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TaxTalk Monthly

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

December 2019

pwc

Corporate Tax Update

Deductibility of labour costs related to construction of capital assets

The Australian Taxation Office (ATO) issued Draft Taxation Ruling TR 2019/D6 which explains the Commissioner of Taxation's preliminary views on when certain labour costs related to constructing or creating capital assets (tangible and intangible) are treated as capital expenses rather than being immediately deductible.

Broadly, to the extent labour costs are incurred *specifically* for constructing or creating capital assets their essential character is considered to be of a capital nature. According to the draft ruling, whether capital asset labour costs are incurred specifically for constructing or creating capital assets is a question of fact and degree and ordinarily to be ascertained at the time the loss or outgoing is incurred.

Among other things, the explanation in the draft ruling makes reference to accounting principles and although it acknowledges that accounting principles are not a determinative factor of the character of expenditure incurred for income tax purposes, the Commissioner considers that there will be at times instances where the accounting treatment of capital asset labour costs is a relevant factual consideration when ascertaining the character of the expenditure.

The draft ruling further notes that not all capital asset labour costs will be regarded as being specifically incurred for constructing or creating capital assets. For instance, the cost of workers or employees whose role has a remote connection with constructing or creating capital assets, or who have a broader role that involves incidental activities connected with constructing or creating capital assets, will generally not be regarded as being incurred specifically for constructing or creating capital assets and therefore will not be of a capital nature. In some cases, however, an apportionment of the costs, on a fair and reasonable basis, may be required.

The position in the draft ruling is consistent with earlier ATO interpretative decisions and provides a number of examples to illustrate how the ATO view is proposed to operate in practice. It also sets out why the Commissioner rejects the alternative view that the costs of labour can never be an outgoing of capital, or of a capital nature.

Comments on the draft ruling are due 14 February 2020.

ATO speech on tax transparency and how large companies can do better

Second Commissioner, Jeremy Hirschhorn, discussed the importance of tax transparency and good governance at the CFO Live event held in Sydney on 7 November 2019, and commenting on the various levels of transparency beyond taxpayer specific information, but also transparency cross-border between different countries' administrators, transparency of the administrator to the public and to individual taxpayers, and also transparency within companies.

The ATO's latest community perceptions survey shows that a little more than forty per cent of big businesses are believed to be paying the correct amount of tax, compared to about ninety per cent of an individual's family and friends. This is a key reason why the ATO sees benefit in being transparent about the tax behaviour of Australia's largest taxpayers.

The ATO continues to seek more insight into companies' internal tax governance frameworks, and how well that governance framework is implemented and operated under the "justified trust" initiative. When working with large corporate taxpayers, the ATO looks for evidence that a tax control framework exists, like a board-endorsed tax policy or documented procedures, as well as objective evidence that the framework is operating as intended.

In respect of best practice for large companies, the Commissioner advised that this could include having:

- aggregated financial statements of all Australian operations (whether or not they have to be consolidated under strict accounting rules)
- a level of information consistent with General Purpose Financial Statements
- clear explanations of both accounting effective tax rates and cash effective tax rates, with explanations as to the structural reasons where they differ
- clear explanations of where profit is booked around the world and the tax rates applicable (and tax paid)

- disclosure of disputes with revenue authorities.

Mr Hirschhorn specifically called on company board members to at least be aware of its tax governance framework, risk stance and structural tax settings, relationships (current and historical) with the ATO, and the reason why some of its profits are not fully taxed.

Treasury proposes guidance for concessional infrastructure projects

Treasury has released for public consultation a draft guidance note regarding the processes for applications to the Treasurer for the economic infrastructure staples tax concession which, if approved, will provide a 15 per cent withholding tax on distributions of income to non-residents to the extent that the income is rent from an investment in land attributable to an approved new economic infrastructure facility (or approved improvement to an economic infrastructure facility).

To qualify, projects must have an estimated capital expenditure of AUD 500 million or more and cover a diverse range of economic infrastructure projects in the areas of transport, energy, communications and water. The application must be made before construction has commenced in relation to the facility or the improvement, which is to significantly enhance the long-term productive capacity of the economy.

Comments are due 17 January 2020.

Division 7A deemed dividends – the importance of good documentation

The Administrative Appeals Tribunal in Abichandani and Commissioner of Taxation (Taxation) [2019] AATA 4296 highlights the importance of independent evidence and good documentation when it comes to dealing with potential "Division 7A" loan matters for private companies.

The Tribunal affirmed that certain transactions including loans from a private company to a related partnership, a transfer of units in a unit trust, and payments to the taxpayers were subject to the deemed dividend provisions in Division 7A of the *Income Tax Assessment Act 1936* (Cth). In particular, in relation to determining the amount of the taxable deemed dividends, there was a lack of any corroborative or independent evidence to support the assertions being made, including those made in the relevant accounting records.

According to the Tribunal, Division 7A "… applies where a private company 'makes a loan to the entity during the current year'… The section does not direct attention to an accounting exercise of assembling debits and credits to determine the net position of a shareholder's indebtedness or contribution to a company at the end of any financial year…" In respect of private company loan repayments, therefore it is important to ensure that there is appropriate written evidence of all amounts that are in fact repayments of moneys borrowed (and accounted for as such), in contrast to other separately accounted for shareholder 'credits'.

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Employment Taxes Update

Car parking fringe benefits' burden may increase under new ATO Draft Ruling

The Australian Taxation Office (ATO) has issued draft taxation ruling TR 2019/D5 (replacing Taxation Ruling TR 96/26, now withdrawn) which sets out the Commissioner of Taxation's preliminary views of when the provision of car parking to employees will constitute a car parking benefit for the purposes of the *Fringe Benefits Tax Assessment Act 1986* (Cth).

The previous ruling TR 96/26 expressed the view that car parking facilities that have a primary purpose other than providing all-day parking (for example, hourly parking at a hospital, university, shopping centre or airport car park), were not commercial parking stations for Fringe Benefits Tax (FBT) purposes.

TR 2019/D5 will bring the Commissioner's view in line with the Qantas Airways and Virgin Airlines decisions in the Administrative Appeals Tribunal and Federal Court and provides that if a car park allows all-day parking, but this is discouraged due to its higher fee structure, the car park may still be considered a commercial parking station if it satisfies the other relevant FBT requirements. Accordingly, there is now potentially a greater FBT exposure on employer-provided car parking where such a special purpose car park is located within a one kilometre radius.

When this ruling is finalised, it will broadly apply to car parking benefits provided in FBT years commencing before and after its date of issue. However, an exception applies given the changed interpretation of special purpose car parking, where the updated view will only apply to car parking benefits provided from 1 April 2020.

The last day for comments on the draft ruling is 17 January 2020.

Further details are included in this TaxTalk Alert.

FBT and year-end functions

The ATO has reminded employers of the FBT implications of holding year-end functions to any current, past and future employees, and their associates (spouses and children). The consequences may differ depending on its cost (i.e. there is a minor benefit exemption that may apply if it is less than AUD300 per employee and certain conditions are met), where and when it is held (for example, a function held on business premises on a normal work day for current employees is treated differently to an event outside of work) and who is invited (i.e. employees and/or clients or suppliers).

Queensland OSR targets payroll tax compliance

The Queensland Office of State Revenue (OSR) has announced a new approach to its payroll tax compliance programme that may impact many employers with employees based in Queensland. Specifically, employers have until 31 January 2020 to review their Queensland payroll tax lodgments and where needed, revise their returns for any payroll tax shortfalls under a voluntary disclosure arrangement, before 1 February 2020. The Queensland OSR has advised that it expects to issue investigation and audit letters to a significant number of taxpayers from 1 February 2020.

Refer to this TaxTalk Alert for more detail.

Queensland payroll tax rebate

The Queensland Commissioner of State Revenue has issued a public ruling, Public Ruling PTAQ000.4.1, which sets out the terms of an administrative arrangement that enables a payroll tax employment growth rebate to be available to eligible employers for the 2019-20 and 2020-21 financial years.

Specifically, subject to the conditions outlined in the ruling, employers will be eligible for the employment growth rebate if they demonstrate a net employment increase by increasing the number of new Queensland full-time positions in their business over the 2019-20 and/or 2020-21 financial years. The amount of the rebate will be broadly calculated based on the employer's annual payroll tax amount for the relevant year and the proportion that the net employment increase bears to the employer's total Queensland workforce, including deemed employees under the Queensland payroll tax legislation.

Eligible employers may claim up to AUD 20,000 per year.

WA payroll tax exemption threshold to be increased

The Western Australian Premier, the Hon Mark McGowan, has announced that the payroll tax exemption threshold in Western Australia will be increased to AUD 950,000 from 1 January 2020 (up from AUD 850,000), and increased to AUD 1 million from 1 January 2021.

Business found liable to superannuation guarantee charge

The Australian Administrative Tribunal (AAT) in Probin and Commissioner of Taxation (Taxation) [2019] AATA 4597 has affirmed that a business operator was liable for Superannuation Guarantee Charge (SGC) for not making superannuation guarantee payments on behalf of a former worker.

The taxpayer operated a general property maintenance business, in which a worker had performed all types of general property maintenance work. As the taxpayer considered that the former worker was a self-employed contractor and not an "employee", no superannuation guarantee payments were made in relation to the worker.

The taxpayer determined what work was to be performed by the worker, including its time and location, such that he practically exercised full control over the worker's daily activities. There was no evidence that the worker had any capacity to delegate work and he neither sourced any independent work nor advertised his services outside of the relationship with the taxpayer. The worker had little or no risk in relation to the work performed, and any risk was borne by the taxpayer.

The fact that the worker was responsible for all tax, holiday pay, sick leave, and workers compensation was seen of little utility in determining the nature of the relationship.

The Tribunal affirmed the Commissioner's decision, finding that on balance, the worker was not an independent contractor, but an "employee" in accordance with the ordinary meaning of the word. Therefore, superannuation guarantee payments were payable by the taxpayer on the worker's behalf.

ATO responds to 'ordinary time earnings' case

The ATO has issued a decision impact statement on the decision of Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union [2019] FCAFC 84, noting that the conclusion reached in that case on the meaning of "ordinary time earnings" and "ordinary hours of work" as used in the *Superannuation Guarantee (Administration) Act 1992* (SGAA) is consistent with the Commissioner of Taxation's position in Superannuation Guarantee Ruling SGR 2009/2.

Specifically, the Full Federal Court held in this case that superannuation guarantee contributions were not payable by an employer in respect of the "additional hours" and "public holidays" components of employees' salaries since these components did not form part of ordinary time earnings.

Dealing with remedial SG contributions

The ATO has released a fact sheet to explain what information employers need to provide to their employees and its approach to the exercise of the Commissioner's discretion to disregard or reallocate contributions when an employer makes remedial SG contributions where insufficient SG contributions were paid on time for a current or former employee in the past.

The SG remedial contributions may cause employees to exceed their annual concessional contributions cap which may result in them having to pay additional tax and an excess concessional contributions charge.

An employee may apply to the Commissioner for a determination (by completing the Application – excess contributions determination form together with all supporting information relevant to their circumstances) to have these remedial SG contributions disregarded or allocated to another year and not count towards their concessional contributions cap in the year they are made.

The ATO will consider the employee's application and decide whether to reallocate or disregard the remedial SG contributions having regard to the following when checking whether the Commissioner can exercise this discretion:

- whether making the remedial SG contributions results in unfair or unintended outcomes
- whether the employee had control over the circumstances that led to the employer having to make remedial SG contributions
- whether it was reasonably predictable that the remedial SG contributions would result in the employee exceeding their concessional contributions cap
- whether the contributions would be more appropriately allocated to another financial year
- other relevant factors that help the ATO to understand the circumstances surrounding the remedial SG contributions.

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Global Tax Update

Latest news from international tax and transfer pricing

ATO guidance on hybrid mismatch rules and US global intangible low-taxed income

The Australian Taxation Office (ATO) has released Draft Taxation Determination TD 2019/D12 that outlines the Commissioner of Taxation's preliminary view that in applying Australia's hybrid mismatch rules, the United States (US) global intangible low- taxed income (GILTI) rules do not correspond to Australia's controlled foreign company (CFC) rules. Accordingly, Australian taxpayers could be denied deductions for certain payments, notwithstanding those payments are included in the tax base of a US taxpayer.

In general terms, the foreign hybrid mismatch rules apply to income years starting on or after 1 January 2019 to neutralise certain hybrid mismatches which arise where entities exploit differences in the taxation treatment of an entity or financial instruments across different countries to defer or reduce income tax. The concept of "subject to foreign tax" is relevant for applying these rules, including for working out whether a "deduction/non-inclusion" outcome arises in respect of a payment (which could result in a denied deduction) and in determining whether a taxpayer has sufficient "dual inclusion income" (which can reduce the adverse impacts of certain hybrid mismatches).

Broadly an amount of income or profits is subject to foreign income tax in a foreign country to the extent it is subject to "direct" foreign taxation (except credit absorption tax, unitary tax or a withholding-type tax) or the amount is included in working out the tax base of another entity under a foreign CFC regime that corresponds to section 456 or 457 in Australia's CFC regime.

Additional detail is provided in this TaxTalk Alert.

MIT withholding — information exchange countries updated

The list of countries whose tax residents can access a 15 per cent withholding tax rate on certain income distributions from managed investment trusts (MIT) has been updated with amending regulations that include the following countries and territories as "information exchange countries": Curaçao, Lebanon, Nauru, Pakistan, Panama, Peru, Qatar and the United Arab Emirates. The amending regulations apply to a fund payment made to a resident of one of these newly added foreign countries on or after 1 January 2020.

If a recipient of an MIT fund payment is not a resident of an "information exchange country" listed, any fund payment is generally subject to withholding at 30 per cent.

Draft legislation expanding the definition of an SGE

Treasury has released revised exposure draft legislation to amend the definition of a "significant global entity" (SGE) so that it applies consistently to all types of entities and covers members of large business groups (i.e. global annual income of at least AUD 1 billion) that may be headed by entities that may not be required to prepare consolidated financial statements such as private companies, trusts and partnerships, as well as members of groups headed by investment entities and

individuals. Whilst there have been some minor changes to the proposals since they were first included in a previous Bill that lapsed with the calling of the Federal election, they are substantially the same in terms of both timing and effect.

In brief, the draft law proposes an expanded concept of an SGE that will cover groups of entities headed by an entity other than a listed company in the same way as it applies to groups that are headed by a listed company (notional listed company group rule) and will operate to ensure that the criteria for determining an SGE will not be affected by the exceptions to requirements for consolidating or materiality in the applicable accounting rules. Entities that are SGEs are potentially subject to the Diverted Profits Tax, the Multinational Anti-Avoidance Law and higher administrative penalties.

The proposed law also introduces the narrower concept of a "country-by-country reporting entity" (CbCRE) which will be subject to CbC reporting and also if it is a corporate tax entity, potentially require it to lodge general purpose financial statements with the ATO (if not already lodged with ASIC). Broadly, an entity will be a CbCRE if the entity would be an SGE if the notional listed company group rules took into account exceptions to consolidation other than the materiality rule and did not include individuals.

Once enacted, the proposed amendments will apply to income years commencing on or after 1 July 2018, with a two-year (previously one year) transitional period with respect to the application of SGE penalties (i.e. the extended definition will not apply for penalty purposes for any income year that commenced before 1 July 2020).

The closing date for submissions on the exposure draft is on 11 December 2019. The last sitting day of Federal Parliament for this year is 5 December 2019, which means these measures will not be introduced into Parliament until February 2020 at the earliest and enacted sometime after that.

Lodgment deferral for CbC reporting for year ended 31 December 2018

SGEs with CbC reporting obligations for the year ended 31 December 2018 are required to have their Local file, Master file, and CbC report lodged by 31 December 2019. Due to the year-end holiday period, the ATO has announced a lodgment deferral where SGEs will have until 15 January 2020 inclusive to lodge each of the respective statements for this period. Tax agents for eligible SGE clients will automatically receive the lodgment concession and do not need to take any action to access the deferral.

Tax challenges of digitalisation of economy – a minimum rate of tax on profits

On 8 November 2019, the Secretariat of the Organisation for Economic Co-operation and Development (OECD) published Global Anti-Base Erosion (GloBE) Proposal under Pillar Two, part of the ongoing work of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS), which seeks to address remaining BEPS challenges by ensuring that the profits of internationally operating businesses are subject to a minimum rate of tax across the more than 130 countries participating in the OECD Inclusive Framework.

The proposal has the following four components:

- an income inclusion rule that would tax the income of a foreign branch or a controlled entity if that income was subject to tax at an effective rate that is below a minimum rate
- an undertaxed payments rule that would operate by way of a denial of a deduction or imposition of source-based taxation (including withholding tax) for a payment to a related party if that payment was not subject to tax at or above a minimum rate
- a switch-over rule to be introduced into tax treaties that would permit a residence jurisdiction to switch from an exemption to a credit method where the profits attributable to a permanent establishment (PE) or derived from immovable property (which is not part of a PE) are subject to an effective rate below the minimum rate
- a subject to tax rule that would complement the undertaxed payment rule by subjecting a payment to withholding or other taxes at source and adjusting eligibility for treaty benefits on certain items of income where the payment is not subject to tax at a minimum rate.

These rules would be implemented by way of changes to domestic law and tax treaties and would incorporate a co-ordination or ordering rule to avoid the risk of double taxation that might otherwise arise where more than one jurisdiction sought to apply these rules to the same structure or arrangement.

Following a period of consultation on this latest paper until 2 December 2019, a public consultation meeting will take place in Paris on 9 December 2019. The OECD seeks political agreement among the members of the Inclusive Framework on the basic architecture of the

proposed changes in January 2020 so that more detailed technical work on the mechanics of both Pillars can take place throughout 2020.

Additional detail on the proposal is provided in the PwC International Tax Services Tax Policy Alert.

OECD releases more guidance on CbC reporting

The OECD/G20 Inclusive Framework on BEPS has released additional interpretative guidance to give greater certainty to tax administrations and multinational groups on the implementation and operation of CbC Reporting (BEPS Action 13). The new guidance includes questions and answers on, among other topics, the treatment of dividends received, the operation of local filing, the use of rounded amounts and the information that must be provided with respect to the sources of data used.

In addition, the OECD has released its summary of common errors in preparing CbC reports that tax administrations have encountered with the data in CbC reports filed to date. This summary will be updated as further common errors, if any, are identified.

Other OECD developments

In other OECD developments:

- Public comments received on the Secretariat Proposal for a "Unified Approach" under Pillar One to address the tax challenges presented by the digitalisation of the economy were published by the OECD
- Bosnia and Herzegovina signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)
- Jordan has become a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes.

Explore PwC's global tax research and insights

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Indirect Tax Update

Waiver of tax invoice and adjustment note requirements

The Australian Taxation Office (ATO) has released the following draft goods and services tax (GST) legislative determinations which deal with the waiver of the tax invoice and adjustment note requirements for certain credit card and charge card holders:

- Draft Goods and Services Tax: Waiver of Adjustment Note Requirement (Corporate Card Statements) Determination 2019 WAN 2019/D1
- Draft Goods and Services Tax: Waiver of Tax Invoice Requirement (Visa Purchasing Card) Determination 2019 WTI 2019/D2.

In each instance, there is no substantive change from the current determinations that the new draft determinations are expected to replace.

However, there have been minor administrative changes, such as the removal of the term "ATO Reference Number" from the definition of "GST registration number".

Comments can be made by 15 November 2019.

Fuel tax credit rates for commercial bus and coach operators

The ATO has advised that fuel tax credits for fuel used to power large passenger air-conditioning units (i.e. in commercial buses and coaches) are to be claimed at the rate for "heavy vehicles for travelling on public roads" from 1 November 2019, and not at the "all other business uses" rate. Details of these changes to fuel tax credit rates have been updated on the ATO's website. For further information, contact Gary Dutton.

Draft determination on fuel tax credits and agriculture property use exemption

The ATO has issued Draft Fuel Tax Determination FTD 2019/D1 which provides the ATO's preliminary views on satisfying the environmental criteria in relation to a motor vehicle for fuel tax credit purposes. The draft determination considers:

- what is a motor vehicle
- when a motor vehicle is used "primarily" on an agricultural property
- how to account for any fuel used in a motor vehicle which no longer satisfies the environmental criteria.

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

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

Comments can be made by 6 December 2019. For further information, contact Gary Dutton.

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Personal Tax Update

ATO expands private groups and high wealth individuals programs

The ATO has expanded its private groups and high wealth individuals tax performance programs to focus on the following three groups of taxpayers:

- Top 500 private groups program – which focuses on the largest private groups and expands on the previous Top 320 program and will involve regular one-to-one ATO engagement to build an understanding of business drivers and risk position
- Private groups controlled by high wealth individuals – this program builds on previous work with high wealth individuals and it includes Australian resident individuals who, together with their associates, control wealth of more than AUD 50 million and will involve a one-to-one ATO tailored engagement, and
- Medium and emerging private groups program – this includes private groups linked to Australian resident individuals who, together with their associates, control wealth between AUD5 million and AUD 50 million, and businesses with an annual turnover of more than AUD 10 million,

that are not public or foreign-owned and are not linked to a wealthy individual. For this group, the ATO will use enhanced data and analytics to understand a group's operating environment and priority tax risks to help the ATO design tailored approaches to help mitigate those risks.

Although the ATO acknowledges that good tax governance will look different for each business, having appropriate controls and processes to support tax decision-making and manage tax and super risks can be expected to play a key role in each of these tailored programs.

Removal of main residence CGT exemption for foreign residents: ATO's administrative treatment

Further to the current legislative proposal to deny the capital gains tax (CGT) main residence exemption for foreign residents (refer to our TaxTalk Alert for further insight), the Australian Taxation Office (ATO) issued a statement regarding its administrative treatment for affected tax returns lodged prior to the new rules being enacted.

Broadly, the ATO will accept tax returns as lodged until the proposed amendments are legislated by Parliament. This means that there should generally be no shortfall penalties and only a base rate of interest charged, once the law is legislated, if a taxpayer omits to report a capital gain arising from a foreign resident's main residence that occurs between 9 May 2017 and the date of enactment of the new law change, where the gain would not otherwise be subject to the transitional rule. The transitional rule applies to properties held as at 7:30pm (AEST) on 9 May 2017 that are sold up until 30 June 2020, provided they satisfy the other existing requirements for the exemption.

Additionally, any interest in excess of the base rate accruing after the date of enactment will be remitted if "taxpayers actively seek to amend assessments within a reasonable timeframe after enactment".

Unless certain exceptions apply, an amendment of a tax return could be required in the following cases:

- for properties acquired from 7.30pm (AEST) on 9 May 2017 - for the income year (as early as the 2016-17 year) in which sale contracts were exchanged; and
- for properties acquired before 7.30pm (AEST) on 9 May 2017 and disposed after 30 June 2020 – from the 2020-21 income year.

Federal Court finds backpacker tax to be "disguised form of discrimination"

Working holiday-makers (i.e. individuals holding a subclass 417 or 462 visa) are subject to a 15 per cent tax on their first AUD 37,000 of income in Australia (the "backpacker tax") with the balance taxed at ordinary personal tax rates. The working holiday makers tax rate is different to the tax rate for Australian residents as Australian resident taxpayers have the first AUD 18,200 of taxable income tax-free and then pay 19 per cent until they earn AUD 37,000.

In a case brought by a British individual having worked in Australia as a working holiday maker (Addy v Commissioner of Taxation [2019] FCA 1768), the Federal Court held that the "backpacker tax" was a "disguised form of discrimination based on nationality" prohibited by the Australia-United Kingdom Double Taxation Agreement. Accordingly, the taxpayer was a "resident" of Australia until 1 May 2017 and subject to the ordinary rates of tax applicable to a resident.

In response to this decision, the ATO has confirmed that residency status depends on the circumstances applying to each individual working holiday maker. It has also noted that the result of this case would also mean that the backpacker tax could not be applied to the taxpayer who is a working holiday maker from other countries such as Chile, Germany, Finland, Japan, Norway, Turkey, or the United States of America because it contravenes the non-discrimination clause contained in the Double Tax Agreements Australia has signed with these countries.

The ATO has lodged an appeal against the case, and has indicated that any affected taxpayer who may be potentially entitled to a refund are encouraged to wait until the appeal has been decided before seeking a refund, amending their return or objecting. It has further indicated that it will continue to administer the working holiday-maker income tax rates in line with current practice until the appeals process is exhausted. Employer obligations have not changed, and employers should apply the PAYG withholding tax rate in accordance with their employees Tax File Number declaration.

Draft ruling on deductions for employee work expenses

The ATO has issued draft ruling TR 2019/D4 dealing with deductions for work expenses. This draft ruling sets out the general deductibility principles for employee work expenses and is based on the ATO guidance using examples. Appendix 1

to the draft ruling contains a list of all ATO guidance (rulings, determinations and other materials) available for work expenses, both for common expenses and occupation-specific expenses. The last day for comments on the draft ruling is 6 December 2019.

Taxpayer assessed for superannuation excess transfer balance tax

In Lacey v FC of T [2019] AATA 4246 the Administrative Appeals Tribunal (AAT) has affirmed an assessment for superannuation excess transfer balance tax on a taxpayer's notional earnings on the excess transfer balance (AUD 1.6 million). In relation to the taxpayer's argument that a document on the ATO website had misled the taxpayer in to believing that the transfer of an amount from his transfer balance account to his accumulation account, combined with his pension drawdowns, would bring his transfer balance below the transfer balance cap by the end of 31 December 2017, the AAT said it did not have jurisdiction to determine whether the ATO document was or was not "objectively" misleading.

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State Taxes Update

State legislation update

The Victorian State Taxation Acts Further Amendment Bill 2019 was enacted on 19 November 2019. Among other things, this Bill extends the vacant residential land tax to properties that remain uninhabitable after two years or more and exclude beneficiaries of implied or constructive trusts as owners for the purposes of the principal place of residence and primary production land tax exemption.

Furthermore, it is worth noting that the recently introduced New South Wales State Revenue Legislation Further Amendment Bill 2019 which proposed to make some important amendments in relation to NSW duties and land tax law will not complete its passage through the NSW Parliament this year and will not be considered again until 4 February 2020. This means that many of the changes which are proposed to commence from the date of assent will not commence until next year at the earliest. This delay also creates some uncertainty in relation to when the proposed amendments relating to surcharge land tax and surcharge purchaser duty for discretionary trusts, which are currently proposed to commence on 31 December 2019 (i.e. before the Bill will actually be able to be passed), will ultimately take effect.

Accordingly, notwithstanding that the Bill has not yet passed, taxpayers with NSW residential land in discretionary trusts should still consider whether they need to amend their trust deeds before 31 December 2019.

Rezoned land failed to qualify for NSW primary production land tax exemption

The Civil and Administrative Tribunal (NSW) in Craig v Chief Commissioner of State Revenue [2019] NSWCATAP 264 has held that land previously used for more than 63 years as a cattle farm and rezoned in 2011 from rural to low density residential land ceased to be eligible for the land tax primary production exemption despite its continuing use for primary production purposes.

The Tribunal was not satisfied that the taxpayer's primary production use of the land had a significant and substantial commercial purpose or character based on the small number of cattle on the land and the limited activities and profitability of the cattle operations. The activities were more of a hobby farm rather than a cattle business with a significant and substantial commercial purpose.

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Superannuation Update

Dividends and franking credits held to be non-arm's length income of a SMSF

The Administrative Appeals Tribunal (AAT) has held in GYBW and Commissioner of Taxation [2019] AATA 4262 that dividends and franking credits received by a trustee of a self-managed superannuation fund (SMSF) for its shareholding in a company were non-arm's length income that were accordingly taxable at the highest individual marginal rate rather than as exempt current pension income.

The AAT rejected the taxpayer's contention that the legislative rule is concerned only with the relative amount of the dividend paid. In particular, it considered that in determining whether an amount is non-arm's length income is not limited to a consideration of whether the dividends paid on the shares held by the fund were paid at the same rate as dividends paid on other shares or whether differences in the rate of the dividend are explicable by differences in the terms of the shares, their costs or their market value. Rather, it can extend to a consideration of whether the amount of the dividend paid to the complying superannuation fund was sourced in a non-arm's length transaction.

Having regard to the facts, the Tribunal concluded that the source of the dividends paid to the fund in the years in question cannot be divorced from the preceding non-arm's length transaction being the dividend-paying company's acquisition of shares in another company where the purpose and effect of the arrangement was to divert income from the previous owner of the shares to the superannuation fund. Accordingly, the Tribunal concluded that the dividends paid to the fund were non-arm's length income.

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Legislative Update

At the time of writing, no new tax or superannuation legislation was introduced into Federal Parliament since the November edition of TaxTalk Monthly, other than a Private Senators' Bill that was introduced into the Senate on 13 November 2019 by Senator Rex Patrick. This Bill proposes to reform Commonwealth procurement rules and the rules for the provision of grants by Commonwealth entities to place greater transparency on government agencies entering into contracts for goods or services exceeding AUD 4 million (or AUD 7.5 million for construction services) with companies that are, or have related entities, domiciled in recognised tax havens.

Commonwealth revenue measures that have completed their passage through Parliament since our last monthly update include:

- Treasury Laws Amendment (International Tax Agreements) Bill 2019, which gives the force of law to the double tax agreement between the Government of Australia and the Government of the State of Israel and also introduces a domestic source of income rule to ensure that Australia can exercise its taxing rights under the Convention and future international tax agreements.
- Customs Amendment (Growing Australian Export Opportunities Across the Asia-Pacific) Bill 2019 and the Customs Tariff Amendment (Growing Australian Export Opportunities Across the Asia-Pacific) Bill 2019), which give effect to the recently signed Peru-Australia Free Trade Agreement, Indonesia-Australia Comprehensive Economic Partnership Agreement, and the Free Trade Agreement between Australia and Hong Kong, China.

The spring session of Federal Parliament is scheduled to end on Thursday 5 December 2019. It is next scheduled to sit from 4 February 2020. The 2020 – 21 Federal Budget will be handed down on 12 May 2020. No date has yet been set for the release of the Mid-Year Economic and Fiscal Outlook for the 2019-20 financial year, but it is expected to be released by the end of January 2020.

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Other News

ATO announces support for taxpayers impacted by bushfires

The Australian Taxation Office (ATO) has announced a range of measures to assist taxpayers that have been impacted by the recent bushfires across New South Wales and Queensland. Depending on individual circumstances, this may include:

- extra time to pay tax debts or lodge tax forms

- help to find lost tax file numbers
- re-issuing income tax returns, activity statements and notices of assessment
- help to re-construct tax records that are lost or damaged
- fast-tracked refunds
- tax payment plans tailored to individual circumstances including interest free periods
- remission of penalties or interest charged during the times affected.

For taxpayers with a business or residential address in identified impacted postcodes (other than large withholders), the ATO has advised that it has automatically applied a two month lodgment and payment deferral for activity statements.

Taxpayers affected by these disasters and requiring further assistance should contact the ATO on 1800 806 218.

Cost base of CGT asset and assumed liabilities

The ATO has indicated its draft views in Taxation Determination TD 2019/D11 that the cost base of an asset for capital gains tax (CGT) purposes cannot include an amount of a liability that is assumed by the purchaser to the extent that it is deducted, or can be deducted, on its discharge, provided it does not fall under one of the listed exceptions.

In principle, an item of expenditure should either be deductible for income tax purposes or included in the cost base of an underlying asset for CGT purposes, but not both.

When the final determination is issued, it is proposed to apply both before and after its date of issue. The closing date for comments was 29 November 2019.

ATO draft compliance approach for superannuation contributions to clearing house

Draft Practical Compliance Guideline PCG 2019/D8 describes the circumstances in which the Commissioner of Taxation will not apply compliance resources to determine which income year an employer is entitled to claim income tax deductions for superannuation contributions made through the Small Business Superannuation Clearing House (SBSCH) to a superannuation fund or retirement savings account (RSA).

The law requires that superannuation contributions are made to a super provider or RSA and therefore deductible (subject to meeting any other qualifying conditions) when the payments are received by the trustee of a complying superannuation fund or an RSA. Uncertainty around the timing of a deduction may arise, however, where a period of time between an employer's payment to the SBSCH and the trustee of a complying super fund receiving the contribution straddles different income years.

Subject to meeting the requirements outlined in the draft guideline, the Commissioner proposes that compliance resources will not be applied to consider whether a contribution was received by the trustee of a superannuation fund or RSA in the same income year in which the payment was made to the SBSCH, provided the payment was made before the close of business on the last business day on or before 30 June.

Comments on the draft guideline are due 17 January 2020.

Draft rules released on cash payment limits

The Government has released draft rules to support the Currency (Restrictions of the Use of Cash) Bill 2019 that proposes to make it an offence from 1 January 2020 to make or accept cash payments (or a series of connected payments) of AUD 10,000 or more.

The draft Currency (Restrictions on the Use of Cash) Rules 2019 specify the following types of transactions that are to be exempt from the cash payment limit:

- payments related to personal or private transactions (other than transactions involving real property)
- payments that must be reported by an entity under anti-money laundering and counter-terrorism legislation, provided, broadly, the entity with a reporting obligation complies (or is reasonably expected to comply) with their obligations under that legislation
- payments made or accepted by a public official in the course of their duties where it is necessary for the payment to be made in cash for the performance of those duties and payments made or accepted by Australian government agencies where the payment is foreign currency produced for a foreign government
- payments that only equal or exceed the cash payment limit because the payment is part of a transaction involving collecting, holding or delivering cash and this is undertaken in the course of an enterprise of collecting or delivering cash (ie providing cash-in-transit services)

- payments that only equal or exceed the cash payment limit because payment is, or includes, an amount of digital currency
- payments that occur in exceptional situations where no alternative method of payment could reasonably be used.

The rules also prescribe that the value in Australian currency of an amount of foreign currency or digital currency for the cash payment limit is to be worked out consistent with the methods prescribed for Goods and Services Tax purposes.

ATO reviewing unit trusts exploiting CGT rollover

The ATO is reviewing arrangements that purportedly allow a unit trust to effectively dispose of an asset to an arm's length purchaser with no CGT consequences. The arrangements that are targeted are outlined in the ATO Taxpayer Alert TA 2019/2 and broadly involve the settlement of a new unit trust to receive the sale asset and the trusts choosing to disregard any capital gain by utilising a CGT rollover. The purchaser of the asset subsequently subscribes for a large number of new units in the receiving unit trust equal in value to the asset's purchase price and the receiving trust uses the subscription funds to repay the amount owing to the vendor trust for the sale asset.

The ATO is concerned that the conditions for the CGT rollover may not be met and/or the arrangement appears to be designed primarily to reduce tax that would otherwise be assessable to a vendor such that the general tax anti-avoidance rules (Part IVA) may apply.

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TaxTalk Monthly

WL 127074694