PwC's Monthly Tax Update

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

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Corporate Tax Update

RTP Schedule changes for 2023

The Australian Taxation Office (ATO) has released the instructions for preparing the Reportable Tax Position (RTP) Schedule for 2023. This includes a few changes to the category C questions, as well as the following new questions:

- Question 41 – Treaty shopping arrangements or to obtain reduced withholding tax rates (TA 2022/2).
- Question 42 – global intangible low-taxed income (TD 2022/9).

The RTP Schedule is to be completed by an entity lodging a company tax return for the entire year (12 months or more) and whether public or an Australian or foreign owned private company, and which has total business income of either:

- AUD 250 million or more in the current year
- AUD 25 million or more in the current year and is part of an economic group with total business income of AUD 250 million or more in the current year.

If the entity meets the criteria, it needs to lodge the Schedule even if it has no disclosures.

It is recommended that taxpayers required to complete the RTP Schedule seek early advice in relation to the completion of the Schedule.

ASIC highlights focus areas for 31 December 2022 reporting

The Australian Securities and Investment Commission (ASIC) has released its list of focus areas for reporting periods ending 31 December 2022. Asset values continue to be an area of focus, with ASIC calling out the treatment of deferred tax assets and whether it is probable that these will be realised.

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Employment Taxes Update

ATO releases updated guidance on worker classification

The Australian Taxation Office (ATO) has released updated guidance to assist organisations in determining whether Pay As You Go (PAYG) Withholding and Superannuation Guarantee (SG) obligations apply when engaging workers (eg contractors). This guidance is intended to refresh the Commissioner of Taxation's previous views on worker classification, having regard to developments arising from recent case law. It also offers practical guidance for organisations to consider, with respect to the degree of risk associated with contracting arrangements from the Commissioner's perspective. Specifically, the following draft guidance has been released:

- Draft Taxation Ruling TR 2022/D3 Income tax: pay as you go withholding – who is an employee?; and
- Draft Practical Compliance Guideline PCG 2022/D5: Classifying workers as employees or independent contractors – ATO compliance approach.

TR 2022/D3 provides the Commissioner's draft interpretation of the ordinary meaning of 'employee' for PAYG withholding purposes and also for purposes of the Superannuation Guarantee. PCG 2022/D5 outlines the Commissioner's proposed compliance approach in relation to contractor arrangements. Notably, PCG 2022/D5 will not have application to employer obligations which are not administered by the Commissioner. Furthermore, the new draft guidance does not address the Commissioner's views on the extended meaning of employee for SG purposes. This is contained in SGR 2005/1, which remains current, however the Commissioner has noted that this ruling is being reviewed; we expect that further guidance on one of the extended tests may be issued pending a decision currently before the Federal Court.

The new draft ruling (which will apply both before and after its date of issue) replaces TR 2005/16 which is withdrawn with effect from 15 December 2022.

For detailed discussion on these latest ATO guidance, refer to our Insight article.

ATO's current focus on employment taxes

The start of the 2023 calendar year presents a timely opportunity for employers to reflect on key tax areas of focus and resourcing, particularly in the context of controls and risk frameworks and governance.

PwC recently had the pleasure of hosting ATO Deputy Commissioner for Superannuation & Employer Obligations, Ms Emma Rosenzweig, for the Payroll Leaders' and Employment Taxes Forum. The Deputy Commissioner provided valuable insights into the ATO's current aims and activities, which include a focus on compliance with employer obligations such as SG, PAYG withholding and Fringe Benefits tax.

See our article for a summary of the key takeaways.

Electric car FBT exemption

The legislation to give effect to the Government's commitment to provide a Fringe Benefits Tax (FBT) exemption for certain electric cars is now in force having received Royal Assent on 12 December 2022 (see What's emerging? Electric Car FBT exemption awaiting Royal Assent).

Now that the measure is law, we have outlined some key FBT considerations for employers (and employees) in our deep dive article. Limited guidance was provided by the ATO on the exemption, and we expect further ATO guidance to be released in relation to the FBT and broader taxation implications and considerations associated with the use of Electric Vehicles.

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Employment agency contracts and intra-group contracting arrangements

The NSW Court of Appeal has found in Chief Commissioner of State Revenue v E Group Security Pty Ltd (No 2) [2022] NSWCA 259 that a security services provider (the taxpayer) was liable to payroll tax on the basis that arrangements between itself and three related companies were considered to constitute "employment agency contracts" under section 37 of the *Payroll Tax Act 2007* (NSW), overturning the previous decision in *E Group Security Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 1190* with respect to these arrangements. This decision followed on from the earlier unsuccessful appeal by the Chief Commissioner in *Chief Commissioner of State Revenue v E Group Security Pty Ltd [2022] NSWCA 115* which addressed a number of other grounds.

In reaching its latest decision, the Court of Appeal primarily focused on the question of whether contracts between various E Group Security entities were employment agency contracts, rather than whether contracts between E Group Security and its clients were employment agency contracts. The grounds for the appeal related to the primary judge's earlier rejection of the Commissioner's alternative claim that, if the taxpayer was not an employment agent in respect of the provision of security services by sub-contractors for clients, the arrangements between the taxpayer and the Grouped Entities themselves were such that each Grouped Entity was an employment agency and the taxpayer was the client. Consequently, the taxpayer would be jointly and severally liable for the unpaid payroll tax of the Grouped Entities if these arrangements were found to constitute employment agency contracts.

The Court of Appeal held that there was sufficient documentary evidence to indicate that the Grouped Entities did more than simply perform a payroll function and had in fact 'procured' security guards to perform services in and for the conduct of the taxpayer's business. Accordingly, the arrangements were found to be subject to payroll tax under the employment agency contract provisions. The court found that a fundamental difficulty with the taxpayer's position was that it relied heavily on the subjective views of its managing director as to the intended operation of the Grouped Entities, which at times contradicted the documentary evidence. Although the court found no specific reason to doubt the verbal evidence of the director, the case was ultimately determined primarily by reference to the documentation.

Following the decision in the Chief Commissioner's favour, the taxpayer has applied to the High Court for special leave to appeal against the decision of the NSW Court of Appeal.

Payroll tax: New QLD Public Ruling on "Relevant Contract" and medical centres

The Queensland (QLD) Treasury has issued Public Ruling PTAQ000.6.1 which deals with payroll tax and the application of the relevant contract provisions to an entity that conducts a medical centre business.

The Ruling explains how the relevant contract provisions in the *Payroll Tax Act 1971* (QLD) apply to a contract between a medical centre and a practitioner who is engaged to serve patients for or on behalf of the medical centre. Where a contract is a relevant contract, the principal is deemed to be an employer and the contractor is deemed to be an employee. Payments made under a relevant contract for the performance of work are deemed to be wages unless an exemption applies.

The ruling provides guidance on:

- when a contract is a relevant contract
- engaging a practitioner from a practitioner's entity
- exemptions from the relevant contract provisions under section 13B(2) of the *Payroll Tax Act 1971*, and
- deemed employers, employees and wages under the relevant contract provisions.

The ruling also discusses the tribunal decisions of *The Optical Superstore Pty Ltd v Commissioner of State Revenue [2018] VCAT 169* and *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue [2021] NSWCATAD 259*, in which terms and conditions of contracts were held to be relevant contracts under provisions equivalent to that applicable for QLD payroll tax purposes.

The ruling takes effect from 22 December 2022.

STP – support payments made to apprentices

A legislative instrument (Taxation Administration – Single Touch Payroll – Amounts to be Notified Amendment (Australian Apprenticeships Incentives) Determination 2022) has been released to bring support payments made by the Commonwealth to Australian apprentices within the STP reporting regime. Specifically, the Commissioner requires STP to be used for the reporting of support payments made to an "Australian Apprentice" by the Department of Employment and Workplace Relations (DEWR).

An "Australian apprentice" refers to a person employed as an apprentice or trainee under a training contract approved by the government body responsible for the operation of the vocational education and training system within a state or territory. This latest determination amends an existing determination (F2021L00094) that sets out information which the approved form may require to be reported through STP for the purposes of section 389-5(2)(b) of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

DEWR is required to report support payments to the ATO but is not currently required to do so through STP. The amendment ensures that DEWR-administered payments relating to an Australian Apprenticeship can be reported through STP, consistent with payments reported by employers with respect to the same apprenticeship. Employers of Australian apprentices are not affected by the amendments as they already report salary and wages using STP.

The instrument applies retrospectively from 1 July 2022.

Global Tax and Trade Update

Exposure draft: tax treaty between Australia and Iceland

Treasury has released exposure draft legislation that proposes to implement the new double tax treaty signed between the Governments of Australia and Iceland. The treaty is designed to alleviate double taxation by lowering applicable withholding tax rates on cross border interest, dividend and royalty payments and includes OECD base erosion and profit shifting (BEPS) recommendations to target international tax avoidance.

Comments were due to be made on the proposed law by 23 December 2022. We expect that the final law will be introduced into the Australian Parliament in the coming months. The Australia-Iceland tax treaty will not however enter into force until both countries have completed their domestic requirements to bring the new tax treaty into force.

Foreign corporations and tax residency – transitional approach extended

The Australian Taxation Office (ATO) has updated its Practical Compliance Guideline PCG 2018/9 which contains guidance to assist foreign incorporated companies apply the principles set out in Taxation Ruling TR 2018/5 regarding the 'central management and control' test of corporate residency for Australian income tax purposes.

The updated PCG 2018/9 extends the transitional approach beyond 31 December 2022 to 30 June 2023, whereby the Commissioner of Taxation will not apply resources to review or seek to disturb a foreign company's status as a non-resident, where the company is taking steps to change their governance arrangements. The updated PCG clearly states that this transitional approach will not be extended again. Accordingly, all affected foreign incorporated companies should revisit their governance, systems and processes and be aware of the consequences if the company is taken to be an Australian tax resident once the transitional period ends.

Synthesised texts of Australia's tax treaties

The ATO has released the synthesised text of the following tax treaties with Australia that are modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI):

- Synthesised Text of the MLI and the Convention Between Australia and New Zealand (minor update)
- Synthesised Text of the MLI and the Convention Between Australia and France
- Synthesised Text of the MLI and the Agreement Between Australia and Ireland
- Synthesised Text of the MLI and the Agreement Between Australia and Malta, and
- Synthesised Text of the MLI and the Agreement Between Australia and Singapore.

Taxation of service fees paid to Indian firms

Following the entry into force of the Australia-India Economic Cooperation and Trade Agreement on 29 December 2022, amendments made to taxation law (enacted by Treasury Laws Amendment (Australia-India Economic Cooperation and Trade Agreement Implementation) Act 2022) ensure that there is no Australian taxation on certain payments or credits made to Indian firms in respect of the provision of certain technical services provided remotely (and not through a permanent establishment) to Australian customers take effect. The measures broadly apply to those technical services covered by Article 12(3)(g) of the Australia-India double tax agreement, ie payments for services (including those of technical or other personnel) which make available technical knowledge, experience, skill, know-how or processes or consists of the development and transfer of a technical plan or design.

The measures apply to assessments for years of income starting on or after 29 December 2022.

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Update on Pillar One

The Organisation for Economic Cooperation and Development's (OECD) has released a public consultation document on the design features of Amount B under Pillar One of the "Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy".

Amount B is used in the application of the arm's length principle to in-country baseline marketing and distribution activities, to provide a simplified and streamlined approach which is aimed to enhance tax certainty and reduce resource-intensive disputes between taxpayers and the administrators. The Consultation Document outlines the progress made in defining what in-country baseline marketing and distribution arrangements are, how they may be identified, and how in-scope arrangements may be priced in accordance with the arm's length principle, as well as areas where further work is being undertaken. Read more in our Tax Policy Alert.

Comments to the consultation document closed on 25 January 2023.

Draft multilateral convention dealing with digital services tax and other measures under Pillar One

The OECD has released a public consultation document on the Draft Multilateral Convention (MLC) Provisions on Digital Services Taxes (DSTs) and other Relevant Similar Measures. The draft MLC provisions reflect the commitments with respect to the removal of all existing DSTs and other relevant similar measures as an integral part of Pillar One. The consultation document includes two articles:

- DSTs that will be withdrawn under Pillar One, and
- the three characteristics of a DST-like tax which should be withdrawn.

Comments were due to be made by 20 January 2023.

Read more in our Tax Policy Alert.

Update on Pillar Two

With practical application of the Pillar Two rules imminent, the OECD Inclusive Framework has released for consultation the following documents relevant to the implementation of the Global Anti-Base Erosion (GloBE) Rules to facilitate a global minimum corporate tax. The implementation package includes the following:

- Guidance on safe harbours and penalty relief including a transitional Country-by-Country Reporting (CbCR) Safe Harbour, which effectively excludes from the scope of GloBE operations in lower-risk jurisdictions in the initial years; a permanent Simplified Calculations Safe Harbour, which would allow either a reduced number of computations and adjustments required under the GloBE rules or alternative simplified income, revenue, and tax calculations; and a transitional Penalty Relief Regime, which recognises that no penalties or sanctions should apply during a transitional period in connection with filing GloBE Information Returns where reasonable measures to ensure the correct application of the GloBE rules were taken. Refer to PwC Tax Policy Alert for further insights.
- the GloBE Information Return (GIR) which proposes the amount and type of information that affected multinational groups should be expected to collect, retain and/or report for the application of the GloBE Rules and possible simplifications and alternative data points. The GIR requires disclosure of the entire corporate legal entity structure of the group (in addition to ownership changes) and extremely detailed information on a constituent entity basis for purposes of determining GloBE income or loss and adjusted covered taxes resulting in an enormously complex tax return. Refer PwC Tax Policy Alert for a summary of the proposal.
- Tax Certainty for the GloBE Rules which outlines various mechanisms, including dispute prevention and dispute resolution, for achieving tax certainty under the GloBE Rules. Refer to PwC Tax Policy Alert for further information.

Comments on the documents are invited until 3 February 2023. It is expected that the administrative guidance will be available in early 2023.

EU Member States give final approval to proposed Pillar Two Directive

On 15 December 2022, the European Union (EU) Council formally adopted the EU minimum tax Directive relating to the Pillar Two rules. The Directive will enter into force on the day following its publication in the Official Journal of the European Union. Member States will transpose the Directive into their domestic law by 31 December 2023. Read more in our Tax Insight.

Japan's 2023 tax reform proposals include an outline for Pillar Two

The Japanese Government has recently released its 2023 tax reform proposal which includes details of the implementation of the global minimum corporate tax (Income Inclusion Rule (IIR)) which was outlined in the Pillar Two rules published by the OECD. The IIR rules are proposed to apply from fiscal years beginning on or after 1 April 2024. Further details are outlined in our Tax Insight.

South Korea first to enact Pillar Two global minimum tax rules in its domestic legislation

South Korea's government approved on 23 December 2022 rules which include a global minimum tax (the GloBE Rules) for IIR and Supplementary Rules for Income Inclusion. These rules will apply to fiscal years commencing on or after 1 January 2024. Additional details in respect of these rules are outlined in our Tax Insight.

Indirect Tax Update

New residential unit was not an input taxed supply

The Administrative Appeals Tribunal (AAT) affirmed the Commissioner of Taxation's objection decision in the matter of Domestic Property Developments Pty Ltd a/t for Dals Property Trust v FC of T [2022] AATA 4436 that goods and services tax (GST) was correctly payable on the sale of two newly-constructed units. The taxpayer was a property developer that had constructed a development comprising home units, two of which subject to this matter were rented to tenants for around five years before being sold. The taxpayer paid GST calculated under the margin scheme in relation to the sales of both units.

The issue under consideration was whether the sales of the units were input taxed supplies and, if so, whether excess GST was passed on to the purchasers of the respective units.

While it was common ground that one of the units was an input taxed supply, the taxpayer was not able to prove in relation to the other unit that for the period of at least five years since the issue of the certificate of occupancy (on or about 28 October 2011), the unit was only used for making rental supplies (refer to sections 40-35 and 40-75(2)(a) and of *A New Tax System (Goods and Services Tax) Act 1999 (Cth) (GST Act)*). In particular, the Tribunal was not satisfied that premises that were marketed for sale during the five-year period can be said to have only been used for making rental supplies. The taxpayer had offered the relevant property for sale at auction on 5 November 2011 but following its failure to sell, changed the intention to sell the units, determining they would be offered for lease "for the foreseeable future". The property then was leased to a single tenant from on or around 24 February 2012 until 23 July 2016, was later advertised for lease from on or around 1 August 2016 to at least 5 September 2016, after which time, around 15 October 2016, the taxpayer had engaged a real estate agent to market the unit for sale. In the context of carrying on an enterprise for the purposes of section 40-75(2)(a) of the *GST Act*, the AAT was persuaded that the unit ceased to be used only for making rental supplies when it was first marketed for sale.

In relation to whether the taxpayer was entitled to a refund on the basis that the GST was passed on to the purchasers, the AAT found that the taxpayer failed to prove that the excess GST was not recovered in the selling price of either unit. The applicant had sold the units at prices ensuring they exceeded their costs, including substantial amounts erroneously understood to be payable as GST. Although the contract required the taxpayer to meet any GST payable without any adjustment to the price, the Tribunal indicated that this did not mean the taxpayer necessarily bore the economic burden of the excess GST.

Single or multiple supply and calculating the margin

The Full Federal Court has dismissed the Commissioner's appeal in FC of T v Landcom [2022] FCAFC 204 which concerned the application of the margin scheme to the sale of four freehold land interests under a single contract. The key issue in the appeal was whether, in calculating the margin for the purposes of the margin scheme in Division 75 of the *GST Act*, the sale constituted a single supply or multiple supplies. If the sale was a single supply, any improvements as at 1 July 2000 on any one of the lots would result in the non-application of item 4 of the table in section 75-10(3) of the *GST Act* with the GST being payable on the entire increase in value of the freehold interest in all four lots since 1 July 2000.

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The Court rejected the Commissioner's contention that the reference to "a freehold interest" in section 75-10 encompasses the plural as well as the singular. Having regard to the structure and language of Division 75 and the language of section 75-10 with its focus on "the interest, unit or lease in question", the Court did not consider that the singular "interest" in section 75-10 includes a reference to the plural and agreed with the primary judge's conclusion that the reference to "the interest" in each of the items in the table is a reference to the particular freehold interest referred to in section 75-5(1)(a). The Court also noted that the interpretation adopted by the primary judge avoids uncertainty, regardless of whether a particular freehold interest is sold separately or in conjunction with other interests.

No input tax credits under retail credit arrangement

In SVYR v FC of T [2022] AATA 3994, the AAT has found that a retailer of mobile telephone and tablet accessories was not entitled to input tax credits or decreasing adjustments arising from a credit arrangement provided by the telecommunications supplier (Telco) to the retailer's customers. The applicant accepts it is liable for GST on the price of the accessories sold to its customers even though it receives less than that amount due to the credit (shortfall).

The Tribunal was not satisfied that there was a taxable supply made by Telco for which the shortfall is consideration and the taxpayer has not established that it is entitled to input tax credits in respect of the shortfall amounts.

The Tribunal favoured the view that the shortfall is consideration for a financial supply of credit, ie commercial reality suggests the shortfall is simply the price the taxpayer pays for Telco extending credit to the customer. The taxpayer has not discharged the burden of proving the shortfall is not consideration for a financial supply.

The arrangements for the Telco's provision of credit to the customer did not involve any event that changes the consideration for the taxpayer's supply of accessories to the customer. The consideration is the price as agreed with the customer and the customer agrees to pay the full amount of the price by instalments to Telco.

Draft GST determinations on the waiver of requirement to provide tax invoice

The Australian Taxation Office (ATO) issued a range of draft GST legislative determinations (LI 2022/D16 to LI 2022/D25) in relation to the waiver of the requirement to provide tax invoices for certain supplies. Comments were due to be made by 16 December 2022. Once finalised, these instruments will have effect on the day after this instrument is registered.

ATO compliance approach for GST and tertiary residential colleges

The ATO has issued Practical Compliance Guideline PCG 2022/3 which sets out the Commissioner of Taxation's compliance approach for universities and residential colleges supplying accommodation, meals, tertiary residential college courses and religious services to resident students and claiming input tax credits. The guideline is intended to assist residential colleges in determining if supplies of accommodation, meals, tertiary residential college courses and religious services can be treated as GST-free supplies.

PCG 2022/3 applies to GST periods starting on and from 1 January 2023.

Personal Tax Update

Deductions allowed for fees paid in settlement court proceedings

In the case of XPTC and Commissioner of Taxation (Taxation) [2022] AATA 4147, the Administrative Appeals Tribunal (AAT) found that the taxpayer was allowed a deduction for $200,000 paid in settlement of court proceedings on the basis it was incurred in gaining or producing assessable income. The Tribunal however denied the deduction that was claimed for the legal costs associated with the litigation as it was found to be for multiple purposes.

The taxpayer was a director, shareholder and key employee and provided consultancy services to another entity that was in the business of providing consultancy services. The circumstances which gave rise to the settlement payment arose out of activities undertaken by the taxpayer, as an employee of the consulting entity, which involved him negotiating leasing finance deals for a client of the consulting entity. In performing that work the taxpayer gained or produced assessable income, being the director's fees paid to him by the consulting entity. The client sought to recover losses it said it had suffered as a result of the 'unauthorised transactions' from the taxpayer. The parties entered into a Settlement Deed where the taxpayer paid the client as consideration for the client not proceeding with its various claims.

The Tribunal found that the essential character in a practical business sense of the settlement payment was that it was a payment that arose from the taxpayer's performance of his work with the consulting entity which was in the course of his gaining or producing assessable income by way of the remuneration paid to him. Furthermore, it found that the settlement payment did not have the feature of being capital in nature as it was not made to produce some longer-term enduring benefit and it did not involve the acquisition of any tangible asset, but rather arose out of the very activities the taxpayer performed in gaining assessable income.

In relation to the legal fees, the Tribunal was not satisfied on an evidentiary basis what expenses were incurred as a result of the taxpayer's defence of the proceedings concerning the unauthorised transactions and other matters relating to the consulting entity and its liquidation, and to the taxpayer's threatened action in defamation. The latter matters were not things that can be characterised as activities that involved gaining or producing assessable income.

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State Taxes Update

NSW Shared Equity Home Buyer Helper program

The Duties Amendment (Excluded Transactions) Regulation 2022 (NSW) has been made to ensure that there is no duty imposed under the New South Wales (NSW) Government's Shared Equity Home Buyer Helper program where the NSW Government will contribute a proportion of the purchase price of a residential property in exchange for an equivalent interest in the property. Specifically, the Regulations prescribe that a transaction that results in an increase in a person's interest in dutiable property under an agreement entered into between the person and the Government under a shared equity scheme is an excluded transaction for the purposes of the *Duties Act 1997* (NSW). The Shared Equity Home Buyer Helper commenced on 23 January 2023.

NSW duties and updated ruling on declarations of trust

Revenue NSW has updated its ruling on declarations of trust in agreements for sale – DUT 031v2. The ruling has been updated to reflect new section 8AA of the *Duties Act 1997* (NSW) that was introduced to impose duty on an acknowledgement of trust on the making of a statement that purports to be a declaration of trust over dutiable property, but merely has the effect of acknowledging that identified property vested, or to be vested, in the person making the statement is already held, or to be held, in trust for a person or purpose mentioned in the statement.

DUT 031v2 is effective from 19 May 2022.

QLD updated rulings dealing with additional foreign acquirer duty

The Queensland (QLD) Treasury has released the following updated rulings to deal with the additional foreign acquirer duty (AFAD) and the relevant exemption applicable to eligible retirement visa holders:

- Public Ruling DA232.1.2 AFAD residential land
- Public Ruling DA232.2.2 Inclusion of chattels in AFAD residential land
- Public Ruling DA000.14.3 Foreign corporations and foreign trusts – interests of foreign persons and related persons
- Public Ruling DA000.15.3 Additional foreign acquirer duty – ex gratia relief for significant development.

The QLD AFAD applies to direct or indirect transactions in land that are liable to QLD transfer duty, landholder duty and corporate trustee duty where the land is 'AFAD residential land' and the acquirer under the transaction is a foreign person. The exemption applies for specified foreign retirees in certain circumstances.

The rulings take effect from 1 January 2023.

NSW land tax rulings for low cost accommodation exemptions

Revenue NSW has issued the following rulings outlining the guidelines for certain NSW land tax exemptions for the 2023 land tax year:

- LT 113 which sets out the approved guidelines and explains the conditions that entitle an owner to claim the exemption or reduction in taxable land value for land that is primarily used to provide boarding house accommodation.
- LT 114 which outlines the approved guidelines and explains the conditions that entitle an owner to claim the exemption or reduction in taxable land value for land that is situated within a five kilometre radius of 1 Martin Place, Sydney and is used to provide certain low-cost rental accommodation.

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Victorian land tax rulings and primary production

The State Revenue Office of Victoria has issued the following rulings dealing with the Victorian land tax primary production exemption:

- LTA-010 – Exemption for primary production land, which provides the Commissioner of State Revenue's interpretation of key terms and elements relating to the primary production exemption in the context of sections 64, 65 and 66 of the *Land Tax Act 2005* (Vic).
- LTA-011 – Primary production exemption for land in urban zone, which sets out the requirements for the primary production land exemption under section 67 of the *Land Tax Act 2005* (Vic).

The rulings apply from the 2023 land tax year.

Superannuation Update

Consultation on non-arm's length expense rules for superannuation funds

The government has released a consultation paper considering options to amend the non-arm's length income (NALI) provisions which apply to superannuation funds. Treasury has developed potential policy changes to the NALI provisions, where they relate to general expenses which have a sufficient nexus to all ordinary and statutory income derived by the fund.These potential changes are intended to ensure the rules continue to operate in line with their original policy intent and provide certainty ahead of the expiry of the transitional compliance approach (PCG 2020/5) on 30 June 2023.

The potential amendments outlined in the paper are as follows:

- Self-managed superannuation funds (SMSFs) and small APRA-regulated funds would be subject to a factor-based approach which would set an upper limit on the amount of fund income taxable as NALI due to a general expenses breach.
- Large APRA-regulated funds would be exempted from the NALI provisions for general expenses.

Comments can be made by 23 February 2023.

Consultation on access to superannuation for victims of child sex abuse

Treasury has released for consultation a discussion paper which outlines two draft proposals which allow victims and survivors of child sexual abuse to access the superannuation of their offender relating to unpaid compensation orders for both criminal and civil proceedings.

Currently, victims and survivors of crime cannot access compensation from the offender's superannuation assets due to the application of the rules in the *Superannuation Industry (Supervision) Regulations 1994* (Cth).

The first proposal aims to prevent convicted abusers from using superannuation to shield assets by enabling court-ordered early release of super to be facilitated by the Australian Taxation Office (ATO).

The second proposal seeks to provide transparency and reduce the costs and complexity of pursuing compensation by providing visibility of superannuation account balances by allowing the victim to submit a superannuation information request to the appropriate court which could then request that the ATO discloses specific information regarding the offender's or their spouse's superannuation accounts.

Submissions to this consultation close on 16 February 2023.

ATO concern over SMSF schemes involving asset protection

The Australian Taxation Office (ATO) has indicated that it has concerns about asset protection arrangements that claim to protect SMSF assets from creditors by mortgaging them to an asset protection trust, commonly referred to as a 'Vestey Trust'. Such arrangements may contravene one or more superannuation laws and if so, penalties will apply.

Superannuation changes?

We understand that the Government plans to progress a review of the objective of superannuation with consultation to start shortly with a view to passing legislation in the first half of the year. Once legislated, future changes to superannuation policy (such as changing thresholds for contributions and balances and changing the first home saver scheme) will need to be consistent with its official objective. Note that the previous Government had attempted to legislate an objective of superannuation.

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Legislative Update

Since our last update, the following tax and superannuation related Bills were introduced into Federal Parliament:

- Safeguard Mechanism (Crediting) Amendment Bill 2022, which was introduced into the House of Representatives on 30 November 2022, is part of the whole of economy plan to reduce emissions in line with Australia's climate targets, and among other things, establishes the framework for creating Safeguard Mechanism Credits (SMCs), covering how credits are issued, purchased, and included in Australia's National Registry of Emissions Units and to ensure SMCs are subject to the existing tax rules covering registered emissions units.
- Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022, which was introduced into the House of Representatives on 30 November 2022, contains amendments to ensure that legislation enabling the Inspector-General of Intelligence and Security (IGIS) will support information sharing, and also to deal with protected taxation information.

The following measures have been registered since our last update:

- Customs (India-Australia Economic Cooperation and Trade Agreement Implementation) Notice 2022 which declares that the India-Australia Economic Cooperation and Trade Agreement entered into force on 29 December 2022.
- Income Tax Assessment (1936 Act) Amendment (Period of Review) Regulations 2022 exclude certain small or medium business entities (ie businesses with an aggregated turnover of up to AUD 50 million) from being subject to the shortened two-year period of review for income tax assessments, ie the four-year amendment period will still apply to these taxpayers. Specifically, the four-year amendment period has been extended so that it will apply to assessments that are made after 9 December 2022 and relate to income years that commence on or after 1 July 2021 of a small or medium business entity that, in broad terms:
  - has a transaction that involves associates in a non-arm's length dealing that has the effect of recording at least AUD 200,000 in either assessable income, allowable deductions or from the total capital proceeds from one or more capital gains tax (CGT) events
  - together with its affiliates or connected entities, derives more than AUD 200,000 of its assessable income from non-Australian sources
  - is a foreign controlled Australian entity or a non-resident entity
  - engages in schemes captured by either the Diverted Profits Tax (DPT) or Multinational Anti-Avoidance Law (MAAL)
  - has at least ten other entities that are connected with or are affiliated with the entity
  - has claimed the research and development (R&D) tax offset or certain related deductions, recoupments and adjustments
  - has claimed CGT restructure rollover relief under Division 615, demerger relief or is a party to a Subdivision 126-B rollover relating to CGT asset transfers between wholly-owned companies, or
  - is a foreign resident applying the Division 855 CGT exemption.

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- Taxation Administration: Classes of Electronic Payment System Transactions Exempt from Being Reported in Third Party Reports Determination 2022 exempts, from 1 July 2022, all administrators of a payment system (not just authorised deposit-taking institutions) from third party reporting obligations in respect of specified classes of transactions involving an electronic payment where the transaction was initiated by another entity that is required to report those transactions to the Commissioner of Taxation, made to or processed by certain specified entities, or made as a loan repayment, chattel mortgage repayment, hire purchase payment or finance lease payment.
- Taxation Administration – Single Touch Payroll – Amounts to be Notified Amendment (Australian Apprenticeships Incentives) Determination 2022, applicable from 1 July 2022, provides the Commissioner of Taxation with the power to require Single Touch Payroll (STP) to be used for the reporting of support payments made to an "Australian Apprentice" by the Department of Employment and Workplace Relations.
- Income Tax Assessment (Developing Country Relief Funds) Amendment (Update No 1) Declaration 2022 declares the following as developing country relief funds for which an income tax deduction is allowed for gifts of AUD 2 or more: A Liquid Future Ltd Gift Fund, The ICDP Foundation Fund, and Mphatso Children's Foundation Gift Fund.
- Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2022 which makes minor and technical corrections to taxation and superannuation laws, among others.

Federal Parliament resumes sittings for the 2023 calendar year on 6 February 2023.

Other News

ATO finalises guidance on trust reimbursement agreements

The Australian Taxation Office (ATO) has finalised Taxation Ruling TR 2022/4 which deals with trust "reimbursement agreements" (section 100A of the *Income Tax Assessment Act 1936 (Cth) (ITAA 1936)*) and also finalised its risk assessment framework and compliance approach to such arrangements in Practical Compliance Guideline PCG 2022/2.

Section 100A of the *ITAA 1936* is an integrity provision which is designed to stop arrangements made to one beneficiary (typically with a low tax rate) of the trust but the economic benefit is effectively transferred to a second beneficiary (who is typically subject to a higher tax rate).

With a continued focus on high wealth private groups by the ATO, it is expected that potential historical exposure to section 100A will be on the ATO's agenda. Given there is no time limit for the Commissioner of Taxation to amend assessments to affect an adjustment under section 100A, it is recommended that all private groups which operate with a discretionary trust review their past transactions and arrangements in line with the framework set out in PCG 2022/2, if they have not already done so.

For more information, refer to our Insight.

ATO guidance on tax governance for Top 500 private groups

The ATO has released guidance on effective tax governance criteria for Top 500 privately owned wealthy groups. This guidance is intended to assist Top 500 groups with implementing effective tax governance frameworks, processes and procedures and to support private groups in achieving a high assurance rating, which is a critical element in the group's ability to achieve justified trust. The guidance includes:

- tax governance frameworks, processes and procedures that the ATO believe are necessary when a Top 500 group is implementing an effective tax governance framework (ie 'required items')
- a menu of ten additional tax governance items for a Top 500 group's consideration (ie 'additional items'), three of which the group will also need to implement to achieve a high assurance rating for tax governance, and
- practical, downloadable examples.

ATO administrative solution to AUD LIBOR for foreign banks

The ATO has released details of a new administrative solution which will apply from 1 January 2023 until a legislative solution is put in place, when applying section 160ZZZA of the *ITAA 1936* for Australian dollar (AUD) notional intra-bank loans.

By way of background, section 160ZZA enables an Australian branch of a foreign bank or foreign financial entity to claim a deduction on the notional interest payment arising from an intra-bank loan. The amount of the deduction is limited to the interest amount calculated by reference to the London Interbank Offered Rate (LIBOR). Since AUD LIBOR is no longer quoted as of 31 May 2013, a proxy rate is to be used and accepted by the ATO in good faith in accordance with the agreed administrative solution.

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Review of Payment Times Reporting regime

The Government has announced an independent review of the *Payment Times Reporting Act 2020* (Cth) and released the terms of reference for the review. The review must consider the:

- efficacy of the Act in meeting its objectives (to enable small businesses to make informed decisions about potential customers and create an incentive for reporting entities to improve their payment times).
- impact of related government policies (for example, eInvoicing) on the payment terms and practices of reporting entities.
- effectiveness of other policy measures (including mandatory payment times) to improve payment terms and practices for small businesses.

The review will include a public consultation process that will provide all interested parties with opportunities to contribute to the review, with a written report due to be provided to the Government by 30 June 2023.

Payment summaries and passbook holders

The ATO has issued a draft legislative instrument (Taxation Administration (Exemption from Providing Payment Summaries to Passbook Account Holders) Legislative Instrument 2023) which proposes to exempt passbook account providers from the requirement to provide a payment summary to a holder of a passbook savings account for certain payments that are made to that account and subject invoicing to withholding on interest.

New reporting requirements for operators of electronic distribution platforms

The ATO has issued a draft legislative instrument (Taxation Administration (Reporting by Electronic Distribution Platform Operators) Legislative Instrument 2022) which, once finalised, will apply to operators of electronic distribution platforms that are subject to the new third party reporting regime (recently enacted by Treasury Laws Amendment (2022 Measures No. 2) Act 2022). For further information about the new reporting regime, refer to our previous Tax Alert.

Under the proposed legislative instrument, affected entities will be required to report information about certain transactions made through their platforms to the ATO on an alternative six-monthly reporting period which will apply from 1 January to 30 June and from 1 July to 31 December, in place of the default annual reporting.

The new regime and the legislative instrument once effective, will apply to transactions entered into on or after:

- 1 July 2023, for transactions that relate to a supply of taxi travel
- 1 July 2023, for transactions that relate to a supply of short-term accommodation, and
- 1 July 2024, for all other transactions (such as asset sharing, food delivery, tasking-based services).

This instrument does not change the lodgment deadlines for the report, ie the report must be given to the Commissioner of Taxation on or before the 31st day after the end of each reporting period.

Comments are due to be made on the proposed instrument by 3 February 2023.

Draft law on Future Fund subsidiaries

Treasury has released exposure draft law which will operate to exempt wholly-owned Australian incorporated subsidiaries of the Future Fund Board of Guardians (Future Fund Board) from corporate income tax. This measure was originally announced in the 2022-23 March Budget. Comments were due to be made by 22 December 2022.

Draft law on DGR Register reform

Treasury has released exposure draft law which proposes to transfer the administration of four deductible gift recipient (DGR) categories from portfolio agencies to the ATO. This would enable the ATO to be responsible for all 52 DGR categories (currently responsible for 48). Comments are invited up to 19 February 2023.

AAT to be abolished

The Government has announced that it will abolish the Administrative Appeals Tribunal and replace it with an administrative review body. A central feature of the new body will be a transparent and merit-based selection process for the appointment of non-judicial members. All cases currently before the AAT will continue and are expected to be decided or finalised before the new federal administrative review body is established. Any remaining cases will transition to the new review body.

Editorial

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