



PwC's Monthly Tax Update

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

November 2023

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Corporate Tax Update

Unpaid present entitlements were not loans under Division 7A

In [Bendel & Anor v Commissioner of Taxation \[2023\] AATA 3074](#), the Administrative Appeals Tribunal (AAT) found that unpaid present entitlements (UPEs) to income or capital of a trust estate payable to a private company did not constitute loans for Division 7A purposes. This position runs contrary to the ATO's longstanding position regarding UPEs and Division 7A.

At the relevant times, the private company beneficiary's entitlements to amounts distributed to it were shown as outstanding in the trust's accounts. The Commissioner argued that those outstanding amounts represented a loan to the corporate trustee that was a deemed dividend under Division 7A, and assessed the private company as a beneficiary of the trust, with penalties also imposed.

The AAT considered several issues, but the critical question to be determined was whether an amount that was, or had its origins in, an unpaid present entitlement to income of a trust estate conferred upon a corporate beneficiary that remained not fully satisfied or discharged by the applicable lodgement day, was a loan to the trust estate for the purposes of section 109D(3) of the *Income Tax Assessment Act 1936*.

Ultimately, the AAT concluded that a loan within the meaning of section 109D(3) did not reach so far as to embrace the rights in equity created when entitlements to trust income (or capital) are created but not satisfied and remain unpaid. The balance of an outstanding or unpaid entitlement of a corporate beneficiary of a trust, whether held on a separate trust or otherwise, was held not to be a loan to the trustee of that trust. For further information, refer to our [Client Update](#).

ATO releases Top 100 and Top 1,000 findings reports

The ATO has issued its key findings from the [Top 100](#) and [Top 1,000](#) income tax and goods and services tax (GST) assurance program reviews completed to 30 June 2023. Below are some key highlights from an income tax perspective.

- **Top 100:** 83% of top 100 taxpayers maintained either high or medium overall assurance ratings. Transfer pricing in relation to related party loans continues to be a key focus area, representing the highest proportion of unassured items that attracted a reg flag rating for top 100 taxpayers. Related party sales also continues to be a focus area for the ATO.
- **Top 1,000:** The Top 1,000 population consists of Australia's large public and multinational corporate groups and APRA-regulated superannuation funds with group turnover over \$250 million, which are not covered by the Top 100 program. The ATO completed 1,332 assurance reviews on 1,085 taxpayers across the Top 1,000 performance and combined assurance programs, and obtained high assurance that 24% of taxpayers have paid the right amount of income tax for the years reviewed, with 84% of taxpayers achieving high or medium assurance.

Tax governance continues to be a critical pillar of the justified trust methodology used by the ATO in these reviews for large public and multinational businesses. The ATO has observed an increase in taxpayers achieving stage 2 and stage 3 ratings for income tax risk management and governance across both populations.

RTP Schedule Findings report

The ATO has also released its fourth [Findings report](#) which provides the aggregated disclosures made by large public and multinational companies for the 2018–19 to 2021–22 income years under Category C of the Reportable Tax Position (RTP) Schedule as of 30 June 2023.

Let's talk

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

Chris Morris

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

Trinh Hua

Sydney
Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

Norah Seddon

Sydney
Sydney Tax Leader
+61 421 051 892
norah.seddon@au.pwc.com

James O'Reilly

Brisbane
Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos

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

Matt Budge

Perth
Tax Leader
+61 (08) 9238 2282
matthew.budge@au.pwc.com

Michael Dean

Sydney
Private Tax Leader
+61 402 041 451
michael.dean@au.pwc.com

Alistair Hutson

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

Amy Etherton

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

Sophia Varelas

Melbourne
National Leader, R&D and Government Incentives
+61 417 208 230
sophia.varelas@pwc.com

RTP Schedule disclosures assist the ATO to understand and assess changes in tax positions and arrangements, including new arrangements that taxpayers enter into. The disclosures also allow the ATO to prioritise its assurance activities.

Some key highlights of the Findings report include:

- There was a significant increase in taxpayers making disclosures, and an upward trend in low-risk disclosures for large public and multinational entities.
- There has been a 50% increase in the number of schedules lodged and the number of disclosures increased nearly threefold between 2018–19 and 2021–22. This reflects the progressive expansion of the lodgment requirement from the top 100 population to all entities that meet the total business income threshold and ownership criteria. The non-lodgement rate remained stable over the same period.
- Nearly two-thirds of Category C questions in 2021–22 related to arrangements described in Taxpayer Alerts. A third of questions related to Practical Compliance Guidelines (PCGs), with remaining questions related to other risks. The majority of disclosures, however, relate to PCGs as these generally cover more common arrangements.
- While the data from RTP schedule disclosures and the tax gap estimates indicated high levels of voluntary compliance, the ATO sees room for improvement, such as the rate of errors made by taxpayers on their schedules.

AAT finds no dividend stripping operation

In [Michael John Hayes Trading Pty Ltd atf the MJH Trading Trust and Commissioner of Taxation \[2023\] AATA 3005](#), the Administrative Appeals Tribunal (AAT) has set aside the Commissioner's objection decisions, allowing the taxpayers' appeal in full, in this case concerning dividend stripping.

At the core of the dispute was whether fully franked dividends that were paid by each of four operating companies constituted distributions 'made as part of a dividend stripping operation' within the meaning of section 207–155 of the *Income Tax Assessment Act 1997*.

In each case, the dividends were earmarked to be paid back to the operating company, directly or indirectly, by way of new loans or repayment of existing loans. The Commissioner contended that the distributions were part of a dividend stripping operation, and that the sole or dominant purpose in carrying out the group's reorganisation was to avoid tax. The taxpayers argued that the purpose of the reorganisation was to secure better asset protection features of the asset ownership arrangements within a group of family entities, and to streamline those arrangements.

The AAT concluded that the dividends paid to the taxpayers by the group operating companies were not part of either a dividend stripping operation or a scheme of that nature or effect as the requisite tax avoidance purposes was not present when all circumstances were taken into account.

The Commissioner has appealed this decision to the Federal Court.

New requirement to publish R&D expenditure information

The ATO has [reminded](#) taxpayers that it is now required to publish information each year about R&D entities and the R&D expenditure they've claimed. The ATO has indicated that the first publication will be for R&D entities that lodged a company tax return with an R&D tax offset for the income year ending 30 June 2022, with an expected publication date in September 2024.

The information to be published will include:

- the name of the entity claiming the R&D tax incentive
- the entity's Australian Business Number (ABN) or Australian Company Number (ACN), and
- total notional deductions claimed (label Z in Part A of the R&D tax incentive schedule), less any feedstock adjustments (label B in Part B of the schedule).

This data will be based on the information provided in the company's tax return (or amended return, where relevant). Note that where the Commissioner has amended the labels, the ATO is required to publish the total expenditure on R&D based on the company return that was lodged prior to the Commissioner-initiated amendment.

Employment Taxes Update

Payroll Tax: NSW Civil and Administrative Tribunal decision on grouping and taxable wages

In [*Home789 Resources Pty Ltd & others v Chief Commissioner of State Revenue*](#) [2023] NSWCATAD 263 two distinct issues arose from the imposition of payroll tax under the *Payroll Tax Act 2007* (NSW) (PT Act) on certain companies (collectively, the Applicants) which carry on business in the real estate industry.

Relevantly, the two issues considered were:

- whether each of the Chief Commissioner's decisions to group those companies and to refuse to remove some companies or combinations of companies from the group; that is, to "de-group" them, was the correct and preferable decision (the De-Grouping issue); and
- whether payments made by particular Applicants to certain persons (comprising both natural persons and corporations) should be treated as taxable wages for the purposes of the PT Act (the Taxable Wages issue).

The Applicants argued each entity carried on distinct and separate businesses, which were independent and not relevantly connected. In that regard, they viewed it not necessary to show the absence of any connection or inter-relation between the businesses; the connection must be material and involve influence over the conduct of the other business.

The NSW Civil and Administrative Tribunal (NCAT) aligned to the Chief Commissioner's decision for the Applicants to disallow de-grouping due to the following:

- A director's significant control over, and interest in, each Applicant;
- All businesses operated in the real estate industry;
- All businesses were located in the same premises; and

- The businesses were marked as a "one-stop shop" under "Home789" common branding.

In addition, the NCAT deemed, on a case-by-case basis, that 28 of the 31 payments made to persons or related companies constituted taxable wages. This was due to the failure by the taxpayer to establish the availability of 'exemptions' for the relevant persons or companies during the financial years in question.

Superannuation Guarantee: Payday super consultation

On 9 October 2023 Treasury released the [Securing Australians' Superannuation consultation paper](#) to seek feedback on the Government's proposal to introduce "payday" superannuation (where an employer is broadly required to pay superannuation on the same day as salary or wages) from 1 July 2026.

The consultation aims to seek input from stakeholders on the policy and legislative design of the Securing Australians' Superannuation package whilst reiterating the Government's position that '[u]npaid superannuation is equivalent to wage theft'. The paper recommends the implementation of payday superannuation under one of two models:

- an 'employment payment' model: an employer would be required to pay Superannuation Guarantee (SG) contributions on the day that salary or wages are paid; or
- a 'due date' model: an employee's SG contributions would be required to be received by the employee's superannuation fund within a certain number of days following 'payday'.

Included in the paper are 49 consultation questions for stakeholders to consider and respond to, which include, but are not limited to: what is considered a 'payday'; is the proposed new reporting mechanism an increase to employers' compliance burden; and what are the challenges in correcting superannuation guarantee payments under the payday model.

The consultation closes on 3 November 2023.

Let's talk

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

Norah Seddon

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

Adam Nicholas

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

Greg Kent

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

Anne Bailey

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

Paula Shannon

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

Superannuation Guarantee: New ATO Data Analytics tool

The ATO Deputy Commissioner for Superannuation & Employer Obligations recently announced through [LinkedIn](#) that the ATO will use data analytics on a larger scale from early 2024 onwards to identify SG shortfalls by employers. The aim of the ATO in this regard is to ensure employers can continue to keep good records and stay up to date with their SG compliance before the introduction of Payday superannuation.

We anticipate that the analytics tool referenced in this post will match Single Touch Payroll (STP) data from employers and Member Account Transaction Service (MATS) data from superannuation funds at scale, which was highlighted in the [payday super consultation paper](#) as being due to commence in 2023. This database is expected to provide a single source of information which shows the near-real time recorded SG positions for employers and employees, thereby enabling the ATO to identify instances and patterns of late or underpayment of SG.

Superannuation Guarantee: JMC Appeal Dismissed

The High Court has refused an application by the Commissioner of Taxation for leave to appeal against the Full Federal Court decision in [JMC Pty Ltd v Commissioner of Taxation](#) [2023] FCAFC 76. This case dealt with the employee/independent contractor distinction in the context of superannuation guarantee obligations, with the Full Federal Court upholding the principles derived from other recent cases that the common law employee/contractor determination relies on an assessment of the 'totality of relationship' from the terms of the written contract.

Fringe Benefits Tax: Draft FBT legislative instruments on records alternative to employee declarations

The ATO has issued 5 draft fringe benefits tax (FBT) legislative instruments on records that can be used as an alternative to employee declarations for consultation, with a proposed effective date of 1 April 2024.

- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Temporary Accommodation Relating to Relocation\) Determination 2023](#) specifies the records that the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits, housing fringe benefits or residual fringe benefits where the employer provides temporary accommodation as a result of a relocation.

- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Otherwise Deductible Benefits\) Determination 2023](#) specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits, property fringe benefits or residual fringe benefits, where the employer seeks to apply the otherwise deductible rule.
- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Living-Away-From-Home Allowance – Maintaining an Australian Home\) Determination 2023](#) specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of living-away-from-home allowance (LAFHA) fringe benefits.
- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Fly-in Fly-out and Drive-in Drive-out Employees\) Determination 2023](#) specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of LAFHA fringe benefits where an employee who works on a fly-in fly-out or drive-in drive-out basis.
- [Draft Fringe Benefits Tax Assessment \(Adequate Alternative Records – Private Use of Vehicles Other Than Cars\) Determination 2023](#) specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of residual fringe benefits where the benefit consists of the private use of a motor vehicle other than a car.

Comments can be made on the draft instruments until 9 November 2023.

PAYG Withholding: Draft instrument on withholding variations for occasional payroll donations to DGRs

The ATO has released draft legislative instrument [Taxation Administration \(Withholding Variation for Occasional Payroll Donations to Deductible Gift Recipients\) Legislative Instrument 2023](#) which proposes to vary the amount a payer is required to withhold under the pay as you go (PAYG) system for payees who make payroll donations to a deductible gift recipient under an occasional giving arrangement. Once finalised, it will replace [Taxation Administration Act 1953 – Pay as you go withholding – Occasional payroll donations to deductible gift recipients No. 4](#) which is due to sunset on 1 April 2024.

The period for comments on the draft instrument ended on 31 October 2023.

Global Tax and Trade Update

Further amendments to thin capitalisation reforms

Treasury has released proposed [amendments to Treasury Laws Amendment \(Making Multinationals Pay Their Fair Share – Integrity and Transparency\) Bill 2023](#), which is currently before the Senate and contains the Government's reforms to Australia's thin capitalisation rules.

The proposed amendments address a number of issues which were raised during the recent Senate Economic Legislation Committee inquiry into the Bill, to ensure the new thin capitalisation rules are appropriately targeted. This includes:

- amendments that allow certain trusts to utilise excess capacity of downstream trusts
- extending access to the third-party debt test (TPDT) to trusts and partnerships
- amendments to broaden the scope of arrangements that can benefit from the TPDT, and
- new exemptions from the debt deduction creation rules, and one-year transitional relief from these rules for financial arrangements entered into before 22 June 2023.

Submissions closed 30 October 2023. Read more about the proposed changes in our [Tax Alert](#).

OECD Pillar 1 update

The Organisation for Economic Cooperation and Development (OECD) Inclusive Framework has [released](#) a package of guidance in relation to the Amount A of Pillar 1. Amount A of Pillar 1 co-ordinates a reallocation of taxing rights to market jurisdictions with respect to a share of the profits of the largest and most profitable multinational enterprises (MNEs) operating in their markets, regardless of their physical presence. The package includes:

- the [Multilateral Convention to Implement Amount A of Pillar 1](#) and [explanatory statement](#);

- [Understanding on the Application of Certainty of Amount A](#); and
- an update to the [economic impact assessment](#) of Pillar 1.

For further information, please refer to our [Tax Alert](#).

OECD Pillar 2 update: Subject to Tax Rule

The OECD Inclusive Framework has [announced](#) the conclusion of negotiations on a [multilateral instrument](#) to implement the Pillar 2 Subject to Tax Rule (STTR).

The Pillar 2 STTR will enable developing countries to tax certain intra-group payments, in instances where such payments are subject to a nominal corporate income tax rate below 9 per cent. The STTR allows source jurisdictions – those in which covered income arises – to impose a tax where they otherwise would be unable to do so under tax treaty provisions.

For further information, please refer to our [Client Alert](#).

Recognising Pillar 2 liabilities in financial statements

The Australian Accounting Standards Board (AASB) has finalised [Accounting Standard AASB 2023–4 Amendments to Australian Accounting Standards – International Tax Reform – Pillar Two Model Rules: Tier 2 Disclosures](#) which amends AASB 1060 *General Purpose Financial Statements – Simplified Disclosures for For-Profit and Not-for-Profit Tier 2 Entities* (March 2020) and AASB 112 *Income Taxes* (August 2015) in relation to the OECD Pillar 2 reforms.

The Standard amends AASB 1060 to require a Tier 2 entity to disclose:

- that it has applied the exception to recognising and disclosing information about deferred tax assets and liabilities related to Pillar 2 income taxes (see AASB 112 paragraph 4A); and
- its current tax expense (income) related to Pillar 2 income taxes.

Let's talk

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

Chris Morris

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

Michael Bona

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

Michael Taylor

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

Greg Weickhardt

Melbourne
Partner
+61 428 769 169
greg.weickhardt@pwc.com

Nick Houseman

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

Angela Danieletto

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

Jonathan Malone

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

Gary Dutton

Partner
Australian Trade Leader
+61 434 182 652
gary.dutton@pwc.com

This Standard also amends AASB 112 to extend the exemption from complying with the disclosure requirements of AASB 112 for entities that apply AASB 1060 to ensure Tier 2 entities are not required to comply with the new disclosure requirements in AASB 112 when preparing their Tier 2 financial statements.

The Standard applies to annual periods beginning on or after 1 January 2023 that end on or after 30 September 2023, with earlier application permitted, including for the 2022–23 financial year.

OECD releases latest CbC peer review

The OECD has [released](#) the latest outcomes of the implementation of BEPS Action 13 on the transparency of global operations of large multinational enterprises. The sixth annual [peer review](#) considers the implementation of the Country-by-Country (CbC) reporting minimum standard by jurisdictions as of April 2023 and covers 136 Inclusive Framework members. The next peer review will be released in the third quarter of 2024.

Other OECD updates

Other updates from the OECD include:

- The release of the [report](#) *International Tax and Africa: OECD Report for the G7 Finance Ministers and Central Bank Governors*
- The OECD's Forum on Tax Administration (FTA) held its annual Plenary meeting in October 2023. The statement of outcomes can be found [here](#).

Extension of additional tariff on imports from Russia and Belarus

The temporary increase in duties for goods imported into Australia from Russia and Belarus has been [extended](#) for a further two years, until 24 October 2025.

The tariff measure, first implemented on 25 April 2022, denies Russia and Belarus access to 'Most Favoured Nation' status through the application of an additional tariff of 35 per cent on goods that are the produce or manufacture of Russia or Belarus.

Under section 18A of the *Customs Tariff Act 1995*, the increase in duties initially applied for the period beginning 25 April 2022 and ending 24 October 2023. As a result of the extension, goods imported into Australia during the period beginning 25 October 2023 and ending 24 October 2025 are now also subject to the increase in duties.

Bermuda issues second consultation on corporate income tax

The Government of Bermuda has issued a second [consultation paper](#) regarding the proposed introduction of a corporate income tax (CIT) of 15 per cent, which would apply to Bermuda businesses that are part of Multinational Enterprise Groups (MNEs) with annual revenue of €750 million or more. Once legislated, the CIT is expected to apply to fiscal years beginning on or after 1 January 2025.

The proposals are designed to ensure alignment with the OECD's GloBE rules, and the Bermuda Government intends to develop a Qualified Refundable Tax Credit program in 2024, to become effective in 2025.

Comments on the second consultation closed October 30. A third public consultation, including full draft legislation, is expected in November 2023. The Bermuda Government intends to table the Corporate Income Tax Bill for debate with a view to enactment prior to 31 December 2023. For more information, read our [Tax Alert](#).

Indirect Tax Update

ATO releases Top 100 and Top 1,000 findings reports

The ATO has issued its key findings from the [Top 100](#) and [Top 1,000](#) income tax and goods and services tax (GST) assurance program reviews completed to 30 June 2023. Below are some key highlights from a GST perspective.

- **Top 100:** The ATO completed an assurance review for one or more GST reporters for 75% of the top 100 economic groups, with 93% attaining overall high or medium assurance. The majority, 70%, attained overall medium assurance. GST food classification, recipient created tax invoices, financial services and investment as well as real property, accommodation and retirement villages continue to be an area of focus for GST.
- **Top 1,000:** The Top 1,000 population consists of Australia's large public and multinational corporate groups and APRA-regulated superannuation funds with group turnover over \$250 million, which are not covered by the Top 100 program. The ATO completed 602 reviews for GST across its various programs, obtaining high assurance that 31% of taxpayers paid the right amount of GST for the tax years reviewed, with 96% having achieved high or medium assurance that they have paid the correct amount of GST.

Generally, high assurance ratings are greater for the manufacturing, construction, and agriculture industry, with lower levels of high assurance in the banking, finance and investment, superfunds and insurance industry.

According to the ATO, a key reason for a recent increase in overall high assurance ratings is due to the increase in the number of taxpayers achieving stage 2 ratings for GST governance. A stage 2 governance rating has been reached where taxpayers have comprehensive documented procedures in place, particularly with controls in place for GST data, as well as the BAS preparation process. However, the majority of taxpayers reviewed received only a stage 1 rating for GST governance (this

ordinarily arises where governance procedures are not adequately documented).

Draft GST Determination: supplies of combination food

In response to the Administrative Appeals Tribunal's (AAT) decision in [Chobani Pty Ltd and Commissioner of Taxation \[2023\] AATA 1664](#), the ATO has issued [Draft GST Determination GSTD 2023/D1 Goods and services tax: supplies of combination food](#).

In Chobani, the AAT found that the supply of flavoured yoghurt in a plastic tub along with a blend of dry ingredients in a separate compartment was not GST-free. The issue for determination in this case was whether the GST-free status of the supply was excluded by section 38–3(1)(c) of *A New Tax System (Goods and Services Tax) 1999* (the *GST Act*) – specifically, whether the product fell within the exclusion in the second limb for biscuit goods or confectionery, or food that is a combination of one or more foods at least one of which is food of such a kind.

Following this decision, the ATO's draft Determination explains when a supply of food is a combination food for the purposes of paragraph 38–3(1)(c) of the *GST Act*. The preliminary Commissioner's view on the meaning of 'combination food' in paragraph 38–3(1)(c) is:

- A supply of a combination food is the supply of a product comprising separately identifiable foods, at least one of which is a taxable food.
- A food is separately identifiable when it can be individually perceived by ordinary visual inspection. Being listed as an ingredient in a food alone is not sufficient to establish that a food is separately identifiable.
- The word 'combination' in paragraph 38–3(1)(c) takes its ordinary meaning as the 'product or outcome of joining 2 or more things together in some way'.

Let's talk

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

Matt Strauch

Melbourne
Indirect Tax Leader
+61 (3) 8603 6952
matthew.strauch@pwc.com

Adrian Abbott

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

Jeff Pfaff

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

Brady Dever

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

Mark Simpson

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

Suzanne Kneen

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

Shagun Thakur

Perth
Partner
+61 (8) 9238 3059
shagun.thakur@pwc.com

Andrew Howe

Sydney
Partner
+61 (4) 1464 1438
andrew.s.howe@pwc.com

Mark De Luca

Sydney
Partner
+61 (2) 8266 2461
mark.de.luca@pwc.com

- Whether separately identifiable foods are sufficiently joined together so that they form a combination food is a matter of overall impression, having regard to factors including physical appearance and packaging, labelling, marketing, product design, manner of sale and consumer experience.
- Two or more foods that are separately identifiable and sufficiently joined will not be a combination food if the taxable food is so integrated into the overall product, or is so insignificant within that product, that it has no effect on the essential character of that product.
- Whether food is a combination food must be evaluated at the point of supply. An expectation or likelihood that the combination food may be later separated or mixed does not prevent it from being a combination food.

According to the Commissioner, the following three principles apply when determining whether there is a supply of a combination food:

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

The draft Determination also confirms that [GST Ruling GSTR 2001/8 Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts](#) has no application to supplies of combination foods, as combination foods have no non-taxable parts. Combination foods are always treated under GST law as a single taxable thing.

When the final Determination is issued, it is proposed to apply both before and after its date of issue. The Commissioner will continue to act in accordance with Law Administration Practice Statement PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only* and PS LA 2012/2 (GA) *GST classification of food and beverage items*.

The due date for comments is 10 November 2023.

Decision impact statement: sale of residential property and input tax

The ATO has released a [decision impact statement](#) regarding the Administrative Appeals Tribunal's (AAT) decision in [Domestic Property Developments Pty Ltd a/t for Dals Property Trust v FC of T \[2022\] AATA 4436](#), which concerned whether the sale of residential property was input taxed on the basis of having been used for the making of rental supplies for five years, and if so, whether GST had been passed on.

In this case, the AAT affirmed the Commissioner of Taxation's objection decision, finding that GST was correctly payable on the sale of two newly-constructed units (for a full summary of this case, please refer to our [February 2022](#) issue).

In its view of the decision, the ATO has stated that:

- The AAT's decision confirms the Commissioner's view that marketing the premises for sale is a 'use' of the premises for the purposes of paragraph 40–75(2)(a), an outcome that is consistent with the Commissioner's views in [GST Ruling GSTR 2009/4 Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose](#).
- The Commissioner accepts that the term 'used' is to be interpreted by reference to its ordinary meaning within the statutory context of the GST Act. While there will be an overlap between the ordinary meaning of the term 'used' in the statutory context of the GST Act and the defined term 'apply', the Commissioner will consider what changes are required to GSTR 2009/4 to clarify this position.
- The AAT's decision confirms the Commissioner's view within [GST Ruling GSTR 2003/3 Goods and services tax: when is a sale of real property a sale of new residential premises?](#) and GSTR 2009/4, that paragraph 40–75(2)(a) requires a continuous period of five years. As the AAT decision did not provide the reasoning for its position regarding the date from which the five-year period commences, the Commissioner will maintain the position in GSTR 2003/3 and GSTR 2009/4 and seek to clarify this issue at the first available opportunity before the Tribunal or Federal Court.
- The AAT's findings provide further support for the Commissioner's view in [GST Ruling GSTR 2015/1 Goods and services tax: the meaning of the terms 'passed on' and 'reimburse' for the purposes of Division 142 of the A New Tax System \(Goods and Services Tax\) Act 1999](#) in relation to the operation of Division 142.

Following on from the above, the Commissioner will review GSTR 2003/3 and GSTR 2009/4.

Comments on the decision impact statement closed 27 October 2023.

Correcting GST and fuel tax errors

The Deputy Commissioner of Taxation has made the following determinations in relation to the correction of GST and fuel tax errors made in earlier periods:

- [Fuel Tax \(Correcting Fuel Tax Errors\) Determination 2023](#), and
- [A New Tax System \(Goods and Services Tax\) \(Correcting GST Errors\) Determination 2023](#).

These determinations, which replace earlier determinations that have now sunset, broadly permit errors that have been made in working out a net amount or net fuel amount for an earlier tax period to be corrected by including the amount of the error in working out the net amount or net fuel amount for a later tax period. See also *Legislative Update*.



Personal Tax Update

Draft Ruling on self-education expenses

The ATO has released [Draft Taxation Ruling TR 2023/D1 Income tax: deductibility of self-education expenses incurred by an individual](#). The draft Ruling sets out principles for the deductibility of self-education expenses under section 8–1 of the *Income Tax Assessment Act 1997*, and discusses the types of expenditure that can be deducted as a self-education expense, as well as those that cannot.

Draft TR 2023/D1 updates and replaces [TR 98/9 deductibility of self-education expenses incurred by an employee or a person in business](#) and [TR 92/8 Income tax: deductibility of self education expenses](#) (both of which are withdrawn from 27 September 2023). It also incorporates case law, and ensures consistency of language across related rulings.

Comments on the draft Ruling closed 27 October 2023.

ATO issues draft changes to guideline on liability of legal personal representatives

The ATO has released a draft update [Practical Compliance Guideline 2018/4DC1 Income Tax – liability of a legal personal representative of a deceased person](#), to provide improved certainty for legal personal representatives (LPR) when finalising less complex estates.

[PCG 2018/4](#) was introduced to provide guidance on situations where a LPR will be considered to have notice of a claim by the ATO on the estate. Under the current law, a LPR can be personally liable for the tax liabilities of the deceased person if they distribute the estate assets with notice of a claim by the ATO. As a result, distributions of estate assets are sometimes delayed until after the relevant period of review has expired. The guidance in PCG 2018/4 is intended to enable LPRs of smaller and less complex estates to finalise those estates without concern that they may have to fund a liability of the deceased from their own

assets. It currently only applies if certain conditions are satisfied, one of which is that the market value of the estate assets at the date of death was less than \$5 million.

PCG 2018/4DC1 proposes to uplift the threshold for the market value of estate assets from \$5 million to \$10 million, and includes additional examples to provide greater certainty to legal personal representatives of the deceased in distributing estate assets.

When finalised, the Guideline is proposed to apply both before and after its date of issue. The comments period closes 10 November 2023.

Let's talk

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

Glen Frost

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

Amy Etherton

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

Samantha Vidler

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

Matt Gurner

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

Alistair Hutson

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

State Tax Update

Victoria: State tax and other legislation amendment Bill introduced

The [State Taxation Acts and Other Acts Amendment Bill 2023 \(Vic\)](#) has been introduced into the Victorian Parliament. The Bill amends the *Land Tax Act 2005 (Vic)* to:

- apply vacant residential land tax to all vacant residential land in Victoria on and after 1 January 2025
- extend the definition of vacant residential land tax to include certain unimproved land in metropolitan Melbourne effective from 1 January 2026
- alter the imposition of a single COVID-19 debt temporary surcharge to aggregated land which is otherwise assessed on a single holding basis from 1 January 2024
- change the frequency of absentee owner surcharge exemption reporting to Parliament from every 6 months to every 12 months, and
- adjust the formula for calculating the amount of BTR special land tax payable by owners of land.

The Bill also includes various other tax-related measures, including amendments to:

- The *Duties Act 2000 (Vic)*, to:
 - change the frequency of foreign purchaser additional duty exemption reporting to Parliament from every 6 months to every 12 months
 - allow the corporate reconstruction and consolidation concession and exemption to apply to certain sub-sale arrangements, and
 - clarify the operation of the pensioner and concession card duty reduction, the public landholder concession and the corporate reconstruction and consolidation concession.

- The *First Home Owner Grant and Home Buyer Schemes Act 2000 (Vic)* to align with the amendments to the *Duties Act 2000 (Vic)* in relation to the pensioner and concession card duty reduction.
- The *Sale of Land Act 1962 (Vic)*, to:
 - prohibit the apportionment of land tax between a vendor and purchaser under a contract of sale of land, and
 - prohibit the apportionment of an existing windfall gains tax liability between a vendor and purchaser under a contract of sale of land or option to enter into a contract of sale of land.
- The *Windfall Gains Tax Act 2021 (Vic)*, to:
 - broaden the windfall gains tax exemption for rezoning errors
 - clarify the definition of excluded rezoning as it applies to land in the contribution area within the meaning of section 201RC of the *Planning and Environment Act 1987 (Vic)*, and
 - clarify the operation of the windfall gains tax waiver for charitable land.

Victoria: Electric car road user charge ruled unconstitutional

A majority of the High Court of Australia has held that section 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic)* (ZLEV Charge Act) is invalid on the basis that it imposes a duty of excise within the meaning of section 90 of the Constitution in [Vanderstock v Victoria \[2023\] HCA 30](#). Under section 90, such power is exclusive to the Commonwealth Parliament.

The ZLEV Charge Act requires the registered operator of a zero or low emissions vehicle (ZLEV) to pay an annual charge for the use of the ZLEV on public roads in Australia, at a prescribed rate for each kilometre travelled. The ZLEV charge is a debt due by the registered operator to the State of Victoria.

Let's talk

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

Rachael Cullen

Sydney
Partner
+61 409 470 495
rachael.cullen@pwc.com

Barry Diamond

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

Cherie Mulyono

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

Matthew Sealey

Partner
+ 61 400 684 803
matthew.sealey@pwc.com

Jess Fantin

Brisbane
Partner
+61 (7) 3257 5501
jess.fantin@pwc.com

Rachael Munro

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

The High Court held that an excise within the meaning of section 90 is an inland tax on goods. The question of whether a tax was to be characterised as a tax on goods turned on whether, first, the tax bears a close relation to the production, manufacture, sale, distribution, or consumption of goods, and, second, whether the tax is of such a nature as to affect the goods as the subjects of manufacture or production or as articles of commerce. The High Court determined that the ZLEV charge was a tax on goods as there was a close relation between the tax and the use of ZLEVs, and the tax affects ZLEVs as articles of commerce, including because of its tendency to affect demand for ZLEVs.

This decision is likely to impact plans by other States to introduce similar road-user charges.

Victoria: No exemption from duty for transfer of property from discretionary trust to beneficiaries

In [Baullo v Commissioner of State Revenue \(Review and Regulation\) \[2023\] VCAT 1164](#), the Victorian Civil and Administrative Tribunal (VCAT) has confirmed the assessment of duty on the transfer of a property from a discretionary trust to its individual beneficiaries.

The taxpayers contended that the transfer of the property was exempt from duty under section 36A *property passing to beneficiaries of discretionary trusts of the Duties Act 2000* (Vic).

However, the Commissioner assessed the transfer on the basis that he could not be satisfied that the transfer was 'not part of a sale or other arrangement under which there exists any consideration for the transfer', which is one of the requirements for the exemption to apply per section 36A(1)(e).

In brief, the Tribunal agreed with the Commissioner, satisfied that – on the balance of probabilities – there was consideration that 'moved' the transfer in the form of satisfaction or forgiveness of amounts owed by the corporate trustee to the taxpayers in connection with the acquisition of the relevant property. A balance of over \$155,000 owed by the trustee to the taxpayers was effectively extinguished following the property transfer, reflecting an 'arrangement' between the trustee and the taxpayers for the purposes of section 36A(1)(e).

The Tribunal also noted that section 36C did not apply to this case, as any loan from the taxpayers to the corporate trustee was not subject to a mortgage.

ACT: Updated Revenue Circular on calculating landholder duty

The ACT Revenue Office has updated Revenue Circular [LHD002.1](#), which identifies how landholder duty in the ACT is calculated, including how relevant acquisitions are valued.

Landholder Duty is imposed under the *Duties Act 1999* on certain transactions when a person makes a relevant acquisition in a landholder who has an interest in land in the ACT. The method for calculating landholder duty varies depending upon how the person acquired the interest in the landholder.

The updated Circular is effective 1 October 2023.

New South Wales: Legislation passed to exempt duty on transfers to employer or employee organisations

The [Revenue, Mining and Energy Legislation Amendment Bill 2023 \(NSW\)](#) has been passed by the NSW Parliament and received Assent.

The Bill amends the *Duties Act 1997 (NSW)*, among other things, to provide an exemption from duty on the transfer of dutiable property to particular employer or employee organisations, or their trustee, if the transfer is a consequence of the withdrawal of an employer or employee organisation from the amalgamation of two or more employer or employee organisations.

NSW: Land tax and surcharge land tax assessments confirmed

In [Waverley Investments Pty Ltd atf The Five Oaks Trust v Chief Commissioner of State Revenue \[2023\] NSWCATAD 255](#), the NSW Civil and Administrative Tribunal confirmed the Chief Commissioner's assessments of land tax and surcharge land tax (SLT) payable for the land tax years 2017 to 2021.

SLT is payable on residential land in New South Wales if the land is owned by a foreign person. SLT is payable in addition to (ordinary) land tax. Section 5D(1) of the *Land Tax Act 1956 (NSW)* deems the trustee of a discretionary trust to be a foreign person 'if the trust does not prevent a foreign person from being a beneficiary of the trust'. To prevent a foreign person from being a beneficiary of the trust, two requirements must be met under section 5D(3). They are that:

- (a) no potential beneficiary of the trust is a foreign person (the 'no foreign beneficiary requirement'), and
- (b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the 'no amendment requirement').

The Tribunal noted that, in simple terms, paragraph 5D(3)(a) looks to the position now, while paragraph 5D(3)(b) looks to future possibilities. The Tribunal found that the requirement in paragraph 5D(3)(a) was met. However, at each of the relevant taxing points, the 'no amendment requirement' in paragraph 5D(3)(b) was not met. The Tribunal commented that the question to ask at the relevant taxing point is whether the terms of the trust can ever be amended to include foreign persons as potential beneficiaries.

NSW: Late variation of trust deed failed to prevent surcharge land tax assessments

In [Axiom88 Pty Ltd atf Axiom88 Trust v Chief Commissioner of State Revenue \[2023\] NSWCATAD 252](#), the NSW Civil and Administrative Tribunal has confirmed assessments to SLT, finding that foreign persons were not excluded as beneficiaries under the terms of the trust deed during the relevant period.

The taxpayer, a corporate trustee, was the registered owner of residential land that was used and occupied by two nominated beneficiaries of the trust as their principal place of residence.

The Chief Commissioner of State Revenue assessed the taxpayer to surcharge land tax for the 2017 – 2021 land tax years (inclusive) on the basis that it was a 'foreign person' for the purposes of section 5D of the *Land Tax Act 1956 (NSW)* during the relevant land tax years.

Prior to 24 February 2021, the trust deed did not contain a provision that prevented a foreign person from being a beneficiary of the trust fund. Therefore, by virtue of section 5D(1) of the *Land Tax Act*, as at 30 December 2020, the taxpayer, as trustee of a discretionary trust, was taken to be a foreign person as, at that time, the trust deed did not contain any provisions that prevent a foreign person from being a beneficiary of the trust fund. In other words, the deed of amendment in February 2021 could not have retrospective effect.

Queensland: Public Ruling on extending lodgement time for certain partnership and trust acquisitions

The Queensland Revenue Office has issued [Public Ruling DA019.2.1](#) which outlines when the Commissioner may grant an extension of time to lodge dutiable transactions involving partnership interests in professional partnerships. Under the *Duties Act 2001 (Qld)*, parties liable to pay transfer duty relating to a dutiable transaction must lodge documents evidencing the transaction within 30 days after the liability arises, unless the Commissioner exercises their discretion to extend the lodgment date.

The Commissioner acknowledges that, for certain professional partnerships, there may be a large number of small fractional interests acquired in the partnership throughout the year due to partner appointments and retirements, and equity interest adjustments. Accordingly, the Ruling sets out the Commissioner's practice in determining when an extension of time should be granted.

Where an extension is granted, the partnership acquisitions and associated trust acquisitions must be lodged with the Commissioner within 30 days after the end of the financial year in which the liability for the acquisition arose.

The Ruling is effective 21 September 2023 and further information on [lodgement requirements](#) is available via the Queensland Treasury.

Superannuation Update

Exposure draft released for high superannuation balance tax

Earlier this year the Government announced that it would reduce the tax concessions available to individuals whose superannuation balances exceed \$3 million. To achieve this, individuals with total superannuation balances over \$3 million at the end of a financial year will be subject to a tax of 15 per cent on "earnings". The proposed start date of this new initiative is 1 July 2025.

Following on from an earlier [consultation paper](#), Treasury has now [released exposure draft legislation](#) in relation to these measures. Once implemented, from the 2025–26 income year onwards, the member's account will be subject to tax at 15% on earnings from their full balance (as part of the Fund's ordinary tax liability in its income tax return) and then an additional 15% tax on a percentage of the increase in that member's balance as represents the portion above \$3 million (with adjustments for contributions and withdrawals with the intention of confining the increase to that caused by investment outcomes).

The additional tax will be imposed directly on the individual and will be separate from the tax arrangements of the superannuation fund or scheme. Balances in Australian superannuation accounts will be included for the purposes of calculating an individual's total superannuation balance (TSB) and earnings. This includes APRA-regulated funds, SMSFs and exempt public sector schemes. Special rules will apply to certain Commonwealth judges and justices, certain State higher level office holders, and non-complying funds.

The new tax will be assessed by the Commissioner of Taxation, and will generally be due and payable within 84 days of the Commissioner giving the notice of assessment (different payment times apply for defined benefit interests).

Individuals will have the option to pay their tax liability either by releasing amounts from their superannuation or using amounts outside of the superannuation system (e.g. cash), or a combination of the two.

This will be the case for all individuals (other than those with a defined benefit interest) irrespective of whether they have met a condition of release.

The draft legislation includes proposed amendments to several Acts to include provisions relating to the calculation of earnings, withdrawals and contributions, modifications for earnings of certain constitutionally protected interests, debt deferral provisions for defined benefit interests in the pre-end benefit phase, and changes to the definition of TSB. Special rules for modified treatment of defined benefit and some retirement phase interests, including the valuation of such interests, will be addressed through specific provisions in subsequent regulations.

[Comments](#) on the exposure draft legislation closed 18 October 2023.

Draft update to taxation ruling: superannuation income stream

The ATO has released [draft Taxation Ruling TR2013/5DC1 Income tax: when a superannuation income stream commences and ceases](#), which outlines proposed changes to [TR 2013/5](#) to reflect legislative amendments that commenced on 1 July 2017, clarify how the general principles in the Ruling apply in the context of successor fund transfers, and remove practical compliance approaches that are no longer current. The draft Ruling also includes a new Appendix 2 summarising legislation changes with respect to superannuation to provide an understanding of what legislation was in effect at a given time.

Comments close 10 November 2023.

Payday super

On 19 October 2023, Treasury released a consultation paper regarding the 2023–24 Budget proposal to require employees to pay their employees' superannuation guarantee entitlements on the same day that they pay salary and wages. For further information regarding the consultation on 'payday' superannuation, please refer to the Employment Taxes update.

Let's talk

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

Naree Brooks

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

Marco Feltrin

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

Stephanie Lam

Brisbane
Partner
+61 (7) 3257 8455
stephanie.lam@au.pwc.com

Alice Kase

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

Ken Woo

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

Allister Sime

Melbourne
Director
+61 3 8603 1195
allister.sime@pwc.com

Sharyn Frawley

Melbourne
Partner
+61 3 8603 1217
sharyn.frawley@pwc.com

Legislative Update

Federal Parliament resumed on 16 October 2023. No tax or superannuation related Bills have progressed in Federal Parliament since our last edition of the Monthly Tax Update. However, [Treasury Laws Amendment \(Support for Small Business and Charities and Other Measures\) Bill 2023](#), which is currently before the House of Representatives, has been referred to the Senate Economics Legislation Committee. The Committee's report is due by 23 November 2023. The Bill introduces a package of measures to provide short-term relief to small businesses, including an increase of the instant asset write-off threshold from \$1,000 to \$20,000. For further information on the contents of the Bill, refer to our [October Tax Update](#).

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

- The [Fuel Tax \(Correcting Fuel Tax Errors\) Determination 2023](#), applicable from 26 September 2023, outlines when an error may be corrected for tax periods starting on or after 1 July 2012. It replaces [Fuel Tax: Correcting Fuel Tax Errors Determination 2013](#).
- The [A New Tax System \(Goods and Services Tax\) \(Correcting GST Errors\) Determination 2023](#), applicable from 26 September 2023, outlines when an error may be corrected for tax periods starting on or after 1 July 2012. It replaces the [Goods and Services Tax: Correcting GST Errors Determination 2013](#).

The next sitting day for the Senate is 6 October 2023, with the House of Representatives next sitting on 13 November 2023.

The [2024 Parliamentary sitting calendar](#) has been released. Parliament will commence 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:

Chris Morris

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

Trinh Hua

Sydney
Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

Norah Seddon

Sydney
Tax Leader
+61 421 051 892
norah.seddon@au.pwc.com

James O'Reilly

Brisbane
Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos

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

Matt Budge

Perth
Tax Leader
+61 (08) 9238 2282
matthew.budge@au.pwc.com

Michael Dean

Sydney
Private Tax Leader
+61 402 041 451
michael.dean@au.pwc.com

Alistair Hutson

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

Amy Etherton

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

Sophia Varelas

Melbourne
National Leader, R&D and Government Incentives
+61 417 208 230
sophia.varelas@pwc.com

Other News Update

ATO releases draft Taxation Ruling on composite items

The ATO has released draft Taxation Ruling [TR 2023/D2](#) *Income tax: composite items – identifying the relevant depreciating asset for capital allowances*.

A 'composite item' is one that is made up of a number of components that are each capable of separate existence. Subsection 40–30(4) of the *Income Tax Assessment Act 1997* requires an objective consideration of whether a particular composite item is itself a depreciating asset, or whether one or more of its components are separate depreciating assets – it is a question of fact and degree to be determined in the circumstances of the particular case.

Draft TR 2023/D2 was previously issued in draft as TR 2017/D1 (withdrawn with effect from 4 October 2023). The updated draft reflects [changes](#) made to address issues raised in the previous consultation, and sets out the Commissioner's preliminary views on:

- relevant principles to assist in determining whether a composite item is itself a depreciating asset or whether its components are separate depreciating assets for the purposes of Division 40, and
- whether an 'interest in an underlying asset' for the purposes of section 40–35 *Jointly held depreciating assets* requires an entity to have an interest in all parts of a composite item that is itself a depreciating asset, or whether an interest in any part of the asset is enough.

The draft Ruling does not address Division 43 which provides deductions for certain capital works expenditure.

The draft Ruling states that purpose or 'functionality' is generally a useful guide to the identification of an item, and provides principles to take into account when determining whether a composite item is a single depreciating asset, or more than one depreciating asset. It also clarifies how the joint holding rules in section 40–35 apply to composite items, and how the composite asset concept applies to intangible depreciating assets.

When the final Ruling is issued, it will apply to years of income commencing both before and after its date of issue. Comments on the draft Ruling closed 3 November 2023.

Section 100A updates

The ATO has issued an [addendum](#) to [Taxation Ruling TR 2022/4](#) *Income tax: section 100A reimbursement agreements*. The addendum amends TR 2022/4 to reflect the recent Full Federal Court decisions in *FC of T v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 and *B&F Investments Pty Ltd ATF the Iluka Park Trust v Commissioner of Taxation* [2023] FCAFC 89.

While the decisions do not substantially alter the Commissioner's views on the operation of section 100A of the *Income Tax Assessment Act 1936* (Present entitlement arising from reimbursement agreement), the changes clarify that advisers may be a party to a reimbursement agreement and explain when a beneficiary may need to be a party to a reimbursement agreement.

Separately, the ATO has also updated its [Practical Compliance Guideline PCG 2022/2](#) *Section 100A reimbursement agreements – ATO compliance approach* to further clarify some features of the arrangements that are excluded from the green zone.

ATO public and multinational business advice and guidance program insights report

The ATO has published an insights [report](#) on its public and multinational business advice and guidance program, which covers insights drawn from work completed over the 2019–20 to 2022–23 financial years.

The program provides advice to all taxpayers within the [Action Differentiation Framework](#) (ADF), which is used to differentiate between the size, complexity and behaviour of public and multinational businesses.

Let's talk

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

Chris Morris

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

Trinh Hua

Sydney
Tax Market Leader
+61 (2) 8266 3045
trinh.hua@pwc.com

Norah Seddon

Sydney
Tax Leader
+61 421 051 892
norah.seddon@au.pwc.com

James O'Reilly

Brisbane
Tax Leader
+61 (7) 3257 8057
james.oreilly@pwc.com

Jason Karametos

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

Matt Budge

Perth
Tax Leader
+61 (08) 9238 2282
matthew.budge@au.pwc.com

Michael Dean

Sydney
Private Tax Leader
+61 402 041 451
michael.dean@au.pwc.com

Alistair Hutson

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

Amy Etherton

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

According to the ATO, the nature and amount of advice requested reflects market activity as well as changes to the law. Key insights include:

- engagement through the early engagement program on complex transactions is more likely to result in positive outcomes for applicants
- Top 100 taxpayers use the Program for rulings for the entities that invest in them as well as their own tax affairs – this reflects the level of engagement they already have with the ATO as well as the need or desire to provide certainty to their investors
- other public groups and international businesses, (for example Top 1,000 taxpayers), access the Program for a mix of tax certainty, predominantly for their own affairs as well as that of the entities that invest in them, and
- most applications to the Program are made via advisers – this reflects the transactional nature of many of the arrangements on which advice is requested, and the likelihood for advisers to be engaged by taxpayers as part of managing those transactions.

The topics on which advice is sought have remained relatively consistent over the past four years of the program, with the top five topics for advice requests being:

- capital gains tax (CGT)
- employee share schemes
- capital management transactions
- withholding tax exemptions, and
- international tax issues.

IGTO releases annual report

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) has released her [annual report](#) for the financial year ending 30 June 2023.

The IGTO is an independent, Commonwealth statutory agency that contributes to the overall integrity and transparency of the tax system by independently investigating taxation administrative actions and decisions of the Australian Taxation Office (ATO) and the Tax Practitioners Board (TPB), as well as systems relating to tax administration.

In FY23, the IGTO received 1,529 complaints and closed 1,445 within the same period (94.5%). In addition, the ATO implemented 16 Agreed Business Improvements (ABIs) and accepted 18 new ABIs which the IGTO proposed. The IGTO also progressed several review investigations.

In FY24, the IGTO will progress two own-initiative investigations. The first concerns the sustained and substantial decrease in the amount of debts permanently released by the ATO for individuals experiencing serious hardship, while the second investigation will examine when the Commissioner has a discretion to delay the time for lodgement of an approved form.

IGTO issues report on Commissioner's General Powers of Administration

The IGTO has published its [final report](#) into The Exercise of the Commissioner's General Powers of Administration (GPA).

Through research and consultation, the IGTO observed that there is no universal understanding of the GPA and that there is a lack of clarity about the nature and objective of the GPA. The report examines the use of the GPA through the lens of five case studies that serve to illustrate the complexities of the GPA, and makes three recommendations to the ATO for administrative improvements aimed at enhancing education and awareness of the GPA, significant decisions that rely upon the GPA and reporting of significant exercises of the GPA, to which the [ATO has agreed](#).

The report also makes three other recommendations to the Government, including that the Government improve tax administration by legislating a requirement for the Commissioner to annually publish and table a record of the exercises of his general powers of administration where it affects a broad class or range of taxpayers.

Ruling on expenses associated with holding vacant land

The ATO has finalised [Taxation Ruling TR 2023/3 Income tax: expenses associated with holding vacant land](#) which explains the Commissioner's view of the application of and some of the exclusions contained in section 26–102 of the *Income Tax Assessment Act 1997* which denies (with effect from 1 July 2019) a deduction for losses or outgoings relating to holding land on which there is no substantial and permanent structure in use or available for use.

The Ruling provides guidance on the three tests to determine whether the section applies to a land holding and provides examples to illustrate its application. Broadly the three tests are:

- Is there a substantial and permanent structure on the land?
- If there is a structure, is it in use or available for use?
- If there is a structure available for use, is it independent of and not incidental to the purpose of any other structure, or proposed structure on the land?

It also considers the treatment of interest incurred after land is sold or a business activity has ceased (with reference to TR 2004/4 *Income tax: deductions for interest incurred prior to the commencement of, or following the cessation of, relevant income earning activities*), land that is in use or available for use in carrying on a business (included where vacant land has mixed uses) and land held by primary producers.

The Ruling is effective from 1 July 2019, being the application date of section 26–102.

Visa data-matching program

The Commissioner of Taxation has given [notice](#) of a new data-matching program under which the ATO will acquire visa data from the Department of Home Affairs for 2023–24 through to 2025–26.

This information will be used to help ensure, among other objectives, that visa populations fulfil their registration, lodgment, correct reporting and payment of tax and super obligations, as well as to improve the integrity of the tax and superannuation systems by cancelling the Australian Business Numbers (ABNs) of ineligible ABN holders.



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.

Jannette Krezel

Senior Manager, Tax Markets

jannette.krezel@au.pwc.com

Lynda Brumm

Principal, Tax Markets & Knowledge

+61 (7) 3257 5471

lynda.brumm@pwc.com

Lucy Webb

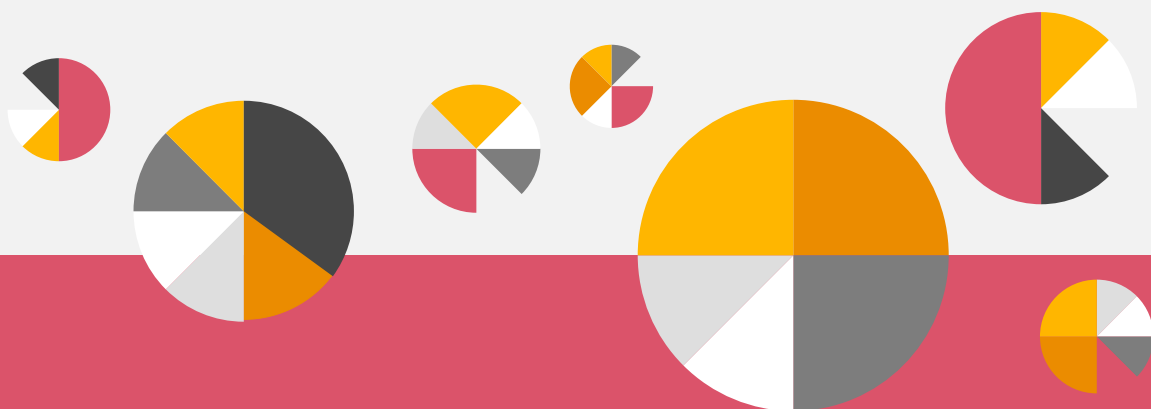
Manager, Tax Markets & Knowledge

lucy.webb@au.pwc.com

Rosie Muirden

Director, Employment Taxes

rosie.muirden@au.pwc.com



pwc.com.au

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