February 2016

TaxTalk Monthly

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

Welcome to the February 2016 edition of TaxTalk Monthly

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Corporate tax update

Trust to provide benefits to employees was not a unit trust

On 14 December 2015 the Full Federal Court in *Commissioner of Taxation v ElecNet (Aust) Pty Ltd (Trustee)* [2015] FCAFC 178 allowed the Commissioner's appeal from the decision of the Federal Court at first instance, and held that a trust, that was established to provide benefits to workers who leave or change their employment, was not a 'unit trust' for the purposes of the public trading trust rules in Division 6C of Part III of the Income Tax Assessment Act 1936 (ITAA 1936).

Briefly, ElecNet (Aust) Pty Ltd was the trustee of the Electrical Industry Severance Scheme which was established to provide benefits to 'workers' leaving or changing their employment in circumstances prescribed under the constituent document establishing the Scheme. Under the Scheme, employers within the relevant industry were required to make weekly contributions to the Scheme in respect of their workers pursuant to obligations under industrial agreements or awards. The trustee then credited those contributions to an account in the name of each of the relevant workers. At such time as a worker's employment was subsequently terminated with his or her employer, the trustee was generally required to make a severance or redundancy payment to the worker.

The trustee applied for a private ruling from the Commissioner to the effect that the trust was a 'unit trust' that is a 'public unit trust' and a 'public trading trust' for the purposes of Division 6C of Part III of the ITAA 1936. If the trust was a trust to which Division 6C applied, an effect would be that the trustee would be taxed on the trust's net income at the corporate tax rate (i.e. 30 per cent). In the case where individual beneficiaries are not presently entitled to the income of a trust, that rate is favourable when compared to the top marginal rate that would otherwise apply via the application of Division 6 of Part III of the ITAA 1936 to the trust.

The Commissioner determined that the trust was not a unit trust for the purposes of Division 6C, and the trustee successfully appealed to the Federal Court (at first instance) against that determination.

In holding that the trust in question was not a unit trust for the purposes of Division 6C, the Full Federal Court said that it was "not appropriate in this case, assuming it to be possible, to attempt to formulate a single, comprehensive definition of 'unit trust' for the purposes of Division 6C that applies in every instance. It is also not necessary to attempt to formulate a single test for a unit trust in this case because this appeal can be resolved on the short point that in determining what is encompassed within the concept of a unit trust within Division 6C, there is a necessity for something which fits a description of 'units' within the functional, and descriptive, notion of a unit trust. This includes a focus upon one of the core indicia of a unit, namely a beneficial interest in any of the income or property of the estate".

Whilst the decision by the Court dispels some uncertainty as to the boundaries of Division 6C, trustees will need to carefully reconcile the facts in this case with their own circumstances in determining whether the trust which they administer, may be treated as a unit trust for the purposes of Division 6C.

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Consultation paper on new Tax Transparency measures

On 11 December 2015, the Board of Taxation released a consultation paper regarding a voluntary tax transparency code (TTC). The paper contains the Board's preliminary recommendations for additional disclosure of tax information by 'large businesses' (Australian turnover of at least $A 500 million) and slightly less disclosure for 'medium businesses' (Australian turnover at least $A 100 million but less than $A 500 million). The Board considered that the TCC should be operational in time for the reporting period for 2015-16 financial statements or annual reports.

For further information see TaxTalk Insights Corporate Tax: Tax Transparency Code - what you need to know – 17 December 2015.

High Court determines in favour of liquidator concerning Commissioner's power to require retention of sale proceeds for payment to the Commissioner

The decision of the High Court in *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation); Commissioner of Taxation v*

Muller and Dunn as Liquidators of Australian Building Systems Pty Ltd (In Liquidation) [2015] HCA 48 (Australian Building Systems) concerns the obligations of a company liquidator under section 254 of the TAA 1936.

Section 254 of the ITAA 1936 imposes a number of general obligations upon agents and trustees (including company liquidators) in respect of any income, profits or gains of a capital nature derived by the agent or trustee in their representative capacity, or derived by the principal by virtue of their agency. Specifically, paragraph (d) of sub-section 254(1) provides that the agent or trustee is "*authorized and required to retain from time to time out of any money which comes to him or her in his or her representative capacity so much as is sufficient to pay tax which is or will become due in respect of the income, profits or gains.*" If an agent or trustee is required to retain moneys under paragraph (d), they become personally liable for the tax payable.

In Australian Building Systems, the principal issue for determination by the High Court was whether section 254 authorised and obliged the liquidators of a company, as trustees, to retain an amount sufficient to pay the income tax to be assessed in respect of the sale by the liquidators of a property owned by the company, prior to the issue of an assessment.

In its judgment on 10 December 2015, the High Court, by majority, dismissed the appeal by the Commissioner of Taxation in respect of this issue, and held that the retention obligation under paragraph (d) of sub-section 254(1) arises only after the making of an assessment or deemed assessment in respect of the income, profits or gains.

In reaching this decision, the majority relied heavily on the previous High Court decision in *Bluebottle UK Limited v Deputy Commissioner of Taxation [2007] HCA 54 (Bluebottle)*, which considered the application of a similar retention provision in section 255 of the ITAA 1936. In Bluebottle, the High Court held that the words "sufficient to pay the tax which is or will become due" must be read as referring to an ascertained sum, and more specifically, to an amount of tax that has been assessed. The phrase "tax which … will become due" was held to be referring to tax which, although assessed, was not yet due for payment. In Australian Building Systems, the majority rejected the Commissioner's attempt to distinguish between the operation of section 255 and section 254.

The High Court also held that the Full Court's views in respect of the application of Division 6 of Part III of the ITAA 1936 to a liquidator were erroneous in that, whilst a liquidator is a 'trustee' as defined in sub-section 6(1) of the ITAA 1936, a liquidator is not a trustee of a trust estate for the purposes of applying Division 6. An effect of this is that the assessment that is required to be made before section 254 can apply, does not need to be an assessment arising through the operation of Division 6.

On 6 January 2016, the Commissioner published a Decision Impact Statement (DIS) in respect of this High Court judgment. In that DIS the Commissioner states that he accepts that a trustee or agent has no obligation to retain under paragraph (d) of sub-section 254(1) of the ITAA 1936 until an assessment has first issued in respect of the income, profits or gains (IPG) derived by them in their representative capacity.

The Commissioner also states that he will consider where it is now necessary to finalise draft Taxation Determinations TD 2012/D6 and TD 2012/D7.

For further information in relation to this decision, contact Ronen Vexler on +61 (2) 8266 0320 or at ronen.vexler@au.pwc.com.

Federal Court dismisses taxpayer's appeal in relation to the ATO's Part IVA determination

On 7 December 2015 in *Orica Limited v Commissioner of Taxation* [2015] FCA 1399, the Federal Court at first instance dismissed the taxpayer's appeal against the Commissioner's objection decision which confirmed that the general anti avoidance provision in Part IVA of the ITAA 1936 applied to deny the taxpayer (as head company of a tax consolidated group) a deduction for interest costs incurred under an intra-group financing arrangement. The taxpayer's appeal in relation to the objection decision on administrative penalties assessed by the Commissioner was also dismissed.

The taxpayer's position was that Part IVA should not apply since the dominant purpose in entering into the financing schemes identified by the Commissioner was to enhance the consolidated profit result of the taxpayer through 'rebooking' the benefit of accumulated tax losses of the taxpayer's United States (US) subsidiary. This rebooking (of the benefit tax losses which had previously been written off) was to occur as the US tax losses of the subsidiary were used to shelter from US tax, interest income derived by that company from funds provided to it in three tranches under the financing arrangement. The Commissioner treated each tranche as a separate scheme for the purposes of Part IVA.

A fundamental aspect of each scheme identified by the Commissioner was that the US subsidiary issued redeemable preference shares in return for capital provided to it by its Australian holding company (which was a subsidiary member of the taxpayer's tax consolidated group). These funds were then used by the US subsidiary partly to repay existing intra group borrowings, and to lend the remaining part at interest to another Australian subsidiary (FinCo) of the taxpayer. The interest cost incurred by FinCo was then claimed as a deduction by the taxpayer, as the head company of the tax consolidated group which included FinCo as a subsidiary member.

In dismissing the taxpayer's appeal, Justice Pagone considered in detail the matters required to be objectively taken into account in determining whether Part IVA should apply. In his Honour's view, when objectively determined, the taxpayer's sole or dominant purpose in entering into the three schemes was to obtain a tax deduction for the interest on the monies lent by the US subsidiary to FinCo. In response to the taxpayer's position outlined above, his Honour concluded that "the increase in the reported profits depended upon the allowability of the deductions claimed for the interest incurred".

In relation to the objection decision confirming the administrative penalties assessed by the Commissioner, Justice Pagone dismissed the taxpayer's appeal, holding that the scheme had been entered into with the dominant purpose of obtaining the 'scheme benefit' being the deduction for the interest expense incurred by FinCo, and further, that the taxpayer had not been able to demonstrate that at the time of entering into each of the schemes it was 'reasonably arguable' that Part IVA should not apply to each scheme. The effect of not having a 'reasonably arguable' position at the time of entering into each scheme, was that penalties equal to 50 per cent of the 'scheme shortfall' applied, instead of penalties equal to 25 per cent of the 'scheme shortfall'.

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Chevron files appeal against Federal Court transfer pricing decision

The taxpayer has appealed to the Full Federal Court against the decision of the Federal Court in *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)* [2015] FCA 1092. This decision was reported in the 2 November 2015 TaxTalk: Corporate Tax Update.

Commissioner releases first Tax Transparency Report

On 17 December 2015, the Commissioner of Taxation published the first Tax Transparency Report which contains the total income, taxable income and tax payable of over 1,500 public and foreign owned private entities for the 2013-14 income year. In his media statement, the Commissioner made the important point that, "no tax paid does not necessarily mean tax avoidance". The Commissioner went on to add that over half of these 1,500 companies have been subject to review or audit by the Australian Taxation Office (ATO) over the past three years, with the ATO's risk and intelligence systems working all the time to ensure confidence in the tax system. The report is available on the data.gov.au website.

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Employment tax update

Decision Impact Statement released by the ATO for the John Holland case

The Australian Taxation Office (ATO) has issued a Decision Impact Statement in relation to the *John Holland Group Pty Ltd & Anor v Commissioner of Taxation* [2015] FCAFC 82 case concerning whether the provision of flights as part of a fly-in fly-out arrangement for employees was subject to fringe benefits tax (FBT), and whether the otherwise deductible rule applied to reduce the taxable value of the fringe benefit to nil.

Victoria (VIC): Application of payroll tax to workers hosting promotional events

In *Styling Australia Pty Ltd v Commissioner of State Revenue [2015] VCAT 1792* the applicant appealed against the Chief Commissioner's decision to disallow an objection against payroll tax assessments in which the Commissioner treated promotional staff as employees of the applicant.

The applicant's business involved the provision of hosting and promotional staff for events, functions, carnivals and marketing campaigns.

In taking the totality of the relationship into account, the Tribunal found that the relationship between the applicant and the workers was an employer-employee relationship and not a relationship where the worker was an independent contractor. Relevantly, the workers had no power to delegate their duties, had no commercial risk and the equipment provided by the worker was largely limited to personal items.

In addition, the Tribunal considered whether the employment agency contract provisions would apply to the arrangement, ultimately finding that these provisions would apply on the basis that the services of the workers were procured by the applicant for one of their clients.

Australian Capital Territory: Payroll Tax – Penalty tax in circumstances where the tax default occurred solely due to circumstances beyond the taxpayer's control

In *Commissioner for ACT Revenue v G Kalsbeek Pty Ltd [2015] ACAT 90* the issue of penalty tax remission was considered on appeal. Ultimately, the Tribunal found that remission of the penalty tax could not be granted as the taxpayer was unable to demonstrate that all of the causes leading to the payroll tax underpayment were beyond the taxpayer's control.

While the Tribunal acknowledged that the sole director of the company had serious health issues and that this was a major factor in the underpayment of payroll tax, the director was also seen to have only limited knowledge of the company's payroll tax obligations and had not taken steps to acquaint himself with these obligations. In the words of the Tribunal, "a failure to understand the legislation or to obtain advice about it does not put that ignorance beyond the control of the respondent or its director".

This case serves as a reminder that it is the taxpayer's responsibility to ensure they are compliant with their payroll tax obligations. If taxpayer's are unsure of their compliance with the legislation, it is recommended that they pro-actively seek advice from their tax advisors prior to any revenue authority investigations.

New South Wales: Payroll tax matter regarding 'employment agency contracts' set aside by Tribunal to be reconsidered

Following the decision in favour of the Chief Commissioner of Taxation in *Qualweld Australia Pty Ltd v Chief Commissioner of State Revenue [2014] NSWCATAD 227*, the taxpayer appealed against the Tribunal decision. This appeal was on the grounds that the employment agency provisions in the New South Wales (NSW) *Payroll Tax Act* did not apply because Qualweld was required to achieve a result in the form of completion of specific welding works, rather than to solely supply the services of welders and boilermakers to its clients.

In failing to refer to evidence from Qualweld's two principal witnesses, the appeal Tribunal found that this amounted to an error of law. Accordingly, the decision was set aside to be reconsidered in full by the Tribunal at a later date.

Limits for FBT entertainment benefits

From 1 April 2016, there will be limits on the use of fringe benefits tax (FBT) concessions for salary packaged meal entertainment and entertainment facility leasing expenses (meal and other entertainment benefits). These changes will impact Public Benevolent Institutions and Health Promotion Charities, Public and Not for Profit Hospitals and Public Ambulance Services.

All salary packaged meal and other entertainment benefits will be subject to a separate single grossed-up cap of $5,000. Benefits exceeding this cap will count towards an employee's existing FBT exemption or rebate cap. If the reporting threshold is exceeded, these benefits will be reported on an employee's payment summary.

Recent legislative amendments

A number of legislative amendments have passed recently including:

- NSW: *State Revenue Legislation Further Amendment Act 2014 — Commencement Proclamation (2015 No 733)* – provides that the repeal of two payroll tax exemptions for payments to certain contractors, (i.e., door-to-door sales persons and insurance agents) commences from 1 January 2016
- VIC: State *Taxation Acts Further Amendment Act 2015* – limits the payroll tax exemption for new entrant apprentices and trainees to those registered with approved group training organisations only. This amendment aligns the definition of 'new entrant' with the current practice of group training organisation.

Single Touch Payroll announcements

The Federal Government has announced changes to employer reporting of pay-as-you-go (PAYG) withholding obligations and superannuation contributions as part of its Single Touch Payroll and Standard Business Reporting initiatives. The requirement for reporting superannuation contributions to funds under SuperStream will not change with the introduction of Single Touch Payroll.

In addition to PAYG withholding and superannuation contributions being reported to the ATO through Standard Business Reporting software and Single Touch Payroll, a number of other employment processes will be streamlined. Individuals will have the option of completing their Tax File Number (TFN) declarations and Superannuation Standard Choice forms using *myGov* or through their employer's business management software.

The ATO will be conducting a pilot in the first half of 2017 to demonstrate the deregulation benefits for businesses, with a focus on small businesses. All businesses will be able to commence Single Touch Payroll reporting from 1 July 2017.

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International tax update

Base erosion and profit shifting (BEPS) update

Since our last TaxTalk publication on 1 December 2015, the following Australian developments have taken place in relation to BEPS:

- On 3 December 2015, legislation introducing the Multinational Anti-Avoidance Rules (MAAL) and country-by-country reporting (CBCR) requirements, as developed by the Organisation for Economic Co-operation & Development (OECD) in Action 13 of the base erosion and profit shifting (BEPS) project, and the requirement for significant global entities with operations in Australia to prepare and lodge general purpose financial statements was passed by the Federal Parliament. Royal Assent was granted on 11 December 2015 (see *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015*).
- On 3 December 2015, legislation introducing the OECD's Common Reporting Standard

(CRS) for the automatic exchange of financial account information was tabled in a Bill (*Tax Laws Amendment (Implementation of the Common Reporting Standard) Bill 2015)* before Parliament. These rules will apply with effect from 1 July 2017.

- On 30 November 2015, law introducing third party transaction reporting requirements for a number of entities including market participants and administrators of payment systems received Royal Assent (see Tax and Superannuation Laws Amendment (2015 Measures No 5) Act 2015). These rules will also apply from 1 July 2017.
- On 20 November 2015, the Board of Taxation released a consultation paper on the implementation of the anti-hybrid rules as developed by the OECD in Action 2 of the BEPS project.
- On 11 December 2015, the Board of Taxation released a consultation paper on the voluntary tax transparency code developed to facilitate business information disclosure.

For further information, see TaxTalk Alert: OECD action plan on BEPS and recent tax transparency measures: impact for banking and capital market sectors.

Also see TaxTalk Alert: Time to act - Australian parliament delivers multinational package.

Tax Policy Bulletin on Final Report of OECD on Hybrid Mismatch Arrangements

See this Tax Policy Bulletin on the Final Report of the Organisation for Economic Co-Operation & Development (OECD) on Hybrid Mismatch Arrangements.

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Israel and Niue sign Multilateral Convention on Mutual Administrative Assistance in Tax Matters

The OECD has announced that Israel and Niue have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters which provides for all forms of mutual assistance - exchange on request, spontaneous assistance, tax examinations abroad, simultaneous tax examinations and assistance in tax collection, while protecting taxpayers' rights.

New Zealand

Tax Tips 2015 provides an insight into tax developments in New Zealand during 2015.

Taxpayer Alert: Offshore procurement hubs – dual CFC structures

On 10 December 2015, the Commissioner of Taxation published Taxpayer Alert 2015/5: *Arrangements involving offshore procurement hubs*. In that Alert, the Commissioner states that the Australian Taxation Office (ATO) is currently reviewing arrangements involving the use of offshore entities which source goods (procurement hub) on behalf of Australian resident multi-national enterprises (MNEs). According to the Alert, these arrangements typically display all or most of the following features:

- A procurement hub and a services hub are established offshore. The hubs are controlled foreign companies (CFCs) of the MNE. A lower rate of tax or concessionary tax treatment may apply to the hubs in the relevant foreign jurisdiction(s).
- In procuring goods, the procurement hub enters into contracts with third party suppliers for or on behalf of the MNE. The procurement hub may or may not take title to or physical possession of the goods on the transfer of the goods. It does not substantially transform the goods it buys on behalf of the MNE.
- The procurement hub may have few or no employees and assets.
- The services hub provides services to the procurement hub in exchange for a fee which may be calculated as a percentage of sales or profits. The pricing methodologies adopted may not result in outcomes which could be expected to be observed between parties dealing at arm's length.
- There is little or no commercial justification for the separation of the procurement function into two separate CFCs/entities.

The Commissioner goes on to state that the ATO has a number of concerns with these arrangements from a tax perspective, including that such structures are being used by MNEs for the purpose of, or for purposes which include, minimising tainted income under section 447 and section 448 of the Income Tax Assessment Act 1936 (ITAA 1936).

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Legislative Update

Commonwealth revenue measures introduced into Parliament or registered as legislative instruments or regulations since our previous *TaxTalk* publication include the following:

Customs (International Obligations) Amendment (China-Australia Free Trade Agreement) Regulation 2015, registered on 27 November 2015, amends the *Customs (International Obligations) Regulation 2015* to prescribe new circumstances for refunds of customs duty, in respect of goods imported from China, to fulfil obligations under the China-Australia Free Trade Agreement (ChAFTA).

Income Tax Assessment Act 1997 – Exploration Development Incentive Modulation Factor – Declaration Instrument (No. 1) 2015, registered on 27 November 2015, declares the modulation factor for the exploration development incentive for the 2015-16 income year to be 1. The modulation factor ensures that the total amount of exploration credits created by entities cannot exceed the exploration credit cap for the relevant income year ($25 million for 2015-16).

A New Tax System (Goods and Services Tax) (Particular Attribution Rules for Certain Motor Vehicle Incentive Payments Made to Motor Vehicle Dealers) Legislative Instrument 2015, registered on 30 November 2015, overrides the basic attribution rules (under section 29-5 of the A New Tax System (Goods and Services Tax) Act 1999), by specifying different rules that apply to attribute goods and services tax payable on an intended taxable supply of a motor vehicle by a dealer.

Treasury Legislation Amendment (China-Australia Free Trade Agreement) Regulation 2015, registered on 27 November 2015, amends the *Foreign Acquisitions and Takeovers Regulation 2015* and the *Life Insurance Regulations 1995* to give effect to Australia’s obligations under ChAFTA.

Customs (Chinese Rules of Origin) Regulation 2015, registered on 27 November 2015, prescribes matters relating to the rules of origin that will be required to be prescribed under new Division 1L of the *Customs Act 1901* (Chinese originating goods).

Customs Amendment (Fees and Charges) Regulation 2015, registered on 14 December 2015, amends the *Customs Regulation 2015* to give effect to recommendations made by the Joint Review of Border Fees, Charges and Taxes.

Customs *(International Obligations) Amendment (Anti-Dumping) Regulation 201* , registered on 15 December 2015, amends the *Customs (International Obligations) Regulation 2015* to enable the Department of Immigration and Border Protection to process refunds for a range of duties that are exempt under the *Customs Tariff (Anti Dumping) Act 1975*.

Petroleum Resource Rent Tax Assessment Regulation 2015, registered on 17 December 2015, repeals and remakes the *Petroleum Resource Rent Tax Assessment Regulations 2005* with some minor changes to modernise the drafting style, reduce compliance costs for industry and ensure that the Regulation is fit for purpose. The key changes are designed to reduce costs and regulatory burden by:

- allowing taxpayers to jointly make an election for an onshore integrated gas to liquid (GTL) operation to aggregate the relevant costs into one upstream phase. For integrity reasons, the election is subject to restrictions

- allowing an election for an onshore integrated operation to use the depreciated replacement cost method, to be made by taxpayers that use the Residual Pricing Method (RPM). This changes the current requirement that the election be made by all of the participants in the integrated operation
- allowing taxpayers to jointly make an election, for an integrated operation, to use the value of their own share of the end products as a component of the netback price in specified circumstances, instead of requiring them to obtain the value of the end products of all of the taxpayers in the operation. For integrity reasons, this election is subject to restrictions
- adding an example to the Regulation to clarify that the Commissioner of Taxation's power to agree to or to determine an RPM price can be used when required information is not accessible for practical or commercial reasons
- correcting the inconsistent treatment of storage costs for project sales gas in an integrated operation so that the cost for storage of sales gas after a non-arm's length sale is treated as a downstream cost.

Tax and Superannuation Laws Amendment (2015 Measures No 6) Bill 2015, introduced into the House of Representatives on 3 December 2015, proposes amendments to the *Income Tax Assessment Act 1997 (ITAA 1997)* to change the capital gains tax (CGT) treatment of 'earnout arrangements' and introduce a new regime that imposes withholding obligations on the purchase of certain Australian assets from foreign residents.

With respect to 'earnout arrangements', the amendments propose to disregard capital gains and losses arising in respect of 'look-through earnout rights' and instead, treat the payments received or paid under these arrangements as part of the capital proceeds and cost base of the underlying asset or assets to which the earnout arrangement relates. There are also consequential amendments regarding amended assessments, interest charges, recognition of capital losses and access to capital gains tax (and other) concessions to ensure this new treatment provides taxpayers with outcomes broadly consistent with those that would have arisen had the value of all of the financial benefits under the earnout right been included in the capital proceeds from the disposal of the underlying asset for the seller and the cost base or reduced cost base of the underlying asset for the buyer at the time of the relevant 'CGT event'. Broadly, these amendments will apply to earnout arrangements entered into on or after 24 April 2015. However, taxpayers that have made statements to the Commissioner or undertaken other actions in reasonable anticipation of announcements made about the amendments in the 2010-11 Budget are protected against the Commissioner applying the law in a way that is inconsistent with what they have anticipated.

With respect to foreign resident capital gains tax withholding, the Bill proposes a new regime that imposes a 10 per cent non-final withholding obligation on the purchasers of certain Australian assets where the asset is acquired from a relevant foreign resident. Broadly, the obligation will apply to a transaction involving the acquisition of an asset that is:

- taxable Australian real property (TARP)
- an indirect Australian real property interest
- an option or right to acquire such property or such an interest.

unless a specific exemption applies, the Commissioner has provided a clearance certificate certifying that the entity is not a relevant foreign resident for the purposes of these amendments, the vendor has made a declaration that they are an Australian resident for tax purposes, or, where the CGT asset acquired is a membership interest, and the vendor has made a declaration that the interest is not an indirect Australian real property interest.

This withholding measure is proposed to apply in relation to acquisitions on or after 1 July 2016. A purchaser is generally taken to have acquired a CGT asset on the date they entered into the contract to acquire it. Therefore, the amendments will not apply to transfers that occur under a contract entered into prior to 1 July 2016.

Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015, introduced into the House of Representatives on 3 December 2015, together with three related Bills, proposes to implement the new attribution tax regime for managed investment trusts (MITs) and a number of related amendments. For further details see our TaxTalk Monthly feature article The New Managed Investment Trust Regime – Legislation introduced into Parliament.

Tax Laws Amendment (Implementation of the Common Reporting Standard) Bill 2015, introduced into the House of Representatives on 3 December 2015, proposes to implement the OECD's Common Reporting Standard (CRS) in Australia from 1 July 2017.

Schedule 1 of the Bill amends the *Taxation Administration Act 1953* (TAA 1953) to require certain financial institutions in Australia (known as Reporting Financial Institutions) to report information to the Commissioner of Taxation about financial accounts held by foreign tax residents. This report (statement) will need to contain reportable information in accordance with the *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, commonly known as the Common Reporting Standard or CRS. In turn, the Commissioner will provide this information to the foreign residents' tax authorities and will receive information on Australian tax residents with financial accounts held overseas.

The CRS sets out the due diligence rules that Reporting Financial Institutions must follow to identify Account Holders who are tax residents of another Participating Jurisdiction and to report the relevant account information to their local tax authority.

Each statement is due to the Commissioner by 31 July of the year following the year to which the information relates. Of note, transitional arrangements that apply in 2017 require a statement that relates to a Reportable Account that is either a Lower Value Account or a Pre-existing Entity Account be given to the Commissioner by 31 July 2019. Section 388-55 of Schedule 1 to the TAA 1953 allows the Commissioner to defer the time that entities must lodge a statement in the approved form.

Penalties may be applied to Reporting Financial Institutions that do not comply with their reporting obligations.

This measure applies to the period 1 July 2017 to 31 December 2017, as if the period were a calendar year, and to later calendar years. There will be transitional arrangements until 31 December 2019 for certain entities that will not be treated as passive non-financial entities for the purposes of triggering the 'look through' due diligence procedures.

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Other News

Inquiry into tax deductibility

On 1 December 2015, the Commonwealth Treasurer, asked the House of Representatives Standing Committee on Economics to undertake an inquiry into the simplification of the personal and company income tax system. Under the terms of reference, matters to be examined by the Committee 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, including but not limited to an examination of comparable jurisdictions such as the United Kingdom and New Zealand
- The company income tax system, with particular reference to the deductibility of interest incurred by businesses in deriving their business income.

Submissions were due to be made to the Committee by 15 January 2016.

Innovation system

On 3 December 2015, the Senate Economics Committee tabled its final report on its inquiry into Australia's Innovation System. The Committee made five recommendations which, in summary, are as follows:

- The Australian Government commits to maintaining stable, coherent and effective administrative arrangements for innovation policies and programs, based on a long-term strategic framework and a target to lift investment in research and development to three per cent of Gross Domestic Product.
- An independent government agency be established with a mandate to administer and coordinate innovation system policies and programs.
- The Australian Government, as part of its long-term innovation strategy, includes policy options to address the structural and strategic barriers that inhibit innovation, including: measures to enhance collaboration and the free flow of knowledge between the university system and the private sector; increase the size of the research and development workforce employed in industry; and ensure that public funding to support science, research and innovation is long term, predictable and secure.
- The Australian Government, working in collaboration with State and Territory governments, adopt a range of measures to support the role of local and regional innovation ecosystems.
- The education system be accorded a central focus in the Australian Government's long-term innovation strategy, thereby acknowledging the central importance of the interplay between the STEM subjects and the humanities, social sciences and creative industries.

Competition policy review

On 24 November 2015, the Commonwealth Government released its response to the final report of the Competition Policy review (Harper Review), which made 56 recommendations for reforms across competition policy, laws and institutions.

From a tax perspective, the Report recommended that indirect charges and taxes on road users, such as fuel excise and registration fees, should be reduced with the recommended introduction of direct cost-reflective road pricing. The Government has indicated that it supports this recommendation as a long term reform option.

Farm Management Deposits

In response to its announcement on 4 July 2015 in the Agricultural Competitiveness White Paper of changes to the Farm Management Deposit (FMD) scheme, the Commonwealth Treasury released exposure draft legislation to effect the changes which include:

- increasing the maximum amount that can be held in FMDs to $800,000 (currently $400,000)
- allowing primary producers experiencing severe drought conditions to withdraw an amount held in an FMD within 12 months of its deposit in the income year following deposit without affecting the income tax treatment of the FMD in the earlier income year. However, early access to FMD withdrawals is only available for some categories of primary production businesses as defined in section 995-1 of the *Income Tax Assessment Act 1997*
- allowing amounts held in an FMD to offset (i.e. by way of reducing the interest charged) a loan or other debt relating to the FMD holder's primary production business.

There are also changes to the law relating to breaches of the FMD scheme including the imposition of administrative penalties.

The changes are proposed to apply for the 2016-17 income year and later years.

National Innovation & Science Agenda

On 7 December 2015, the Commonwealth Government released its National Innovation & Science Agenda that contains a range of tax-related measures and incentives to encourage innovation. These include:

- *increasing access to company losses* through relaxation of the same business test, to be replaced with a more flexible 'predominantly similar business test' which will enable companies to enter into new business activities and transactions without facing a tax penalty (with effect for losses made in the current and future income years)
- *changes to Venture Capital Limited Partnerships (VCLPs)*, including a new 10 per cent non-refundable tax offset for partners in Early Stage Venture Capital Limited Partnerships (ESVCLPs) based on capital invested in start-up companies; increasing the maximum size of ESVCLPs from $100 million to $200 million; ensuring that ESVCLPs will no longer need to divest from a company when its value exceeds $250 million; and relaxing eligibility and investment requirements for both VCLPs and ESVCLPs to allow managers

to undertake a broader range of investment activities and greater diversity of investors (with effect from 1 July 2016)

- *new tax incentives for investors* who support innovative start-ups including a 20 per cent non-refundable tax offset based on the amount of their investment (capped at $200,000) and a 10 year capital gains tax exemption for investments held for three years
- *change the depreciation of intangible* assets by providing a new option to self-assess the effective life of acquired intangible assets (with effect for assets acquired from 1 July 2016)
- *reforms to Employee Share Schemes (ESS)* to limit the requirement for disclosure documents given to employees under an ESS to be made available to the public and to make ESS more user-friendly for innovative companies.

The Government also proposes to amend the Commonwealth bankruptcy and corporate insolvency laws by:

- reducing the default bankruptcy period from three years to one year
- introducing a 'safe harbour' for directors from personal liability for insolvent trading if they appoint a professional restructuring adviser to develop a plan to turnaround a company in financial difficulty
- banning 'ipso facto' contractual clauses that allow an agreement to be terminated solely due to an insolvency event, if a company is undertaking a restructure.

Commissioner's Statutory Remedial Power

The Commonwealth Treasury has released for comment exposure draft legislation to implement a statutory remedial power to be given to the Commissioner of Taxation in relation to taxation and superannuation law.

Under the proposed law, the Commissioner of Taxation will have power to allow a modification to the operation of the law to address unforeseen or unintended outcomes in administration. It is intended that the power would be exercised to the extent that it would have a beneficial outcome for taxpayers, has a negligible revenue impact and only as a last resort.

Government response to tax disputes inquiry

On 4 December 2015, the Commonwealth Government tabled its response to the inquiry into Tax Disputes by the House of Representatives Standing Committee on Tax and Revenue. The Committee made five recommendations to Government, including the creation of a new Second Commissioner - Appeals to head up a new Appeals area within the Australian Taxation Office (ATO). With respect to this recommendation, the Government has stated that it does not support a legislative approach to the separation of the tax appeals area of the ATO from the compliance area, and that this separation has already been achieved without the need for legislative separation. The remaining recommendations of the inquiry were directed to the ATO, which has yet to make a formal response. Overall, the Government's response is one of 'business as usual' (i.e. they have largely rejected all the recommendations), and this may have been a lost opportunity to make real change in this area.

For further details, please contact Michael Bersten (Tax Controversy Partner) on +61 (2) 8266 6858 or at michael.bersten@au.pwc.com.

Data matching – real property transactions

On 8 December 2015, the ATO published a Commonwealth Gazette Notice confirming that it has commenced a new data matching program covering real property transactions (including acquisitions and disposals of real property, and rental bond details) for the period 20 September 1985 (when capital gains tax commenced) to 30 June 2017. The purpose of the program is to ensure that taxpayers are correctly meeting taxation (including capital gains tax) obligations administered by the ATO in relation to their dealings with real property. These obligations include registration, lodgment, reporting and payment responsibilities. Under this data matching program the ATO has formally requested information of relevant transactions from State and Territory Authorities.

Social Security Agreement with India

The *Social Security (International Agreements) Amendment (Republic of India) Regulation 2015* was gazetted to commence on 1 January 2016. The Regulation includes provisions on double superannuation coverage for temporarily seconded workers.

ATO extends time for foreign investors to register agricultural land

On 14 December 2015, the ATO extended the time for foreigners who own Australian agricultural land holdings, to register their ownership with the ATO. Under the extension, the deadline for registration has been extended to 29 February 2016. Penalties may apply if foreign investors do not register their interest in agricultural land by this date.

Under the terms of the extension published by the ATO, “the extension applies to all agricultural land holdings that must be registered on or before 29 February 2016. If agricultural land is purchased or the ownership of land is changed on or after 1 February 2016, the ATO must be notified within 30 days”.

For further information on Australia's new foreign investment regime that came into force on 1 December 2015 see this LegalTalk Alert.

Single Touch Payroll

On 21 December 2015, the Assistant Treasurer and Minister for Small Business announced further details regarding the timing of implementation of Single Touch Payroll, and a new $100 non-refundable tax offset for small businesses for expenditure on Standard Business Reporting (SBR) enabled software (as previously outlined in the 2015-16 Mid Year Economic and Fiscal Outlook (MYEFO)).

Crowd sourced funding for small business

On 21 December 2015, the Assistant Treasurer and Minister for Small Business announced the release of exposure draft regulations regarding Australia's proposed new crowd-sourced equity funding (CSEF) framework. The release of the draft regulations follows the introduction of the *Corporations Amendment (Crowd-sourced Funding) Bill 2015* into the House of Representatives on 3 December 2015. According to the Explanatory Memorandum to that Bill, “crowd-sourced funding is an emerging form of funding that allows entrepreneurs to raise funds from a large number of investors. It has the potential to provide finance for innovative business ideas and additional investment opportunities for retail investors, while ensuring investors continue to have sufficient information to make informed investment decisions “

The provisions in the Bill remove regulatory barriers to CSEF, it being expected by Government, that the overall ‘per business’ compliance costs for ‘issuers’ that participate in CSEF will decline.

The exposure draft regulations provide additional detail on a range of matters, including:

- the class of securities that may be offered
- the minimum requirements for what a CSEF issuer must include in their offer document
- the prescribed checks intermediaries must undertake before allowing an offer to be made on their platform
- wording of the mandatory risk warning and retail investor risk acknowledgment that investors must agree to before they may invest in CSEF products.

ATO annual report

The House of Representatives Tax and Revenue Committee tabled its second report into the 2014 Annual Report of the ATO. The mandate given to the Committee allows the Committee to act as a scrutineer of the ATO, a responsibility previously undertaken by the Joint Committee of Public Accounts and Audit (JCPAA). In this report, the Committee considers and comments on the following matters:

- the ATO’s relationship with tax practitioners through the Tax Agent Portal and Single Touch Payroll,
- progress with no-touch tax returns
- Tax Gap estimates
- client service improvements and correspondence
- the transfer of complaints functions to the Inspector-General of Taxation
- the implementation of strategies to address the cash economy and sharing economy
- the ATO’s pursuit of wind-ups and bankruptcies as a recovery practice, and
- transparency and performance reporting.

Superannuation

On 10 December 2015, the Minister for Small Business and Assistant Treasurer announced the release of exposure draft legislation to improve superannuation fund transparency and extend choice of fund arrangements to employees covered by enterprise agreements and workplace determinations from 1 July 2016.

Private Ancillary Funds

On 22 December 2015, the Commonwealth Treasury released exposure draft legislation for amendments to the *Private Ancillary Fund Guidelines 2009* and the *Public Ancillary Fund Guidelines 2011* to, among other things, introduce portability, remove red tape from certain reporting requirements, update the investment strategy rules, reduce the minimum annual distribution rate, and update spent or redundant references. Submissions are due by 12 February 2016.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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Superannuation update

US – developments for super funds investing in US property

After many years in the making the United States (US) congress finally passed legislation that applies to exempt any US real property interests held by a foreign retirement or pension fund from Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) in some circumstances. The provisions apply to dispositions and distributions on or after the date of enactment. This was signed by President Obama on 18 December 2015 and is discussed below.

On 8 December 2015, an Act that included two proposals that impact foreign funds was introduced. First, the Act included a proposal that increased the 'portfolio investor' exception for sales of stock and capital gains dividends of listed Real Estate Investment Trusts (REITs) from 5 per cent to 10 per cent, including for qualified non-US collective investment entities investing in US real estate. REIT dividends paid to non-US portfolio investors remain subject to US withholding (but not FIRPTA) tax.

Second, the Act treats foreign pension funds the same as domestic pension funds under FIRPTA, therefore exempting investments of foreign pension funds from FIRPTA altogether, hence potentially attracting investment from a large and growing source of foreign capital into the US real estate market.

Whilst the developments are good news, some clarification may be necessary for the rules to operate to exclude Australian super funds. Nevertheless, funds with investments in the US should consider the impact of these changes. This may also impact the way in which Australian entities invest into the US.

The Mid-Year Economic and Fiscal Outlook (MYEFO)

On 15 December 2015, the MYEFO was released. The MYEFO did not contain any new tax measures that impact superannuation funds. The MYEFO papers restated the roll-over measures previously announced on 29 June 2015; that is, providing capital gains tax roll-over relief for mandatory transfers within a super fund in the transition to MySuper. The rollover will be available for mandatory transfers made from 29 June 2015 to 1 July 2017.

Attribution Managed Investment Trust (MIT) rules introduced into Parliament

On 3 December 2015, the Tax Laws Amendment (New Tax System for Managed Investment Trusts) Bill 2015 was introduced into Parliament. Included in the Bill are proposals to implement the new attribution regime for MITs (i.e. AMIT regime),various related amendments including the introduction of a new arm's length income rule for all MITs, changes to the definition of MIT, removal of the '20% super fund' rule in the Public Trading Trust Rules in Division 6C (from 1 July 2016). Broadly, the new rules operate from 1 July 2016.

Trusts that are 100 per cent owned by super funds will not qualify as an AMIT under the new regime.

Ward v FCT – Administrative Appeals Tribunal (AAT) confirms - no special circumstances

In the case of Ward and Commissioner of Taxation (Taxation) [2015] AATA 919 (30 November 2015), in essence, the taxpayer (Mr Ward) in early 2008 withdrew his super and put this into a term deposit. On 9 July 2008, Mr Ward contributed $450k into another super fund before again withdrawing this amount (over a period to April 2009) and placing the funds in a term deposit. Mr Ward and Mrs Ward subsequently contributed $450k each into a self managed fund in September 2010. The second contribution by Mr Ward resulted in a $209k excess contribution tax liability (due to the excess non-concessional contributions and a breach of the three year cap). Mr Ward sought the ATO's discretion to disregard the excess contributions and the Commissioner refused to exercise his discretion.

The AAT noted that the circumstances facing the taxpayer were exceedingly unfortunate, and not of his own making but the imposition of excess contributions tax on him was the natural and foreseeable consequence of the decisions he and his advisers made, albeit in ignorance. The AAT stated that, as it transpired, the taxpayer had suffered a penalty of 19,527 per cent of any 'tax advantage' (his advisers' calculation), an outcome which cannot be regarded as conscionable but this did not amount to 'special circumstances' and therefore the ATO's decision not to exercise its discretion was upheld.

Treasury Consultation - Commissioner's power to modify law

On 1 May 2015, the Government announced it would legislate to provide the ATO with power to ensure that taxation and superannuation laws can be administered consistently with their purpose.

The ATO's power would allow a modification to the operation of the law to address unforeseen or unintended outcomes in administration. It is intended that the power would be exercised to the extent that it would have a beneficial outcome for taxpayers, has a negligible revenue impact, and is only applied as a last resort.

Treasury issued a discussion paper in relation to these proposals.

Although not directly relevant to super funds, this power may be useful to both the ATO and taxpayers in quickly resolving some unforeseen technical issues.

Let's talk

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