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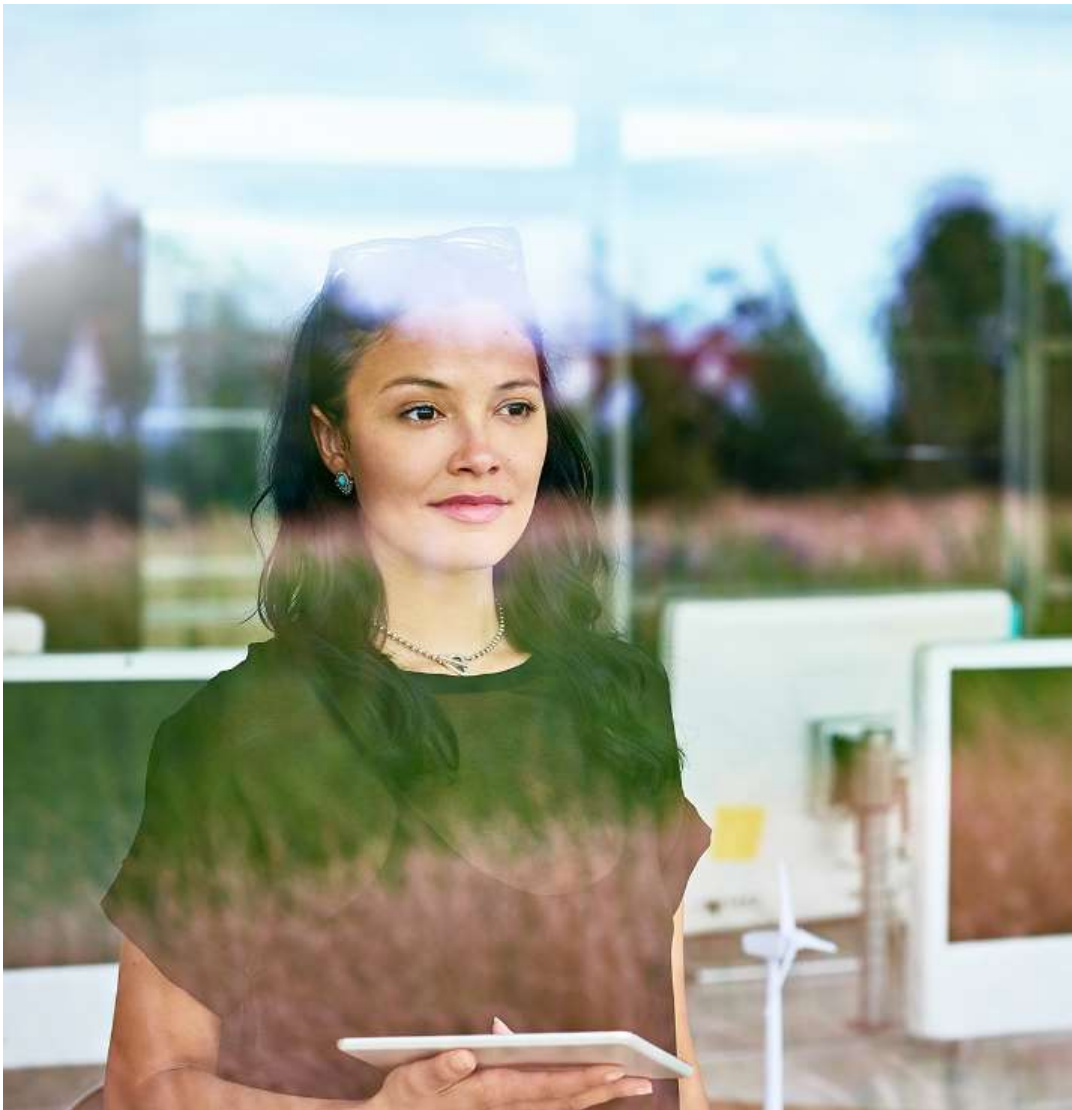
TaxTalk Monthly

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

September 2019



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Employment Taxes Update

ATO guidance on expanded taxable payments reporting system

The Australian Taxation Office (ATO) has finalised Law Companion Ruling LCR 2019/4 which discusses how the ATO will apply the taxable payments reporting system (TPRS) to road freight, security, investigation or surveillance, and information technology services which are now covered by the TPRS from 1 July 2019. The TPRS requires suppliers of relevant services to report any payments made to contractors if the supplier has an Australian business number (ABN) and the payment is wholly or partly for providing that service on their behalf, and a reporting exemption does not apply.

In addition to providing binding guidance and examples of the sort of services that are affected by the rules, the LCR also sets out a practical administration approach to assist taxpayers in complying with relevant law. In this respect, it is noted that the ATO will use the industry code declared in income tax returns as an initial indicator of a potential obligation to report payments to contractors. The ATO expects that businesses who report under the following industry codes are likely to have an obligation to report where they use contractors to provide services:

- 46100 Road Freight Transport
- 70000 Computer System Design and Related Services
- 77120 Investigation and Security Services.

Queensland remakes payroll tax regulations

The Queensland Government has remade payroll tax regulations which deal with the administration and determination of payroll tax, including determining the value of taxable wages and fringe benefits. The new *Payroll Tax Regulation 2019* remake and update the *Payroll Tax Regulation 2009* which was due to expire on 1 September 2019 with minor changes that are not expected to be significant.

Payroll tax cases

The following payroll tax judgments were recently handed down:

- The New South Wales Civil and Administrative Tribunal in Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue [2019] NSWCATAD 145 has determined that Medicare and Department of Veterans Affairs (DVA) benefits to which general practitioners were entitled and collected and paid through the medical centre operator were not “wages” paid by operator as they did not fall within s35(1) *Payroll Tax Act 2007* (NSW). Although the amounts were paid by the operator directly to the GPs they did not have a relevant relationship with the relevant contract for the purposes of the law – the arrangement was a collecting mechanism for the GPs’ Medicare and DVA entitlements. In each case, the payment from Medicare or DVA is an entitlement of the GP who has not “assigned it” in the legal sense to the operator, but rather merely directed Medicare or DVA to make the payment to the operator as a matter of convenience. The Tribunal remitted the matter to the NSW Chief Commissioner for reassessment.
- The Queensland Civil and Administrative Tribunal in Telgrove Pty Ltd t/as P & E Francis Plant Hire v Commissioner of State Revenue [2019] QCAT 199 has set aside the Queensland Commissioner of State Revenue’s decision to refuse to make an Exclusion Order to exclude certain entities from a payroll group. The Tribunal made an exclusion order pursuant to s74(1) of the *Payroll Tax Act 1971* (Qld) and remitted the payroll tax and the penalty the taxpayer paid in full. The Tribunal was satisfied that matters favouring grouping (management control and commercial transactions) are significantly outweighed by matters favouring exclusion (lack of other material commercial transactions, lack of shared resources, facilities or services, different management structures, lack of financial interdependencies and lack of a connection between the nature of the businesses). Accordingly, it found that that the carrying on of the business of the taxpayer is independent of, and not connected to, the carrying on of the business of other group members with the consequence that the payroll tax paid by Telgrove in relation to the group should be remitted in full.

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Global Tax Update

Latest news from international tax and transfer pricing

Draft law on tax treaty between Australia and Israel

Treasury has released draft legislation for the implementation of the tax treaty between Australia and Israel which was signed on 28 March 2019. Key features of the treaty include:

- reduced withholding tax rates including a maximum five per cent rate for royalties that arise in Australia or Israel that are beneficially owned by a resident of the other country
- rules to reduce potential double taxation, and
- the G20/Organisation for Economic Cooperation and Development (OECD) Base Erosion and Profit Shifting (BEPS) treaty-related recommendations, including limitation on benefits.

The Australia-Israel tax treaty will enter into force once both countries have completed their domestic requirements to bring the new tax treaty into force, including amending Australia's domestic law.

In addition, the draft legislation also includes proposed amendments to ensure that Australia can exercise its taxing rights under the new Israel tax treaty and all future tax treaties, by deeming certain income to have an Australian source. The effect of the deemed source rule is consistent with the specific source rules that apply for each of Australia's existing tax treaties, and ensures there is a consistent approach for all future treaties. By introducing a standard deemed source rule, Australia will no longer need to secure agreement to include a specific source rule in the course of negotiating a tax treaty, or legislate a specific rule where such agreement cannot be secured.

Comments were due on 21 August 2019.

Board of Taxation to review corporate tax residency rules

The Treasurer has requested that the Board of Taxation conduct a review into the operation of Australia's corporate tax residency rules. The purpose of the review is to ensure the corporate tax residency rules are operating appropriately, in light of modern, international, commercial board practices and international tax integrity rules.

The Board will consider whether the existing rules:

- minimise commercial uncertainty and ambiguity
- are consistent with and aligned with modern day corporate board practices
- protect the tax system against multinational profit shifting
- support Australia's tax integrity rules as they apply to multinational corporations.

This review is much needed since the ATO's Taxation Ruling TR 2018/5 and final practical compliance guideline PCG 2018/9 which focus on the identification and location of a company's central management and control in the context of determining corporate tax residency. Refer to our TaxTalk alert.

Following the release of a consultation paper that is expected to be issued shortly, the Board is required to report back to the government before 31 December 2019.

Full Federal Court denies taxpayer's FITO claim

The majority of the Full Federal Court in Burton v Commissioner of Taxation [2019] FCAFC 141 have dismissed the taxpayer's appeal and confirmed that the taxpayer, the trustee of an Australian discretionary trust, which derived capital gains from investments they made in the United States (US) was not entitled to a full foreign income tax offset (FITO) against their Australian tax liability.

The Court found that the primary judge made an error in relation to the meaning and effect of Article 22(2) of the Australia-US Double Tax Agreement however, was correct in the construction and application of s770-10 of the *Income Tax Assessment Act 1997* (Cth). The primary judge found that s770-10 provided the taxpayer with a FITO equal to only 50 per cent of the US tax paid on the sale of the assets in the US as the only income that formed part of the taxpayer's Australian assessable income was 50 per cent of the capital gain on which tax was paid in the US.

Synthesised texts of Australia's tax treaties

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

- Synthesised text of the MLI and the Agreement between Australia and Finland
- Synthesised text of the MLI and the Agreement between Australia and the French Republic
- Synthesised text of the MLI and the Agreement between Australia and Malta

The MLI entered into force for Australia in respect of each of the above-mentioned countries on 1 January 2019.

MLI update

Norway and Ukraine have each deposited its instrument of ratification of the MLI. This means that the MLI will enter into force in relation to Australia's tax treaty with Norway from as early as 1 November 2019.

ATO focus on transfer pricing approach

Australian Taxation Office (ATO) Second Commissioner, Jeremy Hirschhorn, in his opening address to the Tax Institute National Transfer Pricing Conference discussed key transfer pricing focus areas for the ATO including related party loans, marketing hubs and inbound supply chains. Some of the transfer mis-pricing traps that the ATO has seen were also discussed, including:

- transferring intellectual property to a related party just before it becomes commercially viable at a significant discount
- an optimistic use of one methodology, with no cross-checking against other methodologies
- failing to take into account the bargaining power that a group would have with a notional third party if it were to enter into that transaction.

OECD developments

The OECD has released the results on implementing the BEPS Action 5 minimum standard which relates to harmful tax practices of preferential tax regimes, noting that a further 22 jurisdictions changing their laws to address harmful tax practices.

In addition, the OECD has also published the following:

- First round of stage 2 peer review monitoring reports on BEPS Action 14, to implement a minimum standard to strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP), which consists of monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review reports. The stage 2 monitoring reports for Belgium, Canada, the Netherlands, Switzerland, United Kingdom and the United States evaluate the progress made by these six jurisdictions. The results thus far demonstrate positive change across all six jurisdictions.
- Peer review reports assessing compliance with the international standard on transparency and exchange of information on request for Costa Rica, Croatia, Lebanon, Malaysia, the Federated States of Micronesia and Nauru (which all received an overall rating of "Largely Compliant"), and Botswana and Vanuatu (which were rated "Partially Compliant") and Guatemala (which was rated "Non-Compliant").

In other developments:

- Albania, Eswatini and Namibia has joined the Inclusive Framework on BEPS.

Singapore's new pilot scheme to facilitate hiring of foreign tech talent

The Economic Development Board and Enterprise Singapore have announced plans for an immigration

pilot programme called Tech@SG to help technology companies grow in Singapore and expand in the region. Under this program, companies will have Employment Pass applications of core workers facilitated to help them get the talent they need to set up teams in Singapore. For further information refer to PwC Global Insights.

Hong Kong guidance on attribution of profits to PEs

The Hong Kong Inland Revenue Department has issued guidance on its codified adoption of the OECD approach to the attribution of profits to Hong Kong permanent establishments (PEs) of non-residents (otherwise known as transfer pricing "Rule 2"). Rule 2 has a specifically major impact on Hong Kong branches of foreign banks. Affected entities should consider the recent guidance as soon as possible as time is running short to take action to be ready for year-end tax accounting purposes, and to prepare the necessary documentation for the financial year 2019/20 tax filing in 2020. For further information refer to PwC Global Tax Insights.

Canada's APA program shows continued progress

Canada Revenue Agency's Competent Authority Services Division recently released an annual report on its Advance Pricing Arrangement (APA) program. The latest report shows continued progress in providing mutually agreeable tax certainty for Canadian taxpayers with cross-border related party transactions. For further information refer to PwC Global Tax Insights.

France enacts digital services tax

The French Parliament passed a tax on digital services by large internet and technology providers and partially postponed the corporate income tax rate reduction initially intended to apply as of 1 January 2019.

The new 3 per cent digital tax applies to companies providing certain digital services in France with global annual revenue in excess of EUR 750M and revenue in France exceeding EUR 25M. The tax is based on the amount, excluding VAT, that the taxpayer collects as consideration for taxable services provided in France as of 1 January 2019.

The new law also postponed the decrease of the corporate income tax rate from 33-1/3 per cent to 31 per cent for companies or tax groups with global revenue in excess of EUR 250M.

For further information refer to PwC Global Tax Insights.

Luxembourg initiates draft law for hybrid mismatches

Draft legislation that will implement as Luxembourg domestic law the EU anti-tax avoidance directive regarding hybrid mismatches with third countries ('ATAD 2') is before the Luxembourg Parliament. As anticipated by ATAD 2, the draft law generally would apply to tax years beginning 1 January 2020, with the additional 'reverse hybrid' measures applying from the 2022 tax year. For further information refer to PwC Global Tax Insights.

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Indirect Tax Update

Addendum to GST ruling on improvements on the land

The Australian Taxation Office (ATO) has issued an addendum to GSTR 2006/6 which deals with improvements on land which is relevant to establish whether concessional goods and services tax (GST) treatment is available for a supply of land (by way of sale or long-term lease) made by the Commonwealth, a state or a territory. The changes to the Ruling seek to provide more information on the ATO's view and are intended to give greater certainty to make it easier for entities to comply with their GST obligations.

Draft legislation for luxury car tax refunds for primary producers and tourism operators

To give effect to the 2019-20 Federal Budget measure to increase luxury car tax (LCT) refunds for eligible primary producers and tourism operators, Treasury has released draft legislation for comment (due on 14 August 2019). Under these new arrangements, eligible primary producers and tourism operators will be able to apply for a refund of any LCT paid, up to a maximum of AUD10,000, for vehicles acquired on or after 1 July 2019. Currently, primary producers and tourism operators may be eligible for a partial refund of any luxury car tax paid on eligible four wheel or all wheel drive cars, up to a maximum of AUD3,000. The eligibility criteria and types of vehicles eligible for the current partial refund will remain unchanged under the new arrangements.

Draft indirect tax regulations

Treasury has released the following draft regulations for consultation (comments were due on 13 August 2019):

- Remake of sunsetting GST transition regulations to facilitate the application of the GST to supplies made under contracts entered into prior to 1 July 2000. The draft regulations do not alter the substantive meaning or operation of the existing regulations and make minor technical changes have been made to reflect current drafting practice and omit provisions that are no longer operative. The existing *A New Tax System (Goods and Services Tax Transition) Regulations 2000* are scheduled to sunset on 1 October 2019.
- Remake of sunsetting Luxury Car Tax regulations to ensure the ongoing operation of various LCT exemptions and refunds and to make minor technical changes to reflect current drafting practice and omit provisions that are no longer operative. The existing *A New Tax System (Luxury Car Tax) Regulations 2000* are scheduled to sunset on 1 October 2019.
- Remake of sunsetting Wine Equalisation Tax regulations to ensure the ongoing operation of the Tourist Refund Scheme as it applies to Wine Equalisation Tax (WET) and ensure continuity in the definitions of wine, fruit wine and mead used for the WET purposes. The existing *A New Tax System (Wine Equalisation Tax) Regulations 2000* are scheduled to sunset on 1 October 2019. Transitional provisions are included in the draft regulations to ensure the Tourism Refund Scheme applies to purchases made before 1 October 2019.

Input tax credits denied due to lack of evidence

The Administrative Appeal Tribunal (AAT) in Byron Pty Ltd and Commissioner of Taxation [2019] AATA 2042 has held that the taxpayer was not able to claim input tax credits on purchases of vehicles and equipment, as they had made no "creditable acquisitions" under the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (GST Act). The Tribunal found that the taxpayer failed to demonstrate that it made any "acquisitions" as defined as it did not have any financial capacity. It was found that even if the taxpayer did make "acquisitions", they were not "creditable acquisitions" as the taxpayer did not provide any "consideration" for the purchase of the vehicles and equipment it claimed to have acquired.

Road user charge applied to travel on toll roads

The Federal Court in Linfox Australia Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia [2019] FCAFC 131 has dismissed the taxpayer's appeal against the decision of the AAT which had held that the road user charge in s43-10 of the *Fuel Tax Act 2006* (Cth) (FTA) applied to fuel acquired for use in a vehicle for travelling on toll roads and in powering air conditioning units in the taxpayer's heavy vehicle fleet. Accordingly, no additional fuel tax credit was available for these uses of fuel.

New fuel tax credit rates

New fuel tax credit rates apply for fuel acquired from 5 August 2019 to 31 January 2020 for businesses and non-businesses.

Dumping duties correctly imposed

The Full Federal Court has dismissed the taxpayer's appeal in Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science [2019] FCAFC 122 and found that dumping notices issued in respect of the taxpayer's export of manufactured grinding balls from the People's Republic of China (PRC) to Australia were valid. The Minister had used a benchmark price for the cost of grinding bar derived from the Latin American export billet price, rather than the actual cost of grinding bar in the PRC because he had concluded that the cost of grinding bar in the PRC was lower than it should have been as a result of Chinese policies and taxing regimes which operated to create a 'market situation' in which the cost of grinding bar was artificially depressed. The Court found that the Minister correctly concluded that the "export price" of goods was less than the "normal value" of goods.

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Personal Tax Update

ATO focus on individual taxpayers' foreign income

The Australian Taxation Office (ATO) is urging individual taxpayers who receive any foreign income from investments, family members or working overseas to make sure they report it this tax time. New international data sharing agreements allow the ATO to track money across borders and identify individuals not meeting their obligations. Under the new Common Reporting Standard (CRS), the ATO has shared data on financial account information of foreign tax residents with over 65 foreign tax jurisdictions across the globe. This includes information on account holders, balances, interest and dividend payments, proceeds from the sale of assets, and other income. The data available to the ATO shows that many Australians have financial dealings in countries like China, the United Kingdom, Switzerland, Singapore and the United States, to name just a few.

Foreign earnings exemption not applicable

The Federal Court in Lochtenberg v Commissioner of Taxation [2019] FCA 1167 has dismissed the taxpayer's appeal from the Administrative Appeal Tribunal's (AAT) decision where it was held that the taxpayer was not entitled to the foreign earnings exemption (s23AG(1) of the *Income Tax Assessment Act 1936* (Cth)) in respect of the amount received under an employee incentive profit participation plan. The Court found that the Tribunal had not made an error of law in its application of the statutory test. The Tribunal found the taxpayer was entitled to receive the amount that was payable to him irrespective of his period of foreign service or the value of the services he performed overseas. Accordingly, since there was no correlation or nexus between the payment and his foreign service, because the taxpayer received the payment when he was a resident of Australia, s23AG(1) did not exempt the amount or any part of it.

Personal services income

In broad terms, income is classified as personal services income (PSI) when more than 50 per cent of the income received under a contract is for an individual taxpayer's labour, skills or expertise. If the rules apply, the individual is taxed on the income directly even if it is derived through a company, partnership or trust.

The Federal Court has handed down the following decisions which deal with the application of the PSI provisions:

- The Federal Court in Douglass v Commissioner of Taxation [2019] FCA 1246 has dismissed the taxpayer's appeal and confirmed that the taxpayer did not meet the 'results test' in s87-18(3) of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997), and as such the taxpayer was subject to the PSI provisions. The Court rejected the taxpayer's argument that the "results test" was satisfied even if they did not get paid for achieving a result, provided they can show this is the custom or practice of independent contractors in their industry.
- The Federal Court in Fortunatow v Commissioner of Taxation [2019] FCA 1247 has allowed the taxpayer's appeal and held that Tribunal had incorrectly interpreted and applied the exception in s87-20(2) of the ITAA 1997 which relates to the 'unrelated clients test'. The matter has been remitted back to the Tribunal for reconsideration according to law. Specifically, the Federal Court found the ATO and AAT had applied the exception for services provided through intermediaries (e.g. recruitment agencies) too broadly and instead the Court preferred a narrow interpretation of the exception.

The ATO has provided a media release in relation to both Federal Court decisions and has stated that it will consider the Fortunatow decision and whether an appeal is appropriate.

Medicare levy on lump sum payment

The AAT in Biswas v Commissioner of Taxation [2019] AATA 2372 has affirmed the Commissioner's decision to disallow the taxpayer's objection, and held that the Medicare levy should be imposed in respect of a lump sum payment which was provided to the taxpayer for the underpayment of wages in earlier income years. The Tribunal found the Commissioner had correctly calculated the taxpayer's taxable income and the amount of the Medicare levy that was payable. The taxpayer would have been exempt from the Medicare levy had they received the income in the respective earlier income years, rather than as a lump sum payment.

Payments from UK Government's ex-gratia payment scheme

The ATO has released a fact sheet to provide guidance about lump sum payments received by taxpayers from the United Kingdom (UK) Government under the ex-gratia payment scheme for former British child migrants. The ATO has reviewed the compensation payments proposed under the UK Government's Payment scheme for former British child migrants and does not consider that the compensation payments are subject to income tax or capital gains tax.

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State Taxes Update

QLD transfer duty applied to trust restructure on aggregated basis

The Supreme Court of Queensland in Radiology Partners Pty Ltd as Trustee for the Radiology Partners Unit Trust v Commissioner of State Revenue (Qld) [2019] QSC 192 has held that a number of dutiable transactions in relation to various redemptions and acquisitions of units in the trust ought to be aggregated pursuant to section 30 of the *Duties Act 2001* (QLD) because "together they form, evidence, give effect to or arise from what is, substantially 1 arrangement". Whilst the redemptions and acquisitions were not conditional upon each other, save that the redemption was conditional on the counterpart acquisition, that fact does not take away from a wider arrangement between the existing unitholders and the new unitholders. The Court found that the redemptions and acquisitions of the units formed part of a single arrangement to restructure the unit trust as there was a unity of purpose in the subject of the transactions, as such, s30 of the *Duties Act 2001* (QLD) applied to aggregate the transactions.

Land tax decisions

The following land tax cases were issued since our last update:

- The Victorian Civil and Administrative Tribunal in Zmijarevic v Commissioner of State Revenue [2019] VCAT 1162 has held that the taxpayer was not exempt from Victorian land tax as the taxpayer failed to discharge the onus of proof to show that the relevant property was their principal place of residence.
- The Victorian Civil and Administrative Tribunal in Helco Pty Ltd v Commissioner of State Revenue No. 2 [2019] VCAT 1212 has held that the taxpayer, a company, was liable for land tax as the relevant property was not held by it as trustee of a trust(s) and used and occupied as the principal place of residence by a director and shareholder of the company. The Court found that the director was not granted a right to reside in the relevant property under a will on the death of the previous occupier. As such, the property was not exempt from land tax under s54(1)(ab) of the *Land Tax Act 2005* (Vic).

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Superannuation Update

Deferral of start date for extending SuperStream to SMSFs

Treasury Laws Amendment (Deferring Extension of SuperStream to Self-Managed Superannuation Funds) Regulations 2019 has been issued which amends the *Superannuation Industry (Supervision) Regulations 1994* to defer the start date for extending the operation of SuperStream to self-managed superannuation funds (SMSF) from 30 November 2019 to 31 March 2021. Under SuperStream money and data in relation to superannuation contributions are sent electronically in a standard format. The commencement date of SMSF rollovers in SuperStream has been delayed to 31 March 2021 to coincide with the expansion of SuperStream to cover electronic release authorities as announced in the 2019-20 Federal Budget.

Director disqualified as responsible officer of SMSF

The Administrative Appeals Tribunal in Fitzmaurice and Commissioner of Taxation (Taxation) [2019] AATA 2217 has affirmed the Commissioner's decision to disqualify an individual from acting as a

responsible officer of the trustee of a SMSF. The Tribunal found that the trustee had contravened various provisions of the *Superannuation Industry (Supervision) Act 1993* (Cth) and that at all relevant times, the applicant was the responsible officer of the trustee. Having regard to a failure to be satisfied that the taxpayer had a sufficient understanding, or sufficient skill and diligence to be a trustee of a SMSF, and the nature, seriousness and number of the contraventions, the Tribunal found that there were grounds for the applicant's disqualification from acting as a responsible officer of a body corporate of a SMSF. In addition, the Tribunal found that the applicant was not a fit and proper person to be a responsible officer of a body corporate.

Emerging areas of ATO focus

ATO Deputy Commissioner James O'Halloran in a speech has discussed recent reforms to superannuation and commented on the following emerging ATO focus areas for 2019-20:

- Compensation received by super funds
- ATO's compliance approach to pension tax bonuses as outlined in PCG 2019/D2
- Transfer balance cap indexation
- Successor fund transfers
- Implementation of the Protecting Your Super measures under the *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019*
- Electronic release authorities and SMSF rollovers
- Implementation of single touch payroll
- Super guarantee compliance.

ATO updates SMSF guidance

The Australian Taxation Office (ATO) has updated the following SMSF guidance:

- Super transfer balance cap guidance has been updated to clarify when the transfer balance account report (TBAR) must be used, clarifying how to use the TBAR to report an SMSF's response to a commutation authority and confirming when the TBAR should not be used.
- Death benefit minimum pension requirements guidance to clarify that this only applies in relation to reversionary pensions.

ATO review of its unclaimed superannuation money protocol

The ATO has commenced a review of its current Unclaimed Super Money (USM) protocol. The protocol provides guidance under the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (SUMLMA) in relation to unclaimed money, lost member accounts, inactive low balance accounts, superannuation accounts of former temporary residents and the associated reporting and payment obligations. The review consisted of:

- restructuring the layout to provide easier navigation throughout the protocol
- additional information to assist funds meeting their reporting obligations
- new content for the new measure Inactive low-balance accounts (ILBA).

Draft versions of the proposed new USM protocol pages are available for comment by 13 September 2019.

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Legislative Update

Federal Parliament resumes for the spring sitting on 9 September 2019.

Commonwealth revenue measures that were registered as legislative instruments or regulations since the last edition of TaxTalk include:

- Exemption of Eligible Community Housing Providers from Providing Third Party Reports for the 2018/19 and 2019/20 Years Determination 2019 exempts eligible community housing providers from providing information to the Commissioner of Taxation in relation to affordable housing certificates issued before 1 July 2020.
- Income Tax Assessment (1936 Act) Amendment (Operation Steadfast Eligible Duty) Regulations 2019 amends the *Income Tax Assessment (1936 Act) Regulation 2015* to ensure that remuneration of Australian Defence Force personnel serving Operations Steadfast is exempt from income tax on an ongoing basis.

In addition to the indirect tax draft regulations released for consultation, the following draft instruments were also issued:

- Taxation Administration: Individuals Engaged in Foreign Service Variation Notice 2019 – this draft instrument ensures that the withholding from payments made to individuals employed in a foreign country closely approximates the Australian income tax that will be payable on the relevant income. The instrument is substantially the same as the previous instrument that it replaces. An entity that satisfied the requirements of the previous instrument will satisfy the requirements of this instrument. Comments were due on 23 August 2019.
- Taxation Administration (Private Ancillary Fund) Guidelines 2019 – this draft instruments remakes the previous guidelines and ensures that eligible funds may obtain or maintain deductible gift recipient status. Comments were due on 21 August 2019.

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Other News

High Court confirms ATO use of leaked data

The High Court in Glencore International AG v Commissioner of Taxation [2019] HCA 26 unanimously dismissed proceedings by which the plaintiffs, being companies within the global Glencore plc group, sought an injunction restraining the Australian Taxation Office (ATO) from making any use of certain documents. The documents in question, colloquially described as the "Paradise Papers", were stolen from a law firm and provided to the International Consortium of Investigative Journalists. The plaintiffs asserted that the documents remained subject to legal professional privilege and asked the defendants to return them and to provide an undertaking that they will not be referred to or relied upon. The High Court held that legal professional privilege is not an actionable legal right capable of sounding in injunctive relief.

In response to the decision, the ATO has issued a media release stating that decision allows the ATO to continue to use the 'Paradise Papers' and other similar information that the public at large can access, even if obtained from data leaks. Furthermore, the ATO fully supports the appropriate use of legal professional privilege and the importance of entities being able to seek advice on issues of law and further noting that the High Court matter was not about the ATO seeking to access legal advice, but confirming that the ATO can use leaked copies of documents like contracts, board minutes and banking details.

In addition, a new protocol dealing with legal professional privilege (LPP) is being developed by the Law Council of Australia and the ATO.

No loss on repayment of foreign currency denominated loans

The Federal Court in Sole Luna Pty Ltd as Trustee for the PA Wade No 2 Settlement Trust v Commissioner of Taxation [2019] FCA 1195 has held that the taxpayer, a trust, did not incur a deductible foreign exchange loss on repayment of multiple foreign currency denominated loans that were advanced to its wholly owned subsidiary which were made when they were both non-residents. The Court was not satisfied that the taxpayer had incurred a foreign exchange loss as there was no evidence that Australian dollars were used as their respective functional currency and that the taxpayer expected to be repaid in Australian dollars. The Court also found that the taxpayer had not incurred a capital loss because of the forgiveness of the balance of the Australian dollar denominated loan.

Value of shares necessary to support capital losses

The Administrative Appeals Tribunal (AAT) in SDRQ v Commissioner of Taxation [2019] AATA 2003 has held that a taxpayer, who was a member of a group of companies, was not entitled to carry forward a capital loss which had arisen from the sale of shares in an engineering company but was entitled to carry forward a capital loss in relation to a non-arm's length sale of shares in the property development company. The issues before the Tribunal concerned the market value of the engineering company shares on acquisition and the market value of the shares in the property development company at the time of disposal. The Tribunal found the taxpayer had not discharged their onus to prove the market value of the shares on acquisition of the shares in the engineering company, but was satisfied in relation to the shares in the property development company.

Beneficiary assessable on cash distribution from trust

The AAT in Campbell v Commissioner of Taxation [2019] AATA 2043 has held that the taxpayer, a beneficiary of trust, was assessable under s99B of the Income Tax Assessment Act 1936 on a cash distribution received from a trust and the amount was not the corpus of the trust. The Tribunal found that the taxpayer had not provided adequate evidence to discharge their onus of establishing that the issued assessments were excessive. The trust records provided were inconsistent and therefore unreliable and there was no evidence before the Tribunal to corroborate witness history of the establishment of the trust and the characterisation of the money held therein.

Disclosure of business tax debts by ATO

To support the new legislation which will allow taxation officers to disclose the business tax debt information of a taxpayer to credit reporting bureaus certain circumstances, Treasury has released a draft legislative instrument which sets out the class of business whose tax debt information can be disclosed. The legislative instrument only allows the ATO to disclose this information when certain conditions and safeguards are met, including ensuring the entity has not entered into a payment arrangement with the ATO, does not have a complaint with the Inspector-General of Taxation about the disclosure of debt information and has total tax debts of at least AUD100,000 which has been payable for more than 90 days. Comments were due on 21 August 2019.

The ATO has also released a consultation paper on the ATO's administrative approach to the disclosure of business tax debt information to credit reporting bureaus. Comments are due by 6 September 2019.

Review of the Tax Practitioners Board

Treasury has released a discussion paper as part of the independent review of the Tax Practitioners Board (TPB). The paper considers potential reforms to the regulation of tax practitioners in Australia, discusses the effectiveness of the TPB and the operation of the *Tax Agent Services Act 2009* and the *Tax Agent Services Regulations 2009*. Comments were due on 30 August 2019.

ATO Corporate plan 2019–20

The ATO has released its 2019-20 corporate plan that outlines the ATO's focus areas and priorities for the 2019-20 financial year, including final stages of Single Touch Payroll, the renewed government commitment to taskforces, such as black economy and corporate tax avoidance, and ABN reforms.

ATO fact sheet on Perth Voluntary Taxi Buyback Scheme payments

The ATO has released a fact sheet to explain the tax implications for Perth metropolitan taxi plate owners who received a Voluntary Taxi Plate Buyback Scheme payment from the Western Australian State Government. In summary, the ATO confirm that the payments are not ordinary income but should be included in the calculation of the capital gain or capital loss that is made by the plate owner on the disposal of the taxi plate.

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