PwC's Monthly Tax Update

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

February 2024

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Corporate Tax Update

ATO seeks input on capital raising and franking measure

Following the recent enactment of the new integrity rule (section 207–159 of the *Income Tax Assessment Act 1997 (ITAA 1997)*) which prevents certain distributions connected with capital raisings from being frankable, the Australian Taxation Office (ATO) has released a consultation paper on capital raised for the purpose of funding franked distributions. The consultation paper seeks feedback on priority issues where ATO public advice and guidance is needed to help entities understand whether the new law addressing franked distributions funded by capital raising applies to their circumstances. Comments close 16 February 2024.

ASIC highlights focus areas for 31 December 2023 reporting

The Australian Securities & Investments Commission (ASIC) has released its focus areas for reporting periods ending 31 December 2023. Asset values continue to be an area of focus, with ASIC noting the need to consider whether it is probable that deferred tax assets will be realised. Other focus areas concern provisions, subsequent events, disclosures, the new insurance accounting standard, and other matters, including consideration of whether off-balance sheet exposures should be recognised on-balance sheet, such as interests in non-consolidated entities.

R&D claims for footwear design denied

In Active Sports Management Pty Ltd and Industry Innovation and Science Australia [2023] AATA 4078, the Administrative Appeals Tribunal (AAT) affirmed the decision under review, finding that the activities undertaken by the taxpayer were not eligible research and development (R&D) activities under the *Industry Research and Development Act 1986* and *ITAA 1997*.

The taxpayer's claimed R&D activities related to the development of a customised basketball shoe to suit the personal requirements and playing style of an Australian professional basketball player.

The AAT found that the process of designing of the shoe was more akin to knowledge discovery and a problem-solving process, rather than an experimental activity based on established scientific principles, and accordingly none of the claimed activities were core or supporting R&D activities within the meaning of the *ITAA 1997*.

R&D Taxpayer Alerts

The ATO has issued two taxpayer alerts concerning R&D tax offset claims.

Taxpayer Alert TA 2023/4 *Research and development activities delivered by associated entities* indicates that the ATO is reviewing claims made by R&D entities for expenditure incurred under an agreement with an associate who itself conducts the R&D activities (the Service Provider). The ATO is concerned with arrangements that:

- incorrectly purport the R&D entity as having incurred and/or paid the relevant expenditure under an agreement with the Service Provider, or
- have the effect of obtaining for the R&D entity a tax offset for expenditure on R&D activities purportedly conducted for the R&D entity's own benefit but are instead in substance being conducted for (or to a significant extent, for) the Service Provider.

The ATO outlines several instances in which it considers entitlement to the tax incentive may be affected in whole or part, noting that, even if an arrangement is effective under the substantive provisions, the general anti-avoidance provisions within Part IVA of the *Income Tax Assessment Act 1936* (*ITAA 1936*) may still apply to cancel the tax offset.

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Separately, Taxpayer Alert TA 2023/5 *Research and development activities conducted overseas for foreign related entities* indicates that the ATO is reviewing arrangements where Australian-resident R&D entities claim a tax offset for expenditure incurred on R&D activities conducted overseas. The ATO highlights instances where an R&D entity has purported that the R&D activities were conducted for the R&D entity's own benefit, but those activities were instead being conducted for (or to a significant extent, for) a foreign entity that is connected with, or an affiliate of the R&D entity (foreign related entity).

In respect of the arrangements covered in the Taxpayer Alert, the ATO is concerned that R&D entities do not qualify for an R&D tax offset under Division 355 of the *ITAA 1997* for expenditure incurred by them on R&D activities conducted overseas as the R&D activities were not conducted for the R&D entity, or were conducted to a significant extent for the foreign related entity. In the alternative, in certain instances the expenditure incurred may not be 'at risk' for the purposes of the risk integrity rule in the R&D provisions or may fall within the scope of the general anti-avoidance provisions within Part IVA of the *ITAA 1936*.

For further details, refer to our Tax Alert.

PRRT and tolling arrangements – draft regulations

Under the Petroleum Resource Rent Tax (PRRT) law, assessable petroleum receipts arising from certain instances of sales gas becoming an excluded commodity in relation to a petroleum project are to be worked out according to the regulations. The Government announced as part of the 2023–24 Federal Budget that the PRRT regulations will be updated to reform the methodology used to calculate the price of sales gas that is processed into liquefied natural gas (LNG), including the advanced pricing arrangement (APA) rules and comparable uncontrolled price (CUP) rules.

The Treasury has released for comment draft regulations that deal only with the reforms covering tolling arrangements. Comments are due by 9 February 2024. The remaining components of the proposed new PRRT regulations are yet to be released for consultation.

Meaning of exploration and PRRT and anti-avoidance – draft legislation

Following announcements as part of the 2023–24 Federal Budget, Treasury has released exposure draft legislation in relation to the following proposed changes to the PRRT law:

- Amendments to the PRRT anti-avoidance rules to bring them in line with the income tax anti-avoidance rules, to ensure consistent operation across PRRT and income tax. These amendments are broadly proposed to apply to any arrangement entered into on or after 1 July 2023.
- Clarify the meaning of 'exploration for petroleum' in the *Petroleum Resource Rent Tax Assessment Act 1987* so that it is limited to the 'discovery and identification of the existence, extent and nature of the petroleum resource' and does not extend to 'activities and feasibility studies directed at evaluating whether the resource is commercially recoverable'. These amendments give effect to the Government's policy intent and the Commissioner's administrative treatment and written binding advice as set out in TR 2014/9. These amendments are proposed to apply to all expenditure incurred from 21 August 2013.

In addition, the draft law also contains revisions to the ITAA 1997 in relation to 'mining, quarrying or prospecting rights' (MQPRs) to clarify:

- that MQPRs 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 tax adjustments.

These amendments are proposed to apply to a MQPR that an entity started to hold after 7.30pm ACT time on 9 May 2023.

Comments close 9 February 2024.

Employment Taxes Update

ATO finalises employee vs independent contractor guidance

On 6 December 2023, the Australian Taxation Office (ATO) released *Taxation Ruling – TR 2023/4 – Income tax: pay as you go withholding – who is an employee?*, its finalised guidance on the ordinary meaning of "employee" for the purposes of pay-as-you-go withholding (PAYG) and Superannuation Guarantee (SG). The finalised ruling has been updated from its draft iteration to reflect the Full Federal Court decision in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76.

Concurrently, the ATO has also released *Practical Compliance Guideline – PCG 2023/2 – Classifying workers as employees or independent contractors – ATO compliance approach*, which provides an outline of the Commissioner of Taxation's approach to compliance in this area, based on a series of process/governance risk factors.

In addition to highlighting the significance of the written contract when evaluating the nature of a relationship, TR 2023/4 describes the process through which the Commissioner intends to evaluate the terms of the contractual arrangement. Notably, it sets out a need to have regard to a broader recourse of events, circumstances and things external to the contract, for the purpose of identifying the rights and obligations of the parties; a process through which a determination can be made as to whether the written contract (if any) accurately and comprehensively reflects those rights and obligations.

For further information on the newly released ATO guidance please see our full 'What's Emerging?' article.

Payroll Tax: SA school operator entitled to exemption for most employees

The South Australian Supreme Court has held in Trinity College Gawler Inv v Commissioner of State Taxation (SA) [2023] SASC 178 that a taxpayer operating several schools was entitled to a payroll tax exemption for wages paid to most employees working at its multi-use fitness and theatre complex.

The taxpayer operated five schools and an early learning centre, as well as a multi-use complex which comprised a swim centre, fitness centre, courts centre, theatre, shop and creche, for use by its students and the wider community.

In its decision, the Supreme Court assessed each category of worker separately in determining whether any of the payroll tax exemptions would be applicable. In summation:

- employees who worked only in the Fitness Centre, Swim Centre, Courts Centre and/or Theatre were engaged exclusively in work of a kind ordinarily performed in connection with the conduct of schools providing education of that kind and the wages paid to them were exempt under the education exemption;
- employees who worked in whole or in part in the Shop, Creche, reception, in membership and promotions, training and/or management were not engaged exclusively in work of a kind ordinarily performed in connection with the conduct of schools providing education of that kind and the wages paid to them were not exempt under the education exemption;
- employees who worked only in the Fitness Centre were, other than in providing educational instruction, engaged exclusively in the provision of health services and the wages paid to them were exempt under the health exemption; and
- employees who worked in whole or in part elsewhere in Starplex were not engaged exclusively in the provision of health services and the wages paid to them were not exempt under the health exemption.

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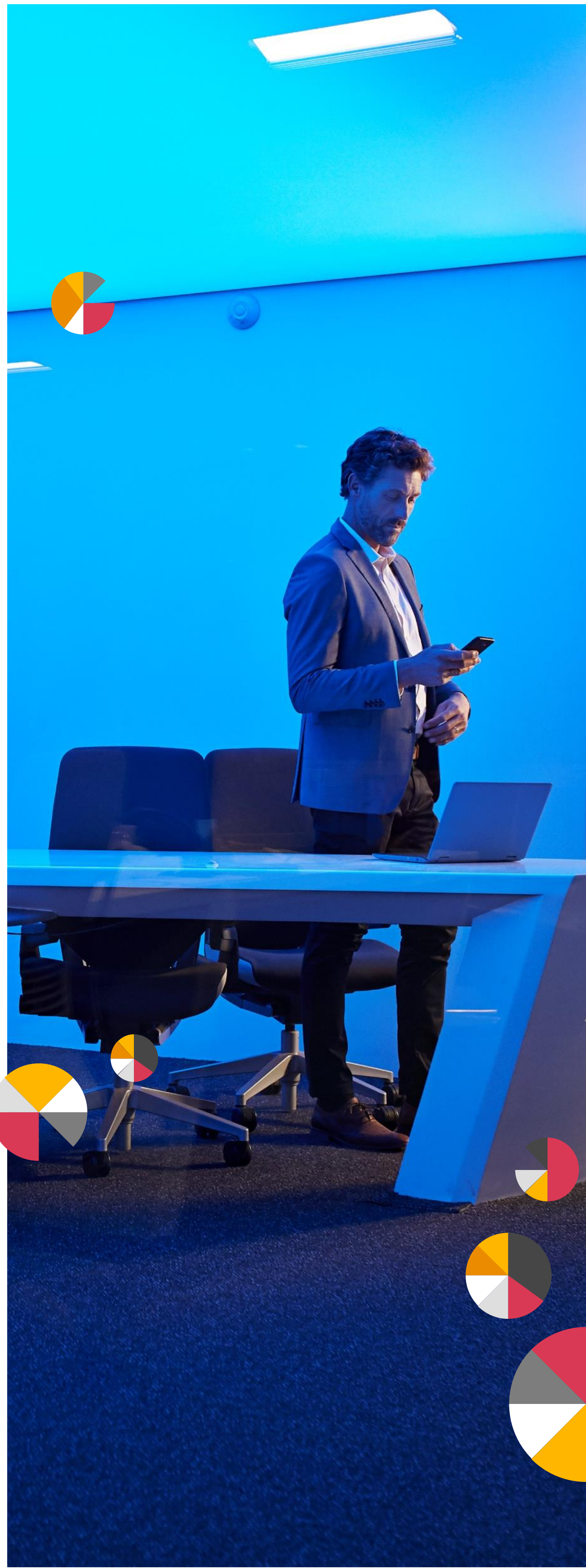
Payroll Tax: NSW and contractors

In Chief Commissioner of State Revenue (NSW) v Integrated Trolley Management Pty Ltd [2023] NSWCA 302, an appeal filed by the Chief Commissioner of State Revenue to the NSW Court of Appeal, was allowed upholding the Commissioner's assessment of payroll tax on subcontracting arrangements.

In the earlier decision of *Integrated Trolley Management Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 557, it was determined the payments made to independent contractors for trolley collection services to various supermarkets through independent contractors ("service providers") were not "taxable wages" under the employment agency provisions.

In the appeal, it was determined by the NSW Court of Appeal that employment agency contracts, as defined in payroll tax law, existed between Integrated Trolley Management and its supermarket clients. This was based on a finding that the service providers worked "in and for" the supermarket clients, which involved regular and continual work akin to that of an employee. Various factors (such as uniforms, signing visitors book and using staff facilities) considered in earlier cases dealing with the employment agency provisions, which to a degree supported the taxpayer's position, were considered insubstantial to the overall outcome.



Payroll Tax: Increased focus on wage underpayment remediation in Victoria

At the end of December, the Victorian State Revenue Office released an alert which signifies an increased payroll tax compliance focus on employer wage underpayments (also known as 'wage theft').

The Victorian State Revenue Office has encouraged employers that have identified an underpayment of wages to voluntary disclose these amounts for payroll tax purposes as soon possible. They linked further information around voluntary disclosures and penalties here.

Payroll Tax: ACT threshold to lodge annual tax returns increased

Registered employers in the ACT with an annual payroll tax liability of $80,000 or less can apply to lodge their payroll tax returns annually (rather than monthly).

As outlined in the *Taxation Administration (Special Arrangements—Lodging of Returns) Approval 2023* Instrument, the threshold value has increased from $5,000 to $80,000 and is effective from 10 November 2023.The ability to varying the lodgment period is intended to reduce the administrative burden of smaller employers.

Global Tax and Trade Update

PCG finalised on related party intangibles

The ATO has released its finalised Practical Compliance Guideline PCG 2024/1 which deals with intangibles migration arrangements.

The PCG, which finalises previously released draft guidelines PCG 2021/D4 and PCG 2023/D2, explains when the Commissioner is likely to apply resources to consider the potential application of the general anti-avoidance rules or transfer pricing rules to certain cross-border related party intangibles migration arrangements regarding structuring issues and tax risks associated with:

- migration of intangible assets, and
- mischaracterisation and non-recognition of Australian activities connected with intangible assets.

Certain inbound and outbound distribution arrangements and low-value services arrangements potentially involving intangible assets are excluded from the scope of the Guideline.

'Intangibles migration arrangements' refer to cross-border arrangements involving the migration of intangible assets, or arrangements with similar effect. This includes arrangements relating to Australian development, enhancement, maintenance, production and exploitation (DEMPE) activities in connect with intangible assets held offshore, including where the Australian activities are for the benefit of another entity that holds or has legal or economic ownership of the intangible assets.

The ATO's compliance approach will vary depending on the risk zone of the entity's arrangement. This risk rating will influence whether and how the ATO is likely to engage. The PCG also sets out the ATO's expectations regarding evidence to support a self-assessment, and the types of evidence they are likely to request when reviewing intangible arrangements.

The PCG applies from 17 January 2024 and will apply to existing and new arrangements. For more information, refer to our Tax Alert.

Royalties and software and intellectual property rights

The ATO has released draft Taxation Ruling TR 2024/D1 which considers the character of payments in respect of software and intellectual property rights as royalties. The draft Ruling, which takes into account feedback received on draft Taxation Ruling TR 2021/D4 (now withdrawn), provides guidance on when payments made in respect of software and intellectual property rights will be a royalty under both domestic law and Australia's tax treaties, and therefore subject to royalty withholding tax.

The draft Ruling's focus is on payments for the use of, or right to use, copyright or other like property or rights. However, such payments may also be for the use of, or right to use, other intellectual property (IP) rights, or otherwise fall within the definition of a 'royalty'. This will also affect the characterisation of the payment.

The draft Ruling provides that the following payments are characterised as a royalty where they are paid as consideration for one or more of the following:

a. The grant of a right to use IP, regardless of whether that right is exercised (paragraph (a) of the standard tax treaty definition)

b. The use of an IP right (paragraph (a) of the standard tax treaty definition)

c. The supply of know-how in relation to an IP right referred to in (a) and (b) (paragraph b of the standard tax treaty definition)

d. The supply of assistance furnished as a means of enabling the application or enjoyment of the supply (paragraph (c) of the standard tax treaty definition)

e. The sale by a distributor of hardware with embedded software, where the distributor is granted or uses rights in the IP of the software.

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The draft Ruling applies to cross-border payments made by an Australian resident or non-resident, which is related to or connected with a permanent establishment in Australia under a software arrangement. Where a tax treaty applies, the royalty definition in the relevant treaty is given primacy over the domestic tax law definition of royalty.

When the final Ruling is issued, it is proposed to apply both before and after its date of issue. Comments close 1 March 2024. For further information, refer to our Tax Alert.

Update on status of interest limitation measures

As noted in last month's update, the proposed interest limitation measures (including amendments to Australia's thin capitalisation regime and new debt deduction creation rules) are currently before the Senate in Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023. Proposed amendments to this Bill were referred to the Senate Economics Legislation Committee for inquiry in December 2023, with the Committee due to report by 5 February 2024. Submissions made to the inquiry are now available on the Parliament website.

In addition, the in readiness for the potential enactment of the new thin capitalisation and debt deduction creation rules, the ATO is consulting on potential public advice and guidance topics, prioritisation and form.

Australia signs first tax treaty with Portugal

On 30 November 2023, Australia signed its first double tax treaty with Portugal, the *Convention between Australia and the Portuguese Republic for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance*, alongside its associated Protocol.

Among other matters, the new treaty provides for lower withholding tax rates on interest, dividends and royalties, provides certainty regarding pension taxation, while also preserving Australia's source country taxing rights over income from natural resources, including the operation of substantial equipment.

Once both countries have completed their domestic implementation requirements and instruments of ratification have been exchanged, the treaty will enter into force.

Other tax treaty developments

The Australian Government has announced that it is working towards negotiating its first tax treaties with Ukraine and Brazil, and will update its treaties with New Zealand, the Republic of Korea, and Sweden.

Work on the expanded tax treaty program is scheduled to run for four years, commencing this financial year and concluding in 2027.

MLI update – Synthesised text for Finland

The ATO has updated the synthesised text for the application of the *Agreement between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion*, and *Protocol*, as modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI) signed by Australia and Finland on 7 June 2017.

The text now includes the consolidated MLI position of Finland submitted to the Depositary on 27 June 2023, and has been updated to reference changes in relation to subparagraph (a) of paragraph 1 of Article 9 of the MLI, which are effective 1 January 2024.

MYEFO update relating to international matters

In the 2023–24 Mid-Year Economic and Fiscal Outlook (MYEFO) – a mid-year budget report which provides updated information on the Government's fiscal position since the release of the 2023–24 Budget – the following measures were noted that relate to international tax and trade issues:

- There will be an increase in the foreign resident capital gains withholding tax rate from 12.5 per cent to 15 per cent and the withholding threshold will be reduced from $750,000 to $0. The changes will apply to real property disposals under contracts entered into from 1 January 2025.
- Amendments are to be made to the 2022–23 October Budget measure to deny deductions for payments relating to intangibles held in low-or no-tax jurisdictions to better target the measure. The amendments will continue to apply to payments made from 1 July 2023 (it is unclear whether the only amendments referred to are those contained in the draft law that was released in June 2023).
- More funding will be provided for the Treasury and the ATO to engage in tax treaty negotiations to improve international trade and investment

- A customs duty exemption will be applied to FIFA, related entities and commercial affiliates on goods imported into Australia for the 2023 FIFA Women's World Cup retrospectively from 1 January 2022 until 31 December 2028.
- The Government will no longer proceed with the uniform business experience component of the Streamlining excise administration for fuel and alcohol package, which was due to commence on 1 July 2024.
- Funding would be provided to continue development and delivery of a simplified trade system that will simplify cross-border trade for Australian businesses, while maintaining integrity of Australia's border and biosecurity.

It was also confirmed that the Government's public country by country reporting proposal will also apply from 1 July 2024, with further consultation on specific parameters, including the appropriate level of disaggregated reporting.

Updates on OECD's Two Pillar solution

The Organisation for Economic Co-operation and Development (OECD) has released its latest Administrative Guidance on the Global Anti-Base Erosion Model Rules (GloBE rules) of Pillar Two. It also released a statement in relation to Pillar One that "members of the Inclusive Framework (IF) reaffirm their commitment to achieve a consensus-based solution and to finalise the text of the Multilateral Convention (MLC) by the end of March 2024, with a view to hold a signing ceremony by the end of June 2024." For more information, refer to our Tax Policy Alert.

The Federal Government had previously indicated in the 2023–24 Federal Budget that it will adopt the Pillar Two reforms including the 15 per cent global minimum tax (Income Inclusion Rule) and domestic minimum tax applying to income years starting on or after 1 January 2024 with the Undertaxed Profits Rule applying to income years starting on or after 1 January 2025. As of the date of writing, draft legislation has not been released yet by the Australian Treasury.

Global minimum tax

The OECD has released a Working Paper which assesses the impact of the global minimum tax (GMT) on the taxation of multinational enterprises. The paper concludes that the GMT will substantially reduce the incentive to shift profits, reduce the tax rate differentials across jurisdictions with potential impacts on the allocation of investment and activity, and substantially reduce low-taxed profit worldwide. A webinar (replay available) was also held that discussed the economic impacts.

Other OECD updates

In other news from the OECD:

- The OECD released the annual peer review (2022) into the implementation of the Base Erosion and Profit Shifting (BEPS) Action 5 dealing with harmful tax practices. One part of the Action 5 minimum standard is the transparency framework for compulsory spontaneous exchange of information on certain tax rulings. The report considers peer review assessments for 131 jurisdictions in relation to the compulsory exchange of information on tax rulings and cover the steps jurisdictions have taken to implement the transparency framework during the calendar year 2022. Of these 131 jurisdictions, 100 jurisdictions are fully in line with the BEPS Action 5 minimum standards, with the remaining 31 jurisdictions receiving recommendations to improve their legal or operational framework.
- The OECD's Revenue Statistics 2023 provides internationally comparative data on tax levels and structures in OECD member countries. The report also examines the extent to which tax revenues in OECD countries have kept pace with economic growth in recent decades. The report also shows a decline in the average tax-to-GDP ratio in the OECD by 0.15 percentage points in 2022, to 34 per cent. This is reported to be driven in part by sharp increases in global energy prices, which led to lower demand and prompted many countries to reduce energy taxes.
- In December 2023, the OECD released its tax database update, which presents comparative information on a range of statutory tax rates and tax rate indicators in OECD countries, including personal income tax rates and social security contributions, corporate income tax rates and value-added taxes between 2000 and 2023.
- the Sixth OECD Forum on Tax and Crime was held in Rome, Italy in December 2023. Against the background of the new challenges and opportunities brought about by the digitalisation of the economy, delegates discussed how countries can further enhance international co-operation to maximise the disruption of tax crimes and related illicit financial flows.

- The Global Forum on Transparency and Exchange of Information for Tax Purposes met for its annual plenary meeting between 29 November and 1 December 2023 in Lisbon, Portugal. The Global Forum annual report for 2023 notes that building upon its success to the date, the Global Forum continued and intensified its monitoring and peer reviews of the international standards on transparency and exchange of information on request (EOIR) and automatic exchange of financial account information (AEOI). In response to the G20's call in 2022 to ensure the widespread implementation of the Crypto-Asset Reporting Framework (CARF) and the amendments to the AEOI Standard by relevant jurisdictions, the Global Forum has commenced the work in 2023, including by establishing a new voluntary group (the CARF Group). Further, the Global Forum has also agreed to adapt its peer review and monitoring processes, in view of the growing maturity of the EOIR and AEOI standards.

France introduces updated transfer pricing regulations

Effective from 1 January 2024, the updated transfer pricing regulations affect multinational groups operating in France. This includes higher penalties for missing or incomplete transfer pricing documentation and a lower threshold for Master/Local File requirements, now capturing a wider range of French subsidiaries of middle-sized groups. For more information, refer to our Tax Alert.

Indirect Tax Update

Compliance concessions for new reporting regime for online marketplaces

Under the new Sharing Economy Reporting Regime, operators of electronic distribution platforms (EDPs) are required to report information to the Australian Taxation Office (ATO) regarding their participating sellers when they make applicable transactions. The following legislative instruments provide support to certain operators of EDPs providing short term accommodation or taxi travel that are preparing to comply with reporting obligations under this regime:

- Taxation Administration (Transitional Exemptions for Reporting by Electronic Distribution Platform Operators – Relevant Accommodation and Taxi Travel) Determination 2023 – which provides transitional reporting exemptions for a period ending on or before 30 June 2024 to certain EDP operators that have reportable transactions of value less than $1 million in the full 12-month period (or a lesser 'prorated amount' if the platform did not operate for the full 12 months). This exemption will only apply to EDP operators who were either operating the platform on or before 30 June 2023 or had completed building the systems to operate the platform on or before 30 June 2023 and commenced operating the platform on or before 31 December 2023. Additionally, for those EDP operators who are eligible for this exemption but choose not to apply it (or fail to notify the Commissioner as required), the determination extends the due date for lodging the report.
- Tax Administration (Reporting Exemptions for Electronic Distribution Platform Operators – Relevant Accommodation and Taxi Travel) Determination 2023 – which exempts certain EDP operators from having to report in circumstances where a taxi travel or accommodation supply is made through more than one EDP effectively placing the obligation to report the transaction on the EDPs that provide all or part of the consideration they receive in relation to the supply directly to the supplier. In addition, the determination also exempts an EDP operator from having to report transactions involving supply of a relevant accommodation or tax travel where the supplier is either a listed entity, or a wholly-owned subsidiary of a listed entity, the transaction involves the provision of consideration relating to a substantial property, or the transactions generally have no Australian income tax or GST consequences.

Guidance on reduced input tax credits and adviser services fees

The Australian Taxation Office (ATO) has issued guidance concerning the eligibility of super funds and investor-directed portfolio services (IDPS) investment platforms (collectively referred to as Funds) to claim reduced input tax credits (RITCs) on adviser services fees.

The guidance considers arrangements where an individual engages a financial adviser to provide them with personal advice related to an investment (or prospective investment) in a Fund and the individual authorises the Fund to pay the adviser services fees to the adviser, but the individual remains liable to pay the Fund. In such circumstances, the Commissioner's view is that the Fund is not eligible to claim RITCs for the adviser services fees, as the Fund is not the recipient of a supply for which the fees are consideration. The Commissioner considers that this view is consistent with the Commissioner's existing guidance in Goods and Services Tax (GST) Ruling GSTR 2006/9 *Goods and services tax: supplies*, including in relation to tripartite agreements.

The ATO recommends that Funds review their arrangements in relation to adviser services, including where a Fund has received a private ruling in the past, to check whether their current contractual arrangements are covered by the guidance.

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The ATO is also taking a prospective compliance approach to this issue such that it will not devote compliance resources to review RITC claims for adviser services fees paid under arrangements of the kind described for tax periods that end before 1 April 2024.

GST on real property sale

In [Lance and Commissioner of Taxation (Taxation) [2024] AATA 11](), the Administrative Appeals Tribunal (AAT) found that the sale of a property with cultural historical significance was a taxable supply under section 9–5 *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The only issue for the AAT to determine was whether the sale of the property was made 'in the course or furtherance of an enterprise' carried on by the taxpayer, as all other elements of making a taxable supply were satisfied.

Although the Tribunal accepted that the taxpayer intended at some stage to live in the heritage homestead located on the property, it found that he also intended to subdivide it and sell off the subdivided lots. The AAT found that the taxpayer's development works on the property constituted an 'enterprise' as they were in 'the form of a business', in particular, due to the scale of the operations in which the taxpayer was involved, as well as the amount of capital invested in the purchase of the property and development works. This was regardless of whether he was in the business of being a property developer.

The AAT noted that the taxpayer's activities could also be characterised as a series of activities 'in the form of an adventure or concern in the nature of trade' within the definition of 'enterprise' within section 9–20(1) of the GST Act, as he intended to profit from the sale of the property, whether viewed as an isolated transaction. Accordingly, the Tribunal concluded that the sale of the property was a supply made in the course or furtherance of an enterprise he carried on and accordingly the supply of the property was a taxable supply liable to GST.

Deceased estate's administrator carrying on enterprise

In [Nerang Subdivision Pty Ltd & Ors v Hutson & Anor [2023] QSC 268](), the Supreme Court of Queensland (QSC) considered (among other matters) whether the administrator of a deceased estate was required to be registered for GST.

The land in question in this case formed part of a deceased estate, with the administrator of that estate the registered owner of the land. The administrator was party to a development deed that governed the development of the land into a new master planned community which was a project that involved the staged development and subdivision of the land into newly created residential and other lots for sale. The project was expected to generate more than $2 billion in revenue. Both the deed and development leases provided for the distribution of the proceeds of sale of the newly created lots, with the administrator to receive part of the gross sales proceeds of a lot as an 'owner's return'.

Disputes arose between the parties to the project as to whether the administrator was required to be registered for GST under section 23–5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), which was one of the issues that fell to the QSC to determine.

Ultimately, the QSC found that the administrator was carrying on an enterprise in the form of a business (or alternatively, on a regular and continuous basis, in the form of a lease) and since the administrator's GST turnover meets the registration turnover threshold, the administrator was required to be registered for GST with the consequence that the sale of a lot would be a taxable supply subject to GST.

The QSC noted the parties' agreement to undertake the project was a commercial arrangement, and although the developer and project manager exercise control over the project, undertake the development work and bear the risk associated with the cost of that development, the administrator's role was not entirely passive. The QSC was satisfied that the administrator's conduct, which facilitated the development and ultimate sale of the lots, amounted to a series of activities done in the form of a business and so came within the broadly expressed definition of enterprise for the purposes of the GST Act.

General anti-avoidance rule not applicable

The AAT found for the taxpayer in the matter of [HNMF and Commissioner of Taxation (Taxation) [2023] AATA 4067]() involving a determination of whether the general anti-avoidance provisions contained within Division 165 of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) were applicable following the remission of the matter by the Federal Court ([[2020] FCAFC 190]()).

The taxpayer acquired scrap gold that was subsequently converted or refined into precious metal, i.e. gold in investment form of at least 99.5 per cent fineness, before it was sold to dealers in precious metal. Previously, the Federal Court held that the taxpayer's supplies of gold to certain dealers were GST-free supplies as they constituted the 'first supply of that precious metal after its refining by [...] the supplier.' Accordingly, subject to the operation of the anti-avoidance provisions, the taxpayer was entitled to input tax credits in respect of its acquisitions of the scrap gold.

The application of Division 165 was brought into question as the taxpayer had acquired refining materials from 'Fraudulent Suppliers' in transactions that were taxable supplies to the taxpayer. Namely, the AAT was to consider whether the taxpayer should be denied a GST benefit comprising input tax credits (ITCs) of almost $73 million in respect of those supplies under Division 165, having regard to the artificiality of some or all of the circumstances in which the refining materials were supplied to it in a missing trader or carousel fraud arrangement.

The taxpayer argued that the steps it undertook were wholly consistent with its day-to-day operations as a refiner and obtaining the ITCs was a normal and intended (by GST law) incident of such a business.

Ultimately, the AAT found that it would not be reasonable to conclude that any entity entered into either scheme or a part of either scheme identified by the Commissioner with the sole or dominant purpose of, or that the principal effect of either scheme or any part of either scheme was, the taxpayer obtaining the contested ITCs. As a result, the objection decision relating to the assessments of net amount, the declarations and the assessments of administrative penalty were set aside and a decision substituted allowing the objections in full. The Commissioner has since appealed against the AAT's decision.

Supplies from cash dispensing equipment were taxable supplies

In Banktech Group Pty Ltd and Commissioner of Taxation (Taxation) [2023] AATA 3850, the AAT decided against the taxpayer, finding that fees the taxpayer charged in relation to the use of cash dispensing machines were not consideration for input taxed financial supplies under section 40–5.09(5)(a) of the *A New Tax System (Goods and Services Tax) Regulations 2019*, and were instead taxable supplies.

Under section 40–5.09(5), a supply by an entity for a fee of not more than $1,000 is a financial supply if it is a supply of one or more specified automatic teller machine (ATM) services.

The taxpayer charged fees to patrons making cash withdrawals involving the use of cash dispensing equipment located in hotels and clubs. While the equipment had some features of an ATM, access to the equipment required intervention by staff at the venue.

The AAT made several findings, including that section 40–5.09(5) requires that a withdrawal is also an ATM service. Further, the taxpayer's supplies did not fall within the ordinary meaning of an ATM service as the involvement of venue staff ran contrary to the 'automatic' dimension that is fundamental to an ATM, the equipment involved the use of multiple devices, and the equipment was not marketed as an ATM. Furthermore, the Tribunal was not satisfied that the taxpayer had discharged the burden of proving its supplies of cash withdrawal services using the equipment are within the ordinary meaning of an ATM service of withdrawal from an account.

MYEFO and luxury car tax changes

It was announced in the 2023–24 Mid-Year Economic and Fiscal Outlook (MYEFO) that the Luxury Car Tax (LCT) will be modernised by tightening the definition of a fuel-efficient vehicle by reducing the maximum fuel consumption from 7 litres per 100km to 3.5 litres per 100 km. Furthermore, the indexation rate of the LCT value threshold for all-other luxury vehicles will be updated from headline CPI to the motor vehicle purchase sub-group of the CPI, aligning it with the indexation of the LCT value threshold for fuel-efficient vehicles.

These changes are proposed to apply with effect from 1 July 2025.

Personal Tax Update

Draft guidance on deductibility of financial advice fees

The Australian Taxation Office (ATO) has published draft Taxation Determination TD 2023/D4 which considers the deductibility of financial advice fees paid by individuals who are not carrying on a business. Such fees incurred by an individual may be eligible for deduction under sections 8–1 (general deductions) or 25–5 (tax-related expenses) of the *Income Tax Assessment Act 1997 (Cth)* where the requirements of the provisions are met.

The determination does not apply to individuals carrying on a business, nor does it consider the circumstances where fees for financial advice are paid from a superannuation fund.

Although the draft Determination replaces TD 95/60 which is withdrawn with effect from 13 December 2023, it does not represent a change in the Commissioner's view on the deductibility of financial advice fees.

When the final Determination is issued, it is proposed to apply to years of income commencing both before and after its date of issue. Comments on the draft close on 2 February 2024.

'Unexplained amounts' taxable

In WYVW and Commissioner of Taxation (Taxation) [2023] AATA 4242, the Administrative Appeals Tribunal (AAT) broadly confirmed the Commissioner's amended assessments, which included income that had been omitted from the taxpayer's returns.

The Commissioner conducted an audit of the taxpayer's financial affairs for the 2009 to 2013 income years by examining the taxpayer's bank accounts and deduction claims in the income tax returns. The Commissioner did not accept the characterisation of some deposits received by the taxpayer from various entities within the family group (some of which had been treated as drawings or loan advances) and determined that certain deposits ('unexplained amounts') were assessable income.

The AAT found that there were incomplete records, gaps in information and in some instances, inconsistences in the records and explanations. On the balance of probabilities, the taxpayer had failed to show that the deposits were from non-income sources.

Lump sum settlement assessable

In Sladden and Commissioner of Taxation (Taxation) [2023] AATA 3815, the AAT found that a lump sum paid in settlement of a claim under an insurance policy was assessable income.

The taxpayer entered into two insurance policies issued under one policy number in respect of a life protection plan and professional income protection (PIP) plan. In February 2013, the taxpayer made a claim for an income protection benefit under the PIP plan. The taxpayer was subsequently diagnosed with a significant illness and sought to commute the income protection benefit into a lump sum. In 2019, the taxpayer received a $1 million settlement in full and final settlement of the taxpayer's claim. Although it later transpired that the $1 million settlement would also include surrender of the taxpayer's life insurance policy, the taxpayer (now knowing that the life cover was being cancelled) did not go back to the insurer and ask for anything beyond the $1 million offered.

The taxpayer argued that the settlement sum was not ordinary income and not assessable, as the payment was an undissected lump sum comprising capital and income and, in accordance with relevant case authority, was all on capital account.

The AAT was not satisfied that the settlement amount related to claims, entitlements or benefits of a mixed income and capital nature. It held that no part of the settlement amount was other than in respect of commutation of the taxpayer's monthly benefits payable under the income protection cover, and therefore the whole amount was assessable income.

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Unsubstantiated work-related expenses denied

In [Copley and Commissioner of Taxation (Taxation) [2024] AATA 8], the AAT found that the expenses claimed by a taxpayer were not deductible under section 8–1 of the *Income Tax Assessment Act 1997*, as the taxpayer failed to meet substantiation requirements.

While the taxpayer submitted that the expenses claimed were legitimately incurred to earn income, and the AAT accepted that the taxpayer was acting honestly, the AAT found that the taxpayer did not keep adequate receipts and records to support the expenses claimed and to apportion personal and business usage.

Transfer to army reserves was genuine redundancy payment

In [Fidge and Commissioner of Taxation (Taxation) [2023] AATA 4245], the AAT found that an army officer who was involuntarily transferred to the army reserves was entitled to concessional income tax treatment after being made redundant.

The taxpayer was a colonel in the army with an acknowledged record of exemplary service. After the expiry of an overseas posting, the Chief of Army advised the taxpayer that a full-time position would not be available to him following his current posting and that, as a result, he would be compulsorily transferred from the permanent forces to the army reserve and receive a special benefit payment.

The sole issue for the AAT to determine was whether the taxpayer was dismissed because his position was genuinely redundant. The AAT found that the taxpayer's dismissal was given effect by the compulsory transfer out of his full-time position and into the reserves. The redundancy caused the compulsory transfer to occur; it would not have occurred but for the redundancy, and so the dismissal was because of the redundancy and attracted concessional tax treatment under Subdivision 83-C of the *Income Tax Assessment Act 1997*.

State Tax Update

Property taxes and international tax treaties

In the 2023–24 Mid-Year Economic and Fiscal Outlook (MYEFO) – a mid-year Federal budget report which provides updated information on the Government's fiscal position since the release of the 2023–24 Budget – it was indicated that the uncertainty associated with the interaction between foreign investment fees, and similar state and territory property taxes, and double tax agreements implemented by the *International Tax Agreements Act 1953 (Cth)* would be clarified, to ensure that the foreign investment fees and similar imposts prevail.

New South Wales: 2023–24 half yearly review

In December 2023, the New South Wales (NSW) Government released its 2023–24 Half-Yearly Review. The following notes the tax-related issues covered:

- Since the 2023–24 Budget, forecast state taxation revenue has been revised up by $138.6 million in 2023–24 and $2.8 billion over the four years to 2026–27, driven primarily by higher property and land prices.
- Transfer duty revenue has been revised up by $956.5 million over the four years to 2026–27, with residential property prices having increased more than expected.
- Forecast land tax revenue has been revised up by $1.8 billion in the four years to 2026–27, reflecting higher average land values than previously forecast.
- Following the High Court of Australia's ruling in *Vanderstock & Anor v State of Victoria [2023] HCA 30* that Victoria's Zero and Low Emission Vehicle Distance-based Charge is constitutionally invalid, work is underway to determine the potential implications of the decision on the electric vehicle road user charge and any potential broader impacts on the NSW tax base.

NSW: 2024 land tax thresholds

The NSW land tax thresholds have been announced for the 2024 land tax year. The land tax threshold has been set at $1,075,000 for the 2024 land tax year (2023: $969,000).

The premium rate threshold has been set at $6,571,000 for the 2024 land tax year (2023: $5,925,000).

NSW: 2024 land tax year rulings

Revenue New South Wales has issued the following rulings regarding land tax exemptions as they apply to the 2024 land tax year.

- Ruling LT-115 *Exemption – Land Used and Occupied Primarily for a Boarding House – 2024 tax year* outlines the approved guidelines applying to the 2024 land tax year in relation to land used primarily as a boarding house which qualifies for an exemption or a reduction in the taxable land value of the land. The Ruling also explains the conditions that entitle the owner to claim the exemption or reduction in the taxable land value.
- Ruling LT-116 *Exemption – Land Used and Occupied Primarily for Low Cost Accommodation* outlines the approved guidelines applying to the 2024 land tax year in relation to land that is used to provide low-cost accommodation that can qualify for an exemption.
  If only part of the land is used to provide the eligible low-cost rental accommodation, the owner may be entitled to a reduction in taxable value rather than a full exemption. The Ruling explains the conditions that must apply in relation to the land that must be situated within a 5 kilometre radius of 1 Martin Place, Sydney.

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NSW: Surcharge land tax assessment and Australia-US free trade agreement

In Gallo v Chief Commissioner of State Revenue [2023] NSWCATAD 311, the NSW Civil and Administrative Tribunal affirmed the Chief Commissioner of State Revenue's land tax assessment of Foreign Owner Surcharge to the taxpayer.

The taxpayer claimed on several grounds including that United States nationals, such as himself, were exempt from NSW Foreign Owner Surcharge by operation of Australian federal law being the Australia-US Free Trade Agreement and the wording of section 109 of the Australian Constitution.

The Chief Commissioner put forward that the taxpayer's argument was identical to the 'misconceived' argument that was rejected by the High Court in *Tajjour v State of New South Wales (2014) 254 CLR 508*, in which it was noted the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law.

In the present appeal, the taxpayer made no express response to the judgment in the Tajjour case and the Tribunal was not satisfied that the taxpayer had satisfied his onus in relation to his submissions concerning the effect of the Treaty and the Australian Constitution.

NSW: Surcharge land tax correctly applied

In Wang v Chief Commissioner of State Revenue [2023] NSWCATAD 302, the NSW Civil and Administrative Tribunal confirmed the Chief Commissioner's assessment to surcharge land tax levied to a foreign persion under section 5A of the *Land Tax Act 1956 (NSW)*. The taxpayer was at all material times a citizen of the People's Republic of China but entitled to permanent residence in Australia as the holder of a relevant visa. The taxpayer had never lived at the property following its construction and instead had let it out. In none of the years 2019 to 2022 did the taxpayer spend 200 days or more in Australia.

The Tribunal found that in respect of all relevant land tax years the taxpayer was a foreign person for the purposes of section 5A, and that the exemption provided for in section 5B dd not apply. The Tribunal also noted that neither it nor the Chief Commissioner had any discretion to waive, or to grant a 'one-off' exemption from surcharge land tax for which a taxpayer is liable, regardless of the landholder's personal and economic circumstances.

Victoria: Proposed Commercial and Industrial Property Tax

The Victorian State Government has published details of the final design of the Commercial and Industrial Property Tax (CIPT).

Announced in the 2023–24 State Budget, the Victorian Government is progressively abolishing stamp duty on commercial and industrial property in favour of the CIPT, which will apply to commercial and industrial property transactions with both a contract and settlement date on or after 1 July 2024.

Where a commercial/industrial property is contracted on or after 1 July 2024, at settlement a ten-year transition period will commence for that property. Additionally, at settlement the purchaser will pay stamp duty one final time on the property, with a choice to either pay the final stamp duty liability as an upfront lump sum or finance the stamp duty through a government-facilitated transition loan.

Stamp duty will not be payable on future transactions of that property, even if it is sold multiple times within the ten-year transition period, provided it continues to have a commercial or industrial use.

The CIPT will start ten years after the initial transaction and will be set at a flat one per cent of that property's unimproved land value. Note CIPT will be separate from and in addition to the existing land tax system.

Legislation to facilitate this reform is expected to be introduced into Parliament in 2024, with additional details on the reform to be released ahead of the 1 July 2024 start date. For further information, refer to our Tax Alert.

Victoria: State tax amendments now law

The State Taxation Acts and Other Acts Amendment Act 2023 is now law having received Royal Assent on 12 December 2023. This Act introduces several amendments to various taxation laws, including the *Land Tax Act 2005 (Vic)*, the *Duties Act 2000 (Vic)*, the *Sale of Land Act 1962 (Vic)*, and the *Windfall Gains Tax Act 2021 (Vic)*.

The Act, details of which can be found in our November 2023 edition of Monthly Tax Update, has been subject to some further amendments, including measures related to vacant residential land tax, which specify the rate of vacant residential land tax as follows:

- If the land was not liable for vacant residential land tax in the preceding tax year – 1 per cent; or
- If the land was liable for vacant residential land tax in the preceding tax year but not the tax year preceding that tax year – 2 per cent or
- If the land was liable for vacant residential land tax in the last two preceding tax years – 3 per cent.

Victoria: Updated ruling on landholder duty concession for interposed unit trusts

The State Revenue Office of Victoria has issued updated guidance DA-047v4 dealing with the landholder duty concession on the interposition of a unit trust between stapled security holders and the stapled entities.

The ruling replaces DA-047v3 to reflect an amendment made to section 87 of the *Duties Act 2000 (Vic)*, which confirmed that the concessional rate of duty in section 87(1) does not apply to a relevant acquisition in a public landholder that is also eligible for the concessional rate of duty under Part 2, Chapter 11 of the Duties Act. The updated ruling is effective 13 December 2023.

Victoria: Draft administrative rulings

The *Taxation Administration Act 1997 (Vic)* sets out the administration and enforcement of Victorian taxation laws (including payroll tax, duties and land tax) and the reciprocal enforcement of recognised laws. The State Revenue Office of Victoria has issued the following draft Revenue Rulings regarding certain administrative aspects of the Act for consultation with comment due by 2 February 2024:

- TAA-007v5 *Interest and penalty tax*, which will replace a previously ruling to clarify the circumstances under which market interest can be remitted.
- TAA-008 *Notification default*, which will include notification default content previously contained within TAA-007v4 and explains the circumstances amounting to a notification default that only arises in relation to land tax, vacant residential land tax and windfall gains tax.

Victoria: Primary production land tax exemption unavailable

In Australian Investment & Development Pty Ltd v Commissioner of State Revenue [2023] VSC 741, the Supreme Court of Victoria (VSC) found that land was not used primarily for the business of primary production, notwithstanding the taxpayer's business intention of cultivating a type of plant called cassinia.

The VSC found that the land was not used primarily for primary production as was required by section 67 of the *Land Tax Act 2005 (Vic)*, but rather was used for a number of purposes (including development) and the cultivation of cassinia was not the primary one. Similarly, the conditions within section 68 (which provide exemption from land tax of land being prepared for use for primary production) were found not to apply. Accordingly, the assessments to land tax were confirmed.

Victoria: No duty on spousal transfer of residential land

In Beech v Commissioner of State Revenue (Review and Regulation) [2023] VCAT 1363, the Victorian Civil and Administrative Tribunal has varied the amount of duty assessed to a taxpayer on the transfer or property from his spouse to nil.

Section 43 the *Duties Act 2000 (Vic)* provides that no duty is payable on certain transfers of residential land between spouses where the transferee spouse 'occupies the land as the person's principal place of residence for a continuous period of at least 12 months commencing within the 12-month period immediately after the transfer'.

It was common ground that the taxpayer had failed the residence requirement. However, on review, the Tribunal accepted that the failure to satisfy the residence requirement was due to a change in circumstances that was unforeseen at the time of the property transfer to the taxpayer. The Tribunal accordingly exercised the section 43B discretion (stepping into the shoes of the Commissioner) and reduced the residence requirement to six weeks.

Western Australia: Temporary land tax exemption for residential construction

On 30 November 2023, the Land Tax Assessment Amendment (Residential Construction Exemptions) Bill 2023 (WA) was introduced into 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.

Western Australia: Duties amendments now law

The Duties Amendment (Off-the-Plan Concession and Foreign Persons Exemptions) Bill 2023 (WA) which implements the off-the-plan duty concessions that were announced in the 2023–24 WA State Budget and that expands the circumstances in which a refund of foreign buyers duty is available for residential developments is now law having received Royal Assent on 28 November 2023.

Northern Territory: Quota units were dutiable property

In Austral Fisheries Pty Ltd v Commissioner of Territory Revenue [2023] NTSC 103, the Supreme Court of the Northern Territory (NTSC) found that the transfer of quota units relating to fishing were subject to duty as they came within the definition of 'dutiable property' under section 4(1)(ga) of the *Stamp Duty Act 1978 (NT)*.

The NTSC accepted the Commissioner's submission that although quota units determine the extent of the entitlement to take fish, they also provide the entitlement such that it is only by holding quota units that a fishing licence holder is permitted to actually take fish and even to undertake a fishing voyage. The quota units came within the definition of dutiable property as applicable at the relevant time.

The Court also rejected the taxpayer's argument that only permanent transfers of a licence are dutiable and the transfer of quota units are temporary and akin to a seasonal lease over the right to take fish from the respective fisheries in allocated proportions. While the Court agreed that quota units are allocated automatically to the holder of a fishery unit on 1 July each year and that they expire on 30 June the following year, unless fully utilised before then, the agreements that the taxpayer was party to provided for the permanent transfer of quota units.

ACT: Transfer duty and declaration of trust

In Commissioner for ACT Revenue v Leemhuis Investments Mitchell Pty Ltd (Appeal) [2023] ACAT 83, the Australian Capital Territory (ACT) Civil & Administrative Tribunal considered whether transactions were correctly characterised as a 'declaration of trust' within the meaning of the *Duties Act 1999 (ACT)*.

This case was an appeal by the Commissioner and a cross-appeal by the taxpayer against the original decision in Leemhuis Investments Mitchell Pty Ltd L v Commissioner for ACT Revenue [2023] ACAT 12. In that decision, the ACT Civil and Administrative Tribunal found on the facts that there was a trust created absolutely of a 100 per cent equitable interest in two properties and this transaction was dutiable and payable by the transferee, who is the person who made the declaration.

In the present appeal, the Tribunal had to determine whether the transactions constituted a 'declaration of trust' by the corporate taxpayer that it held 100 per cent of the beneficial interest in specified units in trust.

In its decision, the Tribunal noted that in cases of an express or declared trust, the creator uses language which expresses an intention to create a trust, either orally or in writing. However, if there is any uncertainty as to intention, there will be no trust.

To the ACAT, it was plain that the statutory definition of 'declaration of trust' referred to an express trust, and not to an implied or resulting trust. Further, whether there has been a 'declaration of trust' within the meaning of the *Duties Act* demanded careful attention to the statutory language and proof of the facts necessary to satisfy each element of the definition.

The ACAT found the Commissioner's submission that an unenforceable transaction can be a 'dutiable transaction' ran contrary to authority and was not supported by the text, context or purpose of the *Duties Act*. A purported 'declaration of trust' that does not alter the legal or equitable rights or obligations concerning property cannot be a 'dutiable transaction' for the purposes of the Act. Accordingly, the Tribunal disallowed the Commissioner's appeal, and allowed the taxpayer's cross-appeal.

Upcoming State and Territory Budgets

In the coming months, the following States and Territories have scheduled their 2024–25 Budgets as follows:

- Northern Territory – 14 May 2024
- Tasmania – 30 May 2024
- South Australia – 6 June 2024
- Queensland – 11 June 2024
- ACT – 25 June 2024

Other States are yet to be scheduled.

Superannuation Update

MYEFO update relating to superannuation matters

In the 2023–24 Mid-Year Economic and Fiscal Outlook (MYEFO) – a mid-year budget report which provides updated information on the Government's fiscal position since the release of the 2023–24 Budget – the following (these can be found in Appendix A of the report) were noted that relate to superannuation issues:

- Provide a clear legal basis for superannuation trustees to pay advice fees agreed between a member and their financial adviser from the member's superannuation account and prescribe that such fees are a tax-deductible expense of the fund retrospectively from 2019–20.
- Amend legislation to ensure the superannuation transfer balance cap of individuals with a capped defined benefit income stream is not adversely impacted in the event of a merger or successor fund transfer between superannuation funds. This measure will apply retrospectively from 1 July 2017.

ATO releases guidance on SMSF investments and pink diamonds

The Australian Taxation Office (ATO) has responded to queries as to whether pink diamonds held under Self-Managed Super Funds (SMSFs) are classified as collectable or personal use assets.

When held in loose form, the ATO considers that natural diamonds (including pink diamonds) are not considered collectable or personal use assets under the superannuation legislation and do not have specific storage and insurance requirements (though the ATO recommends trustees hold adequate insurance and consider appropriate storage arrangements).

These rules only apply for diamonds held in loose form. This means the diamond cannot in any way be mounted, integrated into or used as an item for adornment or other purposes which would be inconsistent with the holding of the diamond in loose form for investment purposes.

Draft determination on fund payments to cover trustee risk reserves

The ATO has released draft Taxation Determination TD 2023/D3 which considers the deductibility of payments made by a superannuation fund to its trustee for building or maintaining a trustee risk reserve.

From 1 January 2022, the indemnification prohibitions in sections 56 and 57 of the *Superannuation Industry (Supervision) Act 1993* (SISA) were expanded to prevent a superannuation trustee or a director of a superannuation trustee from using trust assets to pay a criminal, civil or administrative penalty incurred in relation to a contravention of a Commonwealth law. Impacted funds and their trustees have taken differing approaches to address the risk of exposure to penalties, including the funds making payments to establish or build a trustee risk reserve.

The draft Determination sets out the Commissioner's views on whether increased trustee fees and/or the additional risk reserve payments are deductible to the fund under section 8–1 of the *Income Tax Assessment Act 1997*.

The Commissioner considers that a payment by the fund to the trustee will not be deductible under section 8–1 where the trustee is charging the fund the amount for the purpose of building or maintaining a reserve to address the trustee's risk because of the amendments to SISA and the amount is separate and distinct from existing charges for trustee services. In such cases, these payments will be capital in nature.

However, payment by the fund to the trustee will be deductible to the fund under section 8–1 where it is objectively determined on the facts that the payment is made to the trustee for trustee services and the trustee has merely increased its existing ongoing and recurrent charges for those services (in accordance with its powers and terms of its engagement) to reflect the increased cost of providing those services.

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When the final Determination is issued, it is proposed to apply both before and after its date of issue. Comments closed 19 January 2024.

Discussion paper on retirement phase

The Federal Government has released a discussion paper seeking community and industry views on the retirement phase of superannuation. Specifically, the discussion paper increases the focus on the retirement phase by examining three key areas:

- Supporting members to navigate the retirement income system,
- Supporting funds to deliver better retirement income products and services, and
- Making lifetime income products more accessible.

Comments close 9 February 2024.

Indirect transfer of foreign super lump sums assessable to Australian fund

In Came and Commissioner of Taxation [2023] AATA 3951, the Administrative Appeals Tribunal (AAT) found in favour of the taxpayer, permitting his claim under section 305–80(2) *Income Tax Assessment Tax 1997* to have all applicable fund earnings (APE) from a foreign superannuation funds included in the assessable income of the Australian superannuation fund into which the lump sums were paid.

The taxpayer became an Australian resident in July 2004, after ceasing employment in South Africa and immigrating to Australia. The taxpayer proceeded to pay superannuation lump sums into an Australian complying superannuation fund via an Emigrant Capital Account, in compliance with South Africa law.

The Commissioner argued that the choice was not available in circumstances where the taxpayer receives the superannuation lump sum and then pays the lump sum received into a complying superannuation fund. However, the AAT disagreed, finding the Commissioner's construction of the relevant provisions to be strained. The Tribunal found that the provision applies to include a payment made "for your (the taxpayer's) benefit" under section 307–15(2)(a), including such payments made directly to a taxpayer as occurred in this case.

Family law super payments and Division 293 tax

The Federal Treasury has released a draft legislative instrument that remakes the *Taxation Administration Act 1953 (Meaning of End Benefit) Instrument 2013*, ahead of its sunset date of 1 April 2024.

These instruments prescribe that family law superannuation payments are not end benefits under section 133–130 of Schedule 1 of *the Taxation Administration Act 1953* and therefore do not trigger an individual's liability to pay Division 293 tax in respect of a defined benefit interest that has been deferred to a debt account. Division 293 tax applies to certain superannuation contributions for individuals whose income broadly exceeds $300,000.

The 2023 instrument operates identically to the existing 2013 instrument and makes no changes to current policy settings. Comments closed 22 December 2023.

Legislative Update

The following tax or superannuation related Bills have been introduced to Federal Parliament since our last edition of the Monthly Tax Update:

- The Administrative Review Tribunal Bill 2023, which was introduced into the House of Representatives on 7 December 2023, establishes the Administrative Review Tribunal – a new federal administrative review body that replaces the Administrative Appeals Tribunal (AAT) and conducts merits reviews of administrative decisions. The Bill also re-establishes the Administrative Review Council. It is intended that the Tribunal commence operations as soon as practicable in 2024, subject to the passage of legislation.
- The Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023, which was introduced into the House of Representatives on 7 December 2023, supports the proposed *Administrative Review Tribunal Bill 2023* by repealing the *Administrative Appeals Tribunal Act 1975*, making consequential amendments to 138 Commonwealth Acts and providing transitional rules which facilitate the transition from the AAT to the Tribunal. Note a third Bill containing additional consequential amendments will be introduced in 2024.

No tax or superannuation related Bills have completed their passage since our last edition of Monthly Tax Update.

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

- The Taxation Administration (Reporting Exemptions for Electronic Distribution Platform Operators – Relevant Accommodation and Taxi Travel) Determination 2023 and Taxation Administration (Transitional Exemptions for Reporting by Electronic Distribution Platform Operators – Relevant Accommodation and Taxi Travel) Determination 2023, which support the Sharing Economy Reporting Regime in relation to certain operators of an electronic distribution platform (EDP) for the supply of accommodation and taxi travel. The instruments operate to provide either a temporary or permanent reporting exemption in certain cases. Both instruments have a retrospective commencement date of 1 July 2023. For further information, refer to the Indirect tax section of this September 2023 edition of Monthly Tax Update.

Federal Parliament commences sitting for the 2024 Autumn session on 6 February 2024.

Let's talk

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

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Other News Update

New Commissioner of Taxation appointed

Mr Rob Heferen has been appointed as the new Commissioner of Taxation of the Australian Taxation Office (ATO) and will commence in the role on 1 March 2024. He replaces the outgoing Commissioner Chris Jordan AO, whose term concludes on 29 February 2024. Mr Heferen is also appointed as the Registrar of the Australian Business Register, the Australian Business Registry Services, and Register of Foreign Ownership of Australian Assets.

Mid-Year Economic and Fiscal Outlook (MYEFO) 2023–24

The Treasurer, Jim Chalmers, and Minister for Finance, Katy Gallagher, have released the 2023–24 Mid-Year Economic and Fiscal Outlook (MYEFO), a mid-year budget report which provides updated information on the Government's fiscal position and also takes account of all decisions made since the release of the 2023–24 Budget.

From an economic perspective, the following is noted:

- The underlying cash balance is forecast to be a much smaller deficit of $1.1 billion in 2023–24.
- The economy is expected to expand by 1¾ per cent in 2023–24 before regaining momentum to a forecast 2¼ per cent in 2024–25.
- Inflation is forecast to be 2¾ per cent in the June quarter 2025.

In addition to the tax, trade and superannuation measures reported in other sections of this Update, the following general tax measures were announced as part of the MYEFO (these can be found in Appendix A of the report):

- Increase in the amount of the Commonwealth penalty unit from $313 to $330, commencing four weeks after passage of legislation (this will mean that the maximum penalty for lodging documents with the Australian Taxation Office (ATO) late for a significant global entity will increase from $782,500 to $825,000).
- Deductions will be denied for ATO interest charges, specifically the general interest charge (GIC) and shortfall interest charge (SIC), incurred in income years starting on or after 1 July 2025.
- Apply the lower commercial foreign investment application fee to foreign investments in Build to Rent projects where investors are proposing to acquire residential land or agricultural land.
- Triple foreign investment fees for foreign investors who apply to purchase established dwellings from the day after the date of Royal Assent of the enabling legislation.
- Double vacancy fees for foreign investors who have purchased residential dwellings (new and established) since 9 May 2017 applicable from the day after the date of Royal Assent of the enabling legislation.
- Provide funding to enhance the ATO's compliance regime to ensure foreign investors comply with fee, notification, and other regulatory requirements such as selling their residence when required.
- An alternative minimum spending threshold will be introduced for the Producer Tax Offset of $35 million per season in qualifying Australian production expenditure, for productions that commence filming or production from 1 July 2024.

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- Funding will be provided to ASIC and the Treasury to develop and commence implementation of legislative requirements as part of the Government's proposal to increase transparency of beneficial ownership which will require relevant companies to collect, verify and make available information about individuals who benefit from or control the company, as the first stage of the reform for Australian private and public unlisted companies.

2024–25 Pre-Budget submissions

In advance of the Federal Budget scheduled to be handed down on 14 May 2024, the Assistant Treasurer and Minister for Financial Services issued a call for submissions from individuals, businesses and community groups regarding priorities for the 2024–25 Budget. Comments closed 25 January 2024.

ATO focus areas for 2024

Jeremy Hirschhorn, Second Commissioner, Client Engagement, ATO has delivered a keynote address to Financial Review CFO Live 2023. His speech, among other matters, discussed three areas of focus for the ATO over the coming year:

- Protecting the system and clients against fraud, having recently launched various new protections to help secure people's personal information and having boosted the digital identity requirements for individuals to access ATO online services through myGov.
- Addressing growth in the collectable debt book, the collectable component of which is around $50 billion in self-assessed debt, with 67 per cent of total collectable tax debt attributable to small businesses. The ATO may also now report debt information to credit reporting bureaus where taxpayers do not engage with the ATO and meet certain criteria.
- Improving small business tax performance, which is running at about 87 per cent, by building a digital-first ecosystem to help small businesses comply with their tax and super obligations, and by moving tax reporting or payment closer to the tax event through greater integration of ATO systems with the natural systems of their businesses.

The outgoing Commissioner of Taxation Chris Jordan AO also spoke to these issues at the IPA Centenary National Congress 2023.

Taxpayer Alert issued on franking credit refunds

The ATO has released Taxpayer Alert TA 2023/3 *Franking credit refunds – income tax exempt entities receiving franked distributions in the form of property other than money.*

The ATO is currently reviewing arrangements involving franked distributions in the form of property other than money (in specie distributions) that are made to income tax exempt entities, including registered charities, deductible gift recipients, scientific institutions and public educational institutions.

Under such arrangements:

- An in specie franked distribution is made (or flows indirectly) to an income tax exempt entity, and
- There are restrictions on the ordinary incidents of ownership of the distributed property that:
  - are imposed as part of the terms and conditions for the making of the franked distribution, and
  - prevent the income tax exempt entity from receiving immediate custody and control of that property.

The ATO is concerned that income tax exempt entities may be entering into these arrangements without being aware that these restrictions may make them ineligible for a refund of the franking credits attached to the franked distribution (pursuant to section 207–122(b)(i) of the *Income Tax Assessment Act 1997*).

The ATO is monitoring applications for franking credit refunds by income tax exempt entities where the claim is in respect of an in specie franked distribution.

Deductions denied for holding costs of undeveloped land

In Meakins and Commissioner of Taxation (Taxation) [2023] AATA 3852, the Administrative Appeals Tribunal (AAT) found that the taxpayer failed to establish an entitlement to deductions for holding costs relating to land that remained undeveloped for over 17 years.

The vacant land was purchased in July 2006 by a discretionary family trust of which the taxpayer was a beneficiary. At the time of purchase, the trustee received plans for the construction of a single residential dwelling on the property, and stated its intention was to proceed with construction so as to receive rental income, or alternatively build a commercial office which would also yield rental income.

Although rental property schedules lodged by the trust indicated that the land was made available for rent immediately after purchase, no income was derived for the relevant years.

While the Tribunal accept that an income producing development planned for a property may not proceed as initially planned and that there may be circumstances that disrupt, delay, change or even defeat the development as originally intended, it noted that by the time of the appeal, the property had been held for some 17 years, without even getting to the stage of architectural drawings being produced. It further commented that an intention to develop property has to be acted on in a practical sense, otherwise such intention becomes nothing more than an unrealised, unactioned "hope".

The AAT found that the holding expenses were not deductible under section 8–1 of the *Income Tax Assessment Act 1997* for the relevant income years.

Productivity Commission calls for DGR system overhaul

The Productivity Commission has released its draft report on its inquiry into philanthropy, proposing an overhaul of the system that determines which charities receive tax-deductible donations.

The report, whose purpose was, among others, to understand trends in philanthropic giving in Australia and identify opportunities and obstacles to increase such giving, found the deductible gift recipient (DGR) system is not fit for purpose.

The report proposes several draft recommendations, including:

- Amending the *Income Tax Assessment Act 1997* to remove the $2 threshold for tax-deductible donations to entities with deductible gift recipient status.
- Reforming the DGR system so that it is simpler and creates fairer and more consistent outcomes for donors, charities and the community, including extending eligibility for DGR status to most classes of charitable activities (with some express exclusions).
- Amending the *Australian Charities and Not-for-profits Commission Act 2012* to require the ACNC to register all new and existing charities with all applicable charitable subtypes.
- Developing a legislated definition of what constitutes a public benevolent institution to delineate its scope more clearly.
- Introducing requirements for listed companies to publicly report itemised information on their donations to entities with DGR status.

Comments on the draft report are invited until 9 February 2024.

IGTO launches own initiative investigation into tax identity fraud

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has commenced an 'own initiative investigation' into tax identity fraud.

Since 1 July 2022, the IGTO has received more than 130 complaint cases about the ATO's actions relating to compromised tax accounts and tax identity fraud for income tax, business activity statements and goods and services tax.

The IGTO is seeking comments from those with experiences of identity and financial fraud within the tax system. Comments can be submitted until 15 February 2024. The IGTO's report with findings and recommendations is planned for release in June 2024.

IGTO recommendations to improve administration of Commissioner's Remedial Powers

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has released its report following its review on the Administration of the Commissioner's Remedial Power, which explored the ATO's approach to receiving, considering and determining which issues are suitable for the exercise of the statutory remedial power to modify the operation of certain taxation law provisions that give rise to unintended or unforeseen outcomes.

As part of its findings, the IGTO made nine recommendations to the ATO to improve its administration of the power. They include bolstering community awareness through guidance and information, including that which is already published and available on the ATO website, as well as that the ATO consolidate and improve its system for capturing, tracking and reporting on the progress of candidates for potential exercise of such power. Broadly, the ATO has accepted those recommendations.

Editorial

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

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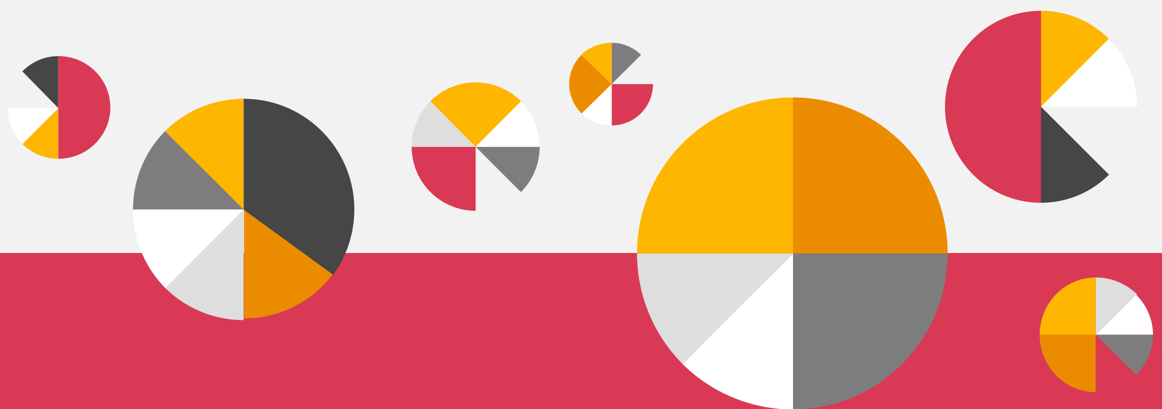

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