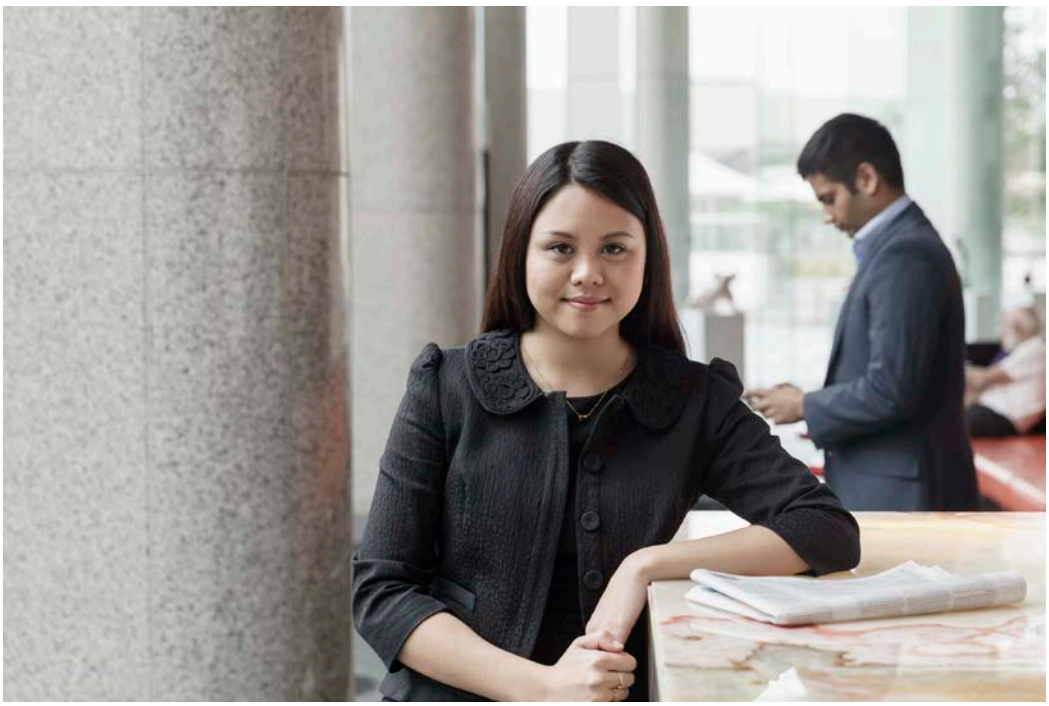
February 2018

TaxTalk Monthly

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



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Corporate Tax Update

ATO compliance approach to attribution of ADI equity capital and controlled foreign entity equity

The Australian Taxation Office (ATO) has issued Practical Compliance Guideline PCG 2018/1, which sets out its compliance approach to the calculation of 'adjusted average equity capital' for thin capitalisation purposes for an authorised deposit-taking institution (ADI) that is classified as an outward investor under the thin capitalisation provisions.

The thin capitalisation rule for an ADI that is an outward investor denies debt deductions of the ADI to the extent that its 'adjusted average equity capital' is less than its 'minimum capital amount'. An ADI's 'adjusted average equity capital' is broadly equal to its equity capital (excluding equity capital attributable to the ADI's overseas permanent establishments (PEs)) less its controlled foreign entity equity (other than controlled foreign entity equity attributable to the ADI's overseas PEs). The guideline deals with the attribution of amounts to a PE, and consists of two parts. Part A is concerned with the attribution of ADI equity capital to a PE, and Part B is concerned with the attribution of controlled foreign entity equity to a PE for the purposes of the thin capitalisation calculation for an outward investor ADI.

ATO ruling on expenditure incurred by a service provider in collecting and processing multi-client seismic data

The ATO has released draft tax ruling TR 2017/D11, which considers how the capital allowance provisions in Division 40 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) apply to the expenditure incurred by a service provider in collecting and processing seismic data licensed on a non-exclusive basis to multiple clients. According to the draft ruling, such expenditure (including labour costs incurred in creating or augmenting data, leave payments and repairs and maintenance) is capital in nature and cannot be deducted under section 8-1 of the ITAA 1997, with some limited exceptions. However, the draft ruling states that seismic data is a depreciating asset, and expenditure incurred to create it forms the cost of the data for depreciation purposes. The draft ruling also considers the effective life of the seismic data, how to work out the decline in value of the data, and the application of the balancing adjustment provisions. It also contains an appendix setting out a practical administration approach to assist taxpayers in complying with the relevant tax law. Comments are due 16 February 2018.

ATO ruling on PRRT expenditure incurred in abandonment, decommissioning and rehabilitation activities

The ATO has released tax ruling TR 2018/1 (released in draft in December 2017 as TR 2017/D9), which considers the character of expenditure incurred in relation to abandonment, decommissioning and rehabilitation (ADR) activities undertaken on a part of a petroleum project for Petroleum Resource Rent Tax (PRRT) purposes. According to the ruling, ADR expenditure will not be 'closing-down expenditure' under subsection 39(1) of the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) (PRRTAA 1987) while the production of petroleum or marketable petroleum commodities continues in another part of the petroleum project. However, it can be general project expenditure under section 38 of the PRRTAA 1987. Similarly, ADR expenditure incurred on activities to partially decommission and rehabilitate the petroleum project will not be expenditure incurred in closing down the entire project as a whole. Where a decision has been made to imminently and permanently cease production from the entire project area, the ATO accepts that closing-down activities may occur progressively and in continuous stages over the project area, and in these cases, the taxpayer must consider all relevant circumstances objectively to determine whether there is closing-down expenditure.

ATO releases draft update to ruling on retirement villages

The ATO has released a draft update (TR 2002/14DAC3) to tax ruling *TR 2002/12* regarding the taxation of retirement village operators. The proposed update includes a new compliance approach appendix to provide compliance guidelines for South Australian retirement villages. This approach has been developed in light of the *Retirement Villages Act 1987* (SA) being repealed and replaced by the *Retirement Villages Act 2016* (SA), which came into effect on 1 January 2018. Comments are due 2 February 2018.

ATO guidance on farm-out arrangements

The ATO has issued addenda to two miscellaneous tax rulings, MT 2012/1A1 – Addendum and MT 2012/2A2 – Addendum, dealing with the application of the income tax and GST laws to farm-out arrangements. The addenda amended the date of effect of the relevant rulings to clarify that, in relation to application of the income tax law, the rulings do not apply to farm-out arrangements entered into after 7.30 pm (ACT time) on 14 May 2013, due to amendments to the income tax law that took effect from that time. The ATO has also published fact sheets on immediate transfer farm-out arrangements and deferred transfer farm-out arrangements to illustrate, using worked examples, how the new income tax law applies to these arrangements.

ATO top 100 risk categorisation

The ATO has made changes to its risk categorisation approach for the top 100 public and multinational businesses and superfunds in Australia. The ATO is now using three risk categorisations in this segment – key taxpayer, key taxpayer with significant concerns and higher risk taxpayer. The 'key taxpayer with significant concerns' category has been added to more clearly articulate the ATO's view of a taxpayer's risk profile, and will apply to taxpayers with more complex risks and larger amounts of tax at risk than those in the 'key taxpayer' category. All top 100 taxpayers will continue to receive an annual letter from the ATO advising them of their risk categorisation and how the ATO intends to engage with them over the next 12 months.

Senate inquiry into Corporate Tax Avoidance extended

The reporting date for the Senate Economics Committee inquiry into Corporate Tax Avoidance has been further extended, with the Committee now due deliver its report by 30 May 2018.

ATO releases Corporate Tax Transparency Report for 2015-16

The ATO has released the corporate tax transparency report for the 2015-16 income year. The report contains the name, Australian Business Number (ABN), total income, taxable income and tax payable for:

- Australian public and foreign-owned companies with an income of AUD100 million or more; and
- Australian-owned resident private companies with an income of AUD200 million or more.

It also contains the name, ABN and tax payable for any entity that had a petroleum resource rent tax (PRRT) payable amount for the 2015-16 year. Refer to the ATO's media release and guidance for further information on the data reported.

Is corporate Australia ready for major accounting changes?

PwC research into the financial reports of the ASX 100 suggests that many companies may still have a lot of work to do to gauge the impact of new accounting standards on their business. Specifically, there are three new standards which are required to be adopted:

- AASB 9 *Financial Instruments* – applies from years commencing 1 January 2018.
- AASB 15 *Revenue from Contracts with Customers* – applies from years commencing 1 January 2018; and
- AASB 16 *Leases* – applies from years commencing 1 January 2019.

PwC's Straight Away Alert – Special Report discusses the key findings of the research, as well as the Australian Securities and Investments Commission's call on companies to address the impact of these major accounting changes.

Let's talk

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Employment Taxes Update

Draft law for superannuation guarantee integrity measures

The Federal Government has released exposure draft legislation on a package of integrity measures relevant to the superannuation guarantee (SG) law. The measures are designed to protect workers' superannuation entitlements and modernise the enforcement of the SG.

In cases where an employer fails to comply with their SG obligations, the draft law will allow the ATO to issue directions to the employer to pay unpaid SG liabilities and to undertake an approved course relating to their SG obligation. In addition, from 1 July 2018, superannuation funds will commence 'event-based' reporting to the ATO on payments they receive for employees from their employer.

The draft law also proposes to extend Single Touch Payroll to all employers from 1 July 2019, facilitate more regular reporting by superannuation funds, improve the operation of the ATO's collection and compliance measures and streamline employee commencement processes.

Submissions on the draft legislation are due by 16 February 2018.

For further information, refer to the Government's media release.

WA changes to payroll tax

The Western Australia (WA) Government has announced it is closing a loophole that has seen companies avoid paying their fair share of payroll tax. Effective from 1 December 2017, payroll exemptions will be limited to all apprenticeships, and to traineeships undertaken by new employees earning no more than AUD100,000 per annum at the date of lodgment of the contract with the Department of Training and Workforce Development.

In consultation with industry, the WA Government will explore a grant scheme for apprenticeships and traineeships that can be accessed by all businesses, not just those that pay payroll tax. Options will be considered in mid-2018, for possible commencement from 1 July 2019.

In addition, the *Pay-roll Tax Amendment (Debt and Deficit Remediation) Bill 2017* received assent and amends the *Pay-roll Tax Act 2002* (WA) to temporarily introduce a progressive payroll tax scale in Western Australia for five years (i.e. from 1 July 2018 to 30 June 2023, applicable to those employers who pay in excess of AUD100 million in wages).

ATO issues draft PCG on FBT and private use of exempt vehicles

The ATO has released draft Practical Compliance Guideline PCG 2017/D14, which provides an optional practical compliance approach that employers can elect to adopt under certain circumstances in determining whether private travel by employees in exempt vehicles is eligible for a fringe benefits tax (FBT) exemption. Exempt vehicles include certain single cab and dual cab utes, panel vans and four wheel drive vehicles. Broadly, minor, infrequent and irregular private travel by an employee in an exempt vehicle will be exempt from FBT. Comments are due by 9 February 2018. Refer to PwC's TaxTalk Alert for further information.

Notice of ATO data matching program – Visa holders

As part of a new data matching program, the Australian Taxation Office (ATO) will acquire information on holders of a Visa from the Federal Department of Immigration and Border Protection for the 2017-18, 2018-19 and 2019-20 financial years.

The data obtained will include address and contact history for Visa applicants and sponsors, all Visa grants, and address and contact history for migration agents. It is estimated that records of 20 million individuals will be obtained over the three year period. These records will be electronically matched with ATO data holdings to identify non-compliance with obligations under taxation and superannuation laws. For further information, refer to PwC Global's Tax Insights.

Taxation Determination on treatment of dividend equivalent payments

The ATO has released Taxation Determination TD 2017/26, which discusses the income tax treatment of dividend equivalent payments to employees who participate in an employee share scheme as a beneficiary of a trust. A 'dividend equivalent payment' is a cash payment paid by a trustee of a trust, that has been funded from dividends (or income from other sources) on which the trustee has been assessed in previous income years because no

beneficiary of the trust was presently entitled to the income.

According to TD 2017/26, a dividend equivalent payment is assessable to an employee as remuneration (and therefore ordinary income) under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997) when the employee receives such a payment for, or in respect of, services they provide as an employee, or similarly, where the payment has a sufficient connection with their employment.

This determination applies to dividend equivalent payments where they are paid under the terms and conditions attached to Employee Share Scheme (ESS) interests granted on or after 1 January 2018. Appendix 2 of the determination sets out the Commissioner's compliance approach which was previously set out in Practical Compliance Guideline PCG 2017/D9, which has now been withdrawn.

Supreme Court upholds Director Penalty Notices

The Supreme Court of Victoria in *Deputy Commissioner of Taxation v Lawson [2017] VSC 789* has upheld Director Penalty Notices issued for failing to pay superannuation guarantee charge amounts. The Court rejected various defences including non-participation due to illness or other good reason based on the defendant's participation in the management of the company.

The Court's finding was on the basis that the Defendant was aware of the serious compliance problems during the relevant periods and participated in several meetings with the ATO in relation to its superannuation guarantee obligations. The court found that the actions of the Defendant, showed 'reckless indifference to the discharge of his duties as director' and the Director Penalty Notices issued by the ATO were found to be valid.

Tribunal confirms decision not to de-group taxpayer for payroll tax purposes

In *Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue [2017] NSWCATAD 368*, the NSW Civil and Administrative Tribunal confirmed that the entities in question did constitute a payroll tax group, and the decision of the Chief Commissioner not to exercise discretion to de-group the Applicant for payroll tax purposes was appropriate after considering the nature and degree of ownership and control of the businesses.

In reaching this decision, the Tribunal found that a Rectification Deed which was intended to disclaim the discretionary trust interests of certain family members was ineffective as it was only executed by one of the three parties to the original Trust Deed. Despite the Defendant's stated intention to distance his business from the businesses of his brothers, de-grouping was found not be appropriate on the grounds that there were still a number of trading and financial ties that bound the businesses together, which did not support the assertion that the businesses were not materially connected and that any connections were insignificant.

Let's talk

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Global Tax Update

Latest news from international tax and transfer pricing

US tax reform developments

On 20 December 2017, the final version of the United States (US) tax reform legislation was approved by Congress. President Trump signed the Bill into law on 22 December 2017. The new law will lower business and individual income tax rates and provide the most significant overhaul of the US tax code in more than 30 years. To keep up to date with the latest developments and news on US tax reform, visit PwC's dedicated website at www.pwc.com.au/ustaxreform. The website is regularly updated, and brings together insights from business specialists across the globe for US inbound and outbound organisations navigating change.

PwC US is also hosting a tax reform readiness webcast series. The first discussion, held in January, explored how mandatory deemed repatriation is likely to impact businesses with US operations. Register for access to the recording of the webcast at www.pwc.com.au/ustaxreform. The webcast series will continue over coming weeks and cover everything from financial reporting implications to workforce strategies and business preparedness. To view upcoming topics, register for webcasts, and download recordings, go to www.pwc.com.au/ustaxreform.

Draft law for Asia Region Funds Passport and tax framework for CCIVs

The Australian Government has released draft legislation and explanatory materials on the Asia Region Funds Passport (the Passport) (comments were due 25 January 2018) and the new tax framework to give effect to the Corporate Collective Investment Vehicle (CCIV) (comments are due 2 February 2018). This follows the earlier release of draft legislation dealing with the regulatory framework proposed to apply to CCIVs. The new Corporate Investment Vehicles (CIVs) are designed to be internationally recognised vehicles to attract foreign investors, including under the Asia Region Funds Passport. Broadly, the proposed tax treatment of CIVs aligns with the current tax arrangements for Attribution Managed Investment Trusts, but there are some important differences to be noted. For further information, refer to PwC's TaxTalk Alert.

In addition, the Asia Region Funds Passport Joint Committee has called for expressions of interest to participate in a Pilot Program for the Passport. The Pilot Program will test the Passport framework and regulator processes across participating economies to identify any remaining barriers to trade or areas for future improvement.

ATO compliance approach to cross-border related party financing

The Australian Taxation Office (ATO) has issued final Practical Compliance Guideline PCG 2017/4, which provides guidance on the ATO's compliance approach to taxation issues associated with cross-border related party financing arrangements and related transactions. The Guideline sets out the framework used by the ATO to assess risk in relation to certain related party financing arrangements having regard to a combination of quantitative and qualitative indicators. The ATO then uses this risk assessment to tailor its engagement with taxpayers according to the features of its related party financing arrangements, the profile of the parties to the arrangements and the choices and behaviours of the taxpayer. For more information, refer to PwC's TaxTalk Alert, which explores the PCG in detail.

ATO guidance on the Diverted Profits Tax

The ATO has published guidance on the application of the Diverted Profits Tax (DPT) measure which can potentially apply to any significant global entity (broadly, groups with annual global income of AUD1 billion or more). The ATO guidance comprises:

- the draft Law Companion Guideline LCG 2017/D7, which seeks to provide assistance to taxpayers in understanding the new DPT law and, when finalised, will constitute a binding public ruling to the extent indicated. The ATO is seeking comments on the draft LCG by 16 February 2018; and
- the Law Administration Practice Statement PS LA 2017/2, which focuses on the ATO's administrative processes related to making a DPT assessment.

PwC's TaxTalk Alert discusses the ATO's guidance in further detail.

Taxation Determination limits foreign hybrid limited partnership election

On 18 December 2017, the ATO issued Taxation Determination TD 2017/25, which sets out the Commissioner of Taxation's view that a foreign resident cannot elect to treat their interest in a limited partnership as an interest in a foreign hybrid limited partnership under paragraph 830-10(2)(b) of the *Income Tax Assessment Act 1997* (ITAA 1997). This determination is substantially the same as the previously issued draft TD 2016/D2. Refer to the September 2016 edition of TaxTalk Monthly for further analysis.

ATO issues guidance on foreign trusts and capital gains

The ATO has issued the following draft taxation determinations dealing with foreign trusts and the interaction with the capital gains tax (CGT) rules:

- Taxation Determination TD 2017/23, which sets out the ATO's view that a foreign trust does not recognise capital gains or capital losses from CGT events arising in respect of assets that are not taxable Australian property (TAP) in working out the trust's net income as the residency assumption in section 95(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) does not apply for purpose of section 855-10 of the ITAA 1997. This also means that the trust's beneficiaries will not have a capital gain in respect of the CGT event however, any amount attributable to such a gain that is paid or applied for the benefit of a resident beneficiary may be included in their assessable income under section 99B of the ITAA 1936.
- Taxation Determination TD 2017/24, which sets out the ATO's view that amounts assessable to a resident beneficiary of a foreign trust under section 99B(1) of the ITAA 1936 that are attributable to gains from a non-TAP asset of the trust are not treated as a capital gain for the purposes of applying a capital loss offset or CGT discount when working out the beneficiary's taxable income.

Both of these Determinations issued in final form, reflect substantially the same views as expressed in their predecessor drafts (TD 2016/D4 and TD 2016/D5). Although the Commissioner continues to reject the alternative views expressed in each of the determinations which are stated to apply to years of income commencing both before and after their date of issue (13 December 2017), it is indicated that the Commissioner will not devote compliance resources to enforce the view taken in TD 2017/24 in relation to distributions received or already assessed in income years ending before that date. However, if the Commissioner is asked to amend an assessment, or required to state a view (for example in a private ruling or in submissions in a litigation matter), the Commissioner will act consistently with the view set out in the Determination.

Update on BEPS Multilateral Instrument

The Australian Parliamentary Joint Standing Committee on Treaties has released a report on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral instrument), and has recommended that binding treaty action be taken. The Multilateral Instrument is designed to implement measures developed as part of the Organisation for Economic Cooperation and Development (OECD)/G20 Base Erosion and Profit Shifting (BEPS) project.

The Committee acknowledged the approach to adopting the Multilateral Instrument is complex, and noted that the Australian Government should ensure that implementing the Multilateral Instrument does not result in onerous compliance costs.

New Zealand introduces BEPS law into Parliament

The *Taxation (Neutralising Base Erosion and Profit Shifting) Bill* was introduced into New Zealand Parliament on 6 December 2017, and contains measures to implement the New Zealand Government's policies concerning BEPS matters. Specifically, the Bill seeks to prevent New Zealand multinationals from using:

- artificially high interest rates on loans from related parties to shift profits out of New Zealand;
- hybrid mismatch arrangements that exploit differences between countries' tax rules to achieve an advantageous tax position;
- artificial arrangements to avoid having a taxable presence (permanent establishment) in New Zealand; and
- related-party transactions to shift profits into offshore group members in a manner that does not reflect the actual economic activities undertaken in New Zealand and offshore.

If enacted as proposed, most of the new rules will take effect as early as 1 July 2018 or, in the case of the new deemed permanent establishment rules, from the enactment date. New Zealand businesses operating overseas or offshore business groups operating in New Zealand are likely to be affected in some way by the new rules. Refer to PwC NZ's Tax Tips Alert for further details.

OECD 2017 Model Tax Convention

The Organisation for Economic Cooperation and Development (OECD) has released the latest edition of the Model Tax Convention. The 2017 edition of the OECD Model Tax Convention mainly reflects a consolidation of the treaty-related measures resulting from the work on the OECD/G20 BEPS Project under Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements), Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances), Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status) and Action 14 (Making Dispute Resolution More Effective). Refer to PwC US's Tax Insights for further information.

OECD consultation on disclosure of CRS avoidance arrangements and offshore structures

The OECD has published the public comments received on the new tax rules requiring disclosure of Common Reporting Standard (CRS) avoidance arrangements and offshore structures. The model rules are intended to target promoters and service providers with a material involvement in the design, marketing or implementation of schemes designed to circumvent the CRS reporting requirements. The proposed rules would require such intermediaries to disclose information on the scheme to their national tax authority, which would then be made available to other tax authorities under information exchange agreements.

OECD releases 2016 mutual agreement procedure statistics

The OECD has released the mutual agreement procedure (MAP) statistics for 2016. Key highlights include:

- In comparison with 2015, both the number of MAP cases on hand at the start of the year and the number of started MAP cases have increased, which results from both an increase in the number of reporting jurisdictions and modified counting rules.
- Transfer pricing cases account for slightly more than half of the MAP cases, and on average take more time than other cases.
- More than 85 per cent of MAPs closed in 2016 resolved the issue. Almost 60 per cent of MAP cases closed were resolved with an agreement fully resolving the taxation not in accordance with the tax treaty, and almost 20 per cent of them were granted a unilateral relief. Almost 5 per cent were resolved via domestic remedy. Finally, 5 per cent of the MAP cases closed were withdrawn by taxpayers while approximately 10 per cent were not resolved for various reasons.

OECD and BEPS developments

The OECD announced that over 1400 bilateral exchange relationships have been activated with respect to jurisdictions committed to exchanging country-by-country (CbC) Reports, with the first exchanges scheduled to take place in 2018. It was also announced that over 2600 bilateral relationships are in place for the exchange of information under the Common Reporting Standard (CRS).

The OECD also released further guidance on CbC reporting (BEPS Action 13). This additional guidance addresses a number of specific issues including the definition of total consolidated group revenue, and how to:

- Report amounts taken from financial statements prepared using fair value accounting.
- Treat a negative figure for accumulated earnings.
- Treat mergers/acquisitions/de-mergers.
- Treat short accounting periods.

In other BEPS-related developments:

- The OECD has released the first peer reviews of the BEPS Action 5 minimum standard on spontaneous exchange on tax rulings and covers 44 countries, including all OECD members and all G20 countries. The next annual peer review will cover all members of the Inclusive Framework, except for the developing countries that requested a deferral of their review to 2019.
- The second round of peer review reports on the implementation of BEPS minimum standards on improving tax dispute resolution mechanisms (BEPS Action 14) have been released in relation to Austria, France, Germany, Italy, Liechtenstein and Sweden. The OECD has also invited taxpayer input on the fourth batch of dispute resolution peer reviews which will cover Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand and Portugal.
- The OECD released comments received on the discussion around a draft toolkit on the Taxation of Offshore Indirect Transfers.
- Trinidad and Tobago, Mongolia, Bahamas and Zambia have joined the Inclusive Framework on BEPS.
- Panama has signed the OECD's Multilateral Competent Authority Agreement for the CRS.
- Qatar has signed the Multilateral Competent Authority Agreement on the exchange of CbC reporting.

- In respect of jurisdictions subject to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Curaçao has signed the convention and Jersey has deposited its instrument of ratification.
- The following countries have introduced new law and guidance in relation to CbC reporting: Canada; Hong Kong; India and Russia.

OECD Revenue Statistics 2017 report

The OECD has released the Revenue Statistics 2017 report which shows that, on average, OECD countries are becoming more reliant on personal income tax revenues, as revenues from social security contributions and consumption taxes fall, and corporate tax collections remain low.

OECD Science, Technology and Industry Scoreboard 2017

The OECD has released the Science, Technology and Industry Scoreboard 2017. Some of the key highlights reported for Australia in relation to innovation included:

- Australia is among the OECD countries where government budgets for Research and Development (R&D) have increased since 2008, growing some 9 per cent from to 2016.
- Australia had the second highest share of tax support for business R&D in the OECD in 2015, at almost 87 per cent of total support, behind the Netherlands. In 2006. R&D tax incentives accounted for about 65 per cent of overall support for business R&D.

EU Commission releases list of non-cooperative tax jurisdictions

The European Union (EU) Commission has issued a list of non-cooperative tax jurisdictions agreed by Finance Ministers of the EU Member States. The list includes 17 countries which failed to meet agreed tax good governance standards, including Bahrain, Republic of Korea, Macao, Mongolia, Panama and the United Arab Emirates. The list will be updated at least once a year.

HMRC releases consultation paper on Royalties Withholding Tax

The United Kingdom's (UK) HM Treasury and HM Revenue & Customs (HMRC) has released a Royalties Withholding Tax – consultation paper which focuses on the design of proposed legislation to broaden the circumstances in which certain payments made to non-UK residents will be taxed. The measure is intended to target a narrow range of arrangements that achieve low effective tax rates through holding intellectual property in low or no tax jurisdictions. These changes will have effect from April 2019. Consultation closes on 23 February 2018.

France introduces temporary corporate surtax for large companies

France has introduced a temporary corporate surtax for large companies which could affect multinational enterprises with French operations or subsidiaries. The surtax applies only to tax years ending on or after 31 December 2017 through to 30 December 2018. Refer to PwC Global's TaxTalk Alert for further information.

Israel launches new voluntary disclosure program

The Israeli Tax Authority has issued a temporary order and procedural guidelines in relation to a voluntary disclosure program which encourages taxpayers to become compliant with Israeli tax law. The temporary order and guidelines encourage taxpayers to disclose unreported income and pay the determined tax liability. The program, which continues through to 31 December 2019, replaces the last special voluntary disclosure opportunity that expired on 31 December 2016. Refer to PwC Global's TaxTalk Alert for further information.

Explore PwC's global tax research and insights

Let's talk

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Indirect Tax Update

Extension of Inquiry into impact of Horizontal Fiscal Equalisation

The Federal Government has announced that it has granted an extension to the Productivity Commission's Inquiry into Economic Impact of Horizontal Fiscal Equalisation which underpins the distribution of the goods and services tax (GST) revenue to the States and Territories. The Commission will now be required to provide its final report to the Government by 15 May 2018.

AAT finds land developer did not provide an 'approved valuation'

The Administrative Appeals Tribunal (AAT) in *Decleah Investments Pty Ltd and Anor as Trustee for the PRS Unit Trust v Commissioner of Taxation [2017] AATA 2418* has held that a land developer did not provide an 'approved valuation' for the purposes of section 75-10 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) when applying the margin scheme to calculate GST payable on the supply of subdivided lots. The Tribunal also set aside the Commissioner's decision regarding the application of shortfall penalties at the rate of 25 per cent, and instead found that the correct rate of tax shortfall penalty was 50 per cent for recklessness. The taxpayers have since lodged an appeal to the Federal Court against the decision of the Tribunal.

Draft rulings dealing with supplies of goods and real property connected with the indirect tax zone

The Australian Taxation Office (ATO) has issued two draft GST rulings that deal with supplies of goods and real property connected with the 'indirect tax zone' (i.e. Australia).

Draft GST ruling GSTR 2017/D1 sets out the Commissioner's preliminary view confirming that ordinarily a supply of goods that is delivered or made available in Australia is connected with Australia. The draft Ruling observes that in determining whether a supply of goods is connected with Australia, a distinction is made in the GST law between supplies of goods wholly within Australia, from Australia, and to Australia. The place the supplier or recipient carries on their business is not relevant in determining if a supply of goods is connected with Australia. This is the case even where the supply is made between two non-residents, neither of which makes the supply or acquisition in the course of an enterprise they carry on in Australia. However, section 9-26 of the GST Act provides two exceptions to the connected with Australia rules in section 9-25(1) for supplies that involve a transfer of ownership of goods that are subject to a lease. Once finalised, the draft Ruling will update and replace GST ruling GSTR 2000/31.

Draft GST ruling GSTR 2017/D2 sets out the Commissioner's preliminary view confirming that a supply of real property is connected with Australia if the real property, or the land to which the real property relates, is in Australia. The test is the location of the land and not the location of the right. This means that a supply of real property is connected with Australia if it involves, for example:

- the sale of land situated in Australia;
- the grant, assignment or surrender of a lease or licence of land situated in Australia;
- a personal right to call for, or be granted, any interest or right over land in Australia;
- the grant of a put or call option over land situated in Australia;
- a licence to occupy land in Australia; or
- the grant of contractual rights to occupy or stay at accommodation in Australia.

Once finalised, the draft ruling will update and replace GST rulings GSTR 2000/31 and GSTD 2004/3.

Comments on the draft rulings were due on 19 January 2018.

GST rulings amended to clarify when a supply is made

The following GST rulings have been amended to clarify when an entity makes a supply as a result of the decision of the High Court in *Commissioner of Taxation v. MBI Properties Pty Ltd [2014] HCA 49* (for a closer look at this case, refer to PwC's TaxTalk Alert):

- GSTR 2004/9A5 – Addendum: Goods and Services Tax: GST consequences of the assumption of vendor liabilities by the purchaser of an enterprise.
- GSTR 2006/9A7 – Addendum: Goods and Services Tax: supplies.

- GSTR 2009/2A3 – Addendum: Goods and Services Tax: partitioning of land.

ATO withdraws GST ruling on bitcoin

The ATO has withdrawn GSTR 2014/3W, which deals with the GST implications of transactions involving bitcoin. This ruling has been withdrawn as a result of the new law which ensures that, from 1 July 2017, digital currency will have the equivalent treatment to money and in certain circumstances and supplies of digital currency will be treated as financial supplies.

Updated ATO guidance on backdating GST registration

The ATO has released updated guidance which confirms that GST registration can only be backdated for up to four years for tax periods commencing on or after 1 July 2012 unless there has been fraud or evasion. A new example in the guidance demonstrates how the ATO will treat requests.

New Australia-China international trade facilitation agreement

The Minister for Immigration and Border Protection and the Minister of China Customs have signed a landmark Mutual Recognition Arrangement (MRA). The MRA enables both countries to formally recognise each other's Authorised Economic Operator programmes, and is expected to provide faster and more efficient access for Australian Trusted Traders into China.

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Personal Tax Update

ATO focus on Everett Assignments

The Australian Taxation Office (ATO) has announced that it is suspending the application of its guidelines for the allocation of profits within professional firms and Everett Assignment as of 14 December 2017. Those taxpayers who have entered into arrangements before 14 December 2017 which comply with the guidelines and do not exhibit high risk factors can rely on those guidelines. However, arrangements entered into prior to 14 December 2017 exhibiting any of the high risk factors may be subject to review.

The ATO will begin consulting with interested stakeholders in early 2018 on replacement guidance and the application of any required transitional arrangements, noting new guidance will apply prospectively. Please contact PwC Australia's David Ireland, Partner, on +61 (2) 8266 2883 if you are affected by this measure.

ATO Decision Impact Statement on Jayasinghe case

The ATO has released its Decision Impact Statement on the decision in *Commissioner of Taxation v Jayasinghe [2017] HCA 26*, in which the High Court held that the taxpayer was not exempt from tax on income he received from the UN Office for Project Services as he did not hold an office in an international organisation within the meaning of s6(1)(d)(i) of the *International Organisations (Privileges and Immunities) Act 1963* (Cth). The ATO plans to update Taxation Determination TD 92/153 to reflect the decision and review Taxation Ruling TR 92/14.

Taxpayer not entitled to work-travel deductions

The Administrative Appeals Tribunal (AAT) in *Tyl and Commissioner of Taxation [2017] AATA 2850* has affirmed the Commissioner's decision and held that the taxpayer was not entitled to deduct amounts claimed for alleged work-travel expenses. This was because the taxpayer had failed to substantiate his claims which exceeded the amount considered reasonable by the Commissioner in relation to food and drink for employee truck drivers.

AAT affirms decision involving fraud or evasion

The AAT in *LDGL v Commissioner of Taxation [2017] AATA 2779* has affirmed the Commissioner's decision to amend the taxpayer's income tax assessments to include in assessable income unexplained bank account deposits and net movements in balances owed to a company, and to adjust net rental losses claimed in respect of investment rental properties. The decision comes after forming an opinion that there had been fraud or evasion. The Tribunal rejected the taxpayer's contention that the fraud or evasion opinion was miscarried since the taxpayer was unable to demonstrate that the amounts were not assessable.

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State Taxes Update

QLD 2017-18 MYEFO

The Queensland (QLD) Treasurer has handed down the 2017-18 Mid-Year Fiscal and Economic Review (MYEFO) for QLD, which included details on the following new revenue measures:

- a 0.5 per cent increase in the land tax rate for aggregated holdings above AUD10 million from 1 July 2018;
- an increase in the additional foreign acquirer duty from 3 per cent to 7 per cent from 1 July 2018;
- an increase of AUD2 per AUD100 of dutiable value for vehicles valued above AUD100,000; and
- a 15 per cent point of consumption tax to apply to online wagering operators from 1 July 2018.

Victorian duties and land tax guidelines for certain exemptions

The Victorian Treasurer has released guidelines around the exercise of his power in relation to:

- the exemption of persons who have a controlling interest in a foreign corporation, or a substantial interest in the capital of a trust estate of a foreign trust, from being taken to hold that interest for purposes of the foreign purchaser additional duty which applies under the *Duties Act 2000* (VIC) to the purchase or acquisition of residential property in Victoria; and
- land tax exemptions from holding absentee controlling interests (under section 3B of the *Land Tax Act 2005 (*VIC)) and land held on trust under absentee trusts (under section 3BA).

Revenue NSW rulings

Revenue NSW has issued the following rulings:

- Revenue Ruling No. LT 097v2, which deals with when land used for primary production for the purposes of applying the land tax exemption. The ruling was updated to remove any references to indirect and non-physical uses being taken into account when determining a primary production claim.
- Revenue Ruling No. G 011 Surcharge Land Tax and Duty — Residential Premises that are not Dwellings, which sets out relevant guidance on the types of premises that are not considered to be 'dwellings' that would otherwise be subject to the land tax and duty surcharges.

WA releases ruling on connected entities duties exemption

The Western Australia (WA) Office of State Revenue has released Revenue Ruling DA 19.0 which sets out the Commissioner of State Revenue's interpretation of certain terms relevant to applying for a connected entities exemption under the *Duties Act 2008 (WA)*.

State tax legislative developments

The following state tax legislative developments have occurred since the December 2017 edition of TaxTalk Monthly:

- The State Revenue Legislation Amendment (Surcharge) Bill 2017 (NSW) has received assent. The Bill amends the *Duties Act 1997* (NSW), the *Land Tax Act 1956* (NSW), and the *Land Tax Management Act 1956* (NSW) to:
  - provide for exemption from and refunds of surcharge purchaser duty and surcharge land tax payable in respect of residential land by a foreign person that is an Australian corporation when the land is used for the construction of new homes or is subdivided and sold for the purposes of the construction of new homes;
  - provide that the small business declaration required for the purposes of the small business exemption from duty on an insurance policy is to be provided in a manner approved by the Chief Commissioner (replacing the current requirement that it be provided in writing); and
  - make consequential savings and transitional provisions.
- The State Debt Recovery Bill 2017 (NSW) has been introduced into the NSW Legislative Assembly. The Bill proposes to authorise the Chief Commissioner of State Revenue to take certain actions to recover State debts without taking court action. The Bill contains other ancillary provisions and makes related and consequential amendments to *Taxation Administration Act 1996* (NSW).
- The State Taxation Acts Further Amendment Bill 2017 (VIC) has received Assent. Amongst other things, the Bill amends:
  - The *Duties Act 2000* (VIC) in relation to the imposition of foreign purchaser additional duty on a dutiable transaction to which a concession applies, and the calculation of the first home buyer concession.
  - The *Land Tax Act 2005* (VIC) to extend the exemption for absentee owners to absentee trusts; ensure the absentee owner surcharge applies to subtrust structures; and to make further provision for when certain land is exempt.
  - The *Payroll Tax Act 2007* (VIC) to extend the exemption for wages paid to new entrants to 'for profit' organisations declared to be an approved group training organisation.
  - The *Taxation Administration Act 1997* (VIC) in relation to permitted disclosures of information and to make further provision for the service of documents.
- The Land Tax Amendment Bill 2017 (TAS) received assent and amends the *Land Tax Act 2000* (TAS) to adopt a fairer, simpler and taxpayer favourable approach to the apportionment of the assessed land value between principal residence land and general land where the land is used for purposes other than as a principal residence. The amendments take effect from 1 July 2017.
- The Stamp Duties (Foreign Ownership Surcharge) Amendment Bill 2017 (SA), which amends the *Stamp Duties Act 1923* (SA) to introduce a foreign ownership surcharge of 7 per cent on the conveyance or transfer of an interest in residential property to a foreign person, corporation or trust, executed on or after 1 January 2018, including landholder acquisitions, has received Assent.

Land tax decisions

The following decisions relevant to land taxes were handed down:

- The Supreme Court of Victoria in *Living and Leisure Australia Ltd v Commissioner of State Revenue [2017] VSC 675* has held that the taxpayer was obliged to pay Victorian land tax as

it was entitled to land under a lease of Crown land. The Court considered the agreements pertaining to ski fields and having had regard to the purpose of the significant reservations, which broadly provided for extensive control and management of the land by the Crown and for public access insofar as it does not interfere with the operations. The Court found that the taxpayer enjoyed the enjoyment of exclusive possession to the relevant land which was distinguishable from a mere licence.

- The Supreme Court of South Australia in *ACN 068 691 092 Pty Ltd v The Commissioner Of State Taxation [2017] SASC 195* has dismissed the taxpayer's appeal and upheld land tax assessments issued by the Commissioner on an aggregated basis pursuant to subsection 13A(3) of the *Land Tax Act 1936* (SA). The decision was based the Commissioner's opinion that a purpose of relevant transfers of interests in land was to reduce land tax. The Court rejected evidence presented by the taxpayer of other purposes such as succession planning, divestment and creditor planning, and held that a substantial purpose of the transfers was to reduce the amount of land tax payable.
- The New South Wales Civil and Administrative Tribunal in *Cooney v Chief Commissioner of State Revenue [2017] NSWCATAD 375* has revoked land tax assessments which were issued on the basis that two adjoining lots did not comprise a parcel of 'residential land' eligible for the principal place of residence exemption under the *Land Tax Management Act 1956* (NSW). The Tribunal held that the two lots constituted one 'parcel' as they satisfied the 'four unities' test, and that the principal place of residence exemption was available for the combined lot as the second dwelling was not capable of being used for separate occupation.
- The Victorian Civil and Administrative Tribunal in *Kamirice Pty Ltd v Commissioner of State Revenue [2017] VCAT 2087* has confirmed the decision of the Commissioner of State Revenue who refused to exercise discretion to exempt the taxpayer from an absentee owner surcharge pursuant to section 3B of the *Land Tax Act 2005* (VIC). The Tribunal held that it would be inappropriate in the circumstances to exercise the discretion after taking into account the nature of the investment, as well as the financial input the taxpayer has had into the community.

Court finds acquired partnership interest was not dutiable property in Victoria

The Supreme Court of Victoria – Court of Appeal in *Commissioner of State Revenue v Danvest Pty Ltd & Anor [2017] VSCA 382* has dismissed the Commissioner of State Revenue's appeal and held that the partnership interest acquired by the Respondents were not dutiable property for the purposes of section 10(1)(ac) of the *Duties Act 2000* (VIC). Rather, the interests the Respondents acquired in the partnership were for the duration of the partnership, each holding an equitable chose in action which confers certain rights on each partner upon dissolution and after the realisation of the assets and payment of the debts and liabilities of the partnership — namely, a right to a proportionate share of any surplus.

ACT Tribunal finds Commissioner entitled to exercise discretionary power in relation to reassessments

The Australian Capital Territory (ACT) Civil and Administrative Tribunal in *FANDS (ACT) Pty Ltd v Commissioner For ACT Revenue (No. 2) [2017] ACAT 112* has found that the Commissioner was entitled to exercise discretionary power in relation to the reassessments of rates, land tax and the City Centre Marketing and Improvements Levy for relevant years. The Tribunal also found the Commissioner was required to repay the amount incorrectly determined as a consequence of the application of the averaging provision of section 14 of the *Rates Act 2004* (ACT). In addition, the Tribunal held the Commissioner's decision related to the redetermined unimproved value of the land for one of the years be set aside and the objection allowed. The objection decision in relation to the average unimproved value of the subject land was also remitted back to the Commissioner.

QLD Tribunal finds applicant not entitled to building boost grant

The Queensland Civil and Administrative Tribunal in *D & V Hambling Pty Ltd as Trustee for D & V Hambling Custodian Deed v Commissioner of State Revenue [2017] QCAT 415* has held that the Applicant was not entitled to the building boost grant according to section 12 of the *Building Boost Grant Act* 2011 (QLD) as the transaction entered into was not eligible because the building work under the contract did not start before the required date.

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Superannuation Update

Review of the early release of superannuation benefits

The Federal Government has announced that Treasury will review the current rules governing early release of superannuation on severe financial hardship and compassionate grounds. It will also review whether, and the circumstances in which, superannuation assets should be available to pay compensation or restitution to victims of crime. Treasury has released a consultation paper examining the key issues related to the early release of superannuation benefits under such grounds, which is available for comment until 12 February 2018. Findings will be reported to the Government in March 2018.

The Government has also announced that it will transfer the regulatory role of administering the early release of superannuation benefits on compassionate grounds from the Department of Human Services to the Australian Taxation Office (ATO). The transfer is expected to take effect in 2018.

New integrity measures for the taxation of superannuation

The Government has released exposure draft legislation and a consultation paper covering the following superannuation integrity measures that were announced in the 2017-18 Federal Budget:

- requirement to include a member's share of the outstanding balance of a Limited Recourse Borrowing Arrangement in their total superannuation balance; and
- measures to ensure that non-arm's length expenditure is taken into account when determining whether the non-arm's length income taxation rules apply to a transaction.

The consultation paper explains how the measures are intended to operate and seeks feedback on whether they meet their policy objectives, whether their objectives could be achieved in some other way and what may be the unintended consequences of the measures. Refer to the Government's media release for further information. Submissions on the draft law and consultation paper are due by 9 February 2018.

In addition, the Federal Government has released exposure draft legislation on a package of integrity measures relevant to the superannuation guarantee (SG) law, designed to protect workers' superannuation entitlements and modernise the enforcement of the SG. Submissions on the draft legislation are due by 16 February 2018. For further information, refer to the Government's media release.

Updates to superannuation Law Companion Guidelines

The ATO has updated the following Law Companion Guidelines (LCGs) to reflect amendments to the law made by *Treasury Laws Amendment (2017 Measures No. 2) Act 2017:*

- LCG 2016/12: Superannuation reform: total superannuation balance.
- LCG 2016/8: Superannuation reform: transfer balance cap and transition-to-retirement reforms: transitional CGT relief for superannuation funds.
- LCG 2016/9: Superannuation reform: transfer balance cap.

ATO compliance update for superannuation funds

In a speech about superannuation to the Association of Superannuation Funds of Australia (ASFA) National Conference on 30 November 2017, ATO Deputy Commissioner James O'Halloran noted the following issues as applicable to superannuation fund compliance:

- Key findings from last financial year show that 99 per cent of funds met their reporting obligations for 2015-16 at a good or high standard.
- At the fund level, the ATO has reviewed fund tax returns for 2015, including Foreign Income Tax Offset (FITO) claims and testing for compliance with TR 2014/7. The ATO has also provided guidance for FITO claims in future income years to funds, tax advisers and other service providers such as foreign-currency managers.
- A high priority for the ATO this year is to support funds going through a merger or successor fund transfer; As such, the ATO is setting up a special team to provide guidance and support to any fund requesting help.
- To replace the annual member contribution statements (MCS) which are lodged by funds, the ATO will provide funds with formal advice and information to support readiness to transfer to the ATO's new digital services – being the member account attribute service (MAAS) and the member account transaction service (MATS) – for reporting between super funds and the ATO.

Self-managed Super Funds event-based reporting: a closer look

As a result of the superannuation reforms taking effect from 1 July 2017, the ATO is introducing mandatory events based reporting for superannuation funds that are paying income streams to members of a fund. This reporting is to ensure accurate records are available to assess how people are tracking against their Transfer Balance Cap (TBC). The TBC is currently set at AUD1.6 million and is the maximum asset value that a person can commence or transfer to an income stream account(s).

Who has to report to the ATO?

All superannuation funds, including SMSFs, with members who are in receipt of, or are commencing, an income stream account are required to report to the ATO. Reporting is required regardless of the member's balance.

What has to be reported?

Most transactions involving an income stream interest will need to be reported, including:

- Commencement value of an income stream (excluding Transition to Retirement Income Streams (TRIS) prior to retirement).
- Death benefit income streams.
- Deferred super income streams.
- Value of a TRIS post retirement (or upon attaining age 65).
- Limited recourse borrowing arrangement (LRBA) repayments (where asset is part of an income stream account but repayments are from an accumulation interest).
- Lump sum withdrawals or commutations from an income stream interest.
- Payments splits on marriage breakdown.
- Structured settlements.
- Failure to meet pension standards.

You do NOT have to report:

- Changes in valuation of an income stream interest due to investment fluctuations.
- Income stream withdrawals.

When is reporting required?

- Existing income streams that were payable before 1 July 2017, that continued to be paid after that time, must be reported on or before 1 July 2018.
- From 1 July 2018, SMSFs with any members who have total superannuation balances of AUD1 million or more (as at 30 June in the prior income year) will be required to report TBC events within 28 days after the end of the quarter in which the event occurs.
- SMSFs with all members with total superannuation balances of less than AUD1 million can choose to report TBC events at the same time as the due date of lodgment of their annual return.
- Australian Prudential Regulation Authority (APRA) funds are already required to report within 10 business days after the end of the month in which a TBC event occurs.

It will no longer be sufficient to wait for year-end preparation of financial statements for reporting purposes. Failure to report on time can result in penalties as well as excess transfer balance earnings and tax being imposed by the ATO.

There are now a range of strategies to be considered as a result of the new superannuation changes, including where an individual wishes to withdraw more from their superannuation than the mandatory minimum amount from income stream accounts. The introduction of TBC may also impact estate planning and the provision of death benefits from superannuation accounts.

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Legislative Update

Commonwealth revenue measures introduced into Parliament, or registered as legislative instruments or regulations since the December 2017 edition of TaxTalk Monthly, include:

- *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*, which proposes to amend the *Corporations Act 2001* to extend the corporate whistleblower protection regime, and the *Taxation Administration Act 1953* to introduce new protections for tax whistleblowers. The Bill was introduced in the Senate on 7 December 2017. For further information, refer to the Government's media release.
- *Treasury Laws Amendment (2017 Measures No. 3) Regulations 2017*, which amends the *A New Tax System (Goods and Services Tax) Regulations 1999* so that supplies of digital currency (broadly fungible digital units of consideration that are valuable only as consideration) receive comparable goods and services tax (GST) treatment to supplies of money.
- *Foreign Acquisitions and Takeovers Amendment (Vacancy Fees and Other Measures) Regulations 2017,* which amends the *Foreign Acquisitions and Takeovers Regulation 2015* to implement exceptions to the annual vacancy charge on foreign owners of residential real estate. The exemptions will apply if a foreign person can show that, for at least 6 months in a 12 month period, the relevant dwelling is incapable of being occupied as a residence, or that the dwelling was left vacant while the usual resident received medical or residential care.
- *Treasury Laws Amendment (Housing Tax Integrity) Commencement Proclamation 2017,* which fixes 15 December 2017 as the day on which Schedule 3 to the *Treasury Laws Amendment (Housing Tax Integrity) Act 2017* commences. Schedule 3 of the Act contains the vacancy fees for foreign acquisitions of residential land, which broadly apply from 7.30pm (AEST) on 9 May 2017.
- *A New Tax System (Goods and Services Tax) (Tertiary Courses) Determination 2017,* which ensures that the supply of certain education courses continue to be GST-free for the purposes of paragraph (b) of the definition of 'tertiary course' in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), despite them ceasing to be a 'tertiary course' for the purposes of the *Student Assistance Act 1973* (Cth). The instrument also preserves the GST-free status of certain courses that will cease to be 'tertiary courses' once amendments to the Student Assistance Determination commence on 1 January 2018.
- *Customs (Exemption from payment of Import Declaration Processing Charge) Determination 2017,* which creates a mechanism by which a person who imports goods under a bilateral or multilateral Status of Forces Agreement or Status of Visiting Forces Agreement is exempt from liability to pay import declaration processing charge in respect of import declarations relating to those goods.

Both Houses of Federal Parliament will resume on 5 February 2018.

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Other News

Government defers TOFA reforms

The Australian Government has announced that it will defer the commencement of the changes to the Taxation of Financial Arrangements (TOFA) regime until income years that commence after the applicable amending law is given Royal Assent. Reforms to the TOFA rules were originally announced in the 2016-17 Budget to apply to income years commencing on or after 1 January 2018. Treasury will continue to engage with stakeholders in the design of the amended rules, and identify specific aspects of TOFA reform that could be prioritised.

Commissioner exercises remedial power for small business restructure roll-over

The Commissioner of Taxation has exercised his remedial power in respect of the application of the small business restructure roll-over (SBRR) in the form of Taxation Administration (Remedial Power – Small Business Restructure Roll-over) Determination 2017. The modification made by the Determination applies where an entity transfers a depreciating asset(s) in the course of carrying out a genuine restructure of a small business (under the SBRR rules in Subdivision 328-G of the *Income Tax Assessment Act 1997* (ITAA 1997)).

The effect is to ensure that the transfer of depreciating assets which occur under a restructure will have no 'direct income tax consequences' and ensures that the treatment of depreciating assets aligns with the treatment of capital gains tax (CGT) assets, trading stock and revenue assets. The modification will most commonly apply where the restructure involves the transfers of depreciating assets by the trustees of trusts to beneficiaries, by companies to shareholders, and other associated persons. In the absence of the modification, such transfers could give rise to assessable income in the hands of the transferee.

Transparency of business tax debts

The Government has released exposure draft legislation and a legislative instrument for public consultation that will authorise the Australian Taxation Office (ATO) to disclose business tax debts to credit reporting bureaus where the business has not effectively engaged with the ATO to manage their debt. This measure was first announced in the 2016-17 Mid-Year Economic and Fiscal Outlook (MYEFO), and aims to improve transparency in the business community by making overdue tax debts more visible to businesses and credit providers, enabling them to make a more complete assessment of the creditworthiness of a business.

The legislative framework includes conditions to be set out in a legislative instrument made by the Minister, which establish whether a type of taxpayer can be subject to the new disclosure arrangements, such as the taxpayer being a business with an ABN, and having a tax debt, of which at least AUD10,000 is overdue for more than 90 days.

Importantly, one of the additional procedural conditions to be met for initial disclosure requires the ATO to consult with the Inspector General of Taxation (IGT) before tax debt amounts are reported to credit reporting bureaus. This is designed as an independent check or safeguard to ensure that the Commissioner does not disclose the tax debt information of an entity inappropriately.

In addition, the ATO has also released a consultation paper and a webinar: Transparency of tax debt measure on its administrative approach to this measure.

Subject to the making of a legislative instrument determining the class of entity whose tax debt information may be disclosed by the Commissioner, the proposed amendments apply in relation to records and disclosures of information on or after the first of 1 January, 1 April, 1 July or 1 October to occur after the day the amending Bill receives Royal Assent.

Submissions on the exposure draft legislation, draft legislative instrument and the ATO consultation paper are due by 9 February 2018.

Mid-Year Economic and Fiscal Outlook 2017-18

The Federal Government released the Mid-Year Economic and Fiscal Outlook (MYEFO) 2017-18 on 18 December 2017, which contained no significant new tax or superannuation measures. However, the following items are worth noting:

- The treatment of Tier 2 capital instruments under the Basel III capital reforms will be extended to allow debt tax treatment for Tier 2 capital that can be converted into mutual equity interests.
- The proposed AUD100 non-refundable tax offset for eligible small businesses with expenditure on Standard Business Reporting-enabled software will not proceed, as consultation identified it was more effective to support early adoption through education and support services.
- The measures announced in the 2014-15 MYEFO to simplify the application of the Superannuation Guarantee Charge for late or short payment of superannuation contributions will not proceed.

Appendix A of the Mid-Year Economic and Fiscal Outlook (MYEFO) 2017-18 summarises all policy decisions taken since the 2017-18 Federal Budget which were previously announced or included in exposure draft legislation.

Reforming administration of tax deductible gift recipients and review of ACNC legislation

The Federal Government has announced that it will reform the administration and oversight of organisations with Deductible Gift Recipient (DGR) status. In particular, the following areas of reform have been identified:

- All non-government DGRs will be automatically registered as a charity with the Australian Charities and Not-for-profits Commission (ACNC) from 1 July 2019, with a 12 month transitional period to assist current non-charity DGRs with compliance. In addition, the Commissioner of Taxation will have the power to exempt DGRs from this requirement in certain circumstances. Public fund requirements will be abolished.
- The ACNC and ATO will receive additional funding to review a greater number of DGRs for ongoing eligibility, where risks are identified.
- The Government will not proceed with the unlegislated 2009-10 Budget measure *Philanthropy – reforming the 'in Australia' requirements that apply to tax exempt entities.*

In addition, the Government is also reviewing the *Australian Charities and Not for profits Commission Act 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012*, in line with the statutory requirement to review the Acts in the first five years of operation. The review will evaluate the performance of the legislative framework, the regulation of the sector, and will identify any improvements that can be made. A report on the review's findings and recommendations is required to be made to the Government by 31 May 2018. Comments are due by 28 February 2018.

Draft determination on entitlement to interest deductions for a trust beneficiary on borrowings on-lent to trust

The ATO has released Draft Taxation Determination TD 2017/D4, which discusses a beneficiary's entitlement to an interest deduction for interest expenses incurred on borrowings on-lent interest free to the trustee. According to the draft determination, a beneficiary of a discretionary trust is not usually entitled to a deduction for such interest expenses. It is only where:

- the beneficiary is presently entitled to income of the trust estate at the time the expense is incurred; and
- the expense has a nexus with the income to which the beneficiary is presently entitled

that some part of the interest expense might ever be deductible. The draft determination also states that even in such cases, the interest expense is likely to have been incurred in the pursuit of one or more objectives other than the derivation of assessable income by the beneficiary and will not be deductible to the extent of any non-income producing objective(s).

Comments are due by 2 February 2018.

Draft ruling on amending the vesting date and consequences of a trust vesting

The ATO has released Draft Taxation Ruling TR 2017/D10, which discusses the income tax consequence of amending a trust's vesting date and of a trust vesting. When a trust vests, all of the interests in the trust as to income and capital become vested in interest and possession.

According to the draft ruling, the income tax consequences that arise on, and after, the vesting of a trust depend on the terms of the deed. Vesting of itself may, but need not, cause a CGT event to happen. In addition, the ATO is developing an administrative approach to provide assistance to trustees and beneficiaries of trusts that may have already vested, and will consult with industry and other interested stakeholders to seek feedback on the problems and issues that these parties may face.

Comments on both the draft ruling and ATO administrative approach are due by 16 February 2018.

Full Federal Court finds funds advanced to taxpayer were assessable

The Full Federal Court in *Zappia v Commissioner of Taxation [2017] FCAFC 185* has held that the taxpayer failed to discharge her onus of proof that the issued assessment was excessive, as required by section 14ZZO of Schedule 1 to the *Taxation Administration Act 1953*, and there was no error in the primary judge's finding that funds advanced to the taxpayer were assessable income on revenue account as she failed to prove she was holding the funds as trustee. The Full Court held that statements made by the Commissioner in an objection decision do not establish the facts upon which tax was to be levied and do not bind the Commissioner, or the operation of the taxing provisions, and that proof of the amount upon which tax was to be levied is not established by showing error by the Commissioner in the evidentiary, factual or legal basis of assessment.

Federal Court sets aside the AAT's decision in valuation case

The Federal Court in *Miley and Commissioner of Taxation [2017] FCA 1396* has found for the Commissioner and set aside the decision of the Administrative Appeals Tribunal. The Federal Court found that the Tribunal erred in law in applying a discount for 'lack of control' when valuing the taxpayer's minority shareholding in a company. The Tribunal had previously held that the taxpayer satisfied the maximum net assets value test of AUD6m just before the CGT event, even though he received AUD5.9m on disposal of shares (and had other assets at the time). The Tribunal's finding was on the basis that the market value of the shares just before sale was less than the actual consideration received as the shares alone did not confer control of the company. The Federal Court held that the Tribunal erroneously ignored or disregarded the fact that each of the three shareholders in the company were willing to sell their shares to a single purchaser, and that the ultimate purchaser was willing to purchase the shares at a price higher than other purchasers would have been prepared to pay if they were only purchasing a minority shareholding.

ANAO issues reports on the ATO's use of settlements and reinvention program

The Australian National Audit Office (ANAO) has released the following reports:

- A report on the effectiveness of ATO's use of settlements to resolve taxpayer disputes. The ANAO broadly concluded that the ATO effectively uses settlements to resolve disputes with taxpayers, and has made many improvements to its approach to settlements in recent years. The ATO has agreed to the three recommendations made by the ANAO, including reviewing its key pre-settlement assurance mechanisms across business lines, implementing processes to provide assurance that settlements involving future compliance obligations are being met, and retention of adequate settlement records. For further information, refer to the ATO's media release.
- A report on the costs and benefits of the *Reinventing the ATO* program. The report concludes that the ATO has sound systems and guidance for estimating and monitoring the costs, savings and benefits associated with *Reinventing the ATO* projects, but the effectiveness of these processes has been compromised by low levels of conformance. As a result, the costs, savings and benefits from these projects cannot be calculated. Two recommendations have been made to address these issues, to which the ATO has partially agreed.

Review of ATO 2016-17 Annual Report

The House of Representatives Standing Committee on Tax and Revenue is undertaking a review of, and will report on, the 2016-17 ATO Annual Report. The Committee is currently accepting submissions.

Small Business Digital Taskforce

The Government has established a Small Business Digital Taskforce which will work to ensure that more Australian small businesses can thrive in an increasingly digital economy. The Small Business Digital Taskforce will liaise with small businesses across Australia about their concerns and ideas on how they can better engage in the digital economy. The taskforce will report their findings to the Government by the end of February 2018.

PBO report on medium-term budget projections

The Parliamentary Budget Office (PBO) has released a report on the 2017-18 Federal Budget medium-term projections. The report examines the sensitivity of budget projections to changes in economic parameters. It also seeks to provide additional detail on the impacts of economic scenarios on the budget position, including the effects on major revenue and expenditure areas of the budget.

Full Federal Court confirms Commissioner's right to decline to issue a private ruling

The Full Federal Court in *Commissioner of Taxation v Hacon Pty Ltd [2017] FCAFC 181* has granted the Commissioner's appeal against the decision of the Federal Court thus confirming the Commissioner had a right to decline providing a private ruling under subsection 357-110(1)(a) of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (TAA 1953) because it would require the Commissioner to make assumptions about future events. The Full Court held that each matter raised by the Commissioner in his letter declining to rule, albeit information, was an assumption about future events that enlivened the discretion under section 357-110(1)(a) of the TAA 1953 to decline to make the ruling.

Let's talk

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

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TaxTalk Monthly

WL 127057608