PwC's Monthly Tax Update

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

April 2024

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Corporate Tax Update

PRRT regulations released for consultation

In the 2023-24 Budget, the Government committed to remake the Petroleum Resource Rent Tax Assessment Regulation 2015. Treasury has released an exposure draft of the amendments to the Petroleum Resource Rent Tax (PRRT) Regulations, dealing with all the announced reforms to the 2015 Regulation, except for those measures related to tolling arrangements (see our February edition of Monthly Tax Update for further information).

The proposed 2024 regulations will reform the methodology to calculate the price of sales gas that is processed into liquefied natural gas (LNG), including:

- the advanced pricing arrangement (APA) rules
- comparable uncontrolled price (CUP) rules
- provisions for backfilling
- making asset life formula elections irrevocable
- equalising the upstream/downstream treatment in profit/loss situations, and
- ensuring that tolling arrangements are expressly captured in the regulations.

Comments on the exposure draft close 12 April 2024.

Cost base uplift denied by rollover relief

In AusNet Services Limited v Commissioner of Taxation [2024] FCA 90, the Federal Court of Australia found that a valid capital gains tax (CGT) rollover election had been made under Division 615 of the *Income Tax Assessment Act 1997*.

The case concerned the restructure of a stapled group involving two corporate entities (each one the head company of a tax consolidated group) and one trust. Following a series of schemes of arrangement, in June 2015 the taxpayer acquired all of the shares in the two corporates and all the units in the trust. The former holders of the stapled securities became shareholders of the taxpayer. Relevant to this appeal, one of the corporate entities became a subsidiary member of a tax consolidated group, with the taxpayer as the head company.

Division 615 provides for rollover relief for transactions under certain schemes pursuant to which a holder ceases to own shares in a company or units in a unit trust and in exchange, the holder becomes the owner of new shares in another company.

The taxpayer argued that Division 615 did not apply to the scheme of arrangement, with the consequence that it could not have made a valid rollover election under that Division, and so was entitled to an increase in the cost bases of the assets of the acquired corporate entity's tax consolidated group.

The Court rejected this argument, finding that Division 615 was capable of applying to such a restructure. The fact that the arrangement was undertaken as part of a broader scheme involving schemes relating to the other entities does not alter the fact that it was a "scheme for reorganising its affairs" satisfying the description in section 615-5(1)(c). Furthermore, the Court was satisfied that the relevant ratio requirements in section 615-20 were satisfied, i.e. the comparison is between the holdings of an exchanging member in the original company with the holdings acquired by that member in the interposed company as a result of the scheme.

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Employment Taxes Update

Adequate alternate FBT records

Employers will be able to use the approaches set out in the following legislative instruments as an alternative to employee declarations and travel diaries record keeping for the Fringe Benefits Tax (FBT) years ending 31 March 2025 and later:

- Fringe Benefits Tax Assessment (Adequate Alternative Records – Temporary Accommodation Relating to Relocation) Determination 2024 requires alternative records to contain specific information about the employee and nature of the temporary accommodation provided for relocation.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Private Use of Vehicles Other Than Cars) Determination 2024 requires alternative records for residual motor vehicle fringe benefits to contain specified information about the vehicle and kilometres travelled.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Fly-in Fly-out and Drive-in Drive-out Employees) Determination 2024 requires alternative records to contain information about the employee and the FIFO and/or DIDO arrangement. The explanatory memorandum released with the legislative instrument provides an example of alternative records which is a combination of an employment agreement, roster, flight schedules/itineraries, employee records, emails and an offer of employment acceptance.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Car Travel to Employment Interview or Selection Test) Determination 2024 requires alternative records for expense payment fringe benefits relating to employment interview or selection tests in relation to the employee's employment to contain information about the employee and travel details.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Car Travel to Certain Work-Related Activities) Determination 2024 relates to where a benefit is provided in respect of car travel for a work-related medical examination, work-related medical screening, work-related preventative health care, work-related counselling or migrant language training. Alternative records are to contain information about the employee and travel details of the work-related activities.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Relocation Transport) Determination 2024 is in respect to expense payment fringe benefits relating to reimbursement of a cents per kilometre for eligible relocation transport expenses. Alternative adequate required include information about the employee and the travel details.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Otherwise Deductible Benefits) Determination 2024 requires the alternative records to contain information about the employee, the dates the benefit was provided and the nature of the benefit.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Overseas Employment Holiday Transport) Determination 2024 requires the alternative records to contain information about the employee, the number of family members who travelled in the car and other travel details.
- Fringe Benefits Tax Assessment (Adequate Alternative Records – Travel Diaries) Determination 2024 is inclusive of expense, property and residual travel fringe benefits. The alternative records require information about the employee, duration of travel and activities undertaken in the course of producing their assessable income while travelling.

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- Fringe Benefits Tax Assessment (Adequate Alternative Records – Living-Away-From-Home – Maintaining an Australian Home) Determination 2024 requires the alternative records to contain information about the employee, their usual place of residence in Australia and their living away from home (LAFH) arrangements. The explanatory memorandum released in conjunction provided an example of alternative records as payroll records, LAFHA application in a payroll system, and a contract of employment.

Full Federal Court decision provides clarity on travel deductibility principles

On 15 March 2024, the Full Federal Court dismissed the taxpayer's appeal in Bechtel Australia Pty Ltd v Commissioner of Taxation [2024] FCAFC 22 (Bechtel) with a unanimous decision that the relevant transport costs for employees in relation to the taxpayer's projects were not otherwise-deductible. This was an appeal against the decision in *Bechtel Australia Pty Ltd v Commissioner of Taxation [2023] FCA 676* in June 2023.

The decision upheld the first instance decision and clarified what it considered to be significant factual differences from *John Holland Group Pty Ltd v Commissioner of Taxation [2015] FCAFC 82* (John Holland), being that the Bechtel employees were not considered to have been rostered on to duty upon arrival at the point of origin airport. More specifically, the Court determined that as employees did not commence employment duties prior to arrival at Curtis island, travel costs to and from Curtis Island, and in particular those incurred for travelling to and from Gladstone, were not incurred in the course of, gaining or producing assessable income.

The decision emphasised the importance of key contractual terms and documentation in determining whether the travel was deductible, with significance attributed to, among other things, each employee having been assigned to work at Curtis Island with the "roster cycle" commencing after arriving on Curtis Island.

In addition, several other factors considered within the decision were found to not impact the character of the travel, including relevant of distance, frequency of travel, employer organised travel, or code of conduct.

As a result, their Honours concluded that as the travel to Gladstone did not occur 'in the course of gaining or producing assessable income', the travel expenses incurred would not have been deductible under section 8-1 of the *Income Tax Assessment Act 1997* and therefore not otherwise deductible for the purposes of section 52(1) of the *Fringe Benefits Tax Assessment Act 1986*. Accordingly, the taxpayer's appeal was dismissed.

Queensland Revenue Office updates payroll tax ruling on medical practitioners

Public Ruling PTAQ000.6.3 Relevant Contracts – medical centres provides the Queensland (QLD) Revenue Office's updated payroll tax position for businesses operating medical practices in QLD.

The ruling is updated with new paragraphs and an Example which explain that assigned Medicare benefits and/or out-of-pocket patient fees (patient revenue) paid into an account may be deemed wages for payroll tax purposes. This can occur where patient revenue is not paid directly to the practitioner, and only released with the approval of the medical centre.

Superannuation on government paid parental leave will apply from 1 July 2025

On 7 March 2024, the Government announced an entitlement to superannuation on Government Paid Parental Leave (PPL) from 1 July 2025. Under the scheme, parents of children born on or after 1 July 2025, will receive 12 per cent superannuation on top of their government funded PPL. The reform builds on the recently passed *Paid Parental Leave Amendment (More Support for Working Families) Bill 2023* which increased the maximum period of flexible paid parental leave by two weeks each year.

Further details of the scheme are to be released in the 2024-25 Federal Budget to be handed down on 14 May 2024.

Full Federal Court decision on contractor arrangements

On 15 March 2024, the Full Federal Court allowed an appeal in EFEX Group Pty Ltd v Bennett [2024] FCAFC 35 regarding an unfair dismissal application brought forward by a worker who argued they were an employee rather than an independent contractor. While the decision does not deal with tax or superannuation, the judgment provides further insight into the meaning of employee, reiterating that the focus on 'control' should be on the right to exercise control, rather than on the actual exercise of control. The decision also emphasised the need to consider extent the putative employer has the right to control how, when and where work is performed and the extend of which the individual engaged can be seen to be working distinct from the employer's business. However, a focus on the terms of the contract needs to be used to answer these considerations.

The case also deliberated on oral contractual elements. It was explained that where no written contract is in place, the deliberation of the parties' contractual rights and obligations must still be, although somewhat differently, ascertained and characterised. Paragraph 9 of the judgment stated "the terms of an oral contract may be able to be inferred from the circumstances, including in whole or in part from the parties' conduct or a course of dealing between them, or implied where necessary for business efficacy".

Global Tax and Trade Update

New multinational law reforms finally passed

The Treasury Laws Amendment (Making Multinationals Pay Their Fair Share - Integrity and Transparency) Bill 2023 - which contains the proposed reforms to limit interest deductions under Australia's thin capitalisation regime - completed its passage through the Senate/Parliament with amendments.

This now clears the way for the following measures to apply:

- new rules on the disclosure of information about subsidiaries by Australian public companies (listed and unlisted) in their annual financial reports, with effect from financial years commencing on or after 1 July 2023
- the new thin capitalisation rules which will apply to income years commencing on or after 1 July 2023
- the debt deduction creation rules which will apply to income years commencing on or after 1 July 2024

Refer to our Alert for further information on the new interest limitation rules.

Draft legislation for Australia's Pillar Two response

To give effect to Australia's response to the Organisation for Economic Co-operation and Development (OECD)/G20 Two-Pillar Solution to address the tax challenges arising from digitalisation of the economy, Treasury has released the following for comment that seek to implement a 15 per cent global minimum tax and domestic minimum tax:

- Exposure draft for primary legislation, which includes an Imposition Bill to impose the tax payable; an Assessment Bill to establish the liability and framework for the taxes; and a Consequential Amendments Bill which contains consequential and miscellaneous provisions necessary for the administration of the global and domestic minimum taxes.
- Exposure draft for subordinate legislation, which includes the Rules to implement the domestic framework for a multinational top-up tax including the specific computations.

The imposition of a top-up tax under the Income Inclusion Rule (IIR) and a Domestic Minimum Tax (DMT) is proposed to apply to fiscal years commencing on or after 1 January 2024, while the imposition of a top-up tax under the Undertaxed Profits Rule (UTPR) is proposed to apply from fiscal years commencing on or after 1 January 2025.

A discussion paper regarding the interactions with foreign income tax offsets, foreign hybrid entity, hybrid mismatch rules and controlled foreign company (CFC) rules has also been released for comment.

Submissions on the exposure draft primary legislation and consultation paper close 16 April 2024, while submissions on the exposure draft subordinate legislation close 16 May 2024. For further information, refer to our Tax Alert

Draft taxation determination on hybrid mismatch rules

The Australian Taxation Office (ATO) has released draft Taxation Determination TD 2024/D1 which sets out the Commissioner's preliminary view on the following two separate but related issues in relation to the hybrid mismatch rules as to whether:

- hypothetical income or profits within the tax base of a country can be used to identify a 'liable entity' or entities in the country for the purpose of section 832-325 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
- a 'non-including country' for the purpose of subsection 832-320(3) of the 'hybrid payer' definition can be a jurisdiction other than the country where the payee of the relevant payment is located or resides.

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The draft determination outlines that the identification of a 'liable entity' or entities in a country in respect of income or profits for the purpose of section 832-325 can be based wholly on hypothetical income or profits within the tax base of the country. This will be necessary where, for example:

- An entity has not actually derived any income or profits in a particular period, or
- An entity has derived income or profits in a particular period, but no part of those income or profits are within the tax base of the country.

For the purpose of subsection 832-320(3), a non-including country is said to be a jurisdiction other than the country where the payee of the relevant payment is located or resides. Therefore, the laws of a jurisdiction other than the country where the payee is located or resides may fall for consideration in determining whether there is a hybrid payer within the meaning given by section 832-320.

The draft Determination contains three illustrative examples.

Once finalised, the Ruling is proposed to apply both before and after its date of issue. Comments are invited until 19 April 2024.

Consultation on tax treaty network expansion

The Australian Government is entering into tax treaty negotiations with Brazil and Ukraine as part of its expansion of Australia's tax treaty network, in addition to revising the existing tax treaties with New Zealand, South Korea and Sweden. Treasury is seeking submissions from stakeholders on the key outcomes Australia should seek in negotiating these tax treaties and any other issues related to Australia's tax treaty network. Comments close 19 April 2024.

Denial of interest deductions confirmed following transfer pricing dispute

In Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation [2024] FCAFC 29, the Full Federal Court dismissed the taxpayer's appeal in relation to a transfer pricing matter in relation to deductions for interest claimed in Australia on funding by way of a cross-border intra-group loan note issuance agreement (LNIA) that was amended several times after its initial issuance. In its appeal before the Full Federal Court, the taxpayer's primary proposition was that if the amount of interest actually paid over the ten-year period in question was equal to or less than that which might be expected to have been paid between independent parties in similar circumstances over the same period, then neither Subdivision 815-A of the ITAA 1997 nor Division 13 of the Income Tax Assessment Act 1936 applied.

Seven alleged errors were proposed as part of the taxpayer's appeal, each of which was dismissed in detail by the Full Federal Court in its decision.

OECD releases peer review report on treaty shopping

The OECD has released the latest peer review report assessing jurisdictions' efforts to prevent tax treaty shopping and other forms of treaty abuse under Action 6 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project (one of the four minimum BEPS standards). The report, which includes data on tax treaties concluded by jurisdictions that were members of the Inclusive Framework on 31 May 2023, reveals that most agreements concluded between the members of the Inclusive Framework are either already compliant with the Action 6 minimum standard or will shortly come into compliance.

A revised peer review document forming the basis of the assessment of the BEPS Action 6 minimum standard was also released alongside the peer review report. The document forms the basis on which the peer review process will be undertaken as of 2024. The consolidated document includes the Terms of Reference which set out the criteria for assessing the implementation of the Action 6 minimum standard, and the Methodology which sets out the procedural mechanism by which the review will be conducted. In light of the successful implementation of the Action 6 minimum standard to date, the revised methodology now provides ongoing targeted assistance to those members of the Inclusive Framework that still need to implement the Action 6 minimum standard with a comprehensive peer review process to be carried out once every five years.

OECD Secretary-General Tax Report

Following the first meeting under the Brazilian G20 Presidency, the OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors has been published. Among other matters, it notes that:

- The BEPS Project has successfully addressed various tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax.
- The implementation of Pillar Two of the Inclusive Framework's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy is well advanced, and is already being (or will be implemented) by over 35 jurisdictions taking effect in 2024. It is expected to substantially reduce low-taxed profit globally by about 80 per cent (from an estimated 36 per cent of all profit globally to about seven per cent)
- The Inclusive Framework is working towards finalising the text of the Multilateral Convention to Implement Amount A of Pillar One of the Two Pillar Solution, with a view to holding a signing ceremony by the end of June 2024.
- Since October 2023, two new countries have joined the Inclusive Framework, bringing total membership to 145 countries and jurisdictions and three new countries have joined the Global Forum, bringing its total membership to 171 countries and jurisdictions

President Biden's FY 25 budget calls for corporate and individual tax increases

The United States President recently sent Congress a fiscal year 2025 budget that proposes to increase taxes by nearly USD 5 trillion for corporations and for individuals with incomes above USD 400,000. Many of the President's tax proposals – including a proposal to increase the corporate tax rate to 28 per cent and impose a 25 per cent minimum tax on certain high-income individuals – were included in President Biden's previous budgets. New tax proposals in the FY 2025 budget include measures to increase the recently enacted corporate alternative minimum tax rate from 15 to 21 per cent and to deny business deductions for employee compensation above $1 million. For further information, refer to the Tax Insight from PwC US.

Draft law to streamline administration of fuel and alcohol excise

Treasury released draft legislation that proposes to streamline the administration of fuel and alcohol excise. Specifically, the proposed law seeks to:

- streamline and align licence application and renewal requirements for entities who hold excise licences or customs warehouse licences to manufacture or store alcohol and fuel
- establish a public register, published on the ATO website, containing the licence holder's name, ABN, and type of licence
- amend the time limit to apply for a refund of excise overpayments to four years after payment, to align with refunds of customs duty and other indirect tax refunds
- permit the refund of excise-equivalent customs duty already paid on petroleum-based oils used in the further manufacture of petroleum lubricants, to align treatment of excise-equivalent customs duty with excise duty
- remove the requirement to pay and then claim refunds for excise or excise-equivalent customs duty on fuels used in commercial shipping ('bunker fuels'), aligning their treatment with the duty-free treatment of bunker fuels for international voyages, and
- introduce a new refund circumstance with a standard formula for the refund of duty paid on fuels processed back into excisable fuel by vapour recovery units.

Comments can be made on the draft by April 2024. The measures once enacted are proposed to have effect from 1 July 2024.

Indirect Tax Update

GST and supplies of combination food

The Australian Taxation Office (ATO) has finalised Taxation Determination GSTD 2024/1, which provides the Commissioner of Taxation's view on the meaning of a food that is a 'combination of one or more foods' in the context of the goods and services tax (GST) for the purposes of paragraph 38-3(1)(c) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), in light of the Administrative Appeals Tribunal's decision in *Chobani Pty Ltd and Commissioner of Taxation [2023] AATA 1664*.

It is the Commissioner's view that the following three principles apply when determining whether there is a supply of combination food:

- There must be at least one separately identifiable taxable food
- The separately identifiable taxable food must be sufficiently joined together with the other components of the overall product at the time of sale
- The separately identifiable taxable food must not be so integrated into the overall product, or be so insignificant within that product, that it has no effect on its characterisation.

If a supply is not a supply of combination food, it may be necessary to determine if the supply is a mixed or composite supply, which is explained in GSTR 2001/8.

GSTD 2024/1 applies both before and after its date of issue. However, the Commissioner will continue to act in accordance with Law Administration Practice Statement PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only and PS LA 2012/2 (GA) GST classification of food and beverage items*.

Updated detailed GST and food list

Following the finalisation of GSTD 2024/1 (as noted above), the Goods and Services Tax Industry Issues Detailed Food List has been updated via Addendum, to align relevant entries with GSTD 2024/1, add new food and beverage product lines, merge similar entries, as well as update several entries to better explain why they are GST-free.

Draft update to GST Ruling dealing with improvements on land

The ATO has released a draft update to GSTR 2006/6DC2, which deals with improvements on land for GST purposes, reflecting the Full Federal Court's decision in *Commissioner of Taxation v Landcom [2022]* FCAFC 204, in which it was held that the margin scheme provisions in the A GST Act apply separately to each freehold interest in land, even if several freehold interests are supplied as a single parcel of land.

The draft updated Ruling discusses the meaning of the phrase 'improvements on the land' in the context of the phrases 'improvements on the land' or 'no improvements on the land' or equivalent phrases in Subdivision 38-N and Division 75 of the GST Act. The issue addressed in the draft update is relevant to suppliers of land that are the Commonwealth, a state or territory seeking to determine whether there are improvements on the land for the purposes of applying the GST Act.

Comments close 19 April 2024.

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Proposed reporting exemptions for EDPs

Under the Sharing Economy Reporting Regime (SERR) operators of electronic distribution platforms (EDPs) are required to report information about certain supplies made through their platforms to the Commissioner of Taxation. The ATO has released draft Legislative Instrument LI 2024/D1, which will exempt operators of EDPs from having to include certain specified classes of transactions for reporting periods starting on or after 1 July 2024. The exemptions provided in the draft instrument generally replicate those provided in Taxation Administration (Reporting Exemptions for Electronic Distribution Platform Operators - Relevant Accommodation and Taxi Travel) Determination 2023 (which ceases to apply after 30 June 2024) but also contains new, additional exemptions that cover certain types of suppliers and transactions.

The instrument is proposed to apply from 1 July 2024. Comments on the draft close 15 April 2024.

Overhead acquisitions confirmed partly creditable

In Commissioner of Taxation v Hannover Life Re of Australasia Ltd [2024] FCAFC 23, the Full Federal Court found for the taxpayer, a life insurance company. in relation to whether it was entitled to input tax credits on certain overseas acquisitions.

The Federal Court had allowed the taxpayer's appeal in part, with the company's overhead acquisitions found to be creditable acquisitions to the extent that they related to the taxpayer's GST-free supplies, and that, subject to one adjustment, the taxpayer's proposed methodology of apportionment was fair and reasonable in the circumstances of its enterprise (for further details, refer to the August 2023 edition of Monthly Tax Update).

The Commissioner appealed the orders made by the primary judge to the Full Federal Court, contending that the taxpayer was not entitled to any input tax credits in respect of overhead acquisitions. The Full Federal Court dismissed the Commissioner's appeal with costs, noting that the primary judge's conclusion that the overhead acquisitions were related to the making of all of the taxpayer's supplies was not shown to be attended by error or otherwise incorrect, and that no error had been identified by the Commissioner in the primary judge's finding that the acquisitions related to both input taxed and GST-free supplies. Further, the primary judge was not shown to have erred in relation to his evaluation of the apportionment methodology.

No input tax credits available for litigation services

In Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation [2024] FCAFC 42, the Full Federal Court has dismissed the taxpayer's appeal against the Federal Court's decision in Konebada Pty Ltd ATF William Lewski Family Trust v FC of T [2023] FCA 257, in which it found that the taxpayer was not entitled to input tax credits in respect of its payment for invoices for the provision of litigation and other services as they were not made in carrying on an enterprise (see our May 2023 edition of Monthly Tax Update for further details).

The Full Federal Court found no error, or procedural unfairness, in the way in which the primary judge approached the evidence in appeal, and agreed with the primary judge's comments that litigation funding agreements were not 'entered into in a systematic and organised manner so as to stamp them with a commercial character'. The regularity, repetition and funds expended by the taxpayer only established that members of the taxpayer's family group were involved in a wide, and expensive, array of litigation over an extended period of time.

Personal Tax Update

Private health insurance thresholds and rates for 2024-25

The Australian Taxation Office (ATO) has published the income thresholds used to calculate the Medicare levy surcharge and private health insurance rebate for the 2024-25 financial year. The thresholds have increased from 1 July 2024. The private health insurance rebate is income tested, with a person's rebate entitlement (tier levels) dependent on whether they have a single or family income.

The 2024-25 income thresholds are as follows.

Family Status	Base Tier	Tier 1	Tier 2	Tier 3
Single	$97,000 or less	$97,001 - $113,000	$113,001 - $151,000	$151,001 or more
Family	$194,000 or less	$194,001 - $226,000	$226,001 - $302,000	$302,001 or more

Note: The family income threshold is increased by $1,500 for each Medicare levy surcharge dependent child after the first child.

Draft lodgment notice for parents with child support assessments

The ATO has published draft Legislative Instrument LI 2024/D3 *Income Tax Assessment (Requirement for Parents with a Child Support Assessment to Lodge a Return for the 2024 Year) Instrument 2024*. The instrument specifies that liable and recipient parents under a child support assessment are required to lodge an income tax return for the 2023-24 income year, unless an exception applies. Comments on the draft determination close 9 April 2024.

Taxpayer posted overseas retained Australian residency

In Quy and Commissioner of Taxation (Taxation) [2024] AATA 245, the Administrative Appeals Tribunal found that the taxpayer was resident under both the ordinary concepts and domicile tests, notwithstanding that for the five-year period under appeal the taxpayer worked overseas.

The taxpayer who was an Australian citizen accepted an internal assignment with his employer to Dubai. While in Dubai, the taxpayer resided in accommodation that was paid for, in most parts, by his employer. His wife and children remained in the family home in Perth while he worked in Dubai.

The taxpayer argued that he was not Australian tax resident for the relevant years.

The Tribunal found that for the purposes of the ordinary concepts test the taxpayer was a resident of Australia for the tax years in question. The Tribunal pointed to many factors, including the fact that the taxpayer could only reside in Dubai by virtue of an employer-sponsored residency permit, with no suggestion that the taxpayer ever intended to reside in Dubai beyond his international work assignment.

The Tribunal also noted that the taxpayer maintained investment properties and bank accounts in Australia throughout the period, maintained his Australian vehicle registrations and Australian drivers licence, maintained private health insurance, and failed to demonstrate any connection with Dubai outside of his employment.

Similarly, the Tribunal found that the taxpayer was resident of Australia under the domicile test - the taxpayer had not abandoned his residence in Australia during the tax years in question, nor had he established a permanent place of abode in Dubai or anywhere else outside of Australia.

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ATO's views on case allowing deduction for loss on sale of main residence

The ATO has released a decision impact statement regarding the outcome of Bowerman and Commissioner of Taxation (Taxation) [2023] AATA 3547, in which the Administrative Appeals Tribunal (AAT) found that a loss on the sale of a property in which the taxpayer lived was deductible under section 8-1 of the *Income Tax Assessment Act 1997*. Further details of the case can be found in the December 2023 edition of Monthly Tax Update.

The Commissioner notes that both the facts of this case, and the result, were unusual. Consequently, he believes that the AAT's decision does not represent a departure from established principles concerning the sale of real property, with cases of this type turning on their particular facts.

In circumstances where the principles in *Myer Emporium* (i.e. a profit-making purpose and a commercial element to the transaction) do not apply, the Commissioner will continue to apply the capital gains tax (CGT) rules to gains and losses on the sale of real property including a person's main residence, including how the ATO applies the CGT main residence exemption.

The ATO will also review Taxation Ruling TR 97/7 and consider whether to clarify when a loss (as distinct from an outgoing) has been 'incurred' for the purposes of subsection 8-1(1). Comments on the decision impact statement are invited until 12 April 2024.

State Tax Update

Victoria: Commercial and Industrial Property Tax Reform Bill introduced

The Commercial and Industrial Property Tax Reform Bill 2024 (Vic) was introduced into the Victorian Legislative Assembly on 20 March 2024, to give effect to the 2023-24 Victorian Budget measure to abolish the upfront cost of stamp duty and replaces it with a Commercial and Industrial Property Tax (CIPT).

The reform will apply to land with a qualifying commercial or industrial use, as determined by the Australian Valuation Property Classification Code allocated to the land, as well as certain land used for student accommodation.

From 1 July 2024, when a property is sold, it will transition into the new system, with stamp duty being payable one final time on that property. To fund the final stamp duty payment, eligible purchases can access a transition loan provided by the Treasury Corporation of Victoria on commercial terms.

After ten years, CIPT will apply at a rate of one per cent of the property's unimproved land value and will be assessed on a calendar year basis, on land owned as at midnight on 31 December in the year preceding the tax year, in a similar manner to land tax.

CIPT is separate from and in addition to existing taxes that apply to land, and will apply to land that:

- has entered into the tax reform scheme
- is no longer within its transition period of ten years
- has a qualifying use as at midnight on 31 December immediately preceding the tax year, and
- is taxable within the meaning of the *Land Tax Act 2005 (Vic)*.

Land that is exempt under the Land Tax Act is not subject to CIPT.

Owners of residential, primary production, community services, sport, heritage or cultural properties will not be affected by the reforms. Also, existing stamp duty concessions for commercial and industrial properties, including the regional concession, will continue to be available for the final stamp duty payment.

Victoria: Updated Ruling on interest and penalty tax

The State Revenue Office Victoria has released updated Revenue Ruling TAA-007v5, which explains the operation of the penalty and interest provisions in Part 5 of the *Taxation Administration Act 1997 (Vic)* and sets out the principles under which the Commissioner of State Revenue applies in exercising his discretion after considering all the relevant circumstances in a matter.

The updates to the Ruling clarify the circumstances under which market interest can be remitted, transfer notification default content to Revenue Ruling TAA-008 (see below) and improve readability. The updated Ruling is effective 27 February 2024.

Victoria: Notification default Revenue Ruling

The State Revenue Office Victoria has issued Revenue Ruling TAA-008, which explains (with examples) the circumstances amounting to a notification default as defined in section 3(1) of the *Taxation Administration Act 1997 (Vic)*.

A notification default only arises in relation to land tax, vacant residential land tax and windfall gains tax.

When a notification default occurs, penalty tax is imposed on the additional land tax, vacant residential land tax, or windfall gains tax that would have been assessed had the notification default not occurred. If no additional tax is assessed, no penalty tax will be imposed.

The Ruling is effective from 27 February 2024.

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Western Australia: Temporary land tax exemption for residential construction

The Land Tax Assessment Amendment (Residential Construction Exemptions) Bill 2023 (WA) has now completed its passage in the Western Australian (WA) Parliament. The Bill seeks to temporarily extend the land tax residential construction exemptions for owners who commenced construction between 1 July 2020 and 30 June 2023 by providing:

- A three-year exemption for newly constructed or refurbished homes, which can be extended to four years in exceptional circumstances; and
- A two-year exemption for a new home that is being built or refurbished while the owner lives in their existing home, which can be extended to three years in exceptional circumstances.

NSW: Supreme court remits premium interest component

In Golden Age and Hannas the Rocks Pty Ltd v Chief Commissioner of State Revenue [2024] NSWSC 249, the New South Wales (NSW) Supreme Court has found for the taxpayer, in as far as remitting in full the premium component of interest levied on a duties notice of assessment.

The taxpayer entered into an agreement for lease with a third party in relation to land located in NSW, for which the Commissioner issued a duties notice of assessment of almost $2,200,000 with interest of approximately $580,000. The interest comprised a market rate component and a premium component at eight per cent per annum of approximately $520,000. The taxpayer paid the duty amount but none of the interest and sought the remission of the premium component under section 25 of the *Taxation Administration Act 1996 (NSW).*

The Supreme Court's view was that it was necessary to approach the remission question by recognising that the premium component is penal in nature and serves the purpose of both imposing a penalty and deterring taxpayers from delaying payment of duty in what is essentially a self-assessment regime.

In the Supreme Court's view, the taxpayer took reasonable care in the discharge of its obligations to pay duty on the transaction by engaging a law firm to act for it, seeking and obtaining advice from that firm and then acting on that advice. The failure to pay duty on the agreement for lease arose from an oversight on the part of the law firm in failing to consider the duty implications of the agreement for lease. Given that explanation for the tax default, it was not a willful default by the taxpayer.

Taking into account all the circumstances relating to the tax default and the explanation for how it came about, and bearing in mind the purpose of the imposition of the premium component, the Supreme Court was satisfied that it was appropriate to remit the premium component in full.

NSW: Deed of rectification ineffective for surcharge land tax

In Chloe Adolphi Pty Ltd as trustee for The Chloe Adolphi Family Trust v Chief Commissioner of State Revenue [2024] NSWCATAD 48, the NSW Civil and Administrative Tribunal found that a deed of rectification did not circumvent a taxpayer's liability to surcharge land tax.

After the taxpayer - the corporate trustee of a discretionary trust - had been assessed by the Chief Commissioner as liable to land tax and surcharge land tax, the taxpayer, settlor and appointor of the trust executed a deed of rectification to the terms of the deed. The reason given was that the terms of the deed needed amendment to give effect to the intention that no foreign person could benefit from the trust. The taxpayer argued that due to the deed of rectification, the basis for liability to surcharge land tax became absent from the date of trust settlement.

The Tribunal noted that the intention of the parties needed to be determined at the time of the document's execution. While the Tribunal took evidence of intention into account from the settlor of the trust and the corporate trustee's director, it gave that evidence limited weight, agreeing with the Chief Commissioner that 'statements of a self-serving nature that the ultimate issue may have shaped should be treated with caution and weighed against objective facts and inferences to be drawn from the taxpayer's activities generally'. Ultimately, the Tribunal concluded that the taxpayer did not establish an actual intention at the time the trust was settled to exclude any foreign person from being a beneficiary of the trust.

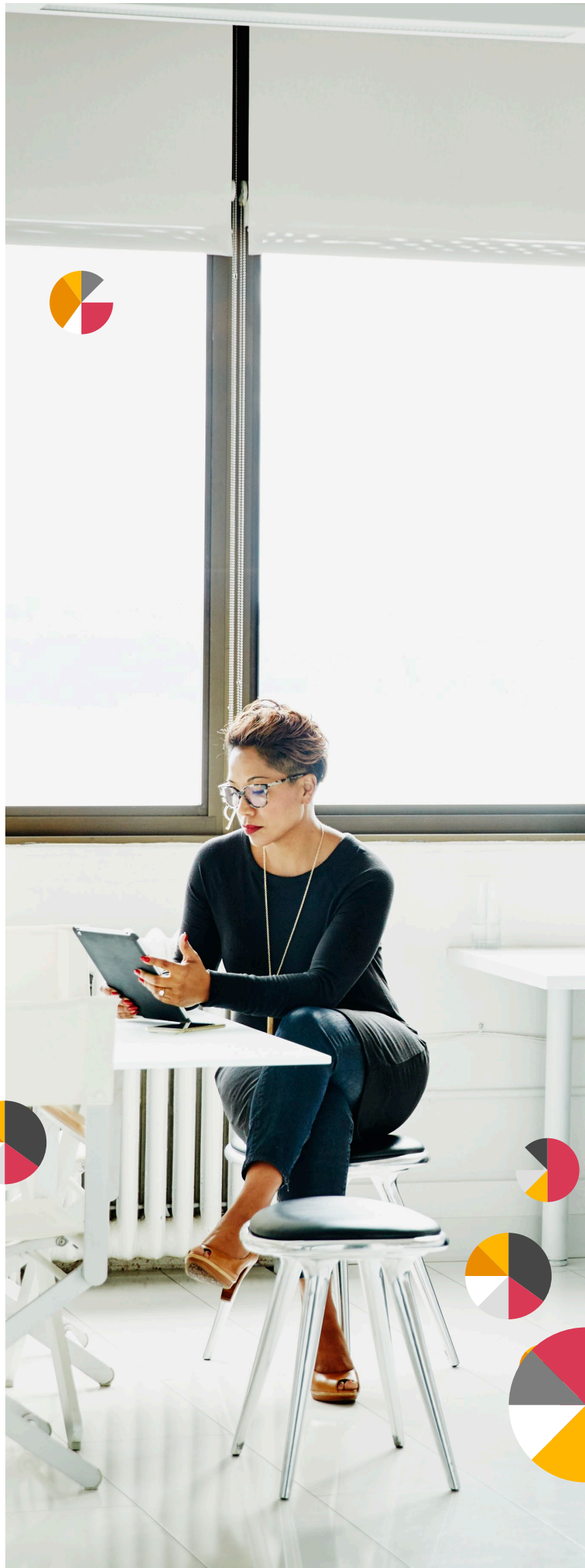
NSW: Surcharge land tax confirmed following extended absence

In Feng v Chief Commissioner of State Revenue [2024] NSWCATAD 56, the NSW Civil and Administrative Tribunal found a taxpayer was liable for surcharge land tax for the relevant years.

The taxpayer was a citizen of China. While she did not have Australian citizenship, she has been a permanent resident since 2007. The taxpayer travelled to China and back several times from January 2018 onwards to care for her sick grandparents. After she flew to China in November 2019, COVID-19 border closures prevented her from returning to Australia for over two years.

The Chief Commissioner accepted that the property was regarded as her principal place of residence under the law, and the taxpayer was not liable to land tax for the relevant years. However, as the Tribunal noted, this had no bearing on whether she was liable for surcharge land tax, which may be payable even if no land tax is payable on the land. By not having actually been in Australia during at least 200 days in each of the 2018 to 2021 calendar years, the Tribunal found that the taxpayer was a 'foreign person' at midnight on the taxing date for each of the 2019 to 2022 land tax years, and so was liable to surcharge land tax in each of those years.

In addressing the taxpayer's contention that the reasons for her extended absences from Australia should be taken into account in determining whether she should be liable to surcharge land tax, the Tribunal noted that it has repeatedly emphasised that the factors contributing to a taxpayer's failure to satisfy a statutory requirement are irrelevant (unless the statute itself says otherwise) and that it has no overriding discretion to waive tax that is otherwise payable.



Superannuation Update

Key superannuation rates and thresholds for 2024-25

Following the release of the latest Average Weekly Ordinary Time Earnings (AWOTE) figures, a number of superannuation rates and thresholds will increase with effect from 1 July 2024.

The following key thresholds apply for the forthcoming financial year commencing from 1 July 2024:

- the concessional contributions cap is $30,000 (up from $27,500)
- the non-concessional contributions cap is 120,000 (up from $110,000)
- the capital gains tax cap amount for contributions from the sale of small business assets is $1,780,000 (up from $1,705,000)
- the Division 293 tax threshold amount is $250,000
- the superannuation guarantee rate is 11.5 per cent (up from 11 per cent)
- the maximum super contribution base is $65,070 per quarter (up from $62,270)
- the general transfer balance cap remains at $1.9 million
- the defined benefit income cap remains at $118,750
- the employment termination payment (ETP) cap for life benefit termination payments is $245,000 (up from $235,000), and
- the tax-free part of genuine redundancy payments and early retirement scheme payments is $12,524 (up from $11,985), and for each complete year of service is $6,264 (up from $5,994).

Draft regulations for defined benefit fund interest

Although the legislation to give effect to the Government proposal to impose tax (under new Division 296) from the 2025-26 income year on individuals with total superannuation balances exceeding $3 million is still before Parliament, to support the implementation of these changes in relation to defined benefit interests, Treasury has released for consultation exposure draft regulations. This includes:

- outlining methods to value defined benefit interests
- making modifications to the Division 296 earnings formula to appropriately capture notional contributions to defined benefit interests.

The draft regulations also update existing methods to calculate notional contributions for defined benefit interests to reflect up-to-date economic parameters.

Comments close 26 April 2024.

Superannuation payments to be added to Paid Parental Leave

The Government has announced that from 1 July 2025, superannuation will be added to Paid Parental Leave (PPL). Further details will be released in the upcoming Federal Budget in May 2024.

This measure adds to reforms contained within the Paid Parental Leave Amendment (More Support for Working Families) Act 2024 which will give families access to an additional two weeks of PPL (22 weeks in total) from 1 July 2024, increasing to 24 weeks from July 2025 and 26 weeks from 1 July 2026.

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Defined benefit lifetime pension included in excess transfer balance calculation

In Stern v Commissioner of Taxation [2024] FCAFC 21, the Full Federal Court considered the correct construction of section 294-140 of the *Income Tax Assessment Act 1997* which deals with the calculation of an excess transfer balance and the special rule for capped defined benefit income streams.

The Court had to consider whether section 294-140 should be construed so as to exclude defined benefit lifetime pensions that are subject to commutation restrictions in working out whether the taxpayer had an "excess transfer balance". Ultimately, the Court rejected the taxpayer's appeal, stating that there is no ambiguity or obscurity in the meaning of section 294-140, and nor does the ordinary meaning of that provision (taking into account its context and purpose) lead to a result that is manifestly absurd or unreasonable.

Estimates of illegal early access of super

The Australian Taxation Office (ATO) has released the findings of a new program that estimates the size, scale and trajectory of superannuation illegally accessed from self-managed superannuation funds (SMSFs) before a condition of release has been met. It has been estimated that for the 2020 year, $381 million of superannuation was illegally withdrawn by trustees, while in the 2021 year, $256 million of superannuation was illegally accessed.

The illegal early access estimate follows the same rigour and best practice approach used in other ATO tax gap programs. The ATO plans to estimate illegal early access on an annual basis.

Legislative Update

The following tax or superannuation related Bills were introduced into Federal Parliament since our last update:

- The Customs Tariff Amendment (Tobacco) Bill 2024 and the Excise Tariff Amendment (Tobacco) Bill 2024, both introduced into the House of Representatives on 20 March 2024, increase the excise and customs duty rates for tobacco goods by five per cent per year for three years starting retrospectively from 1 September 2023. The five per cent increase is in addition to the current indexation. The Bills also align the treatment of tobacco products subject to the per kilogram excise and excise-equivalent customs duty with the manufactured per-stick rate.
- The Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024, which was introduced into the House of Representatives on 27 March 2024, among other things, introduces amendments to increase the penalty unit from $313 to $330 with effect from 1 July 2024.
- The Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024, which was introduced into the House of Representatives on 27 March 2024, among other things, seeks to:
  - amend the general anti-avoidance provisions in the *Petroleum Resource Rent Tax Assessment Act 1987 (PRRTA Act)* so that they align with the more robust drafting approach of the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936*
  - amend the *PRRTA Act* to clarify the meaning of the phrase 'exploration for petroleum'
  - amend the income tax law to clarify that mining, quarrying or prospecting rights cannot be depreciated for income tax purposes until they are used, not merely held; and the circumstances in which the issue of new rights over areas covered by existing rights lead to income tax adjustments
  - make changes to the location tax offset and producer tax offset including, among other things, to increase the rate of the location tax offset from 16.5 to 30 per cent
  - provide legal certainty that payments of certain personal advice fees by a superannuation trustee from the member's interest in the fund are deductible from the superannuation fund's assessable income (to the extent they are not incurred in gaining or producing the fund's exempt or non-assessable non-exempt income) and are not a superannuation benefit for the relevant members, and
  - make technical corrections in relation to the indirect value shifting rules and to ensure that the transfer pricing provisions reflect the most recent version of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

The following tax and superannuation related Bills have now completed their passage through Parliament:

- The Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, which strengthens the legal framework for investigating and prosecuting foreign bribery, and from a tax perspective amends the existing provision in the *Income Tax Assessment Act 1997* to preserve the rule that denies deductions for bribes to foreign public officials. The Bill received Royal Assent on 8 March 2024.

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- The Paid Parental Leave Amendment (More Support for Working Families) Bill 2023, which amends the *Paid Parental Leave Act 2010* to, among other things, increase the maximum period of flexible paid parental leave by two weeks each year from 1 July 2024 to 26 weeks from 1 July 2026. The Bill received Royal Assent on 20 March 2024.
- The Customs Tariff Amendment (Incorporation of Proposals) Bill (No. 2) 2023 which makes the following amendments to Customs law:
  - expand the scope of a tariff concession to include goods covered by the Agreement between the Government of Australia and the European Space Agency for a Co-operative Space Vehicle Tracking Program
  - extend the duration for which the temporary decrease in duties for goods imported from Ukraine into Australia until 4 July 2024
  - extend the duration for which the temporary additional duty for imported goods that are the produce or manufacture of Russia or Belarus applies until 24 October 2025, and
  - provide a 'Free' rate of customs duty to goods that are imported for use in connection with international sporting events prescribed by by-law.
- The Treasury Laws Amendment (Making Multinationals Pay Their Fair Share - Integrity and Transparency) Bill 2023 was passed with amendments to implement the following components of the Government's multinational tax and transparency measures:
  - revised thin capitalisation rules and new debt deduction creation rules to limit debt-related deductions, and
  - enhanced tax transparency by requiring public companies to publicly disclose information about their subsidiaries, including tax residency.
- The Treasury Laws Amendment (Foreign Investment) Bill 2024 which amends the *International Tax Agreements Act 1953* to clarify uncertainty associated with the interaction between certain taxes, such as foreign investment fees and similar state and territory property taxes, and double tax agreements implemented domestically.
- The Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024 which updates the fees imposed on certain foreign acquisitions.

The following Commonwealth revenue measures were registered as a legislative instrument since our last update:

- Various Fringe Benefits Tax legislative instruments, which all commence from 1 April 2024. For detailed information, refer to the Employment Taxes Update:
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Temporary Accommodation Relating to Relocation) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Fly-in Fly-out and Drive-in Drive-out Employees) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Private Use of Vehicles Other Than Cars) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Car Travel to Employment Interview or Selection Test) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Car Travel to Certain Work-Related Activities) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Relocation Transport) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Otherwise Deductible Benefits) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Overseas Employment Holiday Transport) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Travel Diaries) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Living-Away-From-Home – Maintaining an Australian Home) Determination 2024
  - Fringe Benefits Tax Assessment (Adequate Alternative Records – Remote Area Holiday Transport) Determination 2024

Federal Parliament will next resume on 14 May 2024 which is also the date of the 2024-25 Federal Budget.

Other News Update

Draft legislative instrument for lodging 2024 income tax return

The Australian Taxation Office (ATO) has published a draft Legislative Instrument LI 2024/D2 that specifies which persons are required to lodge an income tax return for the 2023-24 income year, and when a return must be lodged in the approved form.

The instrument also deals with other lodgment requirements for:

- Franking account returns
- Venture capital deficit tax returns
- Not-for-profit (NFP) self-review returns, and
- Ancillary fund returns.

Comments close 9 April 2024.

No increased taxes or levy to fund aged care

The Government released the Aged Care Taskforce's Final Report, which was established to consider funding arrangements to support a sustainable aged care system. In relation to taxation matters, the Taskforce recommended that the significant role for government funding of aged care services continue and that a specific tax or levy to fund aged care is not recommended.

The Government has confirmed that it will not impose any increased taxes or a new levy to fund aged care costs or change to the means testing treatment of the family home for aged care. It will continue to analyse the report and finalise its response to its other recommendations.

Rental bond data-matching program

The ATO will commence a rental bond data-matching program. Under the program, the ATO will acquire rental bond data from state and territory rental bond regulators bi-annually for the 2023-24 to the 2025-26 financial years. The ATO estimates that records relating to approximately 900,000 properties will be obtained each financial year.

The objectives of the program, among other matters, are to promote voluntary compliance by communicating how the ATO combines and uses external and internal data to help taxpayers comply with their tax and superannuation obligations, and to improve detection of risks and understand and assess compliance trends.

Pause for certain historic tax debts on hold

When the ATO considers a debt to be 'uneconomical to pursue' those debts are placed 'on hold'. When taxpayers who have a debt on hold are subsequently due a credit or refund, the ATO is obliged to use those amounts to reduce the debt owing. In February 2024, the ATO released a statement to confirm that it will not take any action to recover or offset debts that were placed on hold prior to 2017, and that it has paused all action in relation to such debts while it reviews and develops a pragmatic and sensible way forward that takes into account concerns raised by the community. Taxpayers who have a question about a tax debt on hold are encouraged to contact the ATO for assistance.

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DGR status for organisations under Overseas Aid Gift Deduction Schemes

The ATO has withdrawn Taxation Ruling TR 95/2 *Income tax: Overseas Aid Gift Deduction Scheme* with effect from 29 February 2024. TR 95/2 provided guidelines for organisations seeking deductible gift recipient (DGR) status under the Overseas Aid Gift Deduction Scheme. From 1 January 2024, following the government DGR reform measures, applications for DGR status under this category are administered by the ATO. TR 95/2 has since been replaced by guidance on the ATO's website.

Part IVA appeal successful

In Minerva Financial Group Pty Ltd v Commissioner of Taxation [2024] FCAFC 28, the Full Federal Court allowed the taxpayer's appeal against the primary judge's finding that the general anti-avoidance provisions (Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936)) had applied. The Court stated that the 'true gist' of the schemes to which Part IVA was found to apply at first instance was the taxpayer's failure to exercise its discretion as trustee of a unit trust to make distributions to the holder of special units in the unit trust.

In summary, the Court observed that the taxpayer as trustee of the holding trust made a distribution of distributable income in accordance with the terms of the holding trust constitution and the terms on which the units in the holding trust had been issued. The making of that distribution resulted in a trust being able to make a distribution to its unitholders which resulted in a real benefit to those unitholders. It was not disputed that a tax benefit had been obtained by the taxpayer such that if distributions had been made differently more Australian tax would have been payable. However, the Court stated that the identification of a tax benefit does not answer the question posited by section 177D of the ITAA 1936.

After examining the features of the scheme and its surrounding circumstances objectively examined through the eight factors set out in the law, the Court found that nothing in that context objectively supported a conclusion that any party to any of the schemes either entered into or carried out any of the schemes for a dominant purpose of enabling the taxpayer to obtain a tax benefit.

Another Part IVA case - debt funded share acquisition

The Federal Court decided in favour of the taxpayer in Mylan Australia Holding Pty Ltd v Commissioner of Taxation (No 2) [2024] FCA 253 which considered the application of the general anti-avoidance rules in Part IVA of the ITAA 1936 in relation to a funding arrangement for the acquisition of shares in a company which resulted in deductions for interest and tax losses over a number of years. In a lengthy judgment, the Court reviewed the evidence and considered the various counterfactuals put forward by the Commissioner in relation to the identified schemes and held that the taxpayer had discharged its onus in relation to the dominant purpose enquiry specified by section 177D of the ITAA 1936 and so had established that the assessments issued to it were excessive.

The Court did not consider that the primary counterfactual which has a number of features, with its primary distinguishing characteristic being the proposition that the acquisition of the company would have been 100% equity funded, was a sufficiently reliable prediction of what would, or might reasonably be expected to, have occurred. As such, it found that the taxpayer had discharged its onus of showing that it did not receive a tax benefit calculated by reference to the primary counterfactual.

After considering the alternative counterfactuals put forward, the Court put forward a preferred counterfactual that itself was not considered to be a Part IVA scheme. The fundamental features of this counterfactual involve an Australian holding company subsidiary being established to acquire a valuable business for cash and borrowing from external lenders to do so - the fact that the borrowing concluded would have been taken out correlates (at least in rough terms) with Australia's thin capitalisation ratio is not, of itself, a factor that would render the preferred counterfactual a Part IVA scheme.

Although her Honor found that there was likely to be a tax benefit in connection with the schemes, being the difference between the deductions for interest obtained, and the deductions for interest that would be expected to be allowed on the preferred counterfactual, in considering the objective analysis of purpose, having regard to the eight matters in section 177D(b) of the ITAA 1936, the Court found that it could not be concluded that any of the persons who entered into or caried out the schemes or any part of the schemes did so for the purpose of enabling the taxpayer to obtain a tax benefit in connection with the scheme.

Editorial

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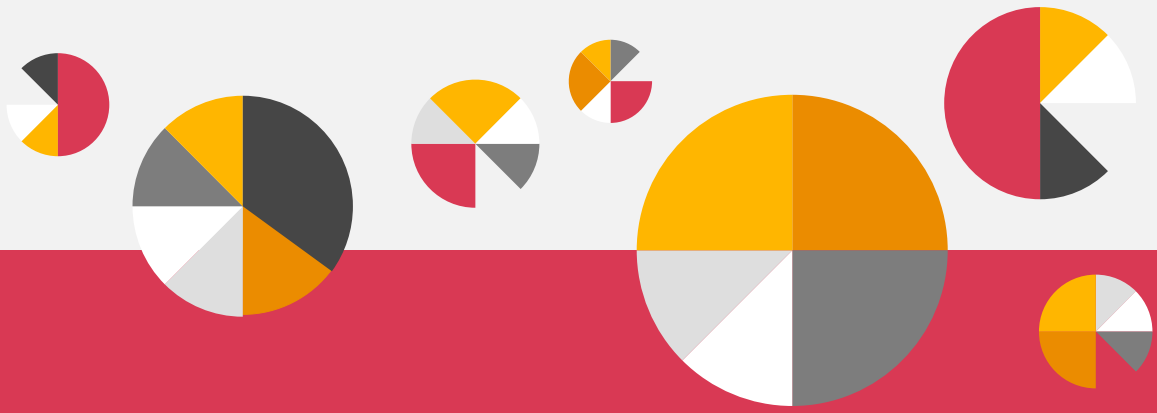

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