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TaxTalk Monthly

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



Corporate Tax Update

Association of persons not a tax limited partnership

In *D Marks Partnership by its General Partner Quintaste Pty Ltd v Commissioner of Taxation* [2016] FCAFC 86 and *NR Allsopp Holdings Pty Ltd as General Partner of Q Uniform Partnership v Commissioner of Taxation* [2016] FCAFC 87, the Full Federal Court (in majority decisions) held that an association of two entities registered as a limited partnership under the Partnership (Limited Liability) Act 1988 (Qld) (PLLA) was not a limited partnership for the purposes of income tax law because the association of persons was not a 'partnership' under the Partnership Act 1891 (Qld) or at common law.

By way of background, under the income tax law, generally, a limited partnership is treated as a company and the partners are treated as if they were shareholders. Of relevance to the cases in hand, a limited partnership is defined for income tax purposes as "an association of persons (other than a company) carrying on business as partners or in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited".

Although the two cases before the Court were based on different facts, the issues did not differ, and the parties agreed that the determination of the issues in the D Marks proceeding would also apply to the Allsopp appeal.

It was common ground in both cases that the 'partners' did not carry on business in common with a view to profit.

Justices Pagone and Griffiths (the majority) found that an association of persons could not be a limited partnership under the relevant Queensland legislation unless the association of persons would qualify as a partnership under the Partnership Act 1891 (Qld) or at general law. The majority also held that the 'conclusive evidence' provision in subsection 8(4)(b) of the PLLA could not be used for an association of persons which was not otherwise a partnership to prove that the association was a limited partnership.

In the dissenting judgment, Logan J held that the conclusive evidence provision in the PLLA bound the Commissioner of Taxation to accept that the association of persons was a limited partnership. In other words, in the absence of fraud in obtaining registration, the obtaining of registration meant that the association of persons was a limited partnership.

Details of the Administrative Appeals Tribunal decision at first instance was reported in the [Corporate Tax update for the October 2015 edition of TaxTalk Monthly](#).

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Employment Tax Update

New South Wales State Budget

Further to the recent announcement of the 2016-17 New South Wales State Budget, amendments to the application of the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011*, as outlined in the *State Revenue Legislation Amendment (Budget Measures) Bill 2016*, received Royal Assent on 23 June 2016. These amendments limit the registration of new positions from 31 July 2016 to employers that have 50 or fewer full-time equivalent employees on the date which employment commences. Additionally, for positions registered from 31 July 2016, the amount payable upon reaching the employee's second anniversary of employment is increased from \$3,000 to \$4,000.

South Australian State Budget

The 2016-17 South Australian Budget was also handed down by the South Australian Treasurer during the month and includes the following changes:

- The announcement of a Job Accelerator Grant Scheme to encourage South Australian businesses to employ additional full-time, part-time and casual employees, and maintain them for at least 12 months. Businesses that increase their number of South Australian employees will receive a grant for each additional worker employed by them in a new position between 1 July 2016 and 30 June 2018. The grant will be paid at the first and second anniversary date of employment. A Job Accelerator Grant of up to \$10,000 (\$5,000 each year for two years) for each new Full-Time Equivalent (FTE) job created is available for businesses liable for payroll tax in South Australia with Australian wages of \$5 million or less. A Job Accelerator Grant for Small Business & Start-ups of up to \$4,000 (\$2,000 each year for two years) per new job created will also be available for most businesses that are not liable for payroll tax
- The extension of the small business payroll tax rebate introduced in the 2013-14 State Budget for an additional four years to 2019-20. The rebate provides payroll tax savings for employers with taxable payrolls that are less than or equal to \$1.2 million. Eligibility criteria for the rebate will be unchanged from the rebate that applied in previous years, and

- Amendment of the *Taxation Administration Act 1996* (SA) to clarify that a taxpayer is only required to pay 50 per cent of the primary tax in dispute before an appeal can be lodged (as opposed to 50 per cent of the whole amount of tax assessed inclusive of interest and penalty tax).

Increase in Payroll Tax Threshold (Australian Capital Territory)

The Australian Capital Territory (ACT) Government has released a Determination during the month, increasing the annual payroll tax threshold from \$1,850,000 to \$2,000,000. This change will take effect from 1 July 2016. The ACT payroll tax rate remains at 6.85 per cent for the 2016-17 financial year.

Payroll Tax Revenue Ruling updates (Victoria and Tasmania)

The State Revenue Offices of Victoria and Tasmania have both released updated versions of Revenue Ruling PTA003 in relation to the payroll tax treatment of fringe benefits in each state. Among other things, the updated rulings remove outdated reference to prior year FBT gross-up rates. These rulings are effective from 1 July 2016.

Failing to pay PAYG Withholding – Director Penalty Provisions

In *Deputy Commissioner of Taxation v Panayi [2016] NSWDC 113* the taxpayer unsuccessfully argued against the application of the Director Penalty Provisions in respect of unpaid PAYG withholding liabilities to the Australian Taxation Office (ATO). Under these provisions, liability for payment of a penalty equal to the unpaid PAYG withholding amount will arise for any person who is either designated as a director of the company on the date of the withholding, or has become a director of the company after that date.

Despite claims by the taxpayer that he was unable to take part in management of the company due to illness, and actions taken to liquidate the company shortly after the penalty notices were issued as a means of avoiding payment of the penalty, the Court

found that the taxpayer was registered with ASIC as the sole director of the company during the relevant period and was therefore liable to pay the Director Penalty amount in full.

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Global Tax Update

New Zealand's changing international tax rules and relationships

The New Zealand Government has released [several papers](#) outlining New Zealand's Base Erosion and Profit Shifting (BEPS) implementation strategy. Simultaneously, the Government also released its response to the recommendations from a recent inquiry into foreign trust disclosure rules. The inquiry made a number of recommendations which propose improvements to registration and disclosure of information, anti-money laundering rules and increased information sharing between government agencies. The Government has agreed with the majority of the recommendations, with modifications to a few of them. For further information, see PwC New Zealand Tax Tips Alert, [New Zealand's changing international tax rules and relationships – what's next?](#)

United Kingdom – Tax Transparency guidance

Her Majesty's Revenue and Customs (HMRC) has provided guidance in [Large businesses: publish your tax strategy](#) for United Kingdom (UK) businesses with group turnover above £200m or balance sheet over £2bn requiring them to make their tax strategy public.

Implications of UK vote to leave the EU

In a 23 June 2016 referendum, the UK public voted to leave the European Union (EU). The implications for the UK, the EU and the rest of the world depend to a substantial extent on the agreed exit terms, as well as the negotiations with other countries. Given the comments from incoming Prime Minister Theresa May, it seems inevitable that the UK Government will, at some point, notify the European Council of its intent to leave the EU. That notification triggers a two-year deadline for concluding negotiations. That deadline could be extended further by mutual consent of all Member States.

There are many misconceptions about how the referendum vote impacts taxes, but it causes no major legislative tax changes directly. However, the market volatility that we have seen since the vote could affect some tax-related affairs. In addition, tax policy changes may, in time, result from what transpires. For further information, see PwC's Tax Policy Bulletin, [EU and global tax implications of UK public vote to leave the EU](#).

European Economic and Financial Affairs Council agree to Anti-Tax Avoidance Directive

Political agreement on the Anti-Tax Avoidance Directive (ATAD) was reached by the EU Member

States in the Council of the EU, meeting through the European Economic and Financial Affairs (ECOFIN) Council on 17 June 2016.

The agreement requires all Member States to enact laws that largely implement G20/Organisation for Economic Co-operation and Development (OECD) BEPS outcomes on interest limitation rules, hybrid mismatches and controlled foreign companies as well as additional measures on exit taxation and a general anti-abuse rule. For further information, see PwC's Tax Policy Bulletin, [ECOFIN agrees EU-wide rules in Anti-Tax Avoidance Directive](#).

Germany and Austria implement BEPS related measures

The German Federal Ministry of Finance published a draft bill which implements the EU directive mandating the automatic exchange of tax information in addition to measures targeting BEPS. The bill's main legislative changes include the adoption of the OECD's recommendations for Country-by-Country (CbC) Reporting and the 'Master File/Local File' for transfer pricing documentation. The rules, when implemented, will update the General Fiscal Code to follow the scope of information to be provided under the recommended rules in the BEPS Action Item 13 report. For further information, see the PwC Tax Insights from International Tax Services, [Germany publishes draft bill implementing BEPS related measures](#).

The Austrian Parliament enacted legislation that introduces mandatory transfer pricing documentation requirements as defined in BEPS Action Item 13, effective from 1 January 2016. The legislation follows the three-tiered approach to transfer pricing documentation requiring multinational enterprises to prepare a Master File, a Local File, and a CbC Report. For further information, see PwC's Tax Insights from Transfer Pricing, [Austria implements transfer pricing documentation, country-by-country reporting requirements](#).

United States' final CbC reporting rules

The United States (US) Internal Revenue Service (IRS) issued final regulations (TD 9773) requiring annual CbC reporting for US-parented multinational enterprise groups. The information collection requirements in these regulations are to be satisfied by submitting a CbC Report with the taxpayer's income tax return. The final regulations apply to reporting periods of 'ultimate parent entities' of US

groups that begin on or after the first day of a taxable year of the ultimate parent entity that begins on or after 30 June 2016. For further information, see PwC's Tax Insights from Transfer Pricing, [IRS issues final country-by-country reporting rules, addresses voluntary reporting for 'gap year,' along with a few points of clarification](#).

Ireland introduced formal bilateral Advance Pricing Agreement program

The Irish Revenue Commissioners have introduced a formal bilateral advance pricing agreement (APA) program effective from 1 July 2016. Prior to this, Ireland accepted requests for bilateral APAs with treaty partners where invited to do so by the other country. The new program was introduced in response to Action 14 of the BEPS initiative with a view to providing certainty to taxpayers in relation to the taxation of cross-border transactions and is in line with OECD Best Practice Guidelines. For further information, see PwC's Tax Insights from Transfer Pricing, [Ireland introduced formal bilateral APA program](#).

Further developments in OECD's BEPS project

Representatives of more than 80 countries and jurisdictions gathered in Kyoto, Japan from 30 June – 1 July 2016 to progress ongoing efforts to update international tax rules as part of the OECD/G20 BEPS project. In addition, the OECD has undertaken further work to progress specific BEPS implementation plans including the release of the following in recent weeks:

- [Discussion Draft](#), which deals with the design and operation of the group ratio rule under BEPS Action 4 (limiting base erosion involving interest deductions and other financial payments) – comments are due by 16 August 2016.
- The [standardised IT-format for the exchange of tax rulings](#) between jurisdictions under BEPS Action 5.
- [Public comments received in response to the discussion draft on the development of a multilateral instrument to implement the tax treaty related BEPS measures](#).
- [Guidance on CbC Reporting](#), which sets out transitional filing options for multinationals that voluntarily file in the Parent jurisdiction, guidance on the application of CbC Reporting to investment funds and partnerships, and the

impact of exchange rate fluctuations on the agreed EUR 750 million filing threshold for groups.

- [The standardised IT-format for providing feedback on Common Reporting Standard \(CRS\) information](#)
- [Additional guidance on the Attribution of Profits to Permanent Establishments](#) – comments are due by 5 September 2016. For further information, see PwC's Tax Insights from Transfer Pricing, [OECD seeks comments on new permanent establishment profit attribution guidance](#).
- Revised Guidance on Profit Splits, which deals with BEPS Actions 8-10 (Aligning Transfer Pricing Outcomes with Value Creation) – comments are due by 5 September 2016. For further information, see PwC's Tax Insights from Transfer Pricing, [Release of BEPS discussion draft: Revised guidance on profit splits](#).

- [Conforming amendments to Chapter IX of the OECD Transfer Pricing Guidelines](#), which are prompted by the changes to the Guidelines set out in the 2015 BEPS reports, specifically the BEPS report on Actions 8-10, Aligning Transfer Pricing Outcomes with Value Creation, and Action 13, Transfer Pricing Documentation and CbC Reporting.

Other International tax news

Read our monthly global newsletter, [International Tax News](#): Edition 41, July 2016, for updates and analysis on developments taking place around the world. The developments covered by this edition include amendments to the Income Tax Act in Singapore, new tax bill in New Zealand, HM Treasury and HMRC consultation of relevance to multinational businesses, and the Dutch Court of Appeal ruling in favour of a cross-border fiscal unity with a non-EU parent.

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State Taxes Update

South Australian Budget

The South Australia (SA) 2016-17 Budget was delivered on 7 July 2016 by the SA Treasurer. The following significant tax changes were announced, including:

- An extension of the small business payroll tax concession for a further four years
- An extension and expansion of the off-the-plan stamp duty concession for a further year
- Confirmation of the previously announced intention to cut Non-Residential Property stamp duty by a further third from 1 July 2017 and abolish it on 1 July 2018, and

- An introduction of a wagering tax (15 per cent on net wagering revenue) from 1 July 2017.

The key taxation measures and/or incentives announced in the Budget are as follows.

Extend and expand Off-the-Plan stamp duty concession

- The Off-the-Plan (OTP) concession is a full stamp duty concession on the transfer of a new apartment or substantially refurbished apartment for a contract entered into from 31 March 2012 to 30 June 2014 (capped at stamp duty payable on a \$500,000 apartment) and a partial concession from 1 July 2014 to 30 June 2017.

- The OTP stamp duty concession will be extended and expanded for one year at a cost of \$8 million.
- The concession of up to \$15,500 will now be available to all new apartments across the State.
- This measure aims to support the building and construction sector. An estimated 800 apartment purchasers will benefit from the stamp duty concession.

Reduce and then cut Non-Residential Property stamp duty

- The Non-Residential Property stamp duty was cut by a third on 7 December 2015, and will be cut by a further third on 1 July 2017. It will be abolished on 1 July 2018.
- Up to 6,000 non-residential property transactions are expected to benefit each year.

Introduction of wagering tax

- A tax of 15 per cent will be introduced on net wagering revenue from bets placed in SA irrespective of the location of the wagering operators from 1 July 2017.
- The tax will apply to all bet types including horses, harness and greyhound racing, bets on sports, and bets on other contingencies.
- A tax-free threshold of \$150,000 net wagering revenue per year will apply for all operators.

- These reforms are estimated to generate around \$10 million per annum.

\$500,000 per annum of this revenue will be used to help fund programs to address problem gambling.

Major Announcements

- To try to promote economic growth and address the State's high unemployment rate, a range of grants and concessions have been established. In particular, this includes grants for certain medium-sized businesses liable for payroll tax of up to \$10,000 over two years, per new job created. This grant will operate from 2016 to 2018.
- Against the backdrop of a significant Budget surplus, there are significant proposals to commit spending to infrastructure projects. The SA Government has announced a \$500 million upgrade for SA schools, which are forecast to commence by the end of 2016. A \$527 million healthcare spend has also been announced.
- The Government also intends to privatise part of the Land Services group, which is responsible for processing land titles transactions. Options are also being considered to obtain some form of private sector involvement in other State-owned entities such as HomeStart.

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Legislative Update

What can we expect when Parliament resumes?

Work can now progress on implementing the policies announced in the 2016-17 Federal Budget, since the Federal election has finished and Coalition has returned to government.

The new Federal Parliament is currently scheduled to commence sitting on 30 August 2016.

Below is a summary of some of the key tax and superannuation measures that the Coalition has previously announced that are yet to be implemented. For further discussion on the 2016-17 Federal Budget, refer to PwC's [Federal Budget analysis](#).

Corporate tax

- Reduce the company tax rate to 27.5 per cent from 1 July 2016 for small business companies (those with annual aggregated turnover of less than \$10 million) followed by a progressive reduction to 25 per cent over 10 years for all companies.
- Introduce a Diverted Profits Tax, a 40 per cent tax on profits that are artificially diverted from Australia, for income years commencing on or after 1 July 2017.
- Amend the transfer pricing rules to give effect to Organisation for Economic Co-operation and Development's (OECD) base erosion and profit shifting (BEPS) recommendations.
- Implement the OECD BEPS recommendations to eliminate hybrid mismatch arrangements, applicable from the later of 1 January 2018 or six months following the date of Royal Assent of enabling legislation.
- Increase penalties for 'significant global entities' (broadly, those with global revenue of at least \$1 billion) that fail to disclose information to the Australian Taxation Office, applicable from 1 July 2017.
- It is understood that the Coalition intends to pursue its previously announced proposal to decrease the research and development tax offset amounts by 1.5 percentage points. The Opposition has recently indicated it will accept this measure.

- Increase access to company losses by replacing the same business test with a more flexible 'predominantly similar business test' (for losses incurred from 1 July 2015).
- Introduce amendments to the tax consolidation rules, including the 'deductible liabilities measure', removing deferred tax liabilities from the tax cost setting entry and exit calculations, and implementing an 'anti-churn' rule.
- Improve the operation and administration of the deemed dividend rules applicable to private companies from 1 July 2018.

Small business

- Increase the small business entity aggregated turnover threshold (currently \$2 million) to \$10 million from 1 July 2016, resulting in increased access to the lower corporate tax rate and the current accelerated depreciation concessions. The current \$2 million turnover threshold will be retained to access the small business capital gains tax concessions.
- Increase the unincorporated small business tax discount from 5 per cent to 8 per cent on 1 July 2016 and progressively increase it to 16 per cent over 10 years. Access to the discount will be extended to individual taxpayers with business income from an unincorporated business that has an aggregated annual turnover of less than \$5 million.
- Simplify Goods and Services Tax (GST) reporting requirements for small business.

Personal tax

- Increase the threshold at which the 37 per cent marginal tax rate cuts in from \$80,001 to \$87,001.

Superannuation

The Government has its 2016-17 Federal Budget package of superannuation measures to implement, in addition to legislating the objective of superannuation as being 'to provide income in retirement to substitute or supplement the Age Pension'. The Government has indicated that it expects to begin consultation on exposure draft legislation in relation to its superannuation reforms

shortly. The 2016-17 Federal Budget package includes:

- Reduce the threshold for the additional 15 per cent contribution tax (on their concessional contributions) for high income earners from \$300,000 to \$250,000.
- Introduce a \$1.6 million cap on balances that can be transferred into pension phase.
- Reduce the annual concessional contributions caps to \$25,000.
- Allow all individuals up to age 75, regardless of their work circumstances, to make concessional contributions subject to the annual cap, or to make 'catch-up' contributions where they have not reached the cap in previous years.
- Introduce a \$500,000 lifetime non-concessional contributions cap.
- Increase the income threshold for low income spouse contributions.
- Introduce a Low Income Superannuation Tax Offset.
- Reduce the tax concessional nature of transition to retirement income streams.
- Remove ability for certain income stream payments to be taxed as lump sums.
- Abolish the anti-detriment payment rule for super funds.
- Subject to the unanimous agreement of the States, apply the GST to low value imported goods imported from 1 July 2017.
- Allow the effective life of acquired intangible assets to be self-assessed for depreciation purposes from 1 July 2016.
- Introduce a new tax and regulatory framework for two new types of collective investment vehicles (CIVs) - a corporate CIV (for income years starting on or after 1 July 2017) and a limited partnership CIV (for income years starting on or after 1 July 2018).
- Simplify the taxation of financial arrangements (TOFA) regime.
- Four annual 12.5 per cent increases in tobacco excise commencing on 1 September 2017.
- Reintroduce into Parliament the legislation to give effect to the statutory remedial power for the Commissioner of Taxation (this was previously included in a Bill that lapsed on proroguing of the last Parliament).
- Implement the new double tax agreement between Australia and Germany.

Other

- Address the 'double taxation' of digital currencies under the GST.

The takeaway

Having regard to the composition of the Senate, further work and prolonged negotiations are likely to be needed in order for the Government to successfully legislate all of its proposals. It will be essential for all taxpayers to monitor the progress and consider the impact of the above measures on their current or proposed business or investment activity.

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Other news

Update on foreign resident capital gains tax withholding regime

The new foreign resident capital gains tax (CGT) withholding regime, which imposes a 10 per cent non-final withholding tax on the acquisition of certain taxable Australian property, applies to contracts entered into on or after 1 July 2016.

The Australian Taxation Office (ATO) has released guidance on the new regime in the form of the following Law Companion Guidelines (LCGs):

LCG 2016/5: Foreign resident capital gains withholding regime: the Commissioner's variation power. This Guideline considers the Commissioner of Taxation's discretion to vary the amount to be withheld from a particular transaction. It describes some of the circumstances that the Commissioner considers would support a request to vary amounts to be withheld including where the vendor makes no capital gain or a lesser capital gain, or will not have an income tax liability.

LCG 2016/6: Foreign resident capital gains withholding regime: amount payable to the Commissioner. This Guideline explains how to work out the amount to be paid to the Commissioner. This extends to how the purchaser can determine the amount to withhold in circumstances where the value of the asset differs from the contract price, or the contract price relates to more than one asset.

LCG 2016/7: Foreign resident capital gains withholding regime: options. This Guideline explains how to work out the amount to be withheld and paid to the Commissioner when a purchaser becomes the owner of an option to acquire taxable Australian real property (TARP) or an indirect Australian real property interest, or TARP or an indirect Australian real property interest as a result of exercising an option.

The ATO has also released the following forms to support compliance with the new withholding regime:

- **[Foreign resident capital gains withholding clearance certificate application and instructions:](#)** The foreign resident capital gains withholding clearance certificate application form is used by Australian resident vendors to seek certification from the ATO that no withholding is required from the sale of taxable Australian real property

because the vendor is an Australian tax resident. A resident vendor will have to provide the purchaser with the ATO issued clearance certificate on or before the day of settlement of the sale of the asset to ensure no withholding occurs. This form is also available [online](#).

- **[Foreign resident capital gains withholding rate variation application and instructions:](#)** Vendors can use the foreign resident capital gains withholding variation application form to apply to the ATO for a reduction in the rate of withholding. The variation may reduce the withholding rate to nil. This form is also available [online](#).
- **[Foreign resident capital gains withholding purchaser payment notification form and instructions:](#)** Purchasers can use the purchaser payment notification form to notify of ATO of a transaction to which foreign resident capital gains withholding applies. The form requests the details of the purchasers and vendors involved, the asset and the amount that has been withheld. The purchaser payment notification form needs to be completed and lodged with the ATO on or before the day of settlement of the purchase of the asset. This form is also available [online](#).

Legislative instrument, **[PAYG withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities](#)**, registered on 30 June 2016, ensures that when the relevant asset is acquired from multiple entities, including both Australian and foreign residents, the amount to be withheld is reduced to reflect only the foreign resident entities' entitlement to the proceeds.

For a consideration of the practical aspects of the new regime for both vendors and purchasers, refer to PwC TaxTalk – Insights, **[Foreign resident capital gains tax withholding regime](#)**.

Tax incentives for early stage investors

From 1 July 2016, an investor in a qualifying early stage innovation company (ESIC) may be eligible for tax incentives, including a non-refundable carry forward tax offset (equal to 20 per cent of the amount invested, subject to a cap) and a CGT concession. The ATO is [seeking feedback](#) on implementation of these new tax incentives, including feedback on how to implement the new

incentives, the proposed content for the ESIC report, and technical and guidance issues that the ATO should address.

Voluntary Tax Transparency Code

The Board of Taxation has published a [list of companies](#) that have committed to adopt the Voluntary Tax Transparency Code. Companies wishing to be added to the register should contact the Board.

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