1965 onwards. The latest data shows that tax revenues collected in advanced economies have continued to increase from last year's all-time high, with taxes on labour and consumption representing an increasing share of total tax revenues.

- a report which reviews consumption tax trends in OECD member countries. The report looks at the evolution of consumption taxes as a source of revenue. The report notes that consumption taxes accounted for 30.5 per cent of total tax revenues in OECD countries in 2014, on average.

- mutual agreement procedure statistics for 2015.

In other developments:

- Monaco has ratified the Convention on Mutual Administrative Assistance in Tax Matters. The Convention will enter into force for Monaco on 1 April 2017.

- Peru, Kazakhstan, Côte d'Ivoire and Bermuda have joined the Inclusive Framework on BEPS.

- Belgium has published detailed requirements in relation to transfer pricing documentation and reporting obligations formally adopting the OECD BEPS Action 13 requirements. Refer to Tax Insights from Transfer Pricing for further information.

- Canada has passed final legislation to implement CbC reporting. For a detailed analysis refer to Tax Insights from Transfer Pricing.

- The Chilean Internal Revenue Service has published new regulations on CbC reporting which aligns with BEPS Action 13 plan and follows the guidance set out by the OECD.

- The OECD has also announced that over 1300 relationships are now in place to automatically exchange information between tax authorities pursuant to the OECD Common Reporting Standard.

European Commission publishes directive on new tax proposals

The European Commission has published new tax proposals which seek to harmonise corporate tax bases, apply formulary apportionment, further address hybrid mismatches and improve tax dispute resolution. For a detailed analysis of these proposals refer to this Tax Policy Bulletin.

European Commission publishes Apple State aid decision and opening decision in GDF Suez

The European Commission has published its final decision announced on the State aid investigation into the profit attribution arrangements and corporate taxation of Apple in Ireland. Refer to Tax Insights from International Tax Services and Transfer Pricing for further information.

In addition, the European Commission has also published the non-confidential version of its opening decision in the formal investigation into Luxembourg tax rulings obtained by entities of GDF Suez. Refer to Tax Insights from International Tax Services and Transfer Pricing.

UK issues 2016 Autumn Statement

On 23 November 2016, the United Kingdom's (UK) Chancellor of the Exchequer, Philip Hammond, made his first Autumn Statement with respect to plans for the UK economy. This is the first Autumn Statement following the EU referendum and the appointment of the Chancellor and the new UK Prime Minister, Theresa May. The Autumn Statement reveals the new government's direction and tax policy goals and reaffirmed the UK Government's commitment to previously announced measures, such as cutting the UK corporate tax rate to 17 per cent, and changing the interest deductibility and loss relief rules. It also included commitments to simplify the UK participation exemption (Substantial Shareholdings Exemption, or SSE) and to make the UK an even more competitive location to perform research and

development. For further information refer to Tax Insights from International Tax Services.

French budget introduces corporate tax changes and incentives

The French parliament has approved the Finance Act for 2017 and the Amended Finance Act for 2016. These Acts contain certain corporate tax measures designed to improve the competitiveness of the French economy. Most of the measures will apply immediately and affect multinational enterprises with French operations or subsidiaries. The Acts include also a number of other provisions affecting wealth tax, individual taxation, and value-added tax. Refer to Tax Insights from International Tax Services for further information on these measures.

Refer to the International Tax News - Edition 46, December 2016 and Edition 47, January 2017 for other updates and analysis on developments taking place around the world, authored by specialists in PwC's global international tax network.

Explore PwC's global tax research and insights

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Indirect tax update

ATO draft GST ruling on making cross-border supplies to Australian consumers

The ATO has issued draft GST ruling GSTR 2016/D1 which discusses the GST implications of an overseas-based supplier making supplies of services, digital products or rights to Australian consumers that use or enjoy those supplies in Australia.
The draft ruling aims to provide guidance in determining whether a recipient of a supply is an Australian consumer, including explaining the evidentiary requirements in establishing that a supply is not made to an Australian consumer.

Once finalised, the ruling is proposed to apply to arrangements that have been carried out from 1 July 2016 but only in relation to working out net amounts for tax periods starting on or after 1 July 2017. Special transitional rules apply for periodic or progressive supplies that are attributable to tax periods commencing before 1 July 2017.
Comments can be made until 17 February 2017.

GST determination on foreign currency conversion

The ATO has issued draft GST Foreign Currency Conversion Determination FOREX 2016/D1.
The draft determination applies to an entity that works out the value of a taxable supply in Australian currency because an amount of the consideration for the supply is expressed in a foreign currency.
The draft determination provides additional conversion day options for non-residents that are making inbound intangible supplies. This draft determination once finalised will replace the A New Tax System (Goods and Services Tax) Act Foreign Currency Conversion Determination (No. 30) 2016.
Comments were due to be made by 31 January 2017.

Addendum to GST rulings

The ATO has released addendum to the following GST rulings due to the changes made to the *A New Tax System (Goods and Services Tax) Act 1999* by the *Tax and Superannuation Laws Amendment*

(2016 Measures No. 1) Act 2016 in relation to certain cross-border supplies:

- GSTR 2000/24A5 - Addendum: Goods and services tax: Division 129 - making adjustments for changes in extent of creditable purpose. The Addendum makes reference to adjustments for acquisitions made solely for a creditable purpose that relate to offshore intangible supplies.

- GSTR 2003/15A2 - Addendum: Goods and services tax: importation of goods into Australia. This Addendum reflects amendments made in relation to the calculation of the value of a taxable importation that is made on or after 1 October 2016.

Discussion paper on issues concerning electronic distribution platforms

The ATO has released a discussion paper on issues concerning electronic distribution platforms (EDPs) and the recent amendments to impose GST on digital supplies and services with effect from 1 July 2017. Broadly, the new rules ensure that the operator of an EDP is treated as having made supplies of digital products and services that are made through the EDP. The ATO is seeking input on a range of issues so it can provide relevant advice and guidance products to assist taxpayers in complying with the new law.

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Personal tax update

Residency - Application of DTA tie-breaker provisions

The Administrative Appeals Tribunal in Tan v Commissioner of Taxation affirmed the Commissioner's decision that the taxpayer was a tax resident of Australia for the whole income year, and as such, his Malaysian sourced personal services income and business income were taxable in Australia.

Since the taxpayer was resident of Australia and Malaysia under the relevant domestic laws, the Tribunal considered the application of the tiebreaker test in Article 4(2) of the Australia-Malaysia Double Tax Agreement (DTA). It was determined that the arrangements the taxpayer had with relatives in Australia and Malaysia provided him access to accommodation which was sufficient to establish that he had a permanent home in both countries.

As it was also determined that he had a habitual abode in both countries, the outcome of the case depended upon whether the taxpayer's 'personal and economic relations' were closer with Australia or Malaysia. Although the Tribunal acknowledged that the taxpayer had some connection with Malaysia, on balance, it considered that the taxpayer's "personal and economic relations" were far closer in Australia than in Malaysia, and accordingly he was resident solely of Australia.

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State Taxes Update

Amendments to duty law in Tasmania

The Duties Amendment (Landholder and Corporate Reconstruction and Consolidation) Bill 2016 received Royal Assent in December 2016 and amends the *Duties Act 2001* (Tas) in relation to the duty liability for indirect transfers of land.
The amendments change the assessment of liability from a land-rich model to a landholder model, bringing Tasmania in line with similar provisions applied by other states.

NSW releases revenue ruling on interpretation of "foreign person"

The New South Wales Office of State Revenue has issued Revenue Ruling No. G 009 concerning the Chief Commissioner's interpretation of "foreign person" for both the duty surcharge on acquisitions of NSW residential land by foreign persons from 21 June 2016, and for land tax purposes from the 2017 year.

South Australian stamp duty on foreign currency transactions

Revenue South Australia has released Information Circular No: 97 which deals with stamp duty in relation to foreign currency transactions.
According to the Circular where an instrument that is chargeable with *ad valorem* duty is expressed in a foreign currency, the duty payable (which is based upon the conversion of such currency to Australian dollars pursuant to section 103 of the *Taxation Administration Act 1996 (SA))* is to be determined at the Australian dollar equivalent using the exchange rate published by the Reserve Bank of Australia as at the date on which the liability to pay the tax arose, or if the rate is not published for a given date, the last earlier date on which the rate was published.

NSW land tax rulings

The NSW office of State Revenue has released the following land tax rulings which provide exemptions in accordance with the *Land Tax Management Act 1956* (NSW):

- LT 100 Exemption - Land Used and Occupied Primarily for a Boarding House - 2017 Tax Year, which provides a land tax exemption or a reduction in the land value of the land is available if land is used and occupied primarily as a boarding house

- LT 101 Exemption - Land Used and Occupied Primarily for Low Cost Accommodation - 2017 Tax Year, which provides a land tax exemption where land is situated within a 5 kilometre radius of the Sydney GPO is used and occupied primarily for low-cost accommodation (other than as a boarding house).

Land tax exemption not applicable

The Supreme Court of Victoria – Court of Appeal in Rainn Pty Ltd v Commissioner of State Revenue has dismissed the applicant's appeal against the Victorian Civil and Administrative Tribunal's decision which affirmed the Commissioner of State Revenue's assessment of land tax on the basis that the land was not exempt under section 66 of the *Land Tax Act 2005* (Vic) because it was not 'used primarily for primary production'.

The Court found it was not reasonably arguable that the Tribunal made an error of law. The Court found that the Tribunal's approach in determining the question of whether land was exempt land as at midnight on 31 December immediately preceding the tax year in question was correct. Furthermore, the Court agreed with the Tribunal's consideration of whether inactivity could nevertheless be shown to have been connected to any prior or subsequent primary production activity, and its conclusion that the land was not 'in use' primarily for primary production at the assessment date.

Let's talk

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Legislative update

With Federal Parliament ending its sittings for 2016 on 1 December 2016, the following Commonwealth revenue measures were introduced into Parliament since our previous TaxTalk publication:

- Treasury Laws Amendment (2016 Measures No. 1) Bill 2016, proposes, amongst other things, amendments to the *Corporations Act 2001* to improve the operation of Employee Share Schemes (ESS), and to add six organisations to the list of deductible gift recipients. The ESS amendments will operate so that ESS disclosure documents lodged with the Australian Securities and Investments Commission are not made publicly available for certain start-up companies.

Other Commonwealth revenue measures registered as legislative instruments or regulations since our previous TaxTalk publication include the following:

- Income Tax Assessment Act 1997 — Exploration Development Incentive Modulation Factor — Declaration Instrument (No 1) 2016, issued on 4 November 2016 and subsequently replaced by Income Tax Assessment Act 1997 — Exploration Development Incentive Modulation Factor — Declaration Instrument (No 2) 2016 to rectify an incorrect date reference, prescribes a modulation factor of 1.00 for the purposes of working out an eligible exploration entity's maximum exploration credit amount for the 2016/17 income year. The modulation factor ensures that the total amount of exploration credits created by eligible exploration companies undertaking greenfields mineral exploration in Australia cannot exceed the exploration credit cap for the relevant income year ($35m for 2016/17).
- The following Customs regulations have been made which amend the *Customs Tariff Regulations 2004* and the *Customs Regulation 2015* to give effect to the World Customs Organisation's fifth review of the International Convention on the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System:
  - Customs Tariff Amendment (2017 Harmonized System) Regulation 2016
  - Customs Amendment (2017 Harmonized System) Regulation 2016

Federal Parliament resumes for the Autumn 2017 sittings on 7 February 2017. The following key tax-related Bills did not complete their passage through Parliament in 2016 and no doubt will re-appear on the forthcoming legislative program:

- Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016 which proposes several amendments, including the introduction of a statutory remedial power for the Commissioner of Taxation, changes to allow primary producers to access income tax averaging ten income years after they opt out, and provide relief from luxury car tax for certain public institutions that import or acquire luxury cars for public display.
- Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016 which seeks to progressively reduce the corporate tax rate over ten years to 25 per cent, increase the tax discount for unincorporated small businesses and increase the small business entity threshold for purposes.

- Superannuation (Objective) Bill 2016 which proposes to establish a legislative framework to guide the development of future superannuation policy by requiring new bills and regulations relating to superannuation to be accompanied by a statement of compatibility with the objective of the superannuation system.

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Other news

Tax-related changes announced in 2016-17 MYEFO

The 2016-17 Mid-Year Economic and Fiscal Outlook (MYEFO) was released on 19 December 2016. Several new tax-related measures were announced including:

- Introducing a specific measure preventing the distribution of franking credits where a distribution declared by a company to its shareholders outside or additional to the company's normal dividend cycle (a special dividend), to the extent it is funded directly or indirectly by capital raising activities which result in the issue of new equity interests. Examples of capital raising activities include an underwritten dividend reinvestment plan, a placement or an underwritten rights issue. This measure will apply to distributions made after 12:00pm (AEDT) on 19 December 2016. It is proposed to address the issues raised by the ATO in Taxpayer Alert TA 2015/2: *Franked distributions funded by raising capital to release credits to shareholders.*

- Increasing the value of the Commonwealth penalty unit from AUD180 to AUD210, with effect from 1 July 2017.

- Changing the way fringe benefits are treated for the calculation of several tax offsets from 1 July 2017 by modifying the meaning of 'adjusted fringe benefits total' so that the gross rather than the adjusted net value of reportable fringe benefits is used. 'Adjusted fringe benefits total' is used to calculate a taxpayer's entitlement for the low income superannuation tax offset, the seniors and pensioners tax offset, the net medical expenses tax offset and the dependent (invalid and carer) tax offset and the amount of offset available. Fringe benefits received by individuals working for public benevolent institutions, health promotion charities and some hospitals and public ambulance services will not be affected by this change.

- From 1 July 2017, measures will allow the ATO to disclose to Credit Reporting Bureaus the tax debt information of businesses that have not effectively engaged with the ATO to manage these debts. This measure will initially only apply to businesses with Australian Business Numbers and tax debt of more than AUD 10,000 that is at least 90 days overdue.

Deductibility of expenditure on a commercial website

The ATO has issued Taxation Ruling TR 2016/3 which discusses the Commissioner of Taxation's final view on the deductibility of expenditure on a commercial website.

The ruling applies existing income tax concepts of capital and revenue to characterise the different types of costs that may be involved in development and maintaining a website. The ruling provides

numerous examples to help illustrate the application of the principles expressed in the ruling and also to highlight some of the challenges involved in categorising website expenditure including website content, leased websites, microsites and modifications to an existing website. The ruling does not cover expenditure on computer hardware, cross-border issues where a business is carried on outside of Australia, when software is trading stock and the Research and Development concession.

Draft ruling on composite items and identifying depreciating assets

The ATO has released draft taxation ruling TR 2017/D1 dealing with the treatment of composite items for the purposes of working out capital allowance deductions on depreicating assets.
The draft Ruling sets out the Commissioner's views on:

- determining whether a composite item is itself a depreciating asset or whether its components are separate depreciating assets for the purposes of Division 40

- whether an 'interest in an underlying asset' for the purposes of section 40-35 of the *ITAA 1997* requires an entity to have an interest in all or any parts of a depreciating asset.

According to the draft ruling, a composite item will be considered a depreciating asset if the component is capable of being separately identified or recognised as having commercial and economic value. The draft ruling provides guiding principles which are taken into account as part of the functionality test to determine whether a component of a composite item can be separately identified as a depreciating asset.

The draft ruling also considers whether modifications or alterations of an existing asset can itself be treated as a separate depreciating asset and also discusses whether intangible depreciating assets and jointly held tangible assets are capable of being recognised as separate depreciating assets.

The draft ruling replaces Taxation Determination TD 2002/5 (now withdrawn) which explained what is considered to be a 'distribution line' in the electricity distribution industry for depreciation purposes. Arrangements covered by TD 2002/5 are now covered in the new ruling. Comments on the draft ruling can be made until 17 February 2017.

Draft taxation ruling on earnout arrangements withdrawn

The long outstanding draft tax ruling (TR 2007/D10) which deals with the capital gains tax (CGT) consequences of earnout arrangements has been withdrawn. The ATO indicates that this draft ruling was withdrawn because most earnout arrangements created on or after 24 April 2015 will qualify for look-through treatment under new Subdivision 118-I of the *Income Tax Assessment Act 1997* (ITAA 1997). In other cases, taxpayers can still rely on TR 2007/D10 for earnout arrangements created on or before 7 December 2016, being the date of withdrawal of the draft ruling.
The withdrawal notice also confirms that there has been no change to the Commissioner's view on the CGT consequences for earnout arrangements that do not satisfy the requirements for look-through treatment under Subdivision 118-I of the ITAA 1997.

ATO issues guidance on foreign trusts and capital gains

The ATO has issued the following draft taxation determinations dealing with foreign trusts and the interaction with the capital gains tax (CGT) rules:

- Draft Taxation Determination TD 2016/D4 sets out the ATO's preliminary view that the residency assumption in section 95(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) does not apply for the purposes of section 855-10 of ITAA 1997 which disregards certain capital gains of a foreign trust.

Accordingly, in calculating the net income of a foreign trust under section 95(1) of the ITAA 1936, a capital gain or capital loss which happens in relation to an asset that is not 'Taxable Australian Property' is disregarded in accordance with s855-10 of the ITAA 1997. However, if an amount attributable to the gain is paid or applied for the benefit of a resident beneficiary of the foreign trust, the amount may be included in the beneficiary's assessable income under section 99B of the ITAA 1936.

The draft taxation determination rejects an alternative view that section 855-10 of the ITAA 1997 only applies to disregard the amount of a capital gain or capital loss from non-taxable Australian property that is reflected in the amount of net income that otherwise falls to be assessed to a trustee of a foreign trust under section 115-222 of the ITAA 1997. Comments can be made until 3 March 2017.

- Draft Taxation Determination TD 2016/D5 provides the Commissioner's preliminary view that where an amount included in a beneficiary's assessable income under section 99B(1) of the ITAA 1936 had its origins in a capital gain from non-Taxable Australian Property assets of a foreign trust, the beneficiary cannot offset capital losses or access the CGT discount in relation to the amount.

The Commissioner has supported this view by referring to paragraphs 99B(2)(a) and (b) of the ITAA 1936 which make reference to a 'hypothetical taxpayer' who is a resident but which do not specify the characteristics of that taxpayer including whether an entity would be eligible for the CGT discount.

The draft determination does recognise alternative views regarding the hypothetical taxpayer test and whether it can be assumed that the other characteristics of the taxpayer can be taken into account. Comments can be made until 3 March 2017.

When both Determinations are finalised, it is proposed that they will apply both before and after its date of issue.

Black Economy Taskforce established

On 14 December 2016 the Minister for Revenue and Financial Services announced the establishment of a taskforce to crackdown on the black economy. The Taskforce, to be chaired by the former chair of the B20 anti-corruption taskforce, Mr Michael Andrew AO, will consider measures that have been employed overseas and will seek to identify policy responses which take advantage of emerging technology. The Taskforce will also consider ways to change community attitudes about the black economy and will look at both positive incentives as well as sanctions. An interim report will be provided to the Government in March 2017 and a final report will be provided by October 2017. Submissions to the Black Economy Taskforce can be made until 17 February 2017.

ATO data matching program – Ride sourcing

The ATO's latest data matching program will acquire data to identify individuals that may be engaged in providing ride sourcing services during the 2016/17 and 2017/18 financial years. Details of all payments made to ride sourcing providers (ie a driver) from accounts held by a ride sourcing facilitator will be requested from a financial institution.

IGOT review of Taxpayers' Charter and Taxpayer protections

The Inspector General of Taxation (IGOT) released his report in relation to the review of the Taxpayers' Charter and taxpayer protections. The review, which examined concerns raised by stakeholders regarding the ATO's adherence to the Charter, its currency and effectiveness, made a number of recommendations including:

- education for taxpayers, tax practitioners and ATO staff about the Charter and increased awareness of the availability of compensation for defective administration

- increased guidance on the Model Litigant Obligation (MLO) and improve investigations of alleged MLO breaches to address perceptions of bias and lack of independence.

The IGOT has also examined an emerging area of concern in relation to the ATO's exchange of taxpayer information with foreign revenue authorities and recommended that the ATO increase public guidance on its approach particularly with respect to data security, notification to taxpayers where their information is being exchanged and opportunities for them to consider that information.

The ATO has either agreed in full, in part or in principle to the recommendations however as noted in the report, the ATO's level of agreement and their accompanying commentary create a level of uncertainty as to how and to what extent the recommendations would be implemented.

New Parliamentary inquiries

The following new Parliamentary inquiries have been recently established:

- The House Standing Committee on Tax and Revenue has commenced an inquiry into taxpayer engagement, with a particular focus on how individuals and small businesses interact with the tax and superannuation system. As part of this inquiry, the Committee will examine the prevalence and impact of the 'cash economy' on the tax system; the contemporary use of information and communication technology by the ATO and comparative tax administrators to deliver services; and behavioural insights from other service delivery agencies including possible ways to better inform taxpayers to help them

make decisions in their best interests. Submission to the inquiry can be made until 9 February 2017.

- The House Standing Committee on Economics will recommence its previous inquiry on tax deductibility. This inquiry was formed to examine some options to simplify the personal and company income tax system, with a particular focus on options to broaden the base of these taxes in order to fund reductions in marginal rates. Matters to be examined include the personal tax system as it applies to individual non-business income, with particular reference to the deductibility of expenditure of individuals in earning assessable income; and the company income tax system, with particular reference to the deductibility of interest incurred by businesses in deriving business income.

- The Senate Economic Committee will inquire into the non-payment of superannuation guarantee. This inquiry was formed to examine the impact of non-payment of the Superannuation Guarantee (SG). The Inquiry has a broad focus but will make particular reference to the economic impact of non-payment of SG, the accuracy and adequacy of data collected and the role and effectiveness of the ATO in the monitoring, investigation and recovery of unpaid SG. Submissions can be made to the inquiry by 17 February 2017. The Committee is due to report by 22 March 2017.

Annual threshold for accessing the small business CGT concessions

The Federal Court of Australia in Doutch v Commissioner of Taxation [2016] FCAFC 166 has dismissed the taxpayer's appeal and upheld the decision of the Administrative Appeals Tribunal that receipts in respect of fuel disbursements were ordinary income that the entity derived "in the ordinary course of carrying on a business". This meant that the taxpayer's aggregated turnover (s328-120 of the ITAA 1997) exceeded the AUD 2,000,000 annual threshold and the taxpayer did not meet the requirements for the small business Capital Gains Tax concessions.

Wine Equalisation Tax Reforms

On 2 December 2016 the Government announced reforms to the Wine Equalisation Tax Rebate, including changes to the eligibility criteria for the Rebate scheme that will apply from 1 July 2018. In addition, the Rebate cap will be reduced from $500,000 to $350,000 effective from 1 July 2018, which is a year later, and a higher cap, than announced in the 2016-17 Federal Budget. A further $100,000 per annum will be made available to producers who exceed the Rebate cap through a new Wine Tourism and Cellar Door grant.

Launch of ATO Public advice and guidance digital community

The ATO has recently launched the Public advice and guidance digital community on its Let's Talk website. This is a new way for the ATO to engage with the community to understand the issues that are important to taxpayers and to help the ATO better target its advice and guidance. The ATO is currently seeking feedback on ATO guidance on the Investment Manager Regime and on its current tax ruling (TR 93/30) dealing with Home Office Expenses.

Let's talk

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