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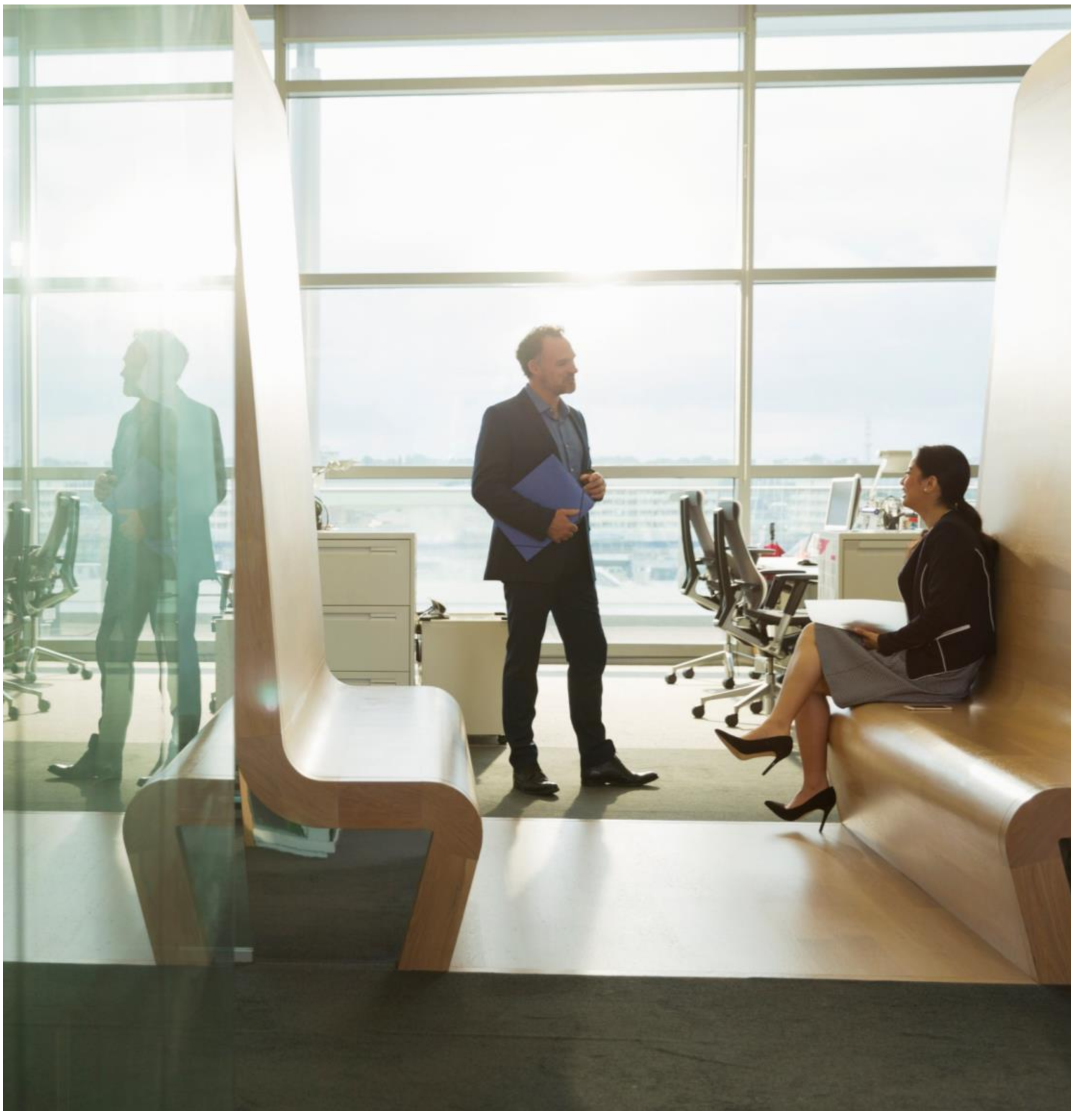
PwC's Monthly Tax Update

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

April 2021



Corporate tax update

Loss carry-back offset – approved form and instructions

With effect from the 2020-21 income year, companies with an aggregated turnover of less than AUD5 billion have the ability to choose to apply a tax loss for the 2019-20, 2020-21 or 2021-22 income years against tax paid in relation to the 2018-19 or later income years in the form of a refundable tax offset.

An eligible corporate tax entity that is seeking to claim the loss carry-back offset for the 2020-21 income year and which:

- has an early balancer substituted accounting period, or
- needs to lodge a company tax return for a part of the 2020-21 income year

before 1 July 2021 is required to lodge a new approved form (the loss carry back claim form) with the Australian Taxation Office (ATO). This form includes details of the company's choice to claim the offset and also the company's aggregated turnover for the relevant loss year(s).

Of particular note, is that the ATO advise that if this form is not lodged before lodging the applicable company tax return, it may consider that the choice to claim the loss carry back tax offset has not been made. Furthermore, it recommends that in order to avoid delays in processing the company tax return, the loss carry back claim form should be lodged at least five business days before lodging the company tax return.

For general information about the new loss carry-back offset, refer to this PwC Tax Alert.

Payment to cancel employee entitlements not deductible

In Clough Limited v Commissioner of Taxation [2021] FCA 108 the Federal Court has held that an amount paid to cancel employee entitlements under an option plan and incentive scheme was not deductible under section 8-1 of the *Income Tax Assessment Act 1997 (Cth)* (ITAA 1997).

The taxpayer paid just over $15 million to cancel employee entitlements granted under an option plan and an incentive scheme. The payment facilitated the acquisition of 100 per cent control of the taxpayer by existing majority shareholders.

The Federal Court was not satisfied that the amount satisfied the positive limbs of section 8-1(1) as it was not an outgoing connected to carrying on the taxpayer's business, and was instead paid in order to fulfil an obligation that arose upon the change in control of the taxpayer to pay relevant employees an amount to bring their entitlements under the Option Plan and Incentive Scheme to an end. It was not done to reward employees or to retain them, nor was it paid with a view to gaining or producing income. Therefore, the Court found that the payment of the amount was not incurred in gaining or producing assessable income or necessarily incurred in carrying on a business for the purpose of gaining or producing such income. If the scheme of arrangement by which the majority shareholders acquired the remaining shares in the taxpayer had not occurred the amount would never have been paid.

Since the Court found that the positive limbs for deductibility were not satisfied, it was not necessary to determine whether the amount would properly be characterised as being on capital account.

New director identification number regime

The Federal Government's Modernising Business Registers (MBR) Program will unify the Australian Business Register (ABR) and 31 business registers administered by the Australian Securities and Investments Commission (ASIC) onto a single platform administered by the Commonwealth Registrar as a separate statutory function of the ATO.

The MBR Program will include the introduction of a director identification number (director ID) which is a unique identifier that a director will keep forever. The director ID will help prevent the appointment of fictitious directors and facilitate traceability of their profile and relationships with companies over time.

To support the commencement of the director ID regimen, Treasury consulted on the new data standard and disclosure framework. The draft director ID data standard prescribes the information required to apply for a director ID under the Corporations Act including how the information is to be provided, used and stored. The draft director ID disclosure framework sets out the circumstances in which the Registrar may disclose director ID information to Public Governance, Performance and Accountability (PGPA) bodies, courts and tribunals in the same way as government entities.

Treasury also intends to consult on draft legislative instruments relating to transitional application periods for directors to apply for a director ID. These draft instruments will provide new and existing directors with an extended timeframe to apply for a director ID during the early stages of the regime.

Let's talk

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

Chris Morris, Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

Sarah Hickey, Sydney
Sydney Tax Market Leader
+61 (2) 8266 1050
sarah.a.hickey@pwc.com

Kirsten Arblaster, Melbourne
Melbourne Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

Liam Collins, Melbourne
Financial Services Tax Leader
+61 (3) 8603 3119
liam.collins@pwc.com

Michael Bona, Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

James O'Reilly, Brisbane
Brisbane Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Rob Bentley, Perth
Perth Tax Leader
+61 (8) 9238 5202
robert.k.bentley@pwc.com

Amy Etherton, Newcastle
Partner
+61 (2) 4925 1175
amy.etherton@pwc.com

Warren Dick, Sydney
Tax Reporting & Strategy Leader
+61 (2) 8266 2935
warren.dick@pwc.com

Jason Karametos, Melbourne
Industries Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

Alistair Hutson, Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

Employment taxes update

FBT 2020-21 year end

The 2020-21 fringe benefits tax (FBT) year ended on 31 March 2021. Be sure to note the various rates and thresholds that apply to the 2020-21 FBT year when preparing the annual FBT return. The due date for the 2020-21 FBT balancing payment is now aligned with the FBT return lodgement date of 25 June 2021 for employers using tax agents who lodge FBT returns electronically (for non-agent lodged returns, the due date is 21 May 2021).

Furthermore, as COVID-19 has impacted the 2020-21 FBT year, it is also worth noting the views of the ATO in the context of changed circumstances affecting benefits provided to employees during that year. Consider the following:

- fact sheet on benefits to support working from home arrangements, including:
  - work laptop, other portable electronic device and tools of trade
  - general office equipment
  - work-related counselling, and
  - work-related preventive health care.
- car fringe benefits including cars garaged at home and log-books
- car parking.

Also refer to PwC's 2021 FBT video series and Employment Taxes Annual Executive Update.

FBT rates and thresholds for 2021-22

The ATO has released the following tax determinations which provide the FBT rates and thresholds for the 2021-22 FBT year commencing on 1 April 2021:

- TD 2021/3 which sets out the amounts the Commissioner of Taxation considers reasonable for food and drink expenses incurred by employees receiving a living-away-from-home allowance (LAFHA) fringe benefit.
- TD 2021/4 which provides the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car.

Voluntary repayments of JobKeeper payments

Some employers who have found that they were not as adversely affected by the impacts of COVID-19 as originally expected, have been seeking to voluntarily repay some of the JobKeeper payments that they were otherwise legally entitled to and have received. In this regard, the ATO has released information about its approach to dealing with such voluntary repayments. Importantly, whilst confirming that eligible businesses do not need to repay JobKeeper payments, the ATO sets out the process for making a voluntary repayment, and importantly, the tax consequences of making a repayment.

The ATO has confirmed that whilst all JobKeeper payments are assessable income (even those repaid), a voluntary repayment of JobKeeper may be deductible in limited circumstances and only if the voluntary payment is clearly appropriate to achieve, or directed at achieving, the business objectives of the business (e.g. prevent reduction in business, or publicise and promote your business in the short-term).

The ATO will generally not apply compliance resources to confirm if the payment is deductible provided the original JobKeeper payments were correctly assessable, and the taxpayer acted in good faith and used best endeavours to determine deduction entitlement.

Data matching program for JobKeeper

The Commissioner of Taxation has given notice of the continuation of the current data matching program relating to the JobKeeper program between Services Australia and the ATO. The JobKeeper program ended on 28 March 2021. This data matching program involves the exchange of data between the ATO and the agency to compare information held by the ATO relating to the JobKeeper Payment, and information that social security payment customers have reported to the agency.

Payroll tax (NSW): JobKeeper: payroll tax exemption

Revenue NSW has released guidance (Commissioner's Practice Note CPN 020) to employers discussing when and the extent to which an exemption from NSW payroll tax applies to the JobKeeper payment. It describes how the amount of the 'top up' payment – the difference between the JobKeeper amount and the total of ordinary wages paid for a fortnight – is exempt from payroll tax. Numerous other specific situations regarding changes to the quantum of payment and employment status of the eligible employee are also explained.

The guidance also notes that the Chief Commissioner and the Commissioner of Taxation are permitted to exchange information under reciprocal arrangements authorised by State and Commonwealth legislation.

Payroll tax (NSW): Relevant contracts and arrangements under Australian Financial Service Licenses and Australian Credit Licenses

Revenue NSW has released guidance (Commissioner's Practice Note CPN 016) to clarify their view on arrangements between entities holding Australian Financial Service Licenses (AFSL) and Australian Credit Licenses (ACL) and persons or entities acting as Authorised or Credit representatives (Authorised Representatives). Broadly, Revenue NSW confirms their view that such arrangements will generally be viewed as relevant contracts, resulting in payroll tax being payable on commissions paid to Authorised representatives subject to the availability of exemptions. Revenue NSW also indicates arrangements that similar arrangements may still be a relevant contract, even if service providers are not acting as Authorised Representatives of the other contracting party.

It is important to note the broad evidentiary requirements stipulated by Revenue NSW, where exemptions are claimed.

ATO reminds businesses to lodge the 2019-20 TPAR

The ATO has reminded businesses who engage contractors to provide certain services to lodge the 2019-20 Taxable Payments Annual Report (TPAR), where it is required to be lodged. The 2019-20 TPAR was due to be lodged with the ATO by 28 August 2020, but the ATO understands that there are over 60,000 businesses that have not yet complied with lodgement requirements. Businesses that are involved in building and construction, cleaning, courier, road freight, IT, security, investigation or surveillance services that engage contractors, subcontractors, or consultants to provide those services may have an annual obligation to report details of the payments to the ATO under the taxable payments reporting system. Penalties may apply for failure to lodge documents with the Commissioner of Taxation as required.

Reporting additional information under expanded STP

The ATO has released additional information about the expansion of Single Touch Payroll (STP) Phase 2 reporting that is scheduled to start from 1 January 2022. The expansion aims to reduce employers' reporting burden, and the additional information includes employment conditions, income types, and salary-sacrificed amounts. Although there is nothing for employers to do now, they should note that their payroll digital service provider will update their STP-enabled software in due course to ensure compliance with the expanded reporting requirements.

No entitlement to cash flow boost for newly incorporated company

The Administrative Appeals Tribunal has found in the matter of Slatter Building Group Pty Ltd v FC of T [2021] AATA 456 that the taxpayer was not eligible to receive the cash flow boost payment. The taxpayer company was registered for the goods and services tax (GST) on 28 January 2020, effective from 20 January 2020, and had made taxable supplies in the period between its incorporation on 17 January 2020 and 12 March 2020. Since it accounted for GST on a quarterly basis, its first activity statement was lodged for the quarter ended 31 March 2020, on 1 May 2020. The issue that was relevant to the taxpayer's entitlement to the Cashflow Boost was whether the entity made a taxable supply in a tax period that applied to it that ended before 12 March 2020.

Although the taxpayer's business had previously been conducted in the form of a sole trader operation prior to its incorporation, the Tribunal is unable to interpret the law in a manner that would have regard to that historical position. That is, it is not possible to interpret the defined term 'entity' in an ambulatory way that would, for purposes of the cash flow boost law, treat the sole trader and the incorporated entity, as a single coherent entity which carried on the building and construction business throughout the relevant period when each of them operated the business independently at different times.

ATO decision impact statement on MWWD case

The ATO has issued a decision impact statement in response to the AAT's decision in MWWD v FC of T [2020] AATA 4169.

In the MWWD case, the Tribunal found that a technician contracting with the taxpayer was not an "employee" under either s 12(1) or s 12(3) of the *Superannuation Guarantee (Administration) Act 1992, instead* characterising the relationship as one of an independent contractor.

While the ATO accepts the Tribunal's decision, the ATO is of the view that the Tribunal's decision differed from the conclusion previously reached by the ATO due to the emphasis placed by the Tribunal on some facts over others. The ATO does not consider this particular decision by the Tribunal to have wider ramifications beyond the taxpayer's particular circumstances and will not appeal the decision.

Payroll tax (Qld): Single director had controlling interest

The QLD Supreme Court in Salemade Pty Ltd & Ors v Commissioner of State Revenue [2021] QSC 19 has affirmed the Commissioner's decision that the taxpayers were a group of commonly controlled companies for QLD payroll tax purposes.

The taxpayer's position was that the relevant provisions of the *Payroll Tax Act 1971* (QLD) were not satisfied on the basis that, as a single director company, no meetings of the directors were held in which voting power could be exercised that would exceed the 50 per cent threshold required under these provisions. The Court ultimately held that the taxpayer company was grouped with eight other commonly controlled companies and that a single director could have a controlling interest in a business.

Let's talk

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

Norah Seddon, Sydney
Partner
+61 (2) 8266 5864
norah.seddon@pwc.com

Adam Nicholas, Sydney
Partner
+61 (2) 8266 8172
adam.nicholas@pwc.com

Greg Kent, Melbourne
Partner
+61 (3) 8603 3149
greg.kent@pwc.com

Anne Bailey, Melbourne
Partner
+61 (3) 8603 6818
anne.m.bailey@pwc.com

Stephanie Males, Canberra
Partner
+61 (2) 6271 3414
stephanie.males@pwc.com

Maria Ravese, Adelaide
Partner
+61 (8) 8218 7494
maria.a.ravese@pwc.com

Paula Shannon, Brisbane
Partner
+61 (7) 3257 5751
paula.shannon@pwc.com

Lisa Hando, Perth
Partner
+61 (8) 9238 5116
lisa.hando@pwc.com

Global tax update

Latest news from international tax and transfer pricing

Australia's OBU laws to be amended

Australia's offshore banking unit (OBU) regime provides a more attractive tax rate for offshore banking activity conducted by Australian registered banks. In response to the Organisation for Economic Co-operation and Development's (OECD) Forum on Harmful Tax Practices which raised concerns during a review of the regime, the Government will amend the OBU to remove the preferential tax rate and close the regime to new entrants.

The amending law (Treasury Laws Amendment (2021 Measures No. 2) Bill 2021) is currently before Parliament and once enacted will:

- ensure that OB income derived from OB activities will be subject to the relevant corporate tax rate in relation to assessments for the 2023-24 income year, and later income years
- remove the exemption from withholding tax for interest payments (including interest consisting of gold paid) on or after 1 January 2024 on offshore borrowings by OBUs, and
- remove the ability for the Minister to make a declaration or determination that a person or company is an OBU (applicable from the day after the amendments receive Royal Assent).

This ensures that existing participants operating within the OBU regime can continue to access the concessional tax rate up until the end of the 2022-23 income year. In this transitional period, the Government will consult with industry on alternative measures to ensure activity remains in Australia.

Australian and Belgium arbitration Memorandum of understanding

The competent authorities of Australia and of the Kingdom of Belgium have entered into a mutual Memorandum of Understanding to establish the mode of application of the arbitration process provided for in Part VI of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent* Base Erosion and Profit Shifting (the MLI). This agreement sets out the process to be adopted in respect of any request that unresolved issues arising from a mutual agreement case be submitted to arbitration.

FATCA reports deadline extended

The deadline for Australian financial institutions with Foreign Account Tax Compliance Act (FATCA) reporting obligations for 2020 has been extended to 31 August 2021. Any Australian financial institution with reporting obligations for FATCA needs to be aware of the reporting requirements relating to account holder United States of America taxpayer identification numbers (TINs). Further ATO news and updates on FATCA may be found here.

OECD update to G20 Finance Ministers and Central Bank Governors

The OECD Secretary-General presented a report to G20 Finance Ministers and Central Bank Governors during the latest G20 meeting, providing an overview of the activities and achievements in the OECD's international tax agenda. Key topic areas include:

- Addressing the tax challenges arising from digitalisation
  - Continuing the G20/OECD Inclusive Framework work to address the tax challenges
  - arising from the digitalisation of the economy. The report notes agreement on goals to refine and simplify the Pillar One and Pillar Two proposals, with the objective of reaching a political agreement in mid-2021.
  - The market capitalisation of virtual currencies has reached over fourfold since October. Recognising this, the OECD is developing a new tax reporting framework for crypto-assets, expected later in 2021.
  - Over 100 countries have or are on course to implement the OECD's standards for the effective collection of VAT on online sales of goods, services and digital products. The OECD aims to deliver new guidance on the VAT treatment for the sharing and gig economy in 2021.
- Response to COVID-19
  - Tax revenue is forecast to greatly diminished as a result of depressed economic activity. The OECD has endeavoured to provide up to date information on worldwide tax and fiscal policy implemented in response to COVID-19,

and has published guidance on transfer pricing implications of the pandemic and its impact on the interpretation of tax treaties.

- Tax and environment
  - The OECD has examined the current state of energy taxation and has found that 70 per cent of all energy-related CO2 emissions across G20 and OECD countries are completely untaxed.
- Implementing the base erosion and profit shifting (BEPS) measures and tax certainty
  - The MLI now covers over 1,700 bilateral tax treaties and started to become effective as of 1 January 2021 for 650 treaties.
- Tax transparency developments
  - Over 30 000 exchanges on previously secret tax rulings have taken place since 2016. In addition, over 90 jurisdictions are exchanging Country-by-Country reports (CbCR) on the activities, income and assets of multinationals since June 2018.
  - Jurisdictions have amended or abolished almost 300 preferential tax regimes
  - Offshore tax evasion is being combatted through the use of voluntary disclosure programs, implementation of global tax transparency standards, Automatic Exchange of Information (AEOI) and Exchange of Information on Request (EOIR) systems. As a result of these systems, EUR 107 billion of additional revenues have been identified, and information on 84 million financial accounts was exchanged in 2019.
- Capacity building – supporting developing countries
  - 43 induction programs have been launched supporting implementation of BEPS priorities and building capacity of new members of the G20/OECD Inclusive Framework.
  - Tax Inspectors Without Borders has helped developing countries raised over USD 775 million in additional tax revenues from multinational enterprises up to the end of 2020.

Europe: Public country-by-country reporting

Public country-by-country reporting of corporate tax data is coming closer to reality in the European Union (EU) with Member States likely to reach agreement before the end of June 2021. Although the transposition into Member States' domestic law could take another two years, companies would need to start preparing and testing their tax data and their narratives sooner rather than later. Our latest Tax Policy Bulletin shares insights about the complexity businesses will face in responding to these anticipated challenges.

Customs duty classification of steel pipes

The Federal Court has found in Comptroller-General of Customs v Smoothflow Australia Pty Ltd [2021] FCA 144 that steel pipes imported for fire protection in high-rise buildings were correctly classified as tubes of iron or steel "prepared for use in structures" within the meaning of heading 7308 in schedule 3 to the *Customs Tariff Act 1995 (Cth)*. The Comptroller-General of Customs had sought to classify the pipes as "tubes … of iron or steel" under heading 7306 in schedule 3 of the Tariff.

Let's talk

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

Chris Morris, Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.j.morris@pwc.com

Michael Taylor, Melbourne
Partner
+61 (3) 8603 4091
michael.taylor@pwc.com

Angela Danieletto, Sydney
Partner
+61 (2) 8266 0973
angela.danieletto@pwc.com

Gary Dutton, Brisbane & Sydney
Australian Trade Leader
+61 (7) 3257 8783
gary.dutton@pwc.com

Michael Bona, Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

Greg Weickhardt, Melbourne
Partner
+61 (3) 8603 2547
greg.weickhardt@pwc.com

Jayde Thompson, Sydney
Partner
+61 (4) 0367 8059
jayde.thompson@pwc.com

Ben Lannan, Melbourne
Partner
+61 (3) 8603 2067
ben.lannan@pwc.com

Peter Collins, Melbourne
International Tax Leader
+61 (3) 8603 6247
peter.collins@pwc.com

Nick Houseman, Sydney
Australian Transfer Pricing Leader
+61 (2) 8266 4647
nick.p.houseman@pwc.com

Jonathan Malone, Sydney
Partner
+61 (2) 8266 4770
jonathan.r.malone@pwc.com

Indirect tax update

No interest payable on overpaid GST

The High Court has unanimously held in the matter of [FC of T v Travelex Ltd [2021] HCA 8] that the taxpayer was not entitled to interest on overpayments of GST arising from an amended Business Activity Statement (BAS) (for a tax period prior to 1 July 2012) because the Commissioner and the taxpayer lacked statutory authority to amend the GST return, and a running balance account (RBA) surplus cannot result from the Commissioner allocating to an RBA an amount that the Commissioner is not obliged to pay to a taxpayer under a taxation law. As a result, no interest was payable by the Commissioner to Travelex under the *Taxation (Interest on Overpayments and Early Payments) Act 1983 (Cth)* on the GST that was originally overpaid.

ATO's GST administration annual performance report

The ATO has released its annual GST administration performance report for the 2019-20 financial year. According to the report, the ATO has raised AUD 1.6 billion from GST compliance and lodgement enforcement activities, exceeding their planned commitment of AUD 740 million. Of further interest is the reported decline in GST cash collections – a total of AUD 60.2 billion, 7.6 per cent lower than the 2018-19 year – reflecting the impact of COVID-19 on the economy, including an increase in unpaid debt, in part due to payment deferrals granted to businesses experiencing financial hardship.

Draft GST arrangements for EFTPOS interchange services

The ATO has released for comment (by 6 April 2021), the following draft legislative determinations which propose to provide concessions from holding a tax invoice or adjustment note in relation to an EFTPOS interchange service:

- Draft GST: Waiver of Adjustment Note Requirement (eftpos Interchange Services Reports) Determination 2021 (WAN 2021/D1) which proposes to provide that a member of eftpos Payments Australia Limited that has a decreasing adjustment relating to the acquisition of eftpos interchange services can attribute the decreasing adjustment without holding an adjustment note if the member holds an eftpos interchange services report that satisfies the prescribed information requirement as set out in the determination.
- Draft GST: Waiver of Tax Invoice Requirement (eftpos Interchange Services Reports) Determination 2021 (WTI 2021/D1) which proposes to allow a member to claim an input tax credit on a creditable acquisition of eftpos interchange services without holding a tax invoice in certain circumstances.

No discretion granted to treat claim as a tax invoice

The Administrative Appeals Tribunal has refused to exercise discretion under section 29-70(1B) of the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* to treat a document (a progress application for a construction Progress Claim) as a tax invoice for GST purpose in BSRJ v FC of T [2021] AATA 333. Had the document been treated as a tax invoice, the resulting input tax credit (ITC) would have been attributed to the June 2015 tax period, rather than the September 2015 tax period, which was out of time for amendment, i.e. the taxpayer would retain the benefit of two ITCs for one acquisition. The Tribunal found that it "would be quite contrary to its evident purpose for the discretion to be exercised in circumstances where that course is not only unnecessary to facilitate a taxpayer obtaining the benefit of an ITC to which it would otherwise be entitled, but would result in the obtaining of a substantial unintended benefit".

Let's talk

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

Michelle Tremain, Perth
Indirect Tax Leader
+61 (8) 9238 3403
michelle.tremain@pwc.com

Brady Dever, Sydney
Partner
+61 (2) 8266 3467
brady.dever@pwc.com

Suzanne Kneen, Melbourne
Partner
+61 (3) 8603 0165
suzanne.kneen@pwc.com

Adrian Abbott, Sydney
Partner
+61 (2) 8266 5140
adrian.abbott@pwc.com

Mark Simpson, Sydney
Partner
+61 (2) 8266 2654
mark.simpson@pwc.com

Jeff Pfaff, Brisbane
Partner
+61 (7) 3257 8729
jeff.pfaff@pwc.com

Matt Strauch, Melbourne
Partner
+61 (3) 8603 6952
matthew.strauch@pwc.com

Personal tax update

Personal services income and personal services businesses

The ATO has issued a draft taxation ruling TR 2021/D2 about the personal services income (PSI) and personal services businesses (PSB) rules and how they apply to an individual or an entity.

The PSI rules ensure that PSI received by a personal services entity (e.g. company, partnership, or trust) is attributed to the individual who performs the personal services. The rules also limit the deductions available to the entity and to the individual who provides the services other than through a personal services entity (e.g. sole trader). The PSI rules do not apply if the personal services entity or sole trader conducts a PSB, i.e. it meets at least one of four PSB tests or it has received a PSB determination from the Commissioner of Taxation.

To assist taxpayers in determining whether they fall within the PSI rules, the draft tax ruling provides various examples and also sets out the Commissioner's view on:

- the meaning of PSI
- what is not PSI
- determining the 'owner' of PSI
- who is not subject to the PSI rules
- the effect of the PSI rules
- the four PSB tests
- applying for a PSB determination, and
- the potential application of the general anti-avoidance rules.

When the final ruling is issued and takes effect, TR 2001/7 (meaning of PSI) and TR 2001/8 (meaning of PSB) will be withdrawn. Comments can be made on the draft ruling by 9 April 2021.

Self-education expenses not deductible when employment ending

The Administrative Appeals Tribunal (AAT) in Khan and Commissioner of Taxation (Taxation) [2021] AATA 367 denied a taxpayer a deduction for self-education expenses because the taxpayer undertook training courses in the view of obtaining new employment with a new employer.

After being advised about his employment termination as an aircraft maintenance technician, the taxpayer enrolled in several training courses related to aircraft maintenance. The taxpayer claimed the expenses as tax deductible self-education expenses, but the Commissioner denied the deduction.

The AAT held that, when the training courses were undertaken, the taxpayer's employment was terminating and there was no prospect of continuing his employment with this employer. Rather, the taxpayer had incurred these expenses to obtain a new employment so these expenses were not connected with his assessable income derived from his existing employment. As a result, there could be no basis that his employment would benefit from this training and the self-education expenses were not tax deductible.

SAPTO and Medicare levy concession disallowed

The AAT in Dodson and Commissioner of Taxation (Taxation) [2021] AATA 484 found that a taxpayer was ineligible for the Senior and Pensioner Tax Offset (SAPTO).

As background, the taxpayer received an Australian government pension that was a tax-exempt carer payment for the care she provided for her adult son, was under the age pension age and did not receive a pension pursuant to the *Veterans' Entitlements Act 1986 (Cth)*. The AAT found that the taxpayer was ineligible for the SAPTO as she did not satisfy the requirement for her assessable income to include a social security pension as required under section 160AAAA(2) of the *Income Tax Assessment Act 1936 (Cth)*. The carer payment she received was a tax exempt government payment. As the taxpayer was not entitled to the SAPTO, she was also not entitled to the associated Medicare levy concession.

Let's talk

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

Martina Crowley, Melbourne
Partner
+61 (3) 8603 1450
martina.crowley@pwc.com

Glen Frost, Sydney
Partner
+61 (2) 8266 2266
glen.frost@pwc.com

Amy Etherton, Newcastle
Partner
+61 (2) 4925 1175
amy.etherton@pwc.com

Samantha Vidler, Brisbane
Partner
+61 (7) 3257 8813
samantha.vidler@pwc.com

Matt Gurner, Perth
Partner
+61 (8) 9238 3458
matthew.gurner@pwc.com

Alistair Hutson, Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

State taxes update

WA duty applied to transfer or property under joint venture agreement

The WA Court of Appeal has held in the matter of Freedom Willetton Pty Ltd & Anor v Commissioner of State Revenue (WA) [2021] WASCA 38 that a joint venture agreement (JVA) constituted an agreement for the transfer of dutiable property within the meaning of the *Duties Act 2008 (WA).*

At the time of entry into the JVA, the JV parties owned contiguous lots of land. The stated intention of the parties under the JVA was to amalgamate the two lots to create a single lot which was to be developed and subdivided into numerous smaller lots which were to be sold to the public. Following entry into the JVA, to facilitate the amalgamation of the land, one of the JV parties transferred its lot to the other party pursuant to the terms of the JVA.

The Court did not accept that only nominal duty was chargeable under section 118(2)(a) in respect of the JVA or the transfer of land made pursuant to the agreement. The operation of s 118(2)(a) was confined to "transfers" of dutiable property by a transferor to a trustee for the property "to be held solely as trustee" and did not extend to an "agreement" for the transfer of dutiable property. The transfer of the land was required to occur before the trust contemplated by the JVA could be effective.

QLD duty and cancelled agreements

The Queensland Office of State Revenue has updated its guidance (Public Ruling DA115.1.3) on the circumstances in which a cancelled agreement for the transfer of dutiable property is exempt from transfer duty under section 115(1) of the *Duties Act 2001 (Qld)*. In broad terms, the guidance indicates that the exemption can only apply where the relevant agreement has 'ended' through cancellation rather than performance (rendered null and void after being voidable), before any of its commercial or practical purposes have been achieved. The updated ruling takes effect from 11 March 2021.

NSW land tax: low-cost accommodation exemption denied

The NSW Supreme Court in Antegra Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 107 has affirmed the assessment of the Commissioner of State Revenue regarding whether community development lots were liable for land tax and whether the taxpayer was entitled to a low-cost accommodation exemption under section 10Q of the *Land Tax Management Act 1956 (NSW)*. The taxpayer was denied the exemption because there was no "community or residential community" under the *Residential (Land Lease) Communities Act 2013 (NSW)*.

NSW land tax: primary production exemption not available

The NSW Civil and Administrative Tribunal has found that the land owner was not entitled to the primary production land tax exemption under section 10AA of the *Land Tax Management Act 1956 (NSW)* in Chandrala v Chief Commissioner of State Revenue [2021] NSWCATAD 50. The Tribunal was not satisfied that the dominant use of the land was for primary production in the period up to and on 31 December 2019, i.e. the subject land was found not to be used for cultivation at 31 December 2019.

Let's talk

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

Rachael Cullen, Sydney
Partner
+61 (2) 8266 1035
rachael.cullen@pwc.com

Barry Diamond, Melbourne
Partner
+61 (3) 8603 1118
barry.diamond@pwc.com

Stefan DeBellis, Brisbane
Partner
+61 (7) 3257 8781
stefan.debellis@pwc.com

Rachael Munro, Perth
Partner
+61 (8) 9238 3001
rachael.munro@pwc.com

Cherie Mulyono, Sydney
Partner
+61 (2) 8266 1055
cherie.mulyono@pwc.com

Superannuation update

Statistics for SMSFs for 2018-19

The ATO has released the annual statistical overview on self-managed super funds (SMSFs) for the 2018-19 financial year. The highlights from the year include:

- there is a total of 593,000 SMSFs, with more than 1.1 million SMSF members, as at 30 June 2020
- all SMSFs hold AUD 733 billion in total assets, as at 30 June 2020
- SMSFs had assets of over AUD1.3 million each on average in 2018–19, up 5 per cent from the previous year and up 22 per cent over five years
- 47 per cent of SMSFs had assets between AUD 200,001 and AUD 1 million, which accounts for 20 per cent of the total SMSF assets
- the median age of SMSF members of newly established funds in 2018-19 was 46, compared with 61 for all members as at 30 June 2020
- the estimated return on assets for 2018-19 was 6.8 per cent.

A more updated quarterly statistical report covers the quarterly period to 31 December 2020.

ATO data-matching program — invalidity benefit payments

Under a new data matching program, the ATO will acquire invalidity benefit payments data from the Commonwealth Superannuation Corporation from 2010-11 to 2021-22. The data will be used to remediate tax and superannuation treatment of certain superannuation schemes invalidity benefit payments following recent court decisions. The ATO estimate records relating to approximately 16,000 individuals will be obtained each financial year. These obligations may include registration, lodgment, reporting and payment responsibilities.

Top 5 SMSF annual return mistakes

The ATO has issued its list of the top five errors in preparing and lodging a SMSF annual return, and how to avoid them. They include:

- not having a bank account in the fund's name
- providing an incorrect electronic service address
- not valuing SMSF assets at market value
- lodging a return for a fund which has no assets
- incorrect or no auditor details in the return.

Let's talk

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

Naree Brooks, Melbourne
Partner
+ 61 (3) 8603 1200
naree.brooks@pwc.com

Marco Feltrin, Melbourne
Partner
+ 61 (3) 8603 6796
marco.feltrin@pwc.com

Abhi Aggarwal, Brisbane
Partner
+ 61 (7) 3257 5193
abhi.aggarwal@pwc.com

Alice Kase, Sydney
Partner
+ 61 (2) 8266 5506
alice.kase@pwc.com

Matthew Strauch, Melbourne
Partner
+ 61 (3) 8603 6952
matthew.strauch@pwc.com

Ken Woo, Sydney
Partner
+ 61 (2) 8266 2948
ken.woo@pwc.com

Legislative update

Since our last update, Treasury Laws Amendment (2021 Measures No. 2) Bill 2021 was introduced into Federal Parliament. This Bill proposes amendments to the income tax law to:

- remove the concessional tax treatment and interest withholding tax exemption for offshore banking units (OBUs) and close the regime to new entrants, and
- require that, as a precondition for deductible gift recipient (DGR) endorsement, a fund, authority or institution must be a registered charity, an Australian government agency or operated by a registered charity or an Australian government agency.

In addition, Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020 which facilitates the closure of eligible rollover funds by 30 June 2021 and enables the Commissioner of Taxation to reunite amounts received from eligible rollover funds with a member's active account, has completed its passage through Parliament and is now law.

Federal Parliament is now in recess, due to resume on 11 May 2021, which is the date the 2021-22 Federal Budget is to be handed down.

Commonwealth revenue measures that were registered as legislative instruments or regulations since our last monthly update include:

- Income Tax Assessment (1997 Act) Regulations 2021 (2021 Regulations) which remakes and improves the *Income Tax Assessment Regulations 1997* (the 1997 Regulations) which are due to sunset on 1 April 2021. The new regulations improve the operation of the 1997 Regulations by repealing redundant provisions, simplifying language and restructuring provisions for ease of navigation. These changes do not impact the substantive meaning or operation of the provisions except in limited cases specifically identified in the Explanatory Statement. The 2021 Regulations apply from 1 April 2021.
- Treasury Laws Amendment (Income Tax Assessment Repeal and Consequential Amendments) Regulations 2021 repeals the 1997 Regulations at the same time as the replacement instrument (noted above) commences. It also makes consequential amendments to regulations made under the *Superannuation Industry (Supervision) Act 1993* and the *Retirement Savings Accounts Act 1997* and some minor updates that are required because of the sunsetting and remaking of the 1997 Regulations.

Let's talk

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

Chris Morris, Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

Michael Bona, Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

Warren Dick, Sydney
Tax Reporting & Strategy Leader
+61 (2) 8266 2935
warren.dick@pwc.com

Sarah Hickey, Sydney
Sydney Tax Market Leader
+61 (2) 8266 1050
sarah.a.hickey@pwc.com

James O'Reilly, Brisbane
Brisbane Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos, Melbourne
Industries Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

Kirsten Arblaster, Melbourne
Melbourne Tax Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

Rob Bentley, Perth
Perth Tax Leader
+61 (8) 9238 5202
robert.k.bentley@pwc.com

Alistair Hutson, Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

Liam Collins, Melbourne
Financial Services Tax Leader
+61 (3) 8603 3119
liam.collins@pwc.com

Other news

ATO guidance on allocation of professional firm profits

The ATO has issued Draft Practical Compliance Guideline PCG 2021/D2 which sets out the ATO's proposed compliance approach to the allocation of profits by professional firms. It explains how the ATO intends to deal with compliance activity arising from its concerns with arrangements where an individual professional practitioner's income may be redirected to an associated entity, affecting their tax liability.

For the Guideline to apply, the ATO expects there to be sound commercial rationale for entering into and operating the arrangement or structure (Gateway 1) and there must not be certain 'high-risk features' (Gateway 2). Overall, schemes which are designed to ensure that the individual professional practitioner is not directly rewarded for the services they provide to the business, or receives a reward which is substantially less than the value of those services, are considered high risk by the ATO. The ATO expects affected taxpayers to annually assess their eligibility to apply the Guideline, and to document an assessment of eligibility.

The deadline for comments on the draft guideline was 26 March 2021. Once finalised, the guideline is proposed to apply from 1 July 2021, with its use and application reviewed from and during 2022.

Temporary full expensing of backing business investment concessions – approved forms

The ATO has released the approved form for an individual, company, partnership, trust or attribution managed investment trust (AMIT) to claim a deduction for or opt out of the temporary full expensing or backing business investment measures before 1 July 2021. Specifically, the form is for those affected taxpayers who are either claiming or opting out of those capital allowance concession and have either:

- an approved substituted accounting period with a year ending before 30 June 2021, or
- need to lodge a tax return for part of the year, e.g. due to liquidation or due to change of residency status during the 2021 income year, before 30 June 2021.

Draft effective lives of depreciating assets

The ATO has issued for comment a list of draft effective lives for assets used in the following industries:

- horse training (racing) – comments were due by 12 March 2021
- salt harvesting – comments due by 7 April 2021.

Once finalised, these effective life determinations are expected to apply to assets purchased or first used or installed on or after 1 July 2021.

Interim approach for paper PAYG and GST quarterly instalment notices from March 2021

In the last monthly update, we advised that the ATO stopped issuing paper quarterly PAYG and GST instalment notices for businesses that had a digital preference on ATO systems. However, since we reported the ATO's interim approach in relation to this issue, the ATO has now indicated it will return to issuing paper PAYG and GST quarterly instalment notices starting with the March 2021 quarterly notices, rather than June 2021 as initially advised. The interim approach will continue until a permanent solution is developed.

Taxpayer's net capital gain included proceeds remitted to another party

The Administrative Appeals Tribunal in ZBFF and Commissioner of Taxation (Taxation) [2021] AATA 275 has affirmed the Commissioner's decision that the taxpayer's net capital gain on the sale of property was not reduced by proceeds remitted to another party under an arrangement to pay an amount equal to the profit on the sale of the property. This was on the basis that the Tribunal was not satisfied the amount was capital expenditure incurred to establish, preserve or defend title to the asset, or a right over the asset that would form part of the property's cost base within the meaning of section 110-25(6) of the *Income Tax Assessment Act 1997 (Cth) (ITAA 1997)*.

The Tribunal also found that the CGT event C2 did not occur in relation to the agreement to make the payment, as the taxpayer was not acquiring any rights when it made the payment, but it was merely fulfilling an agreement. In those circumstances, there was no acquisition of rights, no capital expenditure or loss, and no CGT event C2. The taxpayer was also not entitled to claim a deduction for the payment under s40-880 of the *ITAA 1997* as it was not a capital expenditure in any relevant sense related to a business.

Review of farm management deposit schemes

The Government is reviewing the Farm Management Deposits Scheme (FMDS), which allows primary producers to set aside up to AUD 800,000 in pre-tax income to more effectively deal with fluctuations in cash flows. As part of this review, the Department of Agriculture, Water and the Environment is conducting an evaluation to assess the operation of the FMDS, including if the policy objectives are being met and if the scheme is being administered effectively. Comments and submissions can be made by 26 April 2021.

Capital or revenue? No High Court appeal

The High Court has dismissed the taxpayer's application for special leave to appeal against the Full Federal Court's decision in FC of T v Healius Ltd [2020] FCAFC 173. This means that the Full Court's decision that lump sum payments made to doctors under arrangements to conduct their medical practice from a medical centre for an agreed period were not deductible to the taxpayer as the payments were on capital account stands. Refer to our monthly tax update for November 2020 for background to the case.

Draft notices for lodgment of 2020–21 tax returns

The ATO has released for consultation the following draft legislative instruments setting out the Commissioner of Taxation's proposed requirements for taxpayers to lodge income tax returns for the 2021 income year:

- Notice of Requirement to Lodge a Return for the Income Year Ended 30 June 2021, and
- Notice of Requirement for Parents with a Child Support Assessment to Lodge a Return for the Income Year Ended 30 June 2021.

Comments on both were due to be made by 30 March 2021.

Let's talk

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

Chris Morris, Sydney
Australian Tax Leader
+61 (2) 8266 3040
chris.morris@pwc.com

Michael Bona, Brisbane
Global Tax Leader
+61 (7) 3257 5015
michael.bona@pwc.com

Warren Dick, Sydney
Tax Reporting & Strategy Leader
+61 (2) 8266 2935
warren.dick@pwc.com

Sarah Hickey, Sydney
Sydney Tax Market Leader
+61 (2) 8266 1050
sarah.a.hickey@pwc.com

James O'Reilly, Brisbane
Brisbane Corporate Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos, Melbourne
Industries Corporate Tax Leader
+61 (3) 8603 6233
jason.karametos@pwc.com

Kirsten Arblaster, Melbourne
Melbourne Tax Market Leader
+61 (3) 8603 6120
kirsten.arblaster@pwc.com

Rob Bentley, Perth
Perth Corporate Tax Leader
+61 (8) 9238 5202
robert.k.bentley@pwc.com

Alistair Hutson, Adelaide
Partner
+61 (8) 8218 7467
alistair.hutson@pwc.com

Editorial

PwC's Monthly Tax Update is produced by the PwC's Financial Advisory Marketing and Communications team, with technical oversight provided by PwC's Tax Markets & Knowledge team.

Editorial	
Ruby Taylor Senior Associate, Communications +61 (3) 8603 2888 ruby.taylor@pwc.com	**Lynda Brumm** Principal, Tax Markets & Knowledge +61 (7) 3257 5471 lynda.brumm@pwc.com

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