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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

Government clarifies eligibility for lower company tax rate

The Government has introduced the Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2017 (the Bill) into Parliament, which clarifies that a corporate tax entity will not qualify for the lower corporate tax rate of 27.5 per cent if more than 80 per cent of its assessable income is income of a defined passive nature. For further, details refer to the media release issued by Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP.

Following consultation on the earlier Exposure Draft legislation (on which PwC lodged a submission), this Bill differs in a number of respects. In particular, there is no longer any requirement that a company be carrying on a business to qualify as a 'base rate entity', and ensures that net capital gains (as opposed to gross capital gains) are included in working out base rate entity passive income. Furthermore, the measures no longer have retrospective application and only apply from the 2017-18 income year. For further details, refer to the Legislative Update and TaxTalk Alert: Corporate tax rate reduction – certainty at last.

ATO guidance on when a company carries on a business for tax rate purposes

The Australian Taxation Office (ATO) has issued Draft Taxation Ruling TR 2017/D7, which provides guidance on when a company carries on a business within the meaning of section 23AA of the *Income Tax Rates Act 1986 (Cth)* (ITR 1986).

As currently enacted, to be eligible for the reduced company tax rate for the 2017-18 and later income years, a company must qualify as a base rate entity as defined by section 23AA of the ITR 1986. Given the proposed change to remove the carrying on a business requirement as noted above, it is clear that the draft ruling will need to be revised in the context in which it has been issued. Note that to qualify for a lower tax rate for income years prior to 2017-18, a company has to be a 'small business entity' which requires that it carry on a business and also meet the applicable aggregated turnover requirement.

According to the draft ruling, the question of whether a company is carrying on business must be considered in each context of income tax law, by reference to the particular provision in question and its purpose. The draft ruling makes reference to various indicia which have been considered by Courts in determining whether a business is being carried on. These include:

- the nature of the activities, particularly whether they have a profit-making purpose
- whether the person intends to carry on a business
- whether the activities are repeated and regular, and organised in a business-like manner, including the keeping of books, records and the use of a system
- the amount of capital employed in those activities, and
- whether the activity is better described as a hobby, or recreation.

Comments on the draft ruling can be made until 1 December 2017.

ATO's large corporate groups income tax gap

The ATO has released its large corporate groups income tax gap analysis. According to the ATO's analysis, the size of the income tax gap for the large corporate group sector, which covers some 1,400 groups each with a turnover of more than AUD250 million, is estimated at AUD2.5 billion or 5.8 per cent in the 2014–15 fiscal year. This is said to "reflect[s] a tax system that is operating well. It demonstrates a high degree of voluntary compliance, and compares well globally". It is also stated to be similar to comparable jurisdictions and represent a relatively small proportion of the total corporate income tax base.

The ATO's publication provides a 'whole picture' view of the complexity of Australia's corporate tax system; covering ways the ATO is seeking to improve the system for those who want to comply, and how it takes firm action against those who choose not to comply.

R&D fraudsters in the Government's sights

The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has warned that criminals seeking to defraud the Commonwealth through fraudulent Research and Development (R&D) tax incentive claims are being put on notice by the Serious Financial Crime Taskforce (SFCT). The SFCT is actively pursuing taxpayers who make claims which they are not entitled to, and R&D tax offset claims will be scrutinised for blatant abuse.

Accounting for interest and penalties relating to income tax

In September 2017, the International Financial Reporting Standards (IFRS) Interpretations Committee (IC) issued a decision on interest and penalties relating to income taxes. The IC determined that it would not develop any guidance on accounting for interest and penalties as the benefits of improvements in financial reporting from such a project would not outweigh the costs.

The IC observed in its decision that entities do not have an accounting policy choice between applying *IAS 12 Income Taxes* (IAS 12) and applying *IAS 37 Provisions, Contingent Liabilities and Contingent Assets* (IAS 37) to interest and penalties related to income taxes. If an entity considers that a particular amount payable, or receivable, for interest and penalties is an income tax, IAS 12 is applied to that amount. If an entity does not apply IAS 12 to an amount payable or receivable for interest and penalties, it applies IAS 37 to that amount. For further information refer to the Straight Away Alert IFRS Bulletin.

Voluntary Tax Transparency Code – AASB draft guidance FAQs

The Australian Accounting Standards Board (AASB) has released a set of frequently asked questions (FAQs) that were raised in a recent webinar on the voluntary Tax Transparency Code (TTC). During the webinar, a number of questions were asked about calculating effective tax rates (ETRs). The draft AASB guidance on the Tax Transparency Code is open for comment until 28 February 2018.

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Employment Taxes Update

ATO's discussion paper on definition of taxi

The Australian Taxation Office (ATO) is reviewing the definition of 'taxi' contained in the *Fringe Benefits Tax Assessment Act 1986 (Cth)* (FBT Act), and has released a discussion paper: TDP 2017/2: Definition of taxi for FBT purposes. The paper has been released in light of the recent Federal Court decision in *Uber B.V. v Commissioner of Taxation [2017] FCA 110*, and the rise in popularity of ride-sourcing services as an alternative to traditional taxi services.

The discussion paper outlines the ATO's proposed change of interpretation in relation to the definition of 'taxi' contained within the FBT Act, and its application to the s58Z FBT exemption for taxi travel undertaken to or from work, or due to illness.

PwC supports the need for a broader interpretation by the ATO that both traditional taxi services and other ride-sourcing services are viewed as equivalents under the FBT Act.

WA payroll tax law to give effect to Budget proposal

The *Pay-roll Tax Amendment (Debt and Deficit Remediation) Bill 2017* and *Pay-roll Tax Assessment Amendment (Debt and Deficit Remediation) Bill 2017* were introduced into the Western Australia (WA) Legislative Assembly during October. Following the recent 2017-18 WA State Budget announcement, these Bills propose to amend the *Pay-roll Tax Act 2002* and *Pay-roll Tax Assessment Act 2002* to temporarily introduce a progressive increase in the payroll tax rate in Western Australia for five years from 1 July 2018, for employers paying annual taxable wages in excess of AUD100 million.

No payroll tax under employment agency contract provisions on payments made to certain subcontractors (NSW)

The Supreme Court of NSW in *JP Property Services Pty Limited v Chief Commissioner of State Revenue [2017] NSWSC 1391* has held that payroll tax was not payable on payments made to subcontractors as the relevant contracts were not 'employment agency contracts' as defined in subsection 37(1) of the *Payroll Tax Act 2007 (NSW)*.

JP Property Services Pty Limited (JP) provided cleaning and property maintenance services to commercial and industrial clients, including supermarkets operated by Franklins as well as other privately owned hotels and childcare centres. In providing those services, JP used a combination of both its own employees and third party subcontractors (both natural persons and corporations). While the Chief Commissioner of State Revenue was of the view that the subcontractor arrangements constituted employment agency contracts on the basis that JP procured the services of a service provider for its client and were therefore subject to payroll tax, this was ultimately overturned by the Supreme Court after applying precedent established in last year's UNSW Global case.

The services provided by JP and its subcontractors were solely outside the hours when the stores were open to the public, which resulted in the Court finding that the services of the subcontractors were not procured in or for the conduct of the client's business. Importantly, Justice Kunc stated that if the cleaning services were instead provided during the hours the stores were open to sell goods to the public (for example, responding to a spill in a grocery aisle), the services would have been considered by the Court to be in or for the conduct of the client's business, and would constitute an employment agency contract.

ATO issues Draft Employee Termination Instrument

The ATO has issued SPR 2017/D3 – Draft Income Tax Employment Termination Payments (12 month rule) Determination 2017, which extends the definition of employment termination payment to include certain payments received more than 12 months after the termination of a person's employment, where the delay was either the result of liquidator, receiver or trustee in bankruptcy having been appointed (appointment must be no later than 12 months after the termination of employment), or due to legal action concerning:

- the person's entitlement to the payment; or

- the amount of the person's entitlement.

This draft determination is substantially the same as the previous determination that it is intended to replace.

Club payments to players and coaches subject to payroll tax (QLD)

The Supreme Court of QLD, Court of Appeal (the Court), in *Brisbane Bears – Fitzroy Football Club Limited v Commissioner of State Revenue [2017] QCA 223* has dismissed the taxpayer's appeal and upheld the decision of the Supreme Court of QLD.

The Court found that payments made by the taxpayer to various players and coaches (or their associated corporate entities) were not solely for image rights, but for marketing and promotional services performed or rendered. This decision was reached on the basis that there was insufficient evidence for the Court to establish that payments made by the appellant, for the use of image rights, were made other than in the course of the provision of services, or independently from the provision of promotional or marketing services by the players and coaches.

The Court held that the payments made were 'wages' and 'taxable wages' as defined in the *Payroll Tax Act 1971 (Qld)*, and as such they were liable to payroll tax.

Garnishee notices ruled invalid on grounds of procedural fairness (ACT)

In *Canberra Cleaner Pty Ltd v Commissioner for ACT Revenue (No. 2) [2017] ACTSC 303*, the ACT Supreme Court ordered that garnishee notices issued by the Commissioner in respect of unpaid payroll tax liabilities be set aside.

The Court found that the taxpayer receiving the garnishee notice had not previously been identified on the notice of assessment for the payroll tax liability in question. While this was attributed to an administrative error by the Commissioner, in issuing a garnishee notice based on a notice of assessment issued to a group that did not specifically include the taxpayer, there was a denial of procedural fairness which resulted in the garnishee notices being found to be invalid to the extent they were issued to this taxpayer.

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Global Tax Update

Latest news from international tax and transfer pricing

Final ATO guidance on foreign equity distributions through interposed entities

The Australian Taxation Office (ATO) has finalised its 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:

- Taxation Determination TD 2017/21: 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 of 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.

- Taxation Determination TD 2017/22: a trust can hold a direct control interest (as defined in section 350 of the ITAA 1936) in a foreign company for the purposes of determining whether an Australian corporate tax entity that is a beneficiary of the trust has satisfied the participation test.

In the case of a corporate tax entity that is a beneficiary of a trust, it is important to note that the Commissioner's view in TD 2017/22 has changed since its predecessor, draft Determination (TD 2016/D7), which was issued last year. In particular, the view expressed in the final Determination has the effect that it will be difficult (if not practically impossible) for an Australian corporate tax entity that is a beneficiary in a discretionary trust to access the foreign dividend exemption in Subdivision 768-A. The changed view may also impact the ability of a corporate beneficiary in a fixed trust to access the exemption where it does not have an indirect participation interest in the foreign company of at least 10 per cent at the time the foreign company makes the distribution, notwithstanding that it may be entitled to receive more than 10 per cent of the trust's income at the end of the income year.

The Determinations apply to foreign equity distributions made on or after 17 October 2014, being the date Subdivision 768-A commenced operation. However, in acknowledgement of the change in the Commissioner of Taxation's view in relation to an interposed trust, to the extent that TD 2017/22 provides a less favourable outcome, taxpayers are able to rely on the view in TD 2016/7 up until 18 October 2017 (being the date the final determination was issued).

OECD BEPS developments

At the Organisation for Economic Co-operation and Development's (OECD) Forum on Tax Administration Plenary meeting in Oslo on 27-29 September 2017, a number of key themes were discussed, including:

- Priorities for the incoming G20 Presidency, in particular, effective implementation of Base Erosion and Profit Shifting (BEPS) outcomes, Common Reporting Standards for the exchange of information on offshore accounts and actions to enhance tax certainty, including a new pilot on joint risk assessment of multinationals.

- Continuing efforts to improve tax compliance, including tackling the shadow economy, the effective use of data, the management of tax debt and how to minimise identity fraud through effective registration and identification.

- The digital transformation of tax authorities through the use of new technologies, analytical tools and enhanced data sources.

The OECD has issued a number of updates in relation to BEPS-related issues in the last month:

- A progress report on Harmful Tax Practices – Preferential Regimes (BEPS Action 5), which provides details on the outcome of peer reviews undertaken on 164 preferential tax regimes identified amongst more than 100 jurisdictions participating in the OECD Inclusive Framework on BEPS.

- The full list of automatic exchange relationships that are now in place under the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country (CbC) Reporting, and an update on the implementation of the domestic legal framework for CbC Reporting in jurisdictions.

- The public comments received on BEPS discussion drafts on the attribution of profits to permanent establishments and transactional profit splits. Refer to PwC Global's Tax Insights for comments provided to the OECD on both discussion draft documents.

- The first six peer review reports for Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States (US) on the implementation of BEPS minimum standards on improving tax dispute resolution mechanisms.

In other OECD developments, a number of reports have been published:

- The Tax Administration 2017: Comparative Information on OECD and Other Advanced and Emerging Economies report, which provides internationally comparative data on important aspects of tax systems and their administration in 55 advanced and emerging economies.

- The Changing Tax Compliance Environment and the Role of Audit report, which sets out how tax compliance strategies are evolving in light of new technologies, data sources and tools, including the increasing use of advanced analytics.

- The Shining Light on the Shadow Economy: Opportunities and Threats report, which looks at the impact on the shadow economy of changes in ways of working and business models, the growth of the digital economy and the emergence of new technologies. The report also recommends a number of areas for further targeted work to help improve tax administrations' ability to tackle shadow economy activity.

EU Commission paper on a Fair and Efficient Tax System for the Digital Single Market

A European Commission paper dealing with options for taxing the digital economy in the European Union (EU) Digital Single Market notes that amendments to the Common Consolidated Corporate Tax Base to cover digital activities as the preferred intermediate approach at EU level (developed in parallel with a G20/OECD solution). However, it identifies three EU 'quick fixes': an equalisation tax on the turnover of digitalised companies; a withholding tax on digital transactions; and a levy on revenues generated from the provision of digital services or advertising activity. Refer to PwC Global's Tax Insights for further information.

EU Commission takes next steps in State aid cases

The European Commission has continued its ongoing challenges to Member States' transfer pricing tax regimes by advancing two high profile cases to the next stages. In the Apple case, the Commission referred Ireland to the Court of Justice of the European Union for failing to enforce an August 2016 State aid recovery decision. In the Amazon case, the Commission announced its conclusion that Luxembourg's tax treatment of Amazon gave rise to unlawful State aid. PwC Global's Tax Insights provides further information.

US Treasury recommends substantial changes to tax regulations

The US Treasury Department has released a report, recommending specific actions for eight previously identified regulations that either 'impose an undue financial burden' and/or 'add undue complexity'. The changes relate to the following:

- Treatment of certain interests in corporations as stock or indebtedness.

- Income and currency gain or loss with respect to a Qualified Business Unit.

- Treatment of certain transfers of property to foreign corporations.

- Treatment of partnership liabilities.

- Certain transfers of property to Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs).

- Restrictions on liquidation of an interest for estate, gift, and generation-skipping transfer taxes.

- Definition of a political subdivision/participation of a person described in section 6103(n) in a summons interview.

This review is part of the US President's Executive Order calling for a reduction of tax regulatory

burdens. PwC Global's Tax Insights provides further information.

Revised IRS guidance provides relief for reporting taxpayer identification numbers

The US Internal Revenue Service (IRS) has provided revised guidance for financial institutions required to collect taxpayer identification numbers (TINs) and dates of birth. The Notice provides that foreign financial institutions will not be in significant non-compliance with the Model 1 intergovernmental agreement (IGA) solely because of their failure to report US TINs, provided they comply with certain other requirements. PwC Global's Tax Insights provides further information.

Japanese National Tax Agency guidance for preparing transfer pricing documentation and mutual agreement procedures

The Japanese National Tax Agency (NTA) has published a new guidebook on transfer pricing for taxpayers, and has announced new consultation services and visits to taxpayers to support taxpayers required to prepare Local File transfer pricing documentation contemporaneously. PwC Global's Tax Insights provides further information.

In addition, the NTA's Office of Mutual Agreement Procedure has released guidance on mutual agreement procedures. This guidance complements the existing Commissioner's Directive on Mutual Agreement Procedures, and is designed to ensure Japan's compliance with BEPS Action 14: More Effective Dispute Resolution Mechanisms. PwC Global's Tax Insights provides further information.

Irish Budget

On 10 October 2017, the Irish Minister for Finance released his first Budget, and provided an update on Ireland's international tax strategy. The Minister also announced details of public consultation on the recently published review of Ireland's corporation tax code. Refer to PwC Global's Tax Insights for further information.

Netherlands proposes to amend Dutch dividend withholding tax rules

The Dutch Ministry of Finance has published its 2018 tax budget proposals, which includes a proposal to amend the Dutch Dividend Withholding Tax Act. For multinational enterprises, the proposal broadens the Dutch dividend withholding tax exemption from European Union/European Economic Area residents to all jurisdictions with which the Netherlands has entered into a tax treaty. In addition, 'holding' cooperatives owned by residents of non-treaty jurisdictions would become subject to Dutch dividend withholding tax. PwC Global's Tax Insights provides further information.

Spain introduces new tax return to report transactions with related parties and tax havens

The Spanish Finance Minister has approved a new regulation that will require Spanish corporate taxpayers to file a specific tax return, with detailed information on transactions with related parties and transactions or investments with persons or entities located in tax-haven jurisdictions. Taxpayers are required to file this tax return for all tax periods, starting on or after 1 January 2016. PwC Global's Tax Insights provides further information.

Brazil updates its oil and gas tax framework

The Brazilian Government has updated its oil and gas tax framework, including eliminating uncertainties regarding the tax treatment of expenses incurred in the exploration and production of oil and gas. A Special Import Regime has been established that includes a complete suspension of federal taxes for goods imported on a permanent basis for the exploration, development, and production of oil and natural gas. PwC Global's Tax Insights provides further information.

Explore PwC's global tax research and insights

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Indirect Tax Update

GST legislative determinations

The following goods and services (GST) determinations have been made:

- Goods and Services Tax: Simplified Accounting Methods Determination 2017 for Retailers who sell Food – Business Norms, Stock Purchases and Snapshot Methods: which replaces the Simplified GST Accounting Methods Legislative Instrument, and corrects some minor errors and clarifies a number of matters. The determination provides eligible retailers with the choice to use a simplified accounting method to help work out their GST net amount by estimating the proportion of their sales and purchases of trading stock that are GST-free.

- A New Tax System (Goods and Services Tax) (Incidental Valuable Metal Goods) Determination 2017 (No. 1): which determines a class of goods that are incidental valuable metal goods. An incidental valuable metal good within the definition of the *A New Tax System (Goods and Services Tax) Act 1999* (the Act) is not prevented from being 'second-hand goods' for the purposes of the Act, following amendments made earlier this year in the *Treasury Laws Amendment (GST Integrity) Act 2017*.

Commonwealth Grants Commission's Interim position on HFE

The Commonwealth Grants Commission, which makes recommendations each year for the distribution of GST revenue among the States, has released a paper which presents the Commission's interim positions on the objective of horizontal fiscal equalisation (HFE), provides supporting principles and guidelines, and addresses associated implementation issues.

The States will be invited to make further submissions on the definition of HFE and the supporting principles and guidelines later in 2018, having regard also to any Government decisions on the findings of the Productivity Commission review of the system of HFE (see below).

Productivity Commission's Draft Report on HFE

The Commonwealth Treasurer has welcomed the release of the Productivity Commission's (PC) draft report on horizontal fiscal equalisation (HFE). The draft report provides a comprehensive analysis of how GST revenue is distributed to the States and Territories, the impact of the current method on national productivity, efficiency and economic growth, and how this could be better achieved.

A recommendation is made in the report that 'revising the objective of HFE would be in the best interests of national productivity and wellbeing'. Furthermore, rather than undertaking a major overhaul of the current system, the draft report outlines a number of draft recommendations aimed at improving the way Australia's GST revenue is distributed to achieve HFE goals.

Submissions can be made on the PC draft report until 10 November 2017.

Trusted Trader programme

The Federal Government has announced that the 100th business has signed up to the Australian Trusted Trader programme, and a new streamlined

reporting benefit will be implemented along with easing administration of the China Australia Free Trade Agreement, with a view to enhancing border clearances, and reduce supply chain and compliance costs. For further information about the Trusted Trader programme, refer to our earlier publications.

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State Taxes Update

New South Wales Housing Affordability legislative amendments

The *State Revenue Legislation Amendment (Surcharge) Bill 2017* (the Bill) has been introduced into the New South Wales (NSW) Parliament to give effect to amendments to certain aspects of the NSW Government's Housing Affordability Strategy following industry concerns. In particular, the Bill amends the *Duties Act 1997 (NSW)*, the *Land Tax Act 1956 (NSW)* and the *Land Tax Management Act 1956 (NSW)* to provide an exemption from, and allow for refunds of surcharge purchaser duty and surcharge land tax payable in respect of residential land by a foreign person that is an Australian corporation when the land is used for the construction of new homes, or is subdivided and sold for the purposes of the construction of new homes.

The Bill also makes amendments to provide that the small business declaration required for the purposes of the small business exemption from duty on an insurance policy is to be provided in a manner approved by the Chief Commissioner (replacing the current requirement that it be provided in writing).

Victorian State Revenue – update on smart forms

The Victorian State Revenue Office has published a suite of enhancements for the digital duties form, in addition a reference guide, which explains the changes.

Revenue NSW's new system to process surcharge purchaser duty transactions

Revenue NSW has announced that from the 9 October 2017, surcharge purchaser duty transactions can be processed on the Revenue NSW Electronic Duties Return (EDR) system. The interim arrangement for processing surcharge purchaser duty is no longer available.

Land tax decisions

The following decisions relevant to land taxes were handed down in the last month:

- The Supreme Court of Victoria (Court of Appeal) in *PTDA v Commissioner for State Revenue [2017] VSCA 266* has upheld the decision of the Victorian Civil and Administrative Tribunal (the Tribunal) in relation to a determination of the appropriate value of land. The Tribunal concluded that the value of land for land tax purposes for a site used for public infrastructure assets (including a train and bus terminal) was substantially below those on which the Commissioner's assessments had been based, but the true site value in each year was not nil. The Court, in dismissing the appeal, held that it was reasonably open to the Tribunal to reach its conclusion and was entitled to reject the applicants' contention that the land had no value because the station facility was a loss-making operation.

- The NSW Civil and Administrative Tribunal (the Tribunal) in *Chief Commissioner of State Revenue v Brown Cavallo Pty Ltd [2017] NSWCATAP 189* has dismissed the Chief Commissioner of State Revenue's appeal against the decision of the Tribunal. The Tribunal had set aside land tax assessments and held that the taxpayer was exempt from land tax pursuant to section 10AA of *the Land Tax Management Act 1956 (NSW)* based on the land being used for primary production.

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Superannuation Update

ATO Review Activity

There has been substantial review activity from the Australian Taxation Office (ATO) on superannuation funds in the last two years, largely concerning the determination of Foreign Income Tax Offset (FITO) caps, the question of the 'source' of foreign exchange hedging gains, and the concept of how expenses 'reasonably relate' to foreign income for inclusion in the FITO cap calculation. These reviews and the views expressed by the ATO review teams have brought to light several issues that concern superannuation funds with FITO claims.

A submission has been made to the ATO Tax Counsel Network on a number of these issues, including:

- whether capital gains can have a source, and whether foreign sourced capital gains can be included in the FITO cap calculation where they form part of net capital gains, regardless of whether they have been subject to foreign tax; and

- allocations of expenses (both investment and non-investment related expenses) to the FITO cap calculation.

An industry-wide phone hook-up was held with the ATO and a number of industry participants on 18 October 2017 where issues from the submission were discussed at length. There were important areas of disagreement between the ATO and the industry participants, such as:

- The ATO's view that only capital gains that have been subject to a payment of foreign tax are able to be included in a FITO cap calculation, and not foreign sourced capital gains more broadly.

- The determination of a 'reasonable' approach for the allocation of non-investment related expenses to the FITO cap calculation.

The ATO has agreed to respond in writing to the matters raised in the submission.

In the short term, FITO caps will require very close attention as part of the tax return process for the 2017 income year.

SMSFs in a post-superannuation reform environment

ATO Assistant Commissioner Kasey Macfarlane delivered a speech at the 12th Annual SMSF (self-managed superfunds) Conference on SMSFs in the post superannuation reform environment. The issue of segregated and unsegregated assets and actuarial certificate requirements was discussed. It was also noted that from a practical compliance perspective, the ATO will not be seeking to apply compliance

resources to review applicable exempt current pension income (ECPI) calculations for 2016-17 and prior years. The ATO will shortly publish information on its website to confirm this position.

Also discussed was the transfer balance cap and the total super balance, asset valuation for purposes of the total super balance, the use of reserves by SMSFs, transitional capital gains tax (CGT) relief, and events-based reporting for SMSFs.

Superannuation instruments

The following superannuation instruments have been made:

- Reporting of event based transfer balance account information in accordance with the *Taxation Administration Act 1953*. This instrument sets out the timeframe in which superannuation providers, in relation to superannuation plans, and life insurance companies, in respect of certain life insurance policies, are required to report transactions to enable the ATO to determine if an individual has exceeded their transfer balance cap. The instrument applies from 1 October 2017.

- Retirement Savings Accounts Tax File Number approval No. 1 of 2017 and Superannuation Industry (Supervision) Tax File Number approval No. 1 of 2017. These instruments set out the approved manner for a Retirement Savings Account provider, trustee of an eligible superannuation entity or of a regulated exempt public sector superannuation scheme (superannuation providers) to request that a person quote their tax file number (TFN), including when informing another superannuation provider of a TFN. The instruments are being remade without substantive change and apply from 1 October 2017.

ATO publishes updated LCGs for public comment

The Australian Taxation Office (ATO) has published the following updated Law Companion Guidelines (LCGs) for public comment to reflect changes made by *Treasury Laws Amendment (2017 Measures No. 2) Act (Cth)*:

- LCG 2016/8. Superannuation reform: transfer balance cap and transition-to-retirement reforms: transitional CGT relief for superannuation funds, which has been updated to reflect changes that apply to transition to retirement income streams and pooled superannuation trusts.

- LCG 2016/9. Superannuation reform: transfer balance cap. Changes to this LGC reflect the new transfer balance credit arising from the repayment of a limited recourse borrowing arrangement and changes to the treatment of transition to retirement income streams.

- LCG 2016/12. Superannuation reform: total superannuation balance (a method for valuing an individual's total superannuation interests). This LGC has been updated to reflect changes to the treatment of transition to retirement income streams.

Funds and administrators should take these guides into account in determining their reporting requirements to the ATO.

Applying for a DASP from a super fund or retirement savings account

The ATO has updated its website with respect to online applications for a Departing Australia superannuation payment (DASP). The ATO has also released a form (NAT 7204) for a DASP. Former temporary residents who accumulated superannuation while working in Australia can apply to claim a DASP via this form.

Super reform – an ongoing implementation

ATO Deputy Commissioner of Superannuation, James O'Halloran, delivered a speech to CPA National Congress on the ongoing implementation on super reforms. Topics discussed included:

- updated superannuation Law Companion Guidelines

- renewed visibility of ATO data

- changes to reporting arrangements for Australian Prudential Regulation Authority (APRA) funds, SMSFs and individuals that arise from the 2016 Federal Budget measures; and

- areas of concern in relation to transfer balance cap, total super balance and transitional CGT relief, the use of reserves, and collectables.

The ATO is expected to publish an update to its Super Scheme Smart campaign to highlight existing and emerging arrangements that are considered to

be high risk from a regulatory and tax perspective, including contrived arrangements involving SMSF investment in property development ventures involving related parties; the granting of a legal life interest over a commercial property to an SMSF; and arrangements where an individual deliberately exceeds their non-concessional contributions cap to manipulate taxable and non-taxable components of their super interest upon refund of the excess.

SMSF transfer balance account report and instructions available

The new transfer balance account report (TBAR) and instructions for SMSFs are now available on the ATO website. SMSFs can use the TBAR to report events that affect an individual member's transfer balance account. While SMSFs will not be required to report anything until 1 July 2018, the option will be available from 1 October 2017.

Unclaimed super

The ATO has reported that as at 30 June 2017, there are over 6.3 million lost and ATO-held superannuation accounts with a total value of almost AUD18 billion.

Let's talk

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Legislative Update

Commonwealth revenue measures introduced into Parliament, or registered as legislative instruments or regulations since the October edition of TaxTalk Monthly, include:

- *Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2017* (the Bill), which was introduced into Parliament on 18 October 2017. The Bill proposes to amend the *Income Tax Rates Act 1986 (Cth)* to change the eligibility criteria for a corporate tax entity to qualify for the lower corporate tax rate. Specifically, the Bill removes the requirement that the entity be carrying on a business but introduces a new requirement that no more than 80 per cent of its assessable income is income of a certain passive nature. The amendments, once enacted, will apply from the 2017-18 income year.

- *Treasury Laws Amendment (Junior Minerals Exploration Incentive) Bill* (the Bill), which was introduced into Parliament on 19 October 2017. The Bill proposes to introduce the Junior Minerals Exploration Incentive (JMEI). The JMEI, which is similar to the previous Exploration Development Incentive (EDI) that ceased to be available for expenditure incurred in the 2017-18 income year, provides a tax incentive for those who invest in small minerals exploration companies undertaking greenfields minerals exploration in Australia.

  Specifically, Australian resident investors in such companies will receive a tax incentive in the form of a refundable tax offset (or where the investor is a corporate tax entity, franking credits) where the company chooses to give up a portion of their tax losses relating to their exploration expenditure in an income year. The JMEI will be available for expenditure incurred in the 2017-18, 2018-19, 2019-20 and 2020-21 income years, with the total value of incentives available for each year capped. Refer to our TaxTalk Alert: Welcome incentive for investors

in greenfields mineral exploration for further information.

- *Taxation Administration Regulations 2017 (Cth)* (the Regulations) commenced on 1 October 2017, to remake and improve the *Taxation Administration Regulations 1976* before they sunset, and to repeal redundant provisions, simplify language and restructure provisions for ease of navigation. These changes are not intended to affect the substantive meaning or operation of the provisions. Key changes include:
  - The structure of the Regulations has been changed from that used in the *Taxation Administration Regulations 1976*, to follow the Act more closely.
  - Certain provisions that deal with withholding payments to foreign residents have been restructured so that the provisions which prescribe what types of payments are covered are separate from the provisions for working out the amount of the payment.

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Other News

Draft ruling on treatment of long term construction contracts

The Australian Taxation Office (ATO) has issued a draft taxation ruling TR 2017/D8, which considers the income tax treatment of long term construction contracts. Specifically, the draft ruling explains the methods acceptable to the Commissioner of Taxation for returning income derived from, and recognising expenses incurred in, long term construction projects and acknowledges the new accounting standard *AASB 15 Revenue from contracts with customers* (AASB 15). The draft ruling is a rewrite and update of IT 2450, which was published in 1987 and consolidates the views contained in various other tax determinations.

The Commissioner of Taxation continues to affirm that the completed contracts method remains unacceptable under the income tax law. According to the draft ruling, in contracts which extend beyond one income year, it is not permissible to defer the bringing of profits or losses to account until the contract is completed. Instead, the principles and practices which apply in recognising, for income tax purposes, the income derived from, and expenses incurred in, long term construction contracts are:

- All progress and final payments received in a year are to be included in assessable income and income tax deductions allowed for losses and outgoings to the extent permitted by law (the 'basic approach').
- Any method of accounting which has the effect of allocating, on a fair and reasonable basis, the ultimate profit or loss on a contract over the years taken to complete the contract ('estimated profits approach') will be acceptable.

The draft ruling confirms that the introduction of AASB 15 does not necessarily bring into line the accounting recognition of revenue with the tax law.

The Commissioner of Taxation also indicates that the emerging profits basis is unacceptable.

The Appendix to the draft ruling sets out a practical administrative approach that the ATO will follow in relation to amending prior year assessments where

the estimated profits basis is used and in relation to its interaction with other provisions.

When finalised, the ruling is proposed to apply from 1 January 2018. Comments on the draft ruling can be made until 1 December 2017.

Default beneficiary of trust assessed on trust's net income

On a matter remitted from the Federal Court, the Administrative Appeals Tribunal (the Tribunal) in *Moignard v Commissioner of Taxation [2017] AATA 1661* has held that the taxpayer who was one of three default beneficiaries of a trust was presently entitled to one-third of the income of the trust, and therefore was assessable on one-third of the trust's net income. The Tribunal was not satisfied that there was a valid distribution of the income of the trust that would have prevented the operation of the default clause in the trust deed. Furthermore, the taxpayer had not effectively disclaimed their entitlement to the distribution.

No present entitlement to net income of trust

The Full Federal Court in *Lewski v Commissioner of Taxation FCAFC 145* held that the taxpayer was not presently entitled to any share of the net income of the trust as the alternative resolutions made by the trustee meant that the distribution to the taxpayer was contingent on the occurrence of an event that may or may not take place. In addition, the Full Court held that certain amounts to be paid under a contract were incurred upon execution of the contracts and hence deductible in the year of execution.

Reforms to address illegal phoenix activity

The Federal Government has released a consultation paper on its previously announced reforms to the tax and corporations law to deter and disrupt the core behaviours of phoenix operators, including non-directors such as facilitators and advisers (read the Government's media release regarding this latest consultation).

This Consultation Paper sought feedback (by 27 October 2017) on a number of law reform proposals which are based on recommendations made by the Government's Phoenix and Black Economy Taskforces, and covers certain changes to assist the regulators to better target those who repeatedly misuse corporate structures, and to enable them to take stronger action against those individuals.

Expert advisory panel on whistleblower protections

Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has released the terms of reference for, and the membership of, an Expert Advisory Panel on whistleblower protections. The Panel will review and comment on draft legislation, which the Government expects to introduce this calendar year. The legislation will:

- establish whistleblower protections for those who disclose information about tax avoidance and other breaches of tax laws administered by the Commissioner of Taxation; and
- strengthen existing corporate whistleblower protections under statutes administered by the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulatory Authority.

Making it easier to start a new business

The Government has recently commenced public testing of a new service to make registering a business easier and faster. The new business registration service allows businesses to apply for multiple business and tax registrations at the same time online at business.gov.au. The service is being developed collaboratively with the Department of Industry, Innovation and Science, the ATO, ASIC and the Department of the Treasury.

Changes in average personal income tax rates: distributional impacts

The Commonwealth Parliamentary Budget Office (PBO) has released a report into changes in average personal income tax rates: distributional impacts. The PBO's 2017–18 Budget medium term projections report identified the projected return to surplus in 2020–21 is predominantly due to a projected increase in personal income tax revenue. This latest report analyses the expected increase in average tax rates for individuals in different parts of the taxable income distribution and examines the factors that are driving these outcomes.

Final Budget Outcome 2016-17

The Federal Government has released the Final Budget Outcome 2016-17, which shows the underlying cash deficit at 1.9 per cent of GDP which is a AUD4.4 billion improvement compared with the underlying cash deficit estimated at the time of the

2017-18 Budget. This improvement is stated to be driven by AUD4.1 billion in higher than expected total receipts, and AUD1.2 billion from lower than expected payments. Net Future Fund earnings were AUD860 million higher than expected at the time of the 2017-18 Budget.

Tax receipts were AUD379.3 billion, which was AUD2.1 billion higher than forecast. Higher than expected company tax, goods and services tax receipts, superannuation fund tax receipts and excise were partially offset by lower than expected fringe benefits tax receipts.

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