Institute of Chartered Accountants

Essential Tax Update

Period ending 2 October 2014

Presented by:

The Institute’s Tax Trainers
This package covers developments for the period 28 August to 2 October 2014

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- International Tax
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<td>Bill</td>
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<td>Passed House</td>
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<td>Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) 2014</td>
<td>4 Sep 2014</td>
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Last Updated: 26 September 2014
Mining tax repeal Bill awaits Assent

Minerals Resource Rent Tax Repeal and Other Measures Bill 2014

• Passed by Federal Parliament with government amendments and awaits Royal Assent
• Government amendments include:
  – Continuing income support bonus until 31 December 2016
  – Continuing Schoolkids bonus until 31 December 2016
  – Continuing low income super contribution until 30 June 2017
  – Increase compulsory super rate to 10% from 1 July 2021.

Mineral tax repeal Bill awaits Assent

Minerals Resource Rent Tax Repeal and Other Measures Bill 2014

Legislation to repeal the mining tax has been passed by Parliament and awaits Royal Assent. This came about after the government reached an agreement with the Palmer United Party (PUP) and Senator Muir to pass the Bill in the Senate, albeit with deferral of the abolition of some associated measures eg Income Support Bonus, Schoolkids Bonus, and Low Income Super Contribution - see below. The passage of the legislation unfolded as follows.

On 1 September 2014, the government successfully moved to have the Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 [No 2] laid aside in the House of Reps. The Parliamentary Secretary to the Treasurer said the Bill had been twice introduced into Parliament. It was first negatived by the Senate on 25 March 2014. The Bill was then introduced a second time on 23 June and on 17 July 2014, the Senate passed three amendments to the Bill that the House disagreed to. Mr Ciobo said the Bill was laid aside because it could not be progressed in its current form.

In place of the 2013 [No 2] Bill, the government introduced in the House and passed on 1 September 2014 the Minerals Resource Rent Tax Repeal and Other Measures Bill 2014. It was then introduced in the Senate on the same day.

The Bill repeals the mining tax, specifically, by repealing the: Minerals Resource Rent Tax Act 2012; Minerals Resource Rent Tax (Imposition - Customs) Act 2012; Minerals Resource Rent Tax (Imposition - Excise) Act 2012; and Minerals Resource Rent Tax (Imposition - General) Act 2012. The Bill will repeal the associated measures such as loss-carry back, low income superannuation contribution, the income support bonus, geothermal expenditure deduction, and schoolkids bonus. The Bill also reduces the instant asset write-off threshold for small businesses (from $6,500 to $1,000) and discontinues the accelerated depreciation arrangements for motor vehicles.

The Bill also allows the Treasurer to vary the super guarantee (SG) percentage (currently 9.5%) by legislative instrument. The government announced in the 2014-15 Federal Budget changes to the schedule for increasing the SG charge percentage to 12% so that it would reach that rate from 2022-
23. In order to provide businesses and the community with appropriate notice about changes to the SG charge percentage should the passage of the repeal legislation be further delayed, the amendments in the Bill will allow the Treasurer to vary the SG charge percentage for a particular year starting on 1 July, subject to a number of strict conditions.

**The Senate amendments**

The Bill was passed by the Senate on 2 September 2014 with 13 government amendments after an agreement was reached between the government, PUP and Senator Muir (Australian Motoring Enthusiasts Party). The House then agreed to those amendments, so the Bill awaits Royal Assent.

The Senate amendments:

- Provide that the *Income Support Bonus* will continue until 31 December 2016. It will be abolished from that date;
- Provide that the current *Schoolkids Bonus* (which is exempt from tax) will continue until 31 December 2016, but a means test will be applied, so that only families on incomes of up to $100,000 per annum would qualify. Eligibility to the Bonus will be limited to relevant individuals with an adjusted taxable income (ATI) of $100,000 or less in the relevant income year in which eligibility for the payment is determined. Where the individual is a member of a couple, the individual's ATI will also include the ATI of their partner. This additional income test will not apply where the payment that triggers eligibility for the Bonus is not already subject to an income test (eg certain veterans' education allowance payments or disability support pension payments for those who are permanently blind). Amendments are also made to the *A New Tax System (Family Assistance) (Administration) Act 1999* to allow eligibility for the School Kids Bonus to be based on an estimate of ATI where actual income is not known. When actual income is known, an individual's eligibility for the Bonus can be reviewed and a reconciliation undertaken. The means test will apply to payments of the bonus between Royal Assent of the Bill and 31 December 2016. The Bonus will be abolished from 31 December 2016;
- Provide that the *Low Income Superannuation Contribution* (LISC) in its existing form will apply until 30 June 2017 and then be repealed in respect of concessional contributions made for the 2017-18 financial year and later financial years. The LISC is a superannuation contribution made on behalf of individuals with an adjusted taxable income (ATI) of $37,000 or less in an income year. The contribution is designed to effectively return the tax paid on concessional contributions by an individual's superannuation fund. The maximum contribution amount payable in any year is $500;
- Increase the *compulsory superannuation rate* from its current 9.5% to 10% from 1 July 2021 and by 0.5% per year from 1 July 2022 until it reaches 12% for the year beginning 1 July 2025. [The 2014-15 Federal Budget had announced that the SG rate would remain at 9.5% until 30 June 2018, and then reach 12% from 2022-23. The amendments to the Bill extend that freeze by another three years, meaning that the SG rate will now be fixed at 9.5% for the seven years from 1 July 2014 to 30 June 2021.] The "rephased" SG percentage is summarised in the table below.

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<thead>
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<th>Financial Year</th>
<th>SG charge percentage</th>
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<td></td>
<td>Rates amended</td>
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<tr>
<td>Year starting on 1 July 2014</td>
<td>9.5</td>
</tr>
<tr>
<td>Year starting on 1 July 2015</td>
<td>9.5</td>
</tr>
<tr>
<td>Year starting on 1 July 2016</td>
<td>9.5</td>
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### Financial Year
<table>
<thead>
<tr>
<th>Year starting on or after 1 July 2017</th>
<th>SG charge percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Year starting on 1 July 2017</strong></td>
<td>9.5</td>
</tr>
<tr>
<td><strong>Year starting on 1 July 2018</strong></td>
<td>9.5</td>
</tr>
<tr>
<td><strong>Year starting on 1 July 2019</strong></td>
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<td><strong>Year starting on 1 July 2020</strong></td>
<td>9.5</td>
</tr>
<tr>
<td><strong>Year starting on 1 July 2021</strong></td>
<td>10</td>
</tr>
<tr>
<td><strong>Year starting on 1 July 2022</strong></td>
<td>10.5</td>
</tr>
<tr>
<td><strong>Year starting on 1 July 2023</strong></td>
<td>11</td>
</tr>
<tr>
<td><strong>Year starting on 1 July 2024</strong></td>
<td>11.5</td>
</tr>
<tr>
<td><strong>Year starting on or after 1 July 2025</strong></td>
<td>12</td>
</tr>
</tbody>
</table>

No other changes were made to the Bill, meaning the abolition of the associated measures such as loss-carry back, and geothermal expenditure deduction, will proceed. The reduction of the instant asset write-off threshold for small businesses (from $6,500 to $1,000), and the discontinuation of the accelerated depreciation arrangements for motor vehicles, will also now go ahead.

The Finance Minister Senator Cormann said that, while the government's negotiated package of amendments in the Senate will be budget neutral in the medium term, abolishing the complete mining tax package would save the Budget around $50bn over the next decade.

The Parliamentary Secretary to the Treasurer, Mr Ciobo, said the government amendments made to the Bill in the Senate will forgo around $6.5bn in savings. He said the re-phasing of the scheduled increase of the superannuation guarantee seeks to ensure that the cost of these changes is recovered in the medium term. Mr Ciobo said the package of amendments would be budget neutral by the end of 2022-23 financial year. He said the changes to the mining tax package would still deliver around $10bn in savings to the budget over the forward estimates. The Parliamentary Secretary said Treasury modelling confirmed that abolition of the complete mining tax package of measures would save the budget around $50bn over the medium term.

### Date of effect

#### Mining tax repeal

The amendments in Sch 1 to repeal the mining tax would apply on and from the date it commences, which will be a date fixed by proclamation. This means that taxpayers would not accrue any further MRRT liabilities from this date. It would also mean that rehabilitation tax offsets would only be available in relation to the period before this day.

The government said that due to the delays in the passage of the legislation, the repeal is no longer proposed to commence from a fixed date. This is designed to ensure that further delays will not result in the legislation applying retrospectively and imposing unnecessary compliance burdens on taxpayers. However, the government recognises this flexibility also means it is difficult for both
taxpayers and the FCT to predict the date from which the repeal will have effect. The government says that providing for the date of commencement to be fixed by proclamation allows it to minimise compliance burdens for taxpayers. The Bill specifies that if a date is not fixed within 12 months of Royal Assent, the Schedule will commence on that day.

Other amendments

**Loss carry-back** would be repealed by Sch 2 of the Bill with effect from the start of the income year before the income year in which Sch 2 commences. For companies with normal accounting periods, the repeal would apply from 1 July of the preceding income year. For taxpayers with substituted accounting periods, the repeal would apply from the start of the period before the accounting period in which the repeal commences. For example, if Schedule 2 commenced in the 2014-15 income year, the repeal of loss carry back would have effect from the start of the 2013-14 income year. The operation of the loss carry-back provisions for prior years would be preserved, including for the purposes of any future action that relates to their operation for that year.

**Capital allowances for small business entities:** With the exception of the amendments in relation to low pool values, the amendments proposed to be made by Schedules 3 and 4 would apply on and after 1 January of the income year before the income year in which those Schedules commence and in later income years (including the income year in which the Schedules commence). These amendments include the changes in relation to depreciating assets that are first used or installed ready for use at a particular time, changes in relation to amounts included in the second element of the cost of a depreciating asset that has been written-off in an earlier income year, the repeal of the special rules for certain motor vehicles, as well as the consequential amendments to other provisions. For example, if Sch 3 commenced in the 2014-15 income year, the reduction in the instant asset write-off threshold would apply for assets that are first used and installed on or after 1 January 2014.

**$1,000 depreciating asset threshold:** Depreciating assets that are first used or installed ready for use in the part of the income year falling on or after 1 January in the income year in which the repeal commences or in later income years (including the income year in which the Schedule commences) would be subject to the $1,000 threshold. The requirements that the asset be first used or installed ready for use are alternative requirements. Where a depreciating asset meets one, but not the other, for an income year or part of an income year prior to the period for which the repeal applies, the $6,500 threshold nonetheless would continue to apply to the asset. [Comment: Wide concerns have been expressed re the timing of the reduction in the instant asset write-off threshold to $1,000 as the increased $6,500 amount may have already been claimed by many businesses. It is interesting therefore to note that, in response to a question in Parliament from the Opposition Leader on 3 September 2014, the PM indicated the government was "still considering the commencement date for the repeal of those measures [the instant asset write-off] and we will have more to say in due course".]

04/09/2014
Mining tax repeal start dates proclaimed

The government has announced that it will be recommending to the Governor-General that he proclaim 30 September 2014 as the commencement date for Schedules 1 to 5 to the Minerals Resource Rent Tax Repeal and Other Measures Bill 2014 (which received Royal Assent on 5 September 2014 as Act No 96 of 2014). As a result, the government said the Schedules will have the following dates of effect for most taxpayers:

- Schedule 1 - Abolition of the mining tax from 1 October 2014 (with taxpayers final MRRT year (even if it is a part year) ending on 30 September 2014);
- Schedule 2 - Abolition of the company loss carry-back from 1 July 2013;
- Schedule 3 - Reduction of the instant asset write-off from 1 January 2014;
- Schedule 4 - Abolition of accelerated depreciation for motor vehicles from 1 January 2014; and
- Schedule 5 - Abolition of geothermal energy concessions from 1 July 2014.

Taxpayers with a substituted accounting period may have a different date of effect.

The government said the above dates are consistent with the Exposure Draft to the mining tax repeal legislation, and with the dates announced in November 2013 at the time of the introduction of the first mining tax repeal Bill to Parliament. The government further added that the tax measures can be reconsidered in the context of the government’s review into taxation through the Tax White Paper.

The government said it has consulted with the ATO in relation to the administration of the measures and their dates of effect to ensure that assistance is provided to affected businesses. The ATO has issued a separate media release outlining how this assistance will be provided - key points:

- **Mining tax repeal** - The effect of the repeal is that entities will not accrue further MRRT liabilities from 1 October 2014. The ATO said it will be consulting with industry to implement the administrative approach.
- **Company loss carry-back provisions** - The repeal of the company loss carry-back provisions applies from 1 July 2013 for most taxpayers. Companies who have claimed the offset and are no longer eligible will be contacted by the ATO about their circumstances. The ATO said it will amend the affected assessments and taxpayers will not be subject to penalties and interest if payment is made within a reasonable time.

- **Small business instant asset write-off** - The repeal of the provisions allowing small businesses asset write-off concessions apply from 1 January 2014 for most taxpayers [ie the write-off threshold falls from $6,500 to $1,000 from 1 January 2014]. From the 1 January 2014, only assets costing less than $1,000 (acquired and installed ready for use after 31 December 2013) will be eligible for immediate write-off. Assets costing $1,000 or more will need to be depreciated in the general small business pool. Assets costing less than $6,500, acquired and installed ready for use by the small business between 1 July 2013 and 31 December 2013, will still be eligible to be immediately written-off. Those taxpayers who have lodged their 2013-14 tax returns under the previous law should now seek amendments to reduce their depreciation claim. The ATO said it does not intend to apply penalties or the shortfall interest charge if taxpayers request to amend their assessments within a reasonable period of time.

- **Accelerated deduction for motor vehicles** - From the 1 January 2014, motor vehicles will only be immediately deductible if they cost less than $1,000. Motor vehicles costing $1,000 or more, acquired and available for use after 31 December 2013 will need to be depreciated in the general small business pool. Under previous legislation, small businesses could claim up to $5,000 as an immediate deduction for motor vehicles costing $6,500 or more that were acquired from the 2012-13 income year onwards. Note that motor vehicles acquired and available for use between 1 July 2013 and 31 December 2013 will still be eligible for an immediate initial deduction of up to $5,000. The ATO said no shortfall penalty will apply if taxpayers seek to amend their return within a reasonable time and the shortfall interest charge (SIC) will also be remitted to nil.

- **Abolition of geothermal energy exploration expenditure** - From 1 July 2014: (i) geothermal energy exploration and prospecting expenditure will no longer be immediately deductible; and (ii) if a geothermal exploration right is exchanged for a geothermal energy extraction right relating to the same, or a similar area, then a CGT roll-over applies to defer the liability until the sale of the extraction right. These changes do not affect deductions or balancing adjustments for geothermal exploration rights or geothermal exploration information that started to be held before the income year in which the amendments commence.

The ATO has advised the government that it will waive all penalties and interest in instances where taxpayers have chosen not to prepare their returns on the basis of the government's announcement of the measures, if they seek to have their income tax assessments amended in reasonable time. Small businesses can call the ATO for advice about the changes on 13 28 66.

*Source: Treasurer and Acting Assistant Treasurer’s joint media release, 9 September 2014; ATO media release, 9 September 2014*
FoFA refinements Bill passes Reps

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

The Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 was on 28 August 2014 passed by the House of Reps with seven government amendments and now moves to the Senate. Significantly, the amendments seek to amend the Statement of Advice (SoA) requirements. The Bill makes three key amendments to the SoA requirements:

- **Requiring that the SoA be signed by the providing entity**, or an individual acting on behalf of the providing entity, and acknowledged by the client signing the SoA as soon as practicable after receiving it. The government says the significance of the client's signature on the SoA is to acknowledge receipt of it;

- **Providing clarity that the client may seek further or varied advice.** If further or varied advice is sought, the providing entity must ensure that instructions from the client are: (i) documented in writing; (ii) signed by the client; and (iii) acknowledged by the providing entity, or an individual acting on behalf of the providing entity. They will then constitute valid instructions; and

- **Amending the content requirements of the SoA.** The following statements must be included in the SoA given to a client:
  - The provider of the advice is required to provide the advice in accordance with the best interests duty (s 961B of the Corporations Act);
  - The provider of the advice genuinely believes that the advice given is in the best interests of the client, given the client's relevant circumstances; the term "relevant circumstances" is given meaning by s 961B;
  - The provider of the advice is required in circumstances specified under s 961J to give priority to the client's interests when giving the advice;
  - Information on fees that have been, or may be, charged to the client in relation to the advice. This includes fees by the providing entity; a related body corporate of the
providing entity; a director or employee of the providing entity or a related body
corporate; an associate of any of the above; or any other person in relation to whom
the regulations require the information to be provided;

- If the client enters into an ongoing fee arrangement with the providing entity to which
  Div 3 of Pt 7.7A applies, that the providing entity must give the client a fee disclosure
  statement (FDS) each year in relation to the ongoing fee arrangement;

- If the providing entity recommends that the client acquire a financial product, a
  statement advising the client that they may have the right to return the product under
  Div 5 of Pt 7.9 within a cooling-off period; and

- That the client may seek further or varied advice from the providing entity at any time.

Other amendments seek to:

- **Extend the time for fee disclosure statements** from 30 to 60 days after the client's
  anniversary date. The statement must also relate to the period of 12 months that ends on the
day no more than 60 days before when the statement must be given;

- **Provide a more targeted execution-only provision.** The Bill would insert new subsections
  963B(4) and (5), the "execution-only provision", so that a monetary benefit given to a licensee
  or a representative of a licensee is not conflicted remuneration if the benefit is given in relation
  to: (i) the issue or sale of a financial product; and (ii) if personal advice in relation to the
  product, or a class of products of which the product is one, has not been given to the person
  as a retail client in the 12 months immediately before the benefit is given;

- **Provide a more targeted general advice provision.** The government said it was never its
  intention to allow the payment of commissions on general advice. To this end, the Bill
  proposes to modify proposed new s 963B(6) so that the general advice provision is targeted,
  and is comprised of five limbs. All five limbs must be satisfied for the benefit to not be
  considered conflicted remuneration. Importantly, there is a specific limb that clarifies - beyond
  a doubt - that payments known as commissions cannot be paid. The proposed five limbs to the
  general advice provision are:

  - The "employee" limb (para (a)) - this limb seeks to ensure that only employees or persons in "employee-like" situations are eligible to utilise the provision.

  - The "name of the licensee" limb (para (b)) - this limb would restrict the employee limb
    by requiring the employee to provide general advice under the name of the licensee,
    a trade mark of the licensee, or a business name of the licensee.

  - The "no commissions" limb (para (c)) - this limb seeks to clearly indicate that the
    general advice provision does not permit payments commonly known as commissions.
    This limb indicates that two types of payment are not permitted: (i) a
    recurring payment made because the person has given the general advice, and (ii) a
    payment made solely because a financial product of a class in relation to which the
    general advice was given has been issued or sold to the client.

  - The "no personal advice" limb (para (d)) - this limb seeks to restrict the advice that
    can be provided in the preceding 12 months. The limb specifies that, during the 12
    months immediately before the benefit was given, the employee must not have given
    financial product advice to a retail client other than: (i) general advice; (ii) personal
    advice in relation to basic banking products, general insurance products, and
    consumer credit insurance products; or (iii) a combination of the advice mentioned
    above.
The "allowable products" limb (para (e)) - this limb seeks to ensure that the general advice provided by an employee is in relation to a financial product issued or sold by the licensee. To utilise the general advice provision, the financial product in relation to which the general advice is given must either be: (i) a product issued or sold by the licensee or a related body corporate of the licensee; or (ii) a product issued or sold by another entity under the name of the licensee, a trade mark of the licensee or a business name of the licensee;

- **Include enhanced regulation-making powers** that permit regulations to prescribe when a benefit is or is not conflicted remuneration. This amendment would amend the Bill to provide an additional regulation-making power to prescribe circumstances in which all or part of a benefit prescribed in s 963C(1) is to be treated as conflicted remuneration;
- **Amend the definition of basic banking product.**
Tax and Super Amendment (No 5) Bill introduced

Tax and Superannuation Laws Amendment (2014 Measures No 5) Bill 2014

- Introduced in the House of Reps
- Proposes the following amendments:
  - Abolish the mature age worker tax offset from 2014-15
  - Abolish the seafarer tax offset from 2015-16
  - Reduce rates of tax offset available under the R&D tax incentive by 1.5 percentage points
  - Update list of specifically listed DGRs.

Tax and Super Amendment (No 5) Bill introduced

Tax and Superannuation Laws Amendment (2014 Measures No 5) Bill 2014

The Tax and Superannuation Laws Amendment (2014 Measures No 5) Bill 2014 has been introduced in the House of Reps. It proposes the following amendments:

- Amend the ITAA 1997 by repealing Subdiv 61-K and amends the Taxation Administration Act 1953 to abolish the mature age worker tax offset from the 2014-15 and later years. A new expenditure programme being delivered by the Department of Employment, Restart, will provide alternative support by way of subsidy of up to $10,000 to employers who hire mature age job seekers. Was announced in the 2014-15 Federal Budget;
- Amend the ITAA 1997 by repealing Subdiv 61-N to abolish the seafarer tax offset from the 2015-16 and later years. A company is entitled to the seafarer tax offset in an income year in respect of an Australian resident individual if certain conditions are met. Was announced in the 2014-15 Federal Budget;
- Amend the ITAA 1997 to reduce the rates of the tax offset available under the R&D tax incentive by 1.5 percentage points. The higher (refundable) rate of the tax offset (available to eligible entities with turnover of less than $20m) will be reduced from 45% to 43.5% and the lower (non-refundable) rates of the tax offset (available to all other eligible entities) will be reduced from 40% to 38.5%. The government says the reduction in the tax offset rates is consistent with its commitment to cut the company tax rate from 1 July 2015. Will apply to years starting on or after 1 July 2014. Was announced in the 2014-15 Federal Budget;
- Amend the ITAA 1997 to update the list of specifically listed deductible gift recipients. The changes would add Australian Schools Plus Ltd, East African Fund and The Minderoo Foundation Trust to the list.

04/09/2014
Freezing of Medicare levy surcharge thresholds Bill

- **Private Health Insurance Amendment Bill (No 1) 2014** has been introduced in the House of Reps
- Proposes to pause income thresholds which determine the tiers for Medicare levy surcharge and rebate on private health insurance from 1 July 2015 for three years.

The **Private Health Insurance Amendment Bill (No 1) 2014** has been introduced in the House of Reps. It proposes to implement a 2014 Budget announcement to pause the income thresholds which determine the tiers for the Medicare levy surcharge and the Australian Government Rebate on private health insurance at 2014-15 rates for three years, with effect from 1 July 2015. The Bill would amend the **Private Health Insurance Act 2007 (PHI Act)** to set income thresholds for the income tiers at the 2014-15 rates in the financial years 2015-16, 2016-17 and 2017-18.

The income thresholds for the surcharge are set out in the **Medicare Levy Act 1986** and the **A New Tax System (Medicare Levy Surcharge - Fringe Benefits) Act 1999** and these Acts refer to the thresholds set out in the **PHI Act**. Therefore, no direct amendments to the tax law are required in order to pause the surcharge income thresholds as the amendments to the **PHI Act** will pause the income thresholds for the surcharge and the Rebate.

The 2014-15 thresholds that will apply for three years commencing on 1 July 2015 are:

<table>
<thead>
<tr>
<th>Tier</th>
<th>Singles</th>
<th>Families</th>
<th>Medicare levy surcharge</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>Base</td>
<td>0 - 90,000</td>
<td>0 - 180,000</td>
<td>Nil</td>
</tr>
<tr>
<td>Tier 1</td>
<td>90,001 - 105,000</td>
<td>180,001 - 210,000</td>
<td>1%</td>
</tr>
<tr>
<td>Tier 2</td>
<td>105,001 - 140,000</td>
<td>210,001 - 280,000</td>
<td>1.25%</td>
</tr>
<tr>
<td>Tier 3</td>
<td>140,001+</td>
<td>280,001+</td>
<td>1.5%</td>
</tr>
</tbody>
</table>
The private health insurance offset percentages that have applied since 1 April 2014 are as follows:

- **Base (see above):**
  - Under 65 years old – 29.04%;
  - 65 – 69 years – 33.88%;
  - 70 years or over – 38.72%.

- **Tier 1 (see above):**
  - Under 65 years old – 19.36%;
  - 65 – 69 years – 24.20%;
  - 70 years or over – 29.04%.

- **Tier 2 (see above):**
  - Under 65 years old – 9.68%;
  - 65 – 69 years – 14.52%;
  - 70 years or over – 19.36%.

- **Tier 3 (see above) – 0%.

The original 30%, 35% and 40% offset percentages were altered following the Rebate Adjustment Factor (RAF) by the *Private Health Insurance Legislation Amendment Act 2014*. The RAF represents the difference between the CPI and the industry weighted average increase in premiums. That amending Act had the aim of reducing the regulatory burden relating to the government rebate on private health insurance.

Pausing the income thresholds at 2014-15 levels is expected to result in individuals with incomes marginally below each threshold whose income increases moving into a higher income tier sooner. As a result, the government says some individuals who hold private health insurance may receive a lower Rebate (offset) than if the income thresholds were indexed as usual. Some individuals who do not have private health insurance, and who would not otherwise be liable to pay the Medicare levy surcharge, may become liable to pay the surcharge, and some individual's level of surcharge may increase.

25/09/2014
International Agreement Bill receives Assent

*International Tax Agreements Amendment Act 2014*

The *International Tax Agreements Amendment Act 2014* received Royal Assent on 24 September 2014 as Act No 105 of 2014. It had been passed by Parliament without amendment and amends the *International Tax Agreements Act 1953* to give the force of law in Australia to the revised double tax agreement between Australia and Switzerland.

Under the DTA:

- **Dividends** may be taxed by the source country up to the following limits:
  - Zero for dividends paid to public listed companies, or subsidiaries thereof, or to unlisted companies in certain circumstances, that hold 80% or more of the paying company. This rate also applies to dividends paid to complying Australian super funds and tax exempt Swiss pension schemes;
  - 5% for dividends paid to companies that hold 10% or more of the paying company; and
  - 15% in all other cases.

- **Interest** may be taxed by the source country up to the following limits:
  - Zero for interest paid to bodies exercising governmental functions and to banks performing central banking functions; banks that are unrelated to, and dealing independently with, the payer; and complying Australian super funds and tax exempt Swiss pension schemes; and
  - 10% in all other cases.

- **Definition and rate of royalties** – The revised definition of royalties will exclude the right to use industrial, commercial or scientific equipment from the definition. Royalties may be taxed in the source country at up to 5%.
Entry into force

Once the DTA enters into force, it will take effect in Australia in four stages, namely:

- In respect of FBT, on fringe benefits provided on or after 1 April next following entry into force;
- In respect of withholding tax on income derived by a resident of Switzerland, on income derived on or after 1 January next following entry into force;
- In respect of other Australian tax, on income, profits or gains derived in the income year beginning 1 July next following entry into force; and
- In respect of exchange of information, to information that relates to taxation or business years in course on, or beginning on or after, 1 January next following entry into force.

25/09/2014
Start dates proclaimed: mining tax repeal etc

The Governor-General has proclaimed 30 September 2014 as the start date for Schedules 1 to 5 of the Minerals Resource Rent Tax Repeal and Other Measures Bill 2014 (which received Royal Assent on 5 September 2014 as Act No 96 of 2014). As a result, the Schedules will have the following dates of effect for most taxpayers:

- Schedule 1 - Abolition of the mining tax from 1 October 2014 (with taxpayers final MRRT year (even if it is a part year) ending on 30 September 2014);
- Schedule 2 - Abolition of the company loss carry-back from 1 July 2013;
- Schedule 3 - Reduction of the instant asset write-off from 1 January 2014;
- Schedule 4 - Abolition of accelerated depreciation for motor vehicles from 1 January 2014; and
- Schedule 5 - Abolition of geothermal energy concessions from 1 July 2014.

Taxpayers with a substituted accounting period may have a different date of effect.

Note that the ATO has released details of its administrative treatment of the repeal of the mining tax, now that the repeal is expected to commence on 30 September 2014. Entities will not accrue further MRRT liabilities from 1 October 2014. The ATO says entities will need to consider their circumstances to ensure their MRRT obligations accruing up to and including 30 September 2014 are met. These MRRT obligations include: (i) lodging MRRT instalment liability notices and paying MRRT instalments for instalment quarters (including those commencing on and after 1 July 2014); (ii) lodging MRRT returns.

The ATO says entities have to lodge MRRT instalment liability notices for the 2014-15 MRRT year, including for the period from 1 July 2014 through to 30 September 2014, unless they are exempted from this lodgment obligation. Entities covered by legislative instrument MRRT 2014/1 Taxation Administration Act 1953 - Nil rate determination and exemption from lodging Minerals Resource Rent Tax (MRRT) Instalment Liability Notices - Instrument (No 1) 2014 are exempt from having to lodge MRRT instalment liability notices for the 2014-15 MRRT year.
The ATO says entities should review their circumstances to determine whether they are covered by a 2014-15 MRRT year "nil rate determination" (either on a class basis through the above legislative instrument or an individual basis).

The ATO has previously allowed low-volume non-paying entities until:

- 1 December 2014 to lodge their 2012-13 MRRT returns and starting base returns;
- The later of 1 December 2014 or the first day of the 6th month after the end of their 2013-14 MRRT year to lodge their 2013-14 MRRT returns.

Further to this extension of time to lodge, and following the repeal of the MRRT, the ATO has registered legislative instruments to exempt the following classes of entities from having to lodge MRRT returns:

- **Low-volume non-paying entities (for their 2012-13, 2013-14 and 2014-15 MRRT years).**
- **Large volume non-paying entities (for their 2013-14 and 2014-15 MRRT years).**
Tax and Super Amendment No 4 awaits Assent

The Tax and Superannuation Laws Amendment (2014 Measures No 4) Bill 2014 has been passed by Parliament without amendment and awaits Royal Assent. The Bill contains amendments concerning:

- **Thin cap** - (i) tightens the debt limit settings in the thin capitalisation rules to ensure that multinationals do not allocate a disproportionate amount of debt to their Australian operations eg reduces the maximum statutory debt limit from 3:1 to 1.5:1 (on a debt-to-equity basis) for general entities and from 20:1 to 15:1 (on a debt-to-equity basis) for non-bank financial entities; (ii) increases the de minimis threshold to $2m to minimise compliance costs for small businesses; and (iii) introduces a new worldwide gearing debt test for inbound investors.

- **Foreign residents and capital gains** - amends the ITAA 1997 to ensure that the foreign residents CGT regime operates as intended by preventing the double counting of certain assets under the Principal Asset Test. A technical correction would also be made to the meaning of "permanent establishment" in s 855-15 of the ITAA 1997.

- **Foreign dividends** - rewrites and reforms the existing s 23AJ exemption for foreign non-portfolio dividends into the ITAA 1997 eg the exemption will apply where an Australian corporate tax entity holds a participation interest of at least 10% in a foreign company.

- **Tax receipts** - would amend the tax law to provide greater transparency to taxpayers about how their tax money is spent, by requiring the FCT to issue a tax receipt to individuals for the income tax assessed to them.

- **Miscellaneous amendments** - amendments include style changes, the repeal of redundant provisions, and the correction of anomalous outcomes and corrections to previous amending Acts.

25/09/2014
Tax and Super Amendment No 5 passes Reps

The **Tax and Superannuation Laws Amendment (2014 Measures No 5) Bill 2014** has been passed by the House of Reps without amendment and moves to the Senate. The Bill contains amendments concerning: abolition of mature worker tax offset and seafarer tax offset; reduce the rates of the tax offset available under the R&D tax incentive.

The Bill has been referred to the Senate Economics Legislation Committee for report by 28 October 2014. Feedback is being sought on the proposed R&D amendments in the Bill. The Bill proposes to amend the **ITAA 1997** to reduce the rates of the tax offset available under the R&D tax incentive by 1.5 percentage points. The higher (refundable) rate of the tax offset (available to eligible entities with turnover of less than $20m) will be reduced from 45% to 43.5% and the lower (non-refundable) rates of the tax offset (available to all other eligible entities) will be reduced from 40% to 38.5%. The government says the reduction in the tax offset rates is consistent with its commitment to cut the company tax rate from 1 July 2015. Will apply to years starting on or after 1 July 2014. Was announced in the 2014-15 Federal Budget.

25/09/2014
Amending FoFA regs stand

• Labor's motion to have Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 disallowed has been defeated in the Senate
• Regulation makes a number of interim changes including:
  – Remove “catch all” requirements re best interests duty
  – Remove fee disclosure requirements for some clients
  – Remove “opt-in” requirement
  – Modify best interests duty.

Amending FoFA regs stand

Labor's motion (moved by Senator Dastyari) to have the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 disallowed was, on 1 October 2014, defeated in the Senate by 34 votes to 32. It is understood the government had support from the Palmer United Party, the Motoring Enthusiasts Party, Family First and Liberal Democratic Party cross-benchers.

The Regulation was registered on 30 June 2014 to give effect to the government's proposed amendments to the FoFA legislation to implement its 2013 election commitments. The Regulation amends the Corporations Regulations 2001 to make a number of "interim" changes (applicable from 1 July 2014 until 31 December 2015) eg:

• Remove the "catch-all" requirement (s 961B(2)(g)) from the current list of 7 steps in s 961B(2) of the Corporations Act that an advice provider can take to prove that they have complied with the best interests duty in s 961B(1): reg 7.7A.3 of the Corporations Regulations. [That still leaves six steps in s 961B(2) that advisers must satisfy];
• Remove the requirement for fee disclosure statements (FDS) to be sent to pre-1 July 2013 clients: reg 7.7A.8;
• Remove of the "opt-in" requirement so that investors will not be required to renew their ongoing fee arrangement with their adviser every two years: reg 7.7A.7;
• Clarify the treatment of "intra-fund advice" by inserting a Note at the end of reg 7.7A.10 of the Corporations Regulations;
• Modify the best interests duty to better facilitate "scaled advice" by clarifying that there is nothing to prevent an advice provider and a client from agreeing to the subject matter of the advice sought: reg 7.7A.2 of the Corporations Regulations. However, the best interest obligations still apply to the advice ultimately sought. The changes enable an adviser, in considering the information disclosed by their client, to agree with their client the subject matter of the advice sought; any investigations into the client's circumstances are only those that would reasonably be considered as relevant to the agreed subject matter; and the best interest obligations apply to the agreed subject matter;
• Ensure that the "wholesale client" and "retail client" distinction in the Corporations Act applies in respect of the FoFA provisions. Currently, where a person elects to be treated as a wholesale client (rather than a retail client), the person can obtain an accountant's certificate that the person is a "professional investor" (at least $10m in assets). The Regulation extends the renewal requirement for an accountant's certificate from six months to two years.

Note

It is noted that the Senate Standing Committee on Regulations and Ordinances has raised what it believes are serious concerns with the government over the appropriateness of the amending Regulation. Chairman of the Regulations and Ordinances Committee (Senator John Williams) gave notice that he would move on 3 December 2014 that the Regulation be disallowed.

02/10/2014
Major FOI amendments Bill introduced


The amendments in the Bill would abolish the Office of the Australian Information Commissioner (OAIC) and streamline arrangements for the exercise of privacy and FOI functions by providing for:

- An Australian Privacy Commissioner, to be responsible for the exercise of privacy functions under the Privacy Act and related legislation, as an independent statutory office holder within the Australian Human Rights Commission;
- The AAT to have sole jurisdiction for external merits review of FOI decisions;
- Compulsory internal review of FOI decisions (where available) before a matter can proceed to the AAT;
- The Attorney-General to be responsible for FOI guidelines, collection of FOI statistics and the annual report on the operation of the FOI Act; and
- The Ombudsman to have sole responsibility for the investigation of FOI complaints.

Under the proposed new arrangements, those applicants who wish to seek review of the initial FOI decision will be able to seek internal review of the decision. Where a party is not satisfied with the internal review decision, there will be a further right of review to the AAT. Internal review is not available where the decision was made by the Minister or the agency head. In these cases, there will be a direct right of review to the AAT. There will be a further right of appeal to the Federal Court on a question of law from a decision of the AAT and the AAT will also be able to refer a question of law to the Federal Court during a review.

Those applicants who wish to make a complaint about agency processing under the FOI Act will be able to make their complaint directly to the Ombudsman, who will take over the OAIC’s role of investigating FOI complaints.
The government says the Bill will largely restore the system for the management of privacy and FOI issues that was in operation before the establishment of the OAIC on 1 November 2010.

02/10/2014
Asset betterment method: taxpayer failed onus

**AAT Case [2014] AATA 595, Re Roesch v FCT**

- AAT has affirmed an amended assessment issued to a taxpayer based on an asset betterment calculation
- It said taxpayer had not “adequately explained how he acquired assets from non-income sources”
- Therefore, AAT affirmed FCT’s decision and penalties for “recklessness”.

## Asset betterment method: taxpayer fails onus

**AAT Case [2014] AATA 595, Re Roesch v FCT**

The AAT has affirmed an amended assessment issued to a taxpayer for the 2004 income year that was based on an asset betterment calculation: AAT Case [2014] AATA 595, Re Roesch v FCT (AAT, Ref No: 2013/1839, Molloy DP, 22 August 2014).

### Background

In March 2005, the taxpayer lodged his 2004 tax return reporting a taxable income of $7,382. The FCT subsequently conducted an audit of the taxpayer's financial affairs which considered his assets, liabilities and credit card expenditure. In July 2011, the FCT issued an amended assessment using the asset betterment method. The amended assessment included an amount upon which the FCT's judgment income tax ought to be levied of $451,154. The FCT was of the view there had been evasion on the basis that the taxpayer had withheld information. The FCT also imposed 75% administrative penalty for "intentional disregard".

The taxpayer objected to the assessments, and that objection was allowed in part reducing the taxpayer's assessable income for 2004 by $32,148. However, the taxpayer was dissatisfied with that decision and sought review. Since the objection decision, the FCT further reduced the taxpayer's taxable income for 2004 to $290,360.

Before the Tribunal, the taxpayer submitted he lived in Germany before coming to Australia and transferring over $2m which he used to support himself and his family. He argued he used personal funds to set up or buy businesses and had borrowed funds from a bank. The taxpayer disputed the FCT's inclusion of around $269,089 in personal credit card expenses in his asset betterment calculation, and presented his own calculation which included $580,160 as a loan repayment from a family trust.
Decision

The AAT held the taxpayer had failed to discharge the onus of proving that the assessment was excessive and what the assessment should have been. The AAT said the taxpayer had not "adequately explained how he acquired assets from non-income sources". It also said the taxpayer had "not given anything approaching a satisfactory explanation of how he was able to fund his credit card expenditure".

The AAT affirmed the FCT's objection decision. However, it would not give the direction sought by the FCT to remit the matter to him to amend the taxpayer's taxable income to $292,046 in accordance with another amended asset betterment calculation. It said it was "open to the FCT, if he so chooses, to determine the amount of revenue to collect". However, it agreed with the FCT the penalty imposed should be for "recklessness" and not for "intentional disregard" of a taxation law.

28/08/2014
PSI: payments from service acquirers

**Draft Taxation Determination TD 2014/D15**

- It states a payment received by a personal service entity from a service acquirer during a period where no service is performed is personal services income
- Date of effect: Proposed to apply before and after its date of issue
- Comments due by 24 October 2014.

PSI: payments from service acquirers when no service provided: *TD 2014/D15*

**Draft Taxation Determination TD 2014/D15**

The Draft Determination states that a payment received by a Personal Services Entity (PSE) from a service acquirer during a period the service provider is not providing services to the acquirer until further called upon, is Personal Services Income (PSI) within the meaning of s 84-5(1) of the *ITAA 1997*.

For the purposes of this Draft Determination, the ATO provided the following definitions:

- Personal Services Entity is an entity (PSE) within the meaning of s 86-15(2), ie a company, partnership or trust whose ordinary statutory income includes the personal services income of one or more individuals;
- Service acquirers are entities that acquire the personal services of an individual directly from the individual or through a PSE;
- Service providers are the relevant individual in respect of who the definition of PSI in s 84-5(1) is being applied.

The Draft includes an example in which a sole director/shareholder ("Jim") provides his expertise and skills to a client company for a flat monthly contractual fee that is non-contingent. During a specified period, a dispute arises between Jim and the client company which results in no work being performed for the period, however, Jim is still paid the monthly contractual fee. According to the ATO, the monthly fee during the dispute period is considered to be personal service income under s 84-5(1) notwithstanding that the client company did not call upon Jim to undertake further services.
Date of effect

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

Comments

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Comments are due by 24 October 2014.
Purported loans were income

**AAT Case [2014] AATA 668, Re K A Hicks and Associates Pty Ltd & Ors v FCT**

- AAT has held a taxpayer failed to discharge onus of proving deposits into his bank accounts were not income
- Taxpayer argued amounts received were loans from an informal syndicate
- AAT also found an amount distributed from a family company to the taxpayer was assessable income.

**Background**

The taxpayers were a husband and wife and a family company of which they were the sole shareholders and directors. The main issue in question was whether amounts of over $867,000 deposited in the husband's bank accounts over a four-year period (as discovered by AUSTRAC reports of overseas transactions) was assessable income. The husband claimed the amounts were loans or capital from fellow members of an informal syndicate established for the purposes of buying and selling antiques, antiquities and fossils etc sourced from China: **AAT Case [2014] AATA 668, Re K A Hicks and Associates Pty Ltd & Ors v FCT** (AAT, Ref Nos 2012/5517-5520, 2012/5496-5499, 2012/5504-5507, Ettinger, Senior Member, 11 September 2014).

Also in issue was whether an amount of $180,000 paid from a family company to the husband to enable him to pay off his credit card debts was also assessable income and whether the taxpayer's wife was assessable on an amount of $70,000 allegedly paid to her by the company. The FCT also claimed that the company had not paid GST in relation to relevant transactions and that it was liable for PAYG in respect of payments alleged to have been made to the husband and wife (despite their claim that the company did not pay any wages or directors' fees to either of them). Finally, the AAT had to determine whether 50% shortfall penalties for recklessness for all the taxpayers should be affirmed.
Decision

In relation to the $867,000 deposited in the husband's bank accounts (of which he had at least seven in his name), the AAT found that he had clearly not discharged the onus of proving that the payments were not assessable income. In particular, it found the evidence did not support claims about the nature of the syndicate and how it operated, and that it was not explained why such large sums would be invested in the venture without any formal written agreement as to how funds would be expended or repaid. In addition, the AAT found there was a lack of accurate and comprehensive records to substantiate claims. There was also inconsistent evidence, including from other alleged syndicate members who denied the existence of the syndicate.

In relation to the payments of $180,000 made by the company in reduction of the taxpayer's credit card debts, the AAT dismissed the taxpayer's claim that the payments were repayments of loans made to the company by him and his wife — particularly as there was no evidence of the husband and wife entering into any formal agreement with the company for the lending of the monies or their repayment. Further, in the same way that it found the evidence was unreliable in relation to the amounts deposited in the taxpayer's account, the AAT also found that the taxpayer's evidence on this issue was similarly unreliable and therefore that he had failed to discharge the relevant onus.

Likewise, the AAT found that the company had failed to discharge the onus that assessments of GST were excessive because of the paucity and inaccuracy of supporting documentation. It also dismissed the evidence of the husband and wife that they did not receive any form of remuneration from the company because it found that regardless of whether certain payments to them were repayment of loans or income in their hands, the company must have sourced the income from somewhere. It also found that the payment of superannuation to the taxpayers did not support their claim that they did not receive payments from the company. As a result, the AAT also confirmed the imposition of penalties for failure to withhold PAYG amounts.

The AAT also noted evidence that the husband had sold the majority of the company stock to a private collector for $2.24m but had not reported the income because "he had not been paid for it" and that, furthermore, he had not taken steps to recover the payment despite the lapse of three years since the stock was sold. It also found it "implausible" that such an amount of goods would be transferred without appropriate documentation and payment. It also noted that the husband and wife had applied for a "Lo Doc" home loan of $780,000 on the basis that the husband was a director of the company which paid him a net income of $250,000, and that they had declared on the bank's application form that they had assets of $9.3m and liabilities of $3.8m.

For similar reasons, the AAT found that the taxpayer's wife had failed to discharge the onus of proving that amounts of over $69,000 paid to her in excess of her net salary as a teacher were not assessable income. In this regard, the AAT noted that an ATO audit had shown that her private bills and expenses exceeded the income she declared and that she had not demonstrated that alleged receipts from the company were repayment of loans she had previously made to it. The AAT was also satisfied that the repayment of her credit cards to the amount of $83,300 by the company during one income year was not private in nature as it was provided as a commercial loan, and that it could not act to reduce her tax shortfall amount.

Finally, the AAT confirmed the imposition of 50% shortfall penalties for recklessness imposed on all three taxpayers for a range of reasons including the improper record keeping, the credibility of evidence, the lack of cogent explanations to explain various transactions and the failure to discharge any onus of proof in respect of issues in question. It likewise found there were no grounds to remit the penalties either in whole or part in these circumstances.

18/09/2014
Compensation assessable as ordinary income

AAT Case [2014] AATA 664, Re Riley v FCT

- AAT has held a payment made to a taxpayer for compensation re domestic assistance was assessable as ordinary income under s 6-5 of the ITAA 1997
- Payment was awarded by Workers Compensation Commission re domestic assistance taxpayer provided to her husband following an injury.

Background

In February 1997, the taxpayer's husband suffered a serious injury while white water rafting during a team building exercise organised by his employer. The husband was unable to work and the taxpayer gave up full time work to become a carer. She continued to work part time or on a temporary basis. In June 2012, the husband lodged a claim for compensation for domestic assistance under s 60AA of the Workers Compensation Act 1987 (NSW) in respect of the domestic assistance that the taxpayer had provided to her husband during the period between 1 January 2002 and 12 April 2012.

In November 2012, the Workers Compensation Commission (WCC) awarded the taxpayer the sum of $179,116 ("the Compensation Payment"). The taxpayer received the Compensation Payment as a lump sum in the 2013 income year and lodged a private ruling application with respect to the payment. In July 2013, the FCT issued a private ruling stating the Compensation Payment was assessable income for the purposes of s 6-5 of the ITAA 1997. The taxpayer objected and the FCT disallowed the objection in full.

The taxpayer contended the lump sum was in the nature of capital and was not income according to ordinary concepts. It was also contended that the lump sum should be characterised as a receipt of capital by the taxpayer as the lump sum: was not earned by her; was not expected by her; was not relied upon by her; did not have any element of periodicity, recurrence or regularity; was not payment for services rendered; was not in substitution for income; and was not for financial support.
The FCT contended the Compensation Payment had the character or was in the nature of ordinary income and was therefore assessable as ordinary income under s 6-5. The FCT argued the amount of the Compensation Payment was calculated by reference to the numbers of hours of gratuitous domestic assistance that the taxpayer provided to her husband during the period 1 January 2002 to 12 April 2012 as determined by the WCC. The payment was accordingly made for personal services rendered by the taxpayer. Further, the FCT argued the Compensation Payment was neither calculated nor intended to reflect any loss or earning capacity on the part of the taxpayer and therefore there was no basis for arguing that the payment was a receipt of a capital nature.

The Tribunal said the sole issue for determination was whether the payment made to the taxpayer was assessable as ordinary income under s 6-5.

Decision

Having regard to the case law, the facts referred to in the ruling application and specifically the manner in which the WCC determined the amount to be paid in compensation, the Tribunal concluded the Compensation Payment was assessable as ordinary income under s 6-5.

After consideration of s 60AA of the Workers Compensation Act, the Tribunal was of the view that the purpose of the compensation, in the case of gratuitous domestic help, was to ensure that the care giver was directly provided with a sufficient payment to cover her lost income. It said this was achieved through the mechanism of making a payment directly to the care giver only in circumstances where she had lost income or foregone employment as a result of providing that assistance. The Tribunal was also of the view that the Compensation Payment was a reasonable substitute for a payment which the care giver might have received from the injured worker if the care giver had not chosen to provide those services gratuitously.

The Tribunal did not accept the contention that the Compensation Payment was made to compensate the taxpayer of a loss of earning capacity. It said the facts indicated that the taxpayer did not suffer a loss of earning capacity. She did not suffer an injury that prevented her from being able to work. Rather, it said she elected to voluntarily resign from her full-time employment so as to enable her to provide domestic assistance to her husband. The Tribunal said on no basis could this be described as a loss of income earning capacity - rather, it was a loss of income. The Tribunal further noted that there was no finding by the WCC that the taxpayer had suffered a loss of earning capacity.

While the payment as a lump sum could be suggestive of a capital payment, the Tribunal said that fact alone did not mandate a conclusion that the payment was of a capital nature. It said it will very much depend on all the relevant circumstances. Furthermore, the Tribunal said it was clear from the case law that a lump sum payment representing lost earnings is assessable income. Accordingly, the FCT's decision was affirmed.

18/09/2014
Interest in shares and “indeterminate rights”

**Draft Taxation Determination TD 2014/D16**

- It states that where a right to acquire a beneficial interest in a share is subject to shareholder approval, it is not a “indeterminate right” under s 83A-340(1) of the ITAA 1997
- Date of effect: Proposed to apply both before and after its date of issue
- Comments due by 24 October 2014.

Interest in shares and "indeterminate rights": **TD 2014/D16**

This Draft TD states that where a right to acquire a beneficial interest in a share is granted subject to shareholder approval and an employee acquires only a right to have the matter put to the shareholders and nothing more, that right is not an "indeterminate right" within the meaning of s 83A-340(1) of the ITAA 1997. It also states that prior to shareholder approval being given, such a right is not an ESS interest within the meaning of s 83A-10(1) as it is not yet a right to acquire a beneficial interest in a share. Further, the Draft notes the Determination applies for the purposes of s 83A-15 of the Income Tax (Transitional Provisions) Act 1997.

**Date of effect**

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

**Comments**

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Comments are due by 24 October 2014.

25/09/2014
Vesting dates allowed to be varied

Re Arthur Brady Family Trust; Re Trekmore Trading Trust [2014] QSC 244

• Supreme Court of Qld has allowed two discretionary trusts to amend vesting dates in their deeds
• Trustees sought the change to avoid substantial tax consequences
• Court noted there was no proposed transaction in the sense of dealing with another person, but rather desire to avoid the need to deal with trust property upon vesting date.

The Supreme Court of Qld has allowed two discretionary trusts to amend the vesting dates to expire 80 years from the settlement date of the trust deed.

Trustees of two discretionary trusts sought orders, pursuant to s 94 of the Trusts Act 1973 (Qld), to amend the vesting date of each trust to a later date. Each trust had a vesting date of 16 February 2017. The trustees sought the change as there would be substantial tax consequences if the vesting date remained and the trust property was distributed.

The two trusts in question each hold portfolios of industrial and commercial real estate with a total value of over $15m. If the vesting date remained as 16 February 2017, there would be almost $2m in CGT and stamp duty to be paid on the distribution of the real property assets. The trusts also had unpaid entitlements owing to beneficiaries. The trustees also said that in order to maintain the same property portfolios within the two branches of the families involved, monies would have be borrowed to meet the tax and stamp duty that would be payable and this would result in extra costs and a substantial burden on each trust. All the primary and contingent beneficiaries had consented to the amendment.

The trustees submitted that the beneficiaries wanted to avoid the substantial financial costs that would result if the current vesting date stood. It was submitted that the common intention of all concerned was that the trusts be the commercial vehicle for substantial investment in continuing income streams to those concerned and that this should continue as long as possible. The objective sought was to extend the vesting date of each trust to the maximum perpetuity period permitted by law for one of the trusts, which would be 80 years from 16 February 1977. For the other trust, the amendment sought would extend the vesting day to 80 years from 16 February 1977, with the proviso that the trustee might, subject to the relevant law of perpetuities, appoint an earlier or later date as the vesting day.
The issues arose of whether an amendment to the vesting date was a "transaction" within the meaning of s 94 of the Trusts Act, and whether the vesting date could be amended under s 94. The Court observed that, under s 94, "the jurisdiction exists only where the court's assistance is necessary or desirable in order to facilitate some transaction with trust property".

The Court examined the relevant provisions and case law, and noted there was no proposed transaction in the sense of dealing with another person but rather, a desire to avoid the need to deal with the trust property upon the vesting date. The Court was of the view however, that the amendment of the trust deed to change the vesting date "could be fairly be characterised as a transaction".

The Court concluded that there was a discretion to make the orders sought, taking into account the substantial impact of taxes and duties on the trust funds, and the unanimous approval of all classes of beneficiaries. The Court therefore made the orders sought by the trustees under s 94 of the Trusts Act.

Re Arthur Brady Family Trust; Re Trekmore Trading Trust [2014] QSC 244, Supreme Court of Qld, McMurdo J, 30 September 2014

02/10/2014
DEDUCTIONS

Deduction claims after returns lodged refused

AAT Case [2014] AATA 576, Re ZBVK v FCT

• A taxpayer has been mostly unsuccessful before the AAT re
deduction claims for business expenses
• Taxpayer claimed expenses were omitted from tax returns
lodged for various income years
• AAT said virtually all taxpayer’s claims were unsuccessful.

Deduction claims after returns lodged refused

AAT Case [2014] AATA 576, Re ZBVK v FCT

A taxpayer has been mostly unsuccessful before the AAT in a matter concerning deduction claims
for certain business expenses which were claimed to have been omitted from tax returns lodged for

Background

The taxpayer was a barrister and was involved in a number of business ventures. The taxpayer
objected to tax assessments for the 2006, 2007 and 2008 income years. Essentially, the taxpayer
sought to claim deductions for certain business expenses (arising from certain business ventures)
which had not been claimed when he lodged his returns.

Each objection was allowed in part. The partial allowance of the objection for each of 2006 and 2007
was detrimental to the taxpayer since in each case it resulted in an increase in his taxable income
equal to the amount that appeared to have been disclosed as income. For 2008, and for the same
reason, the taxpayer’s assessable income was also increased, but some of the deductions claimed
($266,679, in respect of interest payments) were allowed. All remaining deductions claimed for each
of the relevant years were disallowed.

Before the AAT, the FCT acknowledged certain errors incorrectly attributing interest income which
had increased the taxpayer’s taxable income in the amended assessments which would need to be
adjusted.
Decision

The Tribunal identified several arrangements which the taxpayer argued gave rise to his claims. The Tribunal indicated difficulty in establishing the precise nature of the arrangements that were entered into either by the taxpayer or by entities associated with him. Among other things, the Tribunal noted "the vague nature of the evidence and the shortage of primary documentation and contemporaneous records".

The Tribunal also observed that the taxpayer seemed "to have had a view that he himself was carrying on many of the activities for which he provided funds, despite the appearance that the activities were actually being conducted by entities to which he had advanced or contributed funds and/or in which he had an interest". In this regard, the Tribunal was mindful of the taxpayer's connection with a trustee company (R Pty Ltd). The taxpayer was a beneficiary of a family trust for which R Pty Ltd was the trustee. The taxpayer was also a shareholder and director of R Pty Ltd, which was also the trustee of the taxpayer's self-managed super fund.

For example, the Tribunal heard details of one arrangement concerning a residential property development in Queensland. The Tribunal heard R Pty Ltd paid amounts to the entity managing the development. However, the taxpayer contended he was entitled to claim deductions for amounts provided by him personally. It was argued that the amounts, paid by R Pty Ltd, were loans to him from R Pty Ltd, and then payments by him "as joint venture contributions" to the company managing the development. However, the Tribunal noted, among other things, that there were no records to support the taxpayer's contention. The Tribunal was not satisfied the taxpayer was entitled to the deduction claims made in the circumstances.

In another arrangement, the taxpayer had agreed to invest in a business in Fiji. The Tribunal heard details of legal proceedings before the High Court of Fiji to recover amounts that had been improperly withdrawn by an individual involved in the business from the bank account of R Pty Ltd as trustee of the taxpayer's family trust into the bank account of the business. In August 2007, the taxpayer obtained an order from the High Court of Fiji to recover the entire amount he had contributed (approximately $649,000 in Fijian dollars). However, the taxpayer was only able to recover $204,000 Fijian dollars. The taxpayer claimed a capital loss of AUD$370,000 made up of legal fees paid in Fiji and the unrecovered investment.

In this instance, the FCT contended, among other things, that the money transferred to the business was not owned by the taxpayer, because it was R Pty Ltd, and not the taxpayer, that supplied the funds. However, the Tribunal was of the view that the order of the High Court of Fiji "comfortably establishes that the taxpayer personally owned the money" and that the time of the CGT event was "no later than 28 April 2007", being the time the AAT accepted the taxpayer first became aware of the money being withdrawn from the account.

The other arrangements heard and dealt with by the Tribunal included: a "joint venture" involving an industrial property development: a "partnership" with the taxpayer's son and others to open bar/nightclub, a venture to develop a resort in Fiji; and a "joint venture" with the taxpayer's daughter-in-law to expand her clothing business into the US market.

In conclusion, the AAT said virtually all of the taxpayer's claims have been unsuccessful. However, it noted the exception of the capital loss in relation to one of the business arrangements (but noted this would have no impact on tax payable in the relevant year as the taxpayer had no capital gains to claim against) and also the FCT's acknowledgment of errors in making the amended assessments. It considered that the appropriate decision was to disallow the objections for the 2006 and 2007 years and to allow in part the objection for the 2008 year to the extent of the acceptance of the above interest deduction. (The AAT allowed the parties seven days to apply to it for the decision to be formulated differently.)

28/08/2014
Relief obtained re non-commercial loss provisions

**AAT Case [2014] AATA 620, Re Bentivoglio v FCT**

- AAT has allowed a taxpayer relief from non-commercial loss provisions re olive growing and olive oil business
- Taxpayer was a medical practitioner and also carried on an olive business from 2010 to 2014
- Based on the facts AAT held he should be granted relief for 2010 to 2013 years, but not for the 2014 income year.

**Background**

The taxpayer is a medical practitioner and for the last 15 years or so has also carried on an olive growing and olive oil production business. For the 2010 to 2014 income years inclusive, the AAT said the taxpayer applied to the FCT for relief from the non-commercial loss provisions (they prevent the taxpayer from deducting his olive oil business losses from his other assessable income). In practical terms, unless he is granted relief, he has to wait until the olive oil business starts to generate profits before he can claim those losses.

Losses cannot be claimed in the year they are incurred unless the FCT exercises the discretion in s 35-55 of the *ITAA 1997* that the non-commercial losses rules not apply. That discretion can only be exercised where the taxpayer applies for a private ruling on the exercise of the FCT’s discretion. That means that the FCT’s decision not to exercise his discretion in the taxpayer’s favour is a “private ruling”. The AAT said the exercise of the discretion in s 35-55 was the only way the taxpayer could be relieved from the non-commercial loss provisions because in each of the relevant years, his taxable income exceeded $250,000.

The FCT refused the taxpayer’s application for relief. His objection against the refusal was disallowed, and he applied to the Tribunal for review of the objection decision.
Decision

The essential issue before the Tribunal was whether the FCT's decision not to allow the taxpayer immediate access to the losses he incurred in the relevant years, was the correct or preferable decision.

The olive growing scheme in question comprised over 200 pages of content. After reviewing the FCT's private ruling, the AAT said it was not helpful that the Schedule of financial information included by the FCT in the Scheme Outline did not accurately reflect the figures provided on the taxpayer's behalf in the ruling application. The Tribunal observed that it seemed "the FCT's officers took a regretfully inattentive approach to the formulation of the scheme. That has made the review task more difficult than it needs to be." The Tribunal also noted that the FCT did not clearly "and with precision" identify the scheme in his private ruling. Against that background, the Tribunal considered it was difficult to accept the FCT's complaints about the taxpayer's approach to the case.

The AAT considered previous case law consideration of s 35-55 and then turned to a consideration of whether special circumstances applied in the taxpayer's case to allow the FCT's discretion to be exercised. The claimed special circumstances included: infestations of the olive trees by the olive lace bug; prolonged drought; destruction of olive trees by a grass fire; extraordinary challenges facing the olive oil industry (eg glut of olives, low price, etc); serious illness of the taxpayer's wife (the AAT accepted she was "a highly qualified member of the team and an experienced oil maker and blender"). The AAT considered that all of the above, except the extraordinary challenges facing the olive oil industry, constituted special circumstances in the taxpayer's case.

One of the FCT's arguments was that, at the time of the ruling application, there was no assertion by the taxpayer that a tax profit would otherwise have been made but for the special circumstances, or the amount of the tax profit. The Tribunal rejected this saying it was a direct consequence of the fact that the FCT's "approved form" asks no questions about tax profit. "It is disappointing that a taxpayer should be criticised on that basis", the Tribunal said.

Having regard to the impact of the special circumstances on the taxpayer's business activity in the excluded years, and to the financial outcomes that could have been expected had those special circumstances not occurred, the Tribunal said it was satisfied that it would be unreasonable to apply the rule in s 35-10(2) in each of the 2010, 2011, 2012 and 2013 income years, but not the 2014 year as it considered that any losses incurred in the 2014 year could not be attributed to the ongoing impact of special circumstances. The Tribunal therefore concluded that the discretion in s 35-55(1) should be exercised due to special circumstances applying.

Tribunal recommends FCT make some changes

The Tribunal also made several recommendations to the FCT as a result of issues raised during the proceedings ie that the FCT:

- Consider the use of an alternative "approved form" for applications of this nature, to take them out of the "private ruling" regime;
- Ensure, as far as possible, that any alternative "approved form": (i) asks applicants to provide all the information the FCT considers necessary for a proper consideration of the application; (ii) takes into account the legislative amendments enacted in 2009 [ie the income requirement which means that taxpayers with taxable income over $250,000 have to rely on the FCT's discretion under s 35-55];
- Provide additional guidance to officers in the formulation of "schemes" for the purpose of private rulings.

04/09/2014
R&D tax concession claims mostly allowed

_AAT Case [2014] AATA 515, Re GHP 104 160 689 Pty Ltd v FCT_

- AAT has allowed most of a taxpayer's claim for R&D expenditure at the 125% rate
- However, it disallowed other claims re overlapping expenditure
- Decision was based on analysis of the complex factual situation.

In a lengthy and factually complex decision, the AAT has allowed most of a taxpayer's claims for R&D expenditure at the 125% rate, but disallowed other claims in respect of overlapping expenditure: _AAT Case [2014] AATA 515, Re GHP 104 160 689 Pty Ltd v FCT_ (AAT, Kerr P, AAT Ref: 2011/4618, 4619, 4674, 29 July 2014).

Background

The taxpayer, referred to in the case as GHP 104 160 689 Pty Ltd, was a company previously known as Xstrata Holdings Pty Ltd prior to the merger of Xstrata and the Glencore Group. The Tribunal said the taxpayer has mining operations in a number of sites in Australia. Its R&D activities were directed to developing new knowledge and increasing the effectiveness of copper and lead-zinc concentrators at sites at Mt Isa, Ernest Henry and McArthur River and a copper smelter at Mt Isa.

Between 2003 and 2007, the taxpayer undertook R&D, conducted by way of plant trials, to test various possible improvements to its copper and lead concentrators and its copper smelter. Many of the plant trials ran over several months. A "plant trial" refers to R&D undertaken by way of testing one or more altered integers of a plant under ordinary operational conditions to assess the changed integers' impacts on the operation of a plant as a whole.

The taxpayer sought to deduct a considerable part of its expenditure incurred during those plant trials at the premium rate of 125%. For each of the relevant tax years, the FCT disallowed many, but not all, items of expenditure claimed to be "research and development expenditure" and, as such, deductible at the premium rate. The taxpayer sought review of these decisions.

The FCT's principal submission was that all of the taxpayer's relevantly disputed expenditure was expenditure "incurred by the company in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities" and was thus within the meaning that s 73B(1) gives to the term "feedstock expenditure" and was therefore
not deductible at the premium rate. "Feedstock expenditure" is expressly excluded from the statutory definition of "research and development expenditure". The FCT also argued that, due to an overlap of the taxpayer's R&D activities at its Mt Isa copper concentrator and Mt Isa smelter, certain expenditure became "feedstock expenditure" and was not deductible at the 125% rate.

**Decision**

In the Tribunal's view, the text of the relevant provisions, read as part of s 73B, allowed it to ascertain the meaning conveyed by the definition of "feedstock expenditure" without any requirement to resort to extrinsic materials.

The Tribunal said things "which are acquired to be the subject of some process in an activity cannot share a common identity with those acquired to subject them to that activity". The exception only applies to expenditure on such goods or materials as are acquired or produced in order that they will be subjected to processing or transformation in the activity. The Tribunal considered the following example to illustrate the point.

"Assume an eligible company that manufactures food products submits its plans for R&D activities in order to test whether a different mechanism might enhance its production of ground coffee. To conduct that R&D it buys new parts for its industrial scale grinding machine and uses the same coffee beans it ordinarily grinds.

Assume that the new grinding mechanism suffers at least minimal wear while grinding the coffee beans in the course of these R&D activities. On the FCT's case that is enough to effect the coffee grinder's mechanism's 'transformation'.

The result, on the FCT case, is that the company's expenditure not only on the coffee but also on the coffee grinding mechanism is 'feedstock expenditure' incurred by the company 'in acquiring or producing materials or goods to be the subject of processing or transformation by the company in research and development activities'. That conclusion sounds decidedly odd."

In the Tribunal's view, the inter-relationship between the various definitions within the feedstock scheme provided a "statutory lens through which the meaning to be attributed to the definition of 'feedstock expenditure' can be viewed and ascertained". In turn, the Tribunal said that provided "an additional foundation for rejecting the construction of the definition pressed upon the Tribunal by the FCT".

The Tribunal considered that the legislation facilitated a distinction between deductibility for expenses incurred by a company in acquiring the goods and materials to be the subject of processing or transformation for which the premium rate is denied, and the enhanced deductibility which is available for expenditure otherwise in the R&D activities.

The Tribunal found that the entire relevant R&D undertaken by the taxpayer involved high levels of technical risk within the meaning of s 73B of the ITAA 1936. After analysis of the complex factual situation, and application of the law, especially in relation to the principles of statutory interpretation, the Tribunal was of the view the taxpayer was entitled to substantially succeed on the first principal issue, but it accepted the FCT's argument on the overlap issue. The Tribunal therefore ordered that the FCT's assessments be varied in accordance with its reasons.

[It is understood the FCT has appealed to the Federal Court against the decision.]
CGT

Damages settlement subject to CGT

AAT Case [2014] AATA 622, Re Coshott v FCT

- AAT has affirmed a taxpayer was liable to CGT on settlement payment re damages for breach of contract and negligence
- It did so on the basis that it was clear law that damages received by way of settlement of a legal claim could be subject to CGT.

Damages settlement subject CGT

AAT Case [2014] AATA 622, Re Coshott v FCT

The AAT has affirmed that a taxpayer was liable to CGT on a payment made to her in respect of the settlement of litigation she pursued for breach of contract and negligence. In doing so, the AAT dismissed the taxpayer's claim that the payment of damages per se could not give rise to a profit or gain. It also found that she had failed to establish any relevant cost base for legal expenses that would otherwise reduce the assessable capital gain: AAT Case [2014] AATA 622, Re Coshott v FCT (AAT, Ref No 2013/3738, Deutsch, DP, 2 September 2014).

Background

The taxpayer (and her husband) were solicitors that ran a family practice. In anticipation of the husband's retirement, they entered an agreement with another solicitor to, among other things, transfer clients to him and recover outstanding debts of their practice. However, following the apparent failure of the agreement, the taxpayer (and her husband) sued the other solicitor for breach of various contractual and equitable duties.

By deed of settlement dated 6 September 2007, the solicitor agreed to pay the taxpayer and her husband $700,000 (as indemnified by LawCover insurance). Importantly, the settlement deed did not set out any basis for apportioning the $700,000 amongst the various claims made under the statement of claim lodged by the taxpayer and her husband. Nor was there material available to indicate how the $700,000 was calculated, or for providing any basis for apportioning it amongst the claims.
The FCT assessed the taxpayer to CGT on her share of the settlement payment (ie $350,000 - but as later reduced to $175,000 for the effect of the CGT 50% discount). He did so on the basis that CGT event C2 (ending of intangible asset) applied to the transaction and that the taxpayer had failed to establish a relevant cost base. The FCT also imposed 50% shortfall penalties for "recklessness".

The taxpayer argued that CGT could not apply to a payment for "damages" per se as it does not give rise to a profit or gain as all the payment did was return her to her "pre-damage" position. Alternatively, she argued that if CGT did apply, then she was entitled to a cost base for her share of legal costs in pursing the action which would reduce her gain to some $34,000. She also contested the imposition of shortfall penalties for recklessness.

Decision

In dismissing the taxpayer's application, the AAT found that she had not discharged the burden of proving the assessment was excessive and what the correct assessment should be - and, in particular, that relevant legal expenses had in fact been incurred for cost base purposes.

In doing so, the AAT first found that each of the causes of action pleaded by the taxpayer against the solicitor were CGT assets under the definition of "CGT asset" in s 108-5(1) of the ITAA 1997 as they were either "a kind of property" or, alternatively, "legal or equitable rights that were not property". It then found that CGT event C2 happened when the deed of settlement was executed because the CGT assets (being the causes of action or "chooses in action") ended by "release, discharge or satisfaction or by being surrendered" as required by CGT event C2. The Tribunal further found that this event happened in the 2008 income year, being the time the taxpayer entered into the settlement deed.

In terms of the amount of the capital gain from the event, the AAT stated that the payment made to the taxpayer was clearly the capital proceeds from the event. It then found that legal costs incurred by a taxpayer in respect of such an action could form part of the cost base of the assets in question, but the taxpayer had failed to establish that the expenses had in fact been incurred. In particular, the AAT noted that while invoices were provided, there were a number of problems with these invoices including:

- There was no clear evidence to support the fact that the invoices were ever paid;
- Even if they were paid, there was no clear evidence they were paid by the taxpayer (ie "incurred" by the taxpayer for cost base purposes);
- Even if paid, there seemed to have been no clear basis for establishing that the invoices that were paid related specifically to the damages received; and
- There was difficulty in reconciling the quantum of the legal costs and the net damages figures with the invoices.

The AAT also emphasised that the taxpayer had not maintained adequate records of cost incurred for CGT purposes as required by s 121-20. Accordingly, in all these circumstances, the AAT found that the taxpayer had not discharged her burden of proving the assessment was excessive and what it, instead, should have been.

Importantly, in relation to the taxpayer's argument that damages cannot be a capital gain, the AAT stated that "there does not appear to be such a broad principle in operation and certainly since the introduction of taxes on capital gains in Australia, it is entirely possible for damages received by way of settlement of a claim to be treated as a capital gain after appropriate adjustment is made for any costs that can be used to reduce that amount under the relevant statutory formulation provided in the legislation". It also noted that this was clear from the decisions in Tuite v Exelby (1993) 25 ATR 81 and Carborundum Realty Pty Limited v RAIA Architecture Pty Limited (1993) 25 ATR 192, for example.
Finally, the AAT found that the 50% shortfall penalties imposed for "recklessness" were appropriate in the circumstances and, in particular, in view of the taxpayer taking no steps to seek independent legal advice in relation to whether any tax might be payable on the payment, the failure to keep virtually any records as required by the tax law and the fact that the taxpayer lodged a tax return which was incorrect in a "material particular".

Comment

Note that this result accords with the FCT view in Ruling TR 95/35 which states that compensation will be considered to be capital proceeds for the right to sue per se, if it is not received in relation to an underlying asset or is received as an undissected lump sum.
The government has released draft legislation to give effect to minor amendments to the operation of the CGT provisions in the *ITAA 1997*, mainly s 118. In particular, the proposed changes seek to ensure a CGT exemption is available to trustees and beneficiaries who receive compensation or damages for certain insurance policies. It is intended that trustees or beneficiaries who receive compensation or damages in respect of certain events (such as an injury an individual suffers at work) or in respect of certain policies of insurance (such as illness, injury or death) not be subject to CGT. The amendments would also ensure that the CGT exemption available to a trustee of a superannuation entity covers insurance policies related to injuries or illness.

Under the proposed changes, a CGT exemption would be available in respect of compensation or damages received by:

- A trustee (other than a trustee of a complying superannuation entity) for a wrong or injury a beneficiary suffers in their occupation, or a wrong, injury or illness a beneficiary or their relative suffers personally; and
  - A beneficiary that subsequently receives a distribution from the trustee;
- A trustee (other than a trustee of a complying superannuation entity) for a policy of insurance on the life of an individual or an annuity instrument if they are the original owner of the policy or instrument; and
- A trustee of a complying superannuation entity for a policy of insurance for an individual's illness or injury.

These changes were one of the 92 announced but unenacted tax and superannuation measures that the Assistant Treasurer announced on 14 December 2013 would proceed.
Comments

Comments are due by 21 October 2014 and should be sent to: Manager, Small Business and Indirect Taxes Unit, Small Business Tax Division, The Treasury, Langton Crescent, PARKES ACT 2600; Email: TaxLawDesign@treasury.gov.au. Enquiries should be directed to Laurel Cavenagh (02) 6263 3065 or Lindsay Smelt (02) 6263 4472.

25/09/2014
INDIRECT TAXES

Over-claimed GST credits: penalty affirmed

**AAT Case [2014] AATA 631, Re Moore v FCT**

- AAT has affirmed FCT’s decision to impose a 50% administrative penalty for “recklessness”
- Matter related to audit conducted by FCT on the taxpayer which discovered over-claimed input tax credits
- AAT held taxpayer had failed to discharge the onus of proving the penalty was excessive.

The AAT has affirmed the FCT’s decision to impose on a taxpayer a 50% administrative penalty of the tax shortfall amount on the basis of “recklessness”.

The taxpayer was a carpenter by trade. The FCT audited the taxpayer in relation to his BASs for the period 1 January 2007 to 30 June 2010 and found he had over-claimed Input Tax Credits (ITCs). The tax shortfall amount was around $130,000 and the penalty imposed was some $65,000 based on 50% of the shortfall amount.

The taxpayer did not dispute the tax shortfall but argued he was not responsible for the penalty maintaining that it was the FCT who was mostly responsible for it. It was alleged that Tax Officers had represented to his wife who prepared his BASs that he was entitled to claim ITCs for the purchase of his family home because he maintained a home office (although the AAT noted the settlement statement for the purchase of the home did not show any GST having been charged by the vendor to the taxpayer and his wife as the purchasers) and, additionally, the taxpayer claimed it was the FCT that allowed the situation to go on for so long without him being audited. It was also alleged that a car salesman had represented that the taxpayer could claim back the GST on the purchase of his cars. The taxpayer also stated that he had lost a lot of information about his purchases when his old computer died and that many other receipts that he had stored had faded and were illegible. The taxpayer contended that the mistakes in his BASs "were not made intentionally by his wife and that he had always been honest with the FCT".
The AAT noted the taxpayer was self-represented. The AAT did not accept what the taxpayer said his wife was told by the Tax Officers or what the taxpayer said he was told by the car salesman. It agreed with the FCT's contention that the taxpayer had over-claimed ITCs "for a lengthy period of time in circumstances where he knew or should have known that he was not entitled to claim the ITCs". The AAT said the taxpayer had conceded he was "indifferent as to whether the BASs were accurate". It also noted the taxpayer "never checked any of the BASs or whether he had the supporting documentation for the ITC claims because he thought everything was fine". The AAT was of the view that the taxpayer "chose to leave the preparation of his BASs in the hands of his wife who had no taxation expertise".

The AAT held the taxpayer had failed to discharge the onus of proving that the penalty was excessive. It held the decision to impose an administrative penalty of 50% was the correct or preferable one. It also held the penalty should not be remitted in the circumstances.

_AAT Case [2014] AATA 631, Re Moore v FCT, AAT, Ref No: 2013/2632, Lazanas SM, 2 September 2014_
GST input tax credits denied

**AAT Case [2014] AATA 614, Re The Trustee of Oenoviva (Australia & New Zealand) Plant and Equipment Trust v FCT**

- AAT held an individual did not have standing to act on behalf of a taxpayer (as trustee of the trust)
- Matter related to FCT’s refusal to allow a claim made by taxpayer as trustee of a trust for input tax credits.

An individual has been unsuccessful before the AAT in seeking to have standing and authority to act on behalf of another entity (a trustee of a trust) in relation to two applications concerning a claim for input tax credits that had been denied and an imposition of an administrative penalty.

The first application lodged with the Tribunal in December 2012 was lodged by the individual and a company entity as joint trustees of a trust. This application was lodged in respect of a decision made by the FCT disallowing a claim for input tax credits for creditable acquisitions of $3.15m for the tax period 1 March 2012 – 31 March 2012. The second application lodged with the Tribunal in March 2014 was lodged in respect of a decision made by the FCT in May 2013 regarding an administrative penalty of $1,575,000 that had been assessed to the company entity (as trustee of the trust) that was related to the first application. In January 2014, the Federal Court ordered that the company (the taxpayer) be wound up in insolvency under the Corporations Act 2001. The individual purported to act on behalf of the taxpayer.

The AAT held the individual did not have standing to act on behalf of the company entity (as trustee of the trust) for the purpose of pursuing the two subject applications. Among other things, the AAT found the individual could not lawfully act on behalf of the company entity under a Power of Attorney which was purportedly granted. The AAT also held the individual could not be joined as a party to the applications because s 14ZZD of the TAA did not apply to him. The AAT said that, in the circumstances, there was no person who was able to consent to the individual's joinder in the proceedings.

Further, the AAT held it was appropriate in the circumstances to dismiss the two applications before it on the basis that the taxpayer had failed, within a reasonable time, to comply with earlier directions made by the Tribunal pursuant to s 42A(5)(b) of the Administrative Appeals Tribunal Act 1975. Although the AAT noted this power "should be used sparingly and only perhaps as a last resort", it said it came to this conclusion because the taxpayer "has no prospect of succeeding in either
application". The AAT said that despite lodging in excess of 15 arch lever folders of documents for the purpose of establishing the right to claim input tax credits involving a single transaction for the March 2012 period, nothing in the materials lodged with it established there was a taxable supply made to the taxpayer and that it was required to provide, or was liable to provide, consideration for that supply.

Decision Impact Statement: notice of GST refund

The ATO has issued a Decision Impact Statement on AAT Case [2014] AATA 363, Re North Sydney Developments Pty Ltd and FCT.

Sufficient notification of ITC entitlement

In the case, the AAT held the taxpayer's letter of 3 September 2009 to the FCT satisfied the "notification" requirement in s 105-55 of Sch 1 to the TAA, thereby extending the four-year time limit in that section in relation to entitlements to Input Tax Credits (ITCs) for acquisitions made more than four years ago.

By way of background and broadly, on 3 September 2009, the taxpayer wrote to the FCT informing him of a receiver's appointment and that it was unable to lodge BASs for the December 2005 and January 2006 tax periods until it was able to access the necessary books and records it said were taken by "ASIC and the receivers". The letter was also to "provide notice that substantial GST refunds are due for these months". In October 2012, the taxpayer applied for a private ruling. However, on 6 June 2013, the FCT issued a private ruling which provided that the four-year time limit to notify the FCT of the refund sought had expired (s 105-55(1)(a) of Sch 1 to the TAA). The taxpayer objected and the FCT disallowed the objection. The taxpayer then sought review from the Tribunal.

The Tribunal concluded that the taxpayer's 3 September 2009 letter did notify the FCT of "the refund, other payment or credit", and was a complying notification for the purposes of the four-year limitation in s 105-55, in relation to ITCs relating to the December 2005 and January 2006 tax periods. The AAT rejected the FCT's submission that in order to be a valid notice, the communication relied on by a taxpayer must provide "the specific nature of the refund and the circumstances under which the refund arises". The Tribunal held that the section requires no greater specification than the tax period involved and the nature of the refund or ITC claimed, and that the letter, by describing the notification as relating to the expected outcome of specified BASs, satisfied those requirements.
The ATO said the FCT accepted the conclusion of the Tribunal that the taxpayer's letter of 3 September 2009 satisfied the "notification" requirement in s 105-55. It noted that the current ATO view on what constitutes "notification" to the FCT under s 105-55 is set out in Miscellaneous Taxation Ruling MT 2009/1 (at paras including 29B, 29C, 32, 32A and 35). It said the FCT will review MT 2009/1 and make any necessary changes to reflect and ensure consistency with the Tribunal's decision in the case.

**Lodgment and payment notices**

The ATO noted the taxpayer had argued (in the alternative) that the lodgment and payment notices issued by the FCT for the December 2005 and January 2006 tax periods were effective notices for the purposes of para 105-50(3)(a), which meant its entitlement to the relevant ITCs would have been preserved, even in the absence of an effective notice under s 105-55. In February and March 2006, the FCT issued "lodgment and payment" notices requiring the taxpayer to lodge its December 2005 and January 2006 BASs, and pay any liability amount recorded.

The ATO said the AAT's finding that the lodgment and payment notices did not engage the exception in subpara 93-10(1)(a)(i) of the GST Act, because the taxpayer's claim to ITCs did not arise out of an unpaid net amount or an amount of indirect tax, was consistent with the FCT's view. The ATO said it will review Practice Statement PS LA 2009/3 and make any necessary changes to reflect the Tribunal's decision in the case.

**Information previously provided to the ATO**

The taxpayer had also argued that its letter, if it lacked the required information when read on its own, nevertheless constituted sufficient notification, in light of the information previously provided to the FCT. In this regard, the Tribunal concluded that if the taxpayer's letter had been deficient as a section 105-55 notice, then that deficiency could not have been overcome by referring to information that had been provided to the FCT about the taxpayer's activities in relation to previous tax periods. The AAT said whatever informality may be permissible for the purpose of an effective notification, it is the communication relied on as the notification that must provide the requisite information. The ATO said this conclusion was consistent with the FCT's submissions in the case.

25/09/2014
GST: meaning of “passed on” and “reimburse”

Draft GST Ruling GSTR 2014/D4

- It explains FCT’s view on the meaning of “passed on” and “reimburse” for determining whether s 142-10 of the GST Act applies to an amount of excess GST
- Date of effect: Proposed to apply both before and after its date of issue
- Comments due by 7 November 2014.

Background

According to the Draft, excess GST is an amount of GST that has been taken into account in an entity’s assessed net amount and is in excess of what was payable by the entity in the relevant tax period prior to applying Div 142. The excess amount can arise as a result of mischaracterisation, miscalculation, or a reporting/administrative error. However, the Draft states that excess GST does not include an amount that was correctly payable but is later subject to a decreasing adjustment, or an amount that is payable but is correctly attributable to another tax period.

Under s 142-10, an amount of excess GST will only be refundable if it has not been passed on to a recipient, or it has been passed onto a recipient but the recipient has been reimbursed. The Draft indicates that where excess GST is not passed on, an entity can request an amendment (subject to the period of review) to reduce the amount of GST attributable to that tax period and any resulting refunds will be paid. In cases where the excess GST has been passed on to a recipient, the ATO says that s 142-10 will apply to treat the excess GST as always having been payable, until the excess GST has been reimbursed.

Meaning of "passed on"

The Draft states that whether the excess GST has been passed on is a question of fact and must be determined on a case-by-case basis taking into account the particular circumstances of each case. However, it states that if excess GST is included on a tax invoice, it is prima facie evidence that the
excess GST has been passed on. In addition, the Draft states that any entity claiming a refund (in cases where it considers that excess GST has not been passed on) will need to clearly substantiate the grounds on which it claims the refund. The ATO indicates that the following matters are relevant in determining whether GST has been passed on:

- **Manner in which the excess GST arose** – Broadly, the Draft states that where an error occurs after the transaction has taken place (eg transcription error), it may point towards a finding that excess GST has not been passed on. On the other hand, it notes that where the excess GST arises as a result of an error made before setting the price (eg incorrectly treating a GST-free or input taxed supply as a taxable supply), this error will generally flow through to the sale price and is likely to point towards a finding that excess GST has been passed on.

- **Entity's pricing policy and practice** – The Draft indicates that this involves considering the entity's conduct and knowledge at the relevant time of setting the price of a supply, and whether there has been any changes to the price to account for GST.

- **Documentary evidence surrounding the transaction** – According to the Draft, the evidence may be in any form, including a tax invoice, a contract of sale, other correspondence between the parties, or internal pricing policy documents and other relevant manuals. In addition, it states that where a tax invoice has been but the amount on the invoice has not yet been paid by the recipient, the non-payment is evidence that the excess GST has not yet been passed on.

- **Any other relevant circumstances.**

**What constitutes a "reimbursement"**

According to the Draft, the FCT considers that, for the purposes of s 142-10, an amount of excess GST that has been passed on to the recipient is appropriately reimbursed when the recipient has been compensated an equivalent amount by the entity for the amount of excess GST passed on to the recipient. This reimbursement may be made voluntarily by the entity or in satisfaction of a contractual obligation, it states. Further, where an entity makes multiple supplies to many recipients and excess GST was passed on, all the recipients must be compensated.

For the purposes of s 142-10, the Draft states that an entity has reimbursed the recipient for the passed-on excess GST where:

- The reimbursement takes the form of a payment of money, or the setting off of mutual liabilities;
- The amount of the reimbursement corresponds to the amount of excess GST passed on to the recipient and the method of reimbursement ensures this is achieved; and
- The reimbursement or journal entry under an agreement to set-off the liabilities between the parties has actually been made, and is not merely planned to be made.

In situations where only part of the excess GST has been reimbursed, the Draft states that s 142-10 ceases to apply only to that part of the excess GST which was reimbursed. However, it continues to apply in respect of the excess GST passed on that it has not reimbursed to the recipient.

**Date of effect**

When the final Ruling is issued, it is proposed to apply both before and after its date of issue.
Comments

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Comments are due by 7 November 2014.

25/09/2014
Lowering GST-free import threshold: no agreement

• Treasurer has met with State and Territory Treasurers and indicated that they had not agreed a preferred workable approach on lowering GST-free import threshold
• He said Treasurers will continue to discuss these issues throughout development of the government’s White Papers.

Lowering GST-free import threshold: no agreement

In March 2014, the Commonwealth agreed to a request from the States collectively to further explore options around lowering the value at which GST is applied to the importation of goods into Australia. Currently, the threshold is $1,000. On 19 September 2014, ahead of the G20 meeting in Cairns, the Treasurer met with State and Territory Treasurers. He said the States indicated they had not agreed a preferred workable approach on this issue. The States may choose to raise this as part of the Tax White Paper process, he said.

Mr Hockey said he also took the opportunity to discuss progress with the Commonwealth’s Federation and Taxation White Paper processes. He said the States will play a key role as all governments consider appropriate roles and responsibilities within the Federation and the taxation arrangements that will allow them to fund the services the public will demand in the future. Mr Hockey said Treasurers will continue to discuss these issues throughout development of the government's White Papers during 2015.

Source: Treasurer’s media release, 19 September 2014

25/09/2014
GST: motor vehicle incentive payments: *GSTR 2014/1*

**GST Ruling GSTR 2014/1**

This Ruling explains the FCT's view on the GST consequences of incentive payments made by motor vehicle manufacturers, importers and distributors to motor vehicle dealers. It provides practical guidance to the motor vehicle industry following the decision in *AP Group Ltd v FCT* [2013] FCAFC 105.

According to the Ruling, commonly, manufacturers make monetary payments to dealers as "incentives" or "rebates" when certain conditions are met (eg when particular vehicles are sold to particular customers or when the dealer achieves set ordering or sales targets). It states that in some cases, manufacturers make payments to the dealer's retail customer.

**Treatment of incentive payments**

Where a motor vehicle incentive payment is made by a manufacturer to a dealer, the dealer's conduct may give rise to the dealer having made the following:

- **A supply to the manufacturer for consideration** – this can occur if the dealer does something specific for the manufacturer for that payment, or where the dealer enters into specific obligations. In circumstances where the same conduct by a dealer can result in two supplies (ie dealer to the customer and manufacturer to the customer), the Ruling indicates that the dealer may be liable for GST on the supply to the manufacturer in addition to any GST liability for making a supply to the customer;

- **A supply to the customer for consideration (ie third part consideration)** - where the supply of a particular motor vehicle(s) to a customer is the reason for the incentive payment and there is nothing specific the dealer does for the manufacturer for the payment, the supply for consideration is the supply of the motor vehicle by the dealer to the customer. These incentive payments are generally considered to be third part consideration for the supply made. In situations where the payment is third party consideration for a supply made by a dealer to its customer, the dealer is liable for GST on the total consideration it receives for that
supply, including the incentive payment from the manufacturer. As such, the dealer does not have an increasing adjustment. Further, since the incentive payment is consideration for a taxable supply of a motor vehicle, and that supply is made to the customer and not the manufacturer, the manufacturer has not made a creditable acquisition and is not entitled to an input tax credit. For customers, where third party consideration is provided, their entitlement to input tax credits is less than the GST payable by the dealer on the supply of the motor vehicle;

- **No supply for consideration (although adjustments may arise for one or both parties)** – where the dealer does not make any supply for consideration, the dealer is not liable for GST. The manufacturer is not entitled to an input tax credit as it has not made a creditable acquisition. However, in these circumstances, an incentive payment may give rise to other GST consequences (eg the parties may have adjustments under Divs 19 or 134 of the GST Act).

**Third party adjustment notes**

A decreasing adjustment under Div 134 is not attributable to a tax period until the manufacturer holds a third party adjustment note, according to the Ruling. It states that the manufacturer must give a copy of the adjustment note to the dealer within 28 days of the dealer or customer requesting a copy, or the manufacturer becoming aware of the adjustment.

The Ruling sets out the following requirements for a document to be a third party adjustment note:

- Be in the approved form;
- Set out the manufacturer's ABN; and
- Contain enough information to enable the following information to be clearly ascertained from the document:
  - The manufacturer's identity (in addition to its ABN);
  - The dealer's identity or ABN;
  - A description of the thing that the dealer acquires (including the quantity) and what the payment relates to;
  - The amount of the third party payment;
  - The amount of the manufacturer's decreasing adjustment under s 134-5(2); and
  - The date the note is issued.

The Ruling indicates that the FCT's will exercise his discretion to treat a particular document (which is not a third party adjustment note) as a third party adjustment note on a case-by-case basis. It states that the factors outlined in Practice Statement PS LA 2004/11 (The FCT's discretions to treat a particular document as a tax invoice or adjustment note (in relation to tax invoices under s 29-70 and adjustment notes under s 29-75)) may be relevant. In addition, the Ruling also states that one document may be both a recipient created tax invoice and a third party adjustment note if it satisfies the requirements for a recipient created tax invoice in s 29-70(1), and the requirements for a third party adjustment note in s 134-20(1) for the respective taxable supplies and adjustments contained in that document.

The Ruling also includes various worked examples to illustrate various scenarios in relation to incentive payments. It was previously issued as Draft GST Ruling GSTR 2014/D1 and contains changes.
Date of effect

It applies to tax periods starting on or after 1 May 2014. The ATO says the Decision Impact Statement for AP Group case explains the FCT's approach to compliance action in respect of earlier tax periods.
Software license payments held to be royalties

*Task Technology Pty Ltd v FCT* [2014] FCAFC 113

The Full Federal Court has unanimously confirmed that licensing payments made by the taxpayer company (an Australian distributor) to a Canadian software supplier were not excluded from being royalties and were subject to Australian withholding tax. The taxpayer argued that the "proviso" in the royalties article in the Australia/Canada DTA applied in the circumstances to relieve the payments from withholding tax: *Task Technology Pty Ltd v FCT* [2014] FCAFC 113 (Full Federal Court, Dowsett, Gordon and Jagott JJ, 5 September 2014).

**Background**

The taxpayer is the Australian distributor of working papers software that was developed by a Canadian resident entity. The taxpayer pays annual fees to the Canadian company under its licensing arrangements with that company. In the relevant period, the fees it paid included a percentage of the software and template license fees that the taxpayer charged its customers. The FCT claimed the payments were "royalties" within the meaning of the DTA between Australia and Canada and were subject to withholding tax.

The taxpayer argued that the proviso in Article 12(7) applied to the payments. The proviso stated that "royalties" shall not include payments made as consideration for the supply of, or the right to use, source code in a computer software program, if the right to use the source code is limited to such use as is necessary to enable effective operation of the program by the user. The taxpayer argued that it had the right to use, and did use, the software to produce templates and to procure end user licences and that both uses were necessary for the effective use of the computer program.

The FCT, on the other hand, contended that Article 12(7) did not apply to the payments because the payments were consideration for the rights given to the taxpayer pursuant to the distribution
agreement, which included the right to copy the software for distribution. He also claimed that for the Article 12(7) exclusion to apply, there must be a supply of source code to the entity making the payment in question, or the grant to that entity of a right to use the source code and, in the present case, the taxpayer was not supplied with the source code nor given any right to use it.

At first instance, in *Technology Pty Ltd v FCT* [2014] FCA 38, the Federal Court held that the payments were not excluded by the proviso because the nature of the rights the taxpayer acquired under the distribution agreement were not limited to such rights as were necessary for the effective operation of the software by the taxpayer itself.

**Decision**

The Full Court agreed with the decision at first instance that the payments that the taxpayer made under the distribution agreement did not satisfy the proviso in the circumstances.

In doing so, it first identified that for Art 12(7) of the Canadian DTA to apply it was necessary for the taxpayer to satisfy 2 limbs. First, that the payments it made under the distribution agreement had to be made as consideration for the supply of source code in a computer software program or for the right to use source code in a computer software program. Second, if the payments it made were consideration for one of those elements, then (and only then) did the proviso in Art 12(7) become relevant.

However, the Full Court found that the taxpayer did not satisfy the first limb and therefore it did not have to consider the second limb. In this regard, the Full Court noted the following factual matters:

- The distribution agreement distinguished between a Computer Program, the Executable Code, the Licensed Program and the Source Code, and that the operation of them was distinct;
- The Licensed Software was installed on and run on a computer, while “Source Code” was not;
- The series of instructions which comprise the Source Code is not the same as the Computer Program or the Executable Code which the computer reads to execute the computer program; and
- There was nothing in the express terms of the agreement which supplies to the taxpayer the particular information which is the Source Code or the right to use the Source Code.

In short, the Full Court concluded that given the specificity with which the rights were granted by the Canadian supplier to the taxpayer in the distribution agreement, there could only be a right to use source code if that right had been created by way of a grant of that right to the taxpayer and that in there was no such grant, and therefore no right to use source code existed for the purpose of Art 12(7). The Full Court therefore held that these matters alone were sufficient to dispose of the taxpayer’s claim.

However, the Full Court also found the taxpayer would fail on the grounds that it did not demonstrate any connection between the relevant payments made and the alleged supply of source code in the program, or the right to use source code in the program, so that a payment could have been said to have been made as consideration for one or both of those rights. To the contrary, it found that the distribution agreement expressly stated that the payments were made as consideration of other rights.

11/09/2014
OECD/G20 BEPS project recommendations

The OECD has released its first seven recommendations for a co-ordinated international approach to combat tax avoidance by multinational enterprises, under the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project designed to create a single set of international tax rules to end the erosion of tax bases and the artificial shifting of profits to jurisdictions to avoid paying tax. Presenting the OECD’s recommendations, Secretary-General Angel Gurría said the G20 had "identified base erosion and profit shifting as a serious risk to tax revenues, sovereignty and fair tax systems worldwide".

The seven BEPS reports were arrived at through consensus of 44 countries on an equal footing (including all OECD members, OECD accession countries, and G20 countries) and extensive consultation of developing countries, business, NGOs and other stakeholders.

The first seven elements of the BEPS Action Plan released focus on helping countries as follows:

- **Hybrid mismatch arrangements**: ensure the coherence of corporate income taxation at the international level, through new model tax and treaty provisions to neutralise hybrid mismatch arrangements (Action 2). The OECD says scope of the report on hybrid mismatch arrangements may need further consideration so there is no conflict with policy considerations or undue impact on ordinary capital market transactions, while tax treaty anti-abuse provisions need to ensure that they do not hamper legitimate transactions, in particular in the case of the fund industry.

- **Preventing treaty abuse**: realign taxation and relevant substance to restore the intended benefits of international standards and to prevent the abuse of tax treaties (Action 6). All countries have agreed that anti-treaty abuse provisions should be included in tax treaties. It is recognised that different instruments can be used either alternatively or cumulatively. A minimum standard has been agreed upon and this is designed to ensure that treaty shopping and other treaty abuses are no longer possible, while flexibility is provided for governments to include instruments that are fit for purpose to their specific situation. The OECD said it has also recognised that the work on treaty abuse may impact existing business structures and may reveal a need for improvements of existing policies in order not to hamper
investments, trade and economic growth. For example, policy considerations will be addressed to make sure that these rules do not unduly impact Collective Investment Vehicles (CIVs) and non-CIVs funds in cases where countries do not intend to deprive them of treaty benefits.

- **Transfer pricing and intangibles**: assure that transfer pricing outcomes are in line with value creation, through actions to address transfer pricing issues in the key area of intangibles (Action 8). The OECD says "significant progress" has been made in addressing the serious concern raised by the separation of the location of the return on intangible property and the location where economic activities take place and value is created. There is consensus that artificial shifting of profit to no or low tax environment jurisdictions (such as through "cash boxes") can no longer be tolerated. Draft guidance has been developed for intangibles. However, it has also been recognised that the 2015 work relating to the transfer pricing treatment of risk and capital and relating to the special measures that may be considered in this area, will influence the final outcomes of the work on intangibles. For that reason, the OECD said the full outcomes of the BEPS Action Plan on issues relating to intangibles will not be finalised until completion of the guidance relating to work on Actions 8, 9 and 10. Due consideration will be paid to make sure that the revised rules reconcile the location where profits are reported for tax purposes with economic activities and value creation, without increasing uncertainty.

- **Transfer pricing documentation**: improve transparency for tax administrations and increase certainty and predictability for taxpayers through improved transfer pricing documentation and a template for country-by-country reporting (Action 13). To this end, improved and better coordinated transfer pricing documentation has been agreed, which is designed to increase the quality of information provided to tax administrations and limit the compliance burden on businesses. In addition to a master file and local files to be provided by multinational companies, a template for country-by-country reporting to tax administrations has been agreed. The country-by-country reporting is designed to provide a clear overview of where profits, sales, employees, and assets are located and where taxes are paid and accrued.

- **Address the challenges of the digital economy** (Action 1). The OECD says common understanding has been reached on the key features of the digital economy. It has been agreed that because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes. However, it is also recognised that the business models and key features of the digital economy exacerbate BEPS risks and therefore must be addressed. It is expected that the other actions will address these risks but at the same time a number of specific issues have been identified which must be taken into account when doing the work (permanent establishment (PE) issues, importance of intangibles and use of data and possible need to adapt CFC rules and transfer pricing rules to the digital economy). A number of broader direct tax challenges have also been analysed, such as the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus and further work will be carried out to evaluate their scope and urgency and potential options to address them.

- **Multilateral instrument**: facilitate swift implementation of the BEPS actions through a report on the feasibility of developing a multilateral instrument to amend bilateral tax treaties (Action 15). In order to implement BEPS measures in a fast and effective manner, the BEPS Action Plan provides for the development of a multilateral instrument. After consultation with public international law and international taxation experts, the OECD Committee on Fiscal Affairs (CFA) has concluded that a multilateral legally binding instrument to achieve this is feasible and could be developed soon to at least incorporate tax treaty related BEPS measures. It has been recommended that a mandate be drafted for countries to further consider negotiating such an instrument.

- **Counter harmful tax practices** (Action 5). This work focuses on reducing the distortionary influence of taxation on the location of mobile financial and service activities, thereby encouraging an environment in which free and fair tax competition can take place. This is considered essential in moving towards a "level playing field" and a continued expansion of
global economic growth and countries have agreed that harmful tax practices should be tackled urgently. In this area, the OECD says work has accelerated with significant progress on improving transparency on rulings and of consideration of Intellectual Property (IP) preferential regimes and methodologies to assess substantial activity in these regimes and others.

The OECD says additional work is needed with respect to the contents of the model provisions and the relevant Commentary, in particular the limitation on benefits (LOB) rule. Further work on these model treaty provisions and relevant Commentary and with respect to the policy considerations relevant to treaty entitlement of CIVs and non-CIVs funds will be finalised by September 2015.

The highly technical nature of the actions will require careful implementation, and guidance will have to be developed in 2015. The OECD says this will be the case in the area of hybrid mismatch arrangements where a commentary on the recommended domestic provisions will have to be developed and the area of treaty abuse where improvements will have to be made to make the model treaty provisions and related commentary fit for purpose for economies with different characteristics.

According to the OECD, some policy issues have emerged which will require careful consideration to make sure that no collateral damage emerges from the exercise eg hybrid mismatch arrangements.

The 2014 deliverables are closely connected to 2015 deliverables. The recommendations they contain will remain in draft form so that the potential impact of the 2015 deliverables can be incorporated before finalising them.

The OECD recommendations will be a key item on the agenda when G20 Finance Ministers convene at a meeting hosted by Australia on 20-21 September 2014 in Cairns.

Once finalised, these measures are expected to become applicable via changes to bilateral tax treaties or through the multilateral instrument, through changes in domestic laws and with support from internationally agreed guidance.

18/09/2014
TAXATION OF SUPERANNUATION

ATO Decision Impact Statement

• ATO has released a Decision Impact Statement on AAT Case [2014] AATA 474, Re Dowling v FCT
• Case was a rehearing of matter as ordered by the Federal Court re excess super contributions
• ATO said the case does not change its approach to excess contributions cases
• However, it will consider whether amendments to PS LA 2008/1 are necessary.

ATO Decision Impact Statement

The ATO has released a Decision Impact Statement on AAT Case [2014] AATA 474, Re Dowling v FCT. In that case, which was a rehearing of the matter as ordered by the Federal Court (see FCT v Dowling [2014] FCA 252, a test case funded by the ATO), the taxpayer was unsuccessful in seeking the FCT’s discretion under s 292-465 of the ITAA 1997 to disregard or re-allocate to another financial year all or part of her excess non-concessional contributions to super in the 2010-11 financial year.

The ATO said the approach taken by the AAT on remittal of the matter was consistent with the principles stated by the Federal Court, both in the case and in Liwszyc v FCT [2014] FCA 112, as to the correct approach to applying the discretion to disregard or allocate contributions to another financial year in accordance with s 292-465 of the ITAA 1997. The ATO added the principles stated by the Federal Court and the AAT’s application of them on remittal of the matter do not change its approach to excess contributions cases.

The ATO said it will continue to approach excess contributions cases by weighing all the relevant facts and circumstances to determine whether the two mandatory pre-conditions to the exercise of the discretion are satisfied and, if so, whether the discretion should be exercised. It said the FCT will apply the relevant tax law and authorities to those facts. Broadly, the two mandatory pre-conditions contained in subpara 292-465(3)(a) and (b) are that: there are special circumstances; and exercising the discretion is consistent with the object of Div 292 of the ITAA 1997.

The ATO noted it will consider whether amendments to Practice Statement PS LA 2008/1 (which guides Tax Officers in the exercise of the s 292-465 discretion) were necessary.

Draft legislation: super fund mergers

The government has released draft legislation to clarify that a tax integrity rule would not be triggered when superannuation benefits are rolled over to another fund as part of a merger between funds.

The draft legislation proposes to amend the ITAA 1997 to ensure that individuals whose superannuation benefits are involuntarily transferred from one superannuation plan to another plan without their request or consent are not disadvantaged through the application of the proportioning rule to their benefits. In other words, where an individual's benefits are involuntarily transferred to a new superannuation plan, the individual would remain in the same taxation position as if the transfer had not occurred. In the case of a superannuation interest supporting an income stream, the income stream commenced in the new plan will retain the same tax components as the income stream in the original plan. The proportioning rule is designed to remove an individual's capacity to reduce their potential tax liability by manipulating the tax components of their superannuation benefits. The rule determines the tax-free and taxable components of a superannuation benefit, and is applied when a benefit is paid from a superannuation plan, including by way of a roll-over.

The draft would also amend the Taxation Administration Act 1953 to remove the need for a roll-over benefit statement to be provided to an individual whose superannuation benefits are involuntarily transferred.

Key points

- The amount of the contributions segment and the crystallised segment of an individual's superannuation interest will no longer be limited to the value of their interest at any particular time.
- When an involuntary rollover superannuation benefit for a superannuation interest not supporting an income stream is paid to a new superannuation plan, the contributions segment in the new plan will include an amount equal to the contributions and crystallised segment in the original plan immediately before the involuntary roll-over superannuation benefit payment.
• If an involuntary roll-over superannuation benefit is paid from a superannuation interest supporting an income stream, the proportions of the tax-free and taxable components of the income stream commenced in the new plan will be the same as the income stream in the original plan. Under the current provisions, if an involuntary transfer is paid from a superannuation interest supporting an income stream, the income stream ceases immediately prior to the transfer. The current law does not provide clear guidance on how the tax-free and taxable components of the benefit payment to the new plan are determined.

• Transferring superannuation plans will not be required to give roll-over superannuation benefit statements to members, depositors, or account holders for involuntary roll-over superannuation benefits.

Comments

Comments are due by 20 October 2014 and should be sent to: Manager, Benefit and Regulations Unit, Personal and Retirement Income Division, The Treasury, Langton Crescent, PARKES ACT 2600; Email: superannuation@treasury.gov.au. Enquiries should be directed to Jongsock Oh (02) 6263 4435.

25/09/2014
AASB exposure draft: deferred tax assets

The Australian Accounting Standards Board (AASB) has issued Exposure Draft ED 253 Recognition of Deferred Tax Assets for Unrealised Losses. The AASB says the ED (which incorporates the International Accounting Standards Board (IASB) Exposure Draft of the same name) seeks comments on the proposals to amend AASB 112 Income Taxes to clarify how to account for deferred tax assets related to debt instruments measured at fair value when the entity reports tax losses.

The AASB says the proposed amendments clarify:

- That decreases in the carrying amount of a fixed-rate debt instrument for which the principal is paid on maturity give rise to a deductible temporary difference if the debt instrument is measured at fair value and if its tax base remains at cost, irrespective of whether the debt instrument's holder expects to recover the carrying amount of the asset by holding it to maturity, or whether it is probable that the issuer will pay all the contractual cash flows;
- The extent to which an entity's estimate of future taxable profit includes amounts from recovering assets for more than their carrying amounts;
- That an entity's estimates of future taxable profits excludes tax deductions resulting from the reversal of deductible temporary differences; and
- That an entity assesses whether to recognise the tax effect of a deductible tax difference as a deferred tax asset in combination with other deferred tax assets. If tax law restricts the utilisation of tax losses so that an entity can only deduct tax losses against income of a specified type or specified types, the entity must still assess a deferred tax asset in combination with other deferred tax assets, but only with deferred tax assets of the appropriate type.
Submissions
Comments are due by 20 November 2014 and can be sent to: The Chairman, Australian Accounting Standards Board, PO Box 204, Collins Street West Victoria 8007 - email: standard@aasb.gov.au.

28/08/2014
ATO PAYG instalment exit letters clarified

• ATO has recently issued letters to taxpayers who have been exited from the PAYG instalment system
• It said other activity statement obligations are not affected by the exit from PAYG instalments
• ATO said it will review the letter to ensure the above is clearly communicated in the future.

ATO PAYG instalment exit letters clarified

The ATO has recently issued letters to taxpayers who have been exited from the PAYG instalment system following changes to the PAYG instalment entry and exit thresholds. The letters reminded them to lodge and pay any activity statements or instalment notices not already lodged or paid by the due date. The ATO said other activity statement obligations including GST and PAYG withholding are not affected by their exit from PAYG instalments. It said taxpayers need to continue to lodge and/or pay these obligations. The ATO said it will review the PAYG instalment exit letter in the future to ensure this message is clearer. The ATO said taxpayers can voluntarily re-enter the PAYG instalment system. It said tax agents on behalf of taxpayers can call the ATO on 13 72 86 Fast Key Code 2 1 1 and request that their client is manually entered into the PAYG instalment system.

28/08/2014
Draft legislation: repeal of tax provisions

Treasury has released for comment *Exposure Draft Treasury Legislation Amendment (Repeal Day) Bill 2014*. The draft legislation contains the following proposed amendments:

- **Consolidation and repeal of tax provisions** - the draft amendments propose to simplify the taxation laws by: (i) repealing a number of taxation administration provisions from various taxation laws (eg ITAA 1936, ITAA 1997, GST Act, FBTAA, SGAA, etc) and consolidating those provisions into Sch 1 to the TAA by broadening the provisions already contained in Sch 1 to that Act so that they cover those various taxation laws - broadly, the amendments relate to the FCT's powers to obtain information and rules about evidence in judicial proceedings contained in Div 353 and Div 350 of Sch 1 to the TAA, respectively; (ii) repealing provisions from the ITAA 1936, the FBTAA and the Petroleum Resource Rent Tax Assessment Act 1987 that have become spent or redundant; and (iii) moving the content of certain short, longstanding and static regulations from the Income Tax Regulations 1936 into the ITAA 1936;

- **Definition of "Australia"** - the draft amendments propose to rewrite provisions defining "Australia" for income tax purposes from the ITAA 1936 into the ITAA 1997 and the TAA. This is another step towards achieving a single income assessment act for Australia. The rewritten provisions generally make no policy changes. However, they include the drafting changes needed to conform to the legislative approach used in the ITAA 1997, to simplify how the law is expressed, and to remove any ambiguity about the operation of the law;

- **Stake in a financial sector company** - the draft amendments propose to amend the Financial Sector (Shareholdings) Act 1998 so that persons who do not hold a direct control interest in a financial sector company will be deemed to have no stake in that financial sector company. This has implications for determining the stake held by a person where the person acquires a direct control interest in a financial sector company. The amendments will mean that where the associate of the person does not have a direct control interest in a financial sector company, it is no longer necessary to include the associate's interest with the aggregate direct control interest held by a person; and
- **Payslip reporting re super contributions** - the payslip reporting provisions in the *SIS Act* require employers to include in employee payslips information prescribed by the SIS regs. It was intended that regulations be made so that employers had to report on payslips the amount of super contributions and the date on which the employer expects to pay them. This has not occurred. There are existing requirements in the *Fair Work Act 2009* and the *Fair Work Regulations 2009* for employers to include in payslips the amount of super contributions they are liable to make. The draft amendment proposes to repeal the payslip reporting provisions in the *SIS Act*.

The majority of the amendments are proposed to generally commence and apply from Royal Assent. The draft legislation and accompanying draft explanatory material are available on the [Treasury website](http://www.treasury.gov.au).

**Submissions**

Comments are due by 17 September 2014 and can be sent to: General Manager, Deregulation Division, The Treasury, Langton Crescent, PARKES ACT 2600 - email: deregulation@treasury.gov.au. Enquiries can be directed to Victoria Henry of the Treasury on tel: (02) 6263 2086.

28/08/2014
ATO reminder: electronic lodgment for businesses

- ATO said it has started contacting some businesses re need to lodge and pay electronically to avoid fines
- Businesses with a GST turnover of $20m or more are required to lodge their BASs and pay debts electronically
- Businesses that do not comply will be subject to a penalty of $850 per event.

ATO reminder: electronic lodgment for businesses

The ATO said it has started contacting some businesses, or their registered contacts, about the need to lodge and pay electronically to avoid penalties. The ATO has reminded businesses with a GST turnover of $20m or more that they are required to lodge their BASs electronically and to pay their tax debts electronically. Where businesses do not lodge or pay electronically, the ATO said they can be subject to a penalty, which is currently $850 per event.

04/09/2014
TPB: tax (financial) adviser registration options

The Tax Practitioners Board (TPB) has released the following updates:

- **Registering as a tax (financial) adviser - transitional option** - The transitional application option will be available from 1 January 2016 to 30 June 2017 to Australian Financial Services (AFS) licensees and representatives (as defined in the Corporations Act 2001) who wish to apply for registration as a tax (financial) adviser. Provides an overview of the transitional eligibility requirements and the application process for registering as a tax (financial) adviser.

- **Registering as a tax (financial) adviser - standard option** - From 1 January 2016, the standard registration option will be available to Australian Financial Services (AFS) licensees and representatives (as defined in the Corporations Act 2001) who wish to be registered as a tax (financial) adviser. Provides an overview of the standard eligibility requirements and the application process for registering as a tax (financial) adviser.

- **Qualifications and experience for tax (financial) advisers** - Qualifications and experience requirements will depend on which option is used for registration as a tax (financial) adviser:
  
  - Notification option (available from 1 July 2014 - 31 December 2015) - no qualification or experience requirements apply.
  - Transitional option (available from 1 January 2016 - 30 June 2017) - no qualification requirements apply, but experience requirements apply.
  - Standard option (available from 1 January 2016 onwards) - qualification and experience requirements apply.
Treasurer speech: international tax planning

- In a recent speech, Treasurer Joe Hockey said the government was firmly committed to ensuring that Australia tax is paid on profits earned in Australia.
- He noted legislation that will prevent multinational companies from using hybrid financial arrangements and tightening of thin cap rules.

Treasurer speech: international tax planning

The Treasurer has made a Ministerial Statement on G20-OECD tax and transparency in the House of Reps. In relation to multinational businesses that have set up sophisticated arrangements to avoid Australian tax, Mr Hockey said this was "patently unfair - unfair on the Australian taxpayer and unfair on local businesses that are doing the right thing". He said the Coalition government was "firmly committed to ensuring that Australian tax is paid on profits earned in Australia". The following are highlights from his Statement.

Australia's laws are robust

The Treasurer said that Australia has a robust and sophisticated set of laws deal with aggressive tax planning and international profit-shifting. Mr Hockey noted the legislation currently before the House of Reps to tighten the thin capitalisation rules which built on the previous government's work. He said this further legislation before Parliament "will prevent multinational companies using hybrid financial arrangements to circumvent the proper application of our thin capitalisation rules".

More multinational audits

Mr Hockey said he has asked the FCT to "double his efforts" by undertaking more extensive enquiries and audits of multinational companies considered a risk to Australian tax collections. The Treasurer said Australian consumers often pay higher prices compared to US consumers for identical goods. He also noted media reports indicating that some companies selling these goods pay little tax in Australia despite their products selling for much higher prices in Australia.

Mr Hockey said part of the FCT's efforts will be examining whether these are location-specific profits being generated and then shifted out of Australia. In such cases, Australia's transfer pricing rules could apply to determine whether the appropriate amount of profit from Australian sales was booked to Australian operations. The Treasurer said he has also asked the FCT "to double his efforts in applying our rules so that his officers are able to look at these price differences to ensure that profits earned in Australia are taxed in Australia".
G20 agenda on information exchange

The Treasurer is due to meet other G20 Finance Ministers in Cairns on 18-21 September 2014. Mr Hockey said an important theme for the next meeting will be tax transparency and information exchange. "When tax authorities provide better information on individuals as well as the global operations of multinational companies, that data becomes a powerful tool to crack down on tax avoidance," said Mr Hockey. The Treasurer noted that Australia is a leader in exchanging information with other countries and that currently, "the ATO automatically sends information to around 40 countries, and receives it from around 20 tax authorities".

Other key points:

- **Base Erosion and Profit Shifting (BEPS)** - At the upcoming Cairns meeting, the G20 will ensure progress on the OECD BEPS Action Plan. Mr Hockey said the G20 will review the work to date, which involves progress on country-by-country reporting of tax information by multinationals, assessments of harmful tax practices, and responses to business use of hybrid funding instruments to avoid tax.

- **Common Reporting Standards** - The G20 will also reveal its implementation plan for a new Common Reporting Standards at the Cairns meeting. This exchange of information will catch hidden assets and undisclosed income, said Mr Hockey.

04/09/2014
ATO voice authentication for telephone calls

The ATO has launched voice authentication to help callers save time on the phone with the ATO. The ATO receives around 8m calls per year and for around 75% of these calls, it requires the caller to verify their identity. Australians contacting the ATO by phone will now be given the choice to record a short “voiceprint” that can be used to verify their identity for future calls.

According to the ATO, this will provide a more secure, and much more convenient, call experience to the ATO.

A voiceprint is a digital representation of the sound, rhythm, physical characteristics and patterns in the caller's voice. Once recorded, the ATO can match the "voiceprint" to verify the caller. This means the ATO won't need as much information to verify the caller's identity and the caller will spend less time on the phone verifying their identity in future calls. The ATO noted that even if the caller has a "cold", the technology can still match the caller's voice because of the range of unique characteristics represented in the caller's "voiceprint".

Further information on the "voiceprint" technology is available on the ATO website.

11/09/2014
Financial advice and SoA regs made

Corporations Amendment (Statement of Advice) Regulation 2014

- Has been registered
- It makes a number of amendments to the financial disclosure requirements and Statements of Advice (SoA)
- It commences on 1 January 2015.

Financial advice and SoA regs made

The Corporations Amendment (Statements of Advice) Regulation 2014 was registered on 8 September 2014. It amends the Corporations Regulations 2001 to make a number of amendments to the financial disclosure requirements. The amendments alter some of the provisions regarding the Statement of Advice (SoA), a disclosure document which generally must be provided to retail clients receiving personal financial advice.

The government announced on 15 July 2014 that it would implement additional improvements to the SoA requirements. These changes were negotiated with the Palmer United Party (PUP) and the Australian Motoring Enthusiasts Party in light of their support for the government’s reforms to the Future of Financial Advice (FoFA) provisions. The changes include additional disclosure requirements in the SoA, requiring an adviser to disclose existing obligations in the Act. Further, the amendments also provide requirements for the adviser and the client to sign the SoA, as well as any instructions from clients for further or varied advice.

Specifically, the Regulation makes the following changes:

- Requires that an SoA must be signed by the adviser, as well as signed by the client to acknowledge receipt;
- Requires that if a client, after receiving the SoA, requests further or varied advice (this may be necessary, for example, if the client’s relevant circumstances change), the providing entity must ensure that instructions from the client are: (i) documented in writing; (ii) signed by the client; and (iii) acknowledged by the providing entity, or an individual acting on behalf of the providing entity;
- Requires that advisers include the following statements and information in the SoA to ensure clients are aware of their existing rights and their adviser’s obligations under the Act:
  - That the adviser is required to act in the best interests of their client and prioritise their client’s interests ahead of their own, consistent with the requirements in ss 961B and 961J of the Act;
That any fees must be disclosed and that the adviser will provide a Fee Disclosure Statement (FDS) annually if the client enters into an ongoing fee arrangement to which Div 3 of Pt 7.7A of the Act applies (which will generally be those entered into on or after 1 July 2013);

That a client may have the right to return financial products under a 14-day cooling-off period in accordance with the arrangements under Div 5 of Pt 7.9 of the Act;

That the adviser genuinely believes that the advice he or she is providing to the client is in the client's best interests given the client's relevant circumstances; and

That the client has the right to seek further or varied advice from their adviser at any time, for example, if they experience a change in their circumstances.

The Regulation commences on 1 January 2015. The amending Regulation provides no limitation on the period for which these changes will have effect. However, it is intended that the changes in this Regulation will be repealed once the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 passes the Parliament and receives Royal Assent. The Bill had been passed by the House of Reps with seven government amendments and is currently before the Senate, and has been referred to the Senate Economics Legislation Committee for report by 30 September 2014.

11/09/2014
Prohibition period upheld re tax agent registration

**AAT Case [2014] AATA 644, Re Su v The Tax Practitioners Board**

- AAT has upheld a period of three years during which a de-registered agent is prohibited from applying for registration
- Matter concerned the lodgment of tax returns by the applicant containing false information.

The AAT has upheld a period of three years during which a de-registered tax agent is prohibited from applying for registration as a tax agent.

The applicant commenced practice as a registered tax agent in 2005. He lodged 164 tax returns on the instructions of one of two men who had approached him about preparing tax returns for clients of theirs (the men had claimed to be representatives of a recruitment company) and of a third intermediary. The AAT said all of those tax returns contained false information eg the PAYG tax amounts claimed to have been withheld were overstated, the income figures were wrong, deductions were claimed that were not allowable, etc. Most of the refunds were between $3,000 and $5,000 per tax return and were paid into a bank account nominated by the intermediaries. The Tribunal said the applicant did not check the bona fides of the intermediaries, had not asked for any identification of any of the taxpayers, and did not check the accuracy of any of the payment summaries, or any of the details relating to the taxpayers.

The ATO investigated the agent and the Tax Practitioners Board subsequently commenced its own investigation. In August 2013, the Board wrote to the applicant to inform him that it had decided to terminate his registration as a tax agent; that it had determined that he would not be permitted to apply for registration as a tax agent for a period of three years; and that it would be applying to the Federal Court for payment of a pecuniary penalty in respect of various contraventions of the TASA. The applicant did not contest the Board’s decisions but he considered that the three-year non-application period was excessive, and applied to the Tribunal for review of that decision. The Tribunal considered the three-year period was appropriate.

**AAT case [2014] AATA 644, Re Su and Tax Practitioners Board, AAT, Frost DP and Gaudion M, AAT Ref: 2013/4349; 4354; 4355, 4 September 2014**

11/09/2014
Treasury speech: tax reform and living standards

In a recent speech, Secretary to the Treasury, Dr Martin Parkinson discussed some of the structural challenges of the economy and the scope for tax reform to address those issues. He said that unless productivity growth is lifted, the economy risks a long period of sluggish income growth. The productivity challenge requires a wide-ranging and comprehensive response, of which tax reform was a key part, he said. In this regard, Dr Parkinson said the government's Tax White Paper is an ideal opportunity to have public debate about the best taxation system for enhancing productive capacity. In relation to "genuine tax form", Dr Parkinson said it is as much about "how much" revenue is raised, as "how it is" raised.

One of the key challenges is the current tax mix. Dr Parkinson said that under current policy settings reliance on personal income taxes and corporate income taxes will continue to increase. As a result, the economic cost of raising tax from the current tax mix will also increase, he said. In this regard, Dr Parkinson noted studies showing that reducing reliance on direct taxes would lead to higher incomes.

Another key challenge is competitiveness of the tax system, particularly corporate tax and the capacity to attract new foreign and domestic investment. Dr Parkinson noted the increased digitisation of the economy across all sectors and the pressure it was placing on the international tax system. He noted a trend of certain countries (eg the US) where investment in intangibles (eg brands, R&D, internal business processes) have been outstripping investment in physical capital. He said Australia’s integrity rules were "strong"; however, he said further international cooperation was important.

Dr Parkinson said another key challenge of the tax system is to balance incentives for people to work, while ensuring those most vulnerable in our society are adequately supported and funds are available to provide key public goods. He said over time Australia has developed a highly progressive taxation system compared to other similar taxing countries. This has been driven by a number of factors including reliance on income taxes, the tax-free threshold, and the country's lack of a mandated social security contribution.
Dr Parkinson said the combination of a tax-free threshold and no social security contributions mean Australia has low levels of average taxes on low-to-middle income earners compared to other countries with similar tax systems. He added that it was this low tax on low income earners, rather than the high taxes on the middle and high income earners, that drives the system's progressivity. And he said this low tax, together with our highly targeted welfare system, means that Australia is both relatively low taxing and highly re-distributive.

Referring to lessons from past reform, Dr Parkinson said the case for reform needs to be compelling and well-understood. He said the public needs to understand how the reforms will deliver increases in living standards. He also said reform proposals should highlight medium-term economic payoffs. He also noted that every reform has winners and losers, and sometimes the winners are not obvious. While always uncertain, he said recent work by a group of Treasury analysts suggests that more than half of the long run economic burden of corporate tax is borne by wages. Paradoxically, then, he said "wage earners may be big winners from a company tax cut".

11/09/2014
ATO speech: implications of OECD BEPS

ATO DCT, Mark Konza, has delivered a speech providing an insight into the Base Erosion and Profit Shifting (BEPS) Action Items that were discussed at the recent G20 Finance Ministers meeting held in Cairns. In particular, Mr Konza focused on the implications of the proposals, the ATO's priorities and strategy, and the compliance action being implemented in response. Key points are as follows.

- **BEPS Action 1 - address the tax challenges of the digital economy**: Mr Konza said the intelligence the ATO has gained through an E-Commerce project has been used as a basis to instigate a multilateral working party, with five tax agencies coming together to investigate the global tax planning of e-commerce multinational enterprises. He said work is currently underway to undertake joint compliance action between several jurisdictions where appropriate. Mr Konza said another compliance initiative currently underway is the internal review of the effectiveness and efficiency of the ATO's Advance Pricing Arrangement (APA) and Mutual Agreement Procedure (MAP) programs. He said the ATO wants to replicate the advantages of early engagement in its rulings program to streamline APAs, especially in the information gathering stage.

- **BEPS Action 2 - neutralise the effects of hybrid mismatch arrangements**: Mr Konza said the ATO was currently seeking feedback from its operations teams to identify and consolidate examples of hybrid mismatch in order to establish the level of risk, before identifying any potential action required. Mr Konza said any recommendations made dealing with hybrid mismatch arrangements will need to be considered in light of work already underway in Australia on related anti-avoidance measures.

- **BEPS Action 5 - counter harmful tax practices**: Mr Konza said there has been considerable progress made to improve transparency on tax rulings related to preferential regimes and a methodology to assess substantial activity in intellectual property and other preferential regimes (patent box). However, he said more work is required to achieve an agreement on the definition of "substantial activity" for reviewing concessional patent box regimes. Mr Konza said the ATO has set up an Integrated Tax Design team to blueprint and implement the OECD's compulsory exchange of tax rulings initiative by the end of 2014.
• **BEPS Action 6 - prevent treaty abuse** - Mr Konza said both the ATO and Treasury were conscious to ensure any proposed anti-treaty abuse rules do not restrict the ability for cross-border trade and investment both in and out of Australia, and that they only deal with instances of intended treaty abuse.

• **BEPS Action 8 - transfer pricing of intangibles**: Mr Konza said the ATO supports the OECD's stance against artificial profit shifting to no or very low tax jurisdictions, mainly where there is a separation between the location of the return on the intangible and the location where the economic activities take place and value is created. However, he said any Governmental consideration of law change would be in the context of new transfer pricing laws under Div 815 of the ITAA 1997 which have already been enacted.

• **BEPS Action 13 - re-examine transfer pricing documentation**: Mr Konza noted the OECD's 2014 Guidance on Transfer Pricing Documentation and Country-by-Country (CbC) reporting. He said the ATO was supportive of CbC reporting as an important transparency measure. He said the ATO was also conscious of the balance required between information that is useful to tax administrations, maintaining confidentiality, and ensuring requirements do not cause excessive compliance costs for taxpayers. Mr Konza said the ATO was currently reviewing the impact of CbC reports on the ATO's administrative and compliance products, to see how they would operate together and to minimise these risks. Other issues being considered include the inclusion of a materiality threshold (ie a minimum global MNE turnover before being obliged to report), and the best mechanism for sharing the reports.

25/09/2014
Tax agent registration renewal denied

*AAT Case [2014] AATA 687, Re Burnett v Tax Practitioners Board*

- AAT has rejected a tax agent’s application for renewal of registration
- It was of the view the agent did not possess the level of competence in handling her clients’ tax affairs and therefore is not a “fit and proper” person to be a tax agent.

**Background**

The tax agent had been registered since 1980. The agent had been audited on several occasions by the ATO and adjustments totalling over $500,000 had been made to the assessments of 29 of her clients. The ATO visits and audits found a number of issues, including lack of substantiation of expenses, overclaimed work-related expenses, no satisfactory working papers for a number of clients, a high percentage of claims were estimates, private expenses had been claimed, car-related expenses claimed without nexus to employment, log book created after an ATO audit.

The Tribunal said 62 penalties were apparently imposed, with 55 imposed for lack of reasonable care, four imposed for recklessness and three imposed for "intentional disregard". The ATO considered the errors found were primarily attributable to "tax agent error", the AAT said. The Tax Practitioners Board had also received a complaint alleging that the tax agent had accessed the records of another agent's clients through the Tax Agent Portal without authorisation. The Tribunal said it was satisfied on the evidence that this had occurred.

The Board investigated and rejected her application for renewal as a tax agent as it considered she had failed to comply with provisions of the Code of Professional Conduct in the *Tax Agents Services Act 2009* (*TASA*). The Tribunal said the breaches found related to the agent's failure to:

- Act honestly and with integrity;
- Act lawfully in the best interests of her clients;
- Ensure that tax agent services she provided, or that were provided on her behalf, were provided competently;
• Take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs was relevant to a statement she was making or a thing she was doing on behalf of the client; and
• Take reasonable care to ensure that taxation laws were applied correctly to the circumstances in relation to which she was providing advice to a client.

Decision

The Tribunal was of the view the agent did not possess the level of competence in the handling of her clients' taxation affairs which would be necessary for her to be regarded as a "fit and proper" person to be a tax agent. It considered the agent was not an individual of "good fame, integrity and character" and was not a fit and proper person to be registered as a tax agent pursuant to ss 20-15 and 20-5 of TASA.

The Tribunal also concluded that the agent had shown "little in the way of contrition or appreciation of the seriousness of her conduct and, accordingly, there is no basis for confidence that, if given the opportunity, she would not repeat the same types of conduct in the future, both with respect to the management of the taxation affairs of her clients, and in her dealings with the ATO". The Tribunal found the agent had failed to cooperate with ATO staff when they visited her.

The Tribunal therefore affirmed the decision under review, which had the effect of rejecting the agent's application for renewal of her registration as a tax agent.

25/09/2014
Application refused for tax debt relief

AAT Case [2014] AATA 691, Re KNNW v FCT

AAT has upheld FCT’s decision refusing to release a taxpayer from his tax debt on grounds of “serious hardship”

Application refused for tax debt relief

AAT Case [2014] AATA 691, Re KNNW v FCT

The AAT has upheld the FCT’s decision refusing to release a taxpayer from his tax debt of $26,045 on the grounds of “serious hardship” under s 340-5(3) of Sch 1 to the TAA.

The tax debt arose after the FCT denied deductions claimed by the taxpayer under a managed investment scheme promoted by a registered tax agent. The deductions had generated tax refunds of $36,379 and $37,602, respectively, for the 2006 and 2007 tax years. However, the promoter took 86% and 90% of the refunds, respectively. The amended assessments left the taxpayer with a tax shortfall totalling $68,820 (plus significant penalties and interest charges).

The FCT granted the taxpayer's application to be released from the tax debt in part, to the extent of $70,000, but refused relief in relation to the remaining $26,045. The taxpayer objected arguing that he needed $5,560 per fortnight to avoid serious hardship for his family (including four teenage children). While the household currently had a net deficit of $4,045 pf, it previously had a surplus of $1,067 pf based on earnings derived through the family trust.

The AAT upheld the FCT’s decision not to release the taxpayer from the remaining tax debt. Based on the taxpayer's current income levels, the AAT agreed that the taxpayer could be regarded as suffering serious hardship (even if all discretionary expenditure was removed). However, if the household deficit continued, the AAT said that it was not appropriate to grant the relief under s 340-5(3) of Sch 1 to the TAA because it would not relieve the hardship (and simply benefit other creditors at the expense of the ATO).

Alternatively, if the family earnings were restored to a projected surplus, the AAT held that it was not appropriate to exercise the discretion as the serious hardship condition would not apply as the debt could be cleared within two years. Even if serious hardship could be shown under the surplus earnings scenario, the AAT considered that the circumstances weighed heavily against exercising the discretion as the taxpayer had reduced other liabilities, acquired unnecessary assets (eg a second car) and incurred discretionary expenditure. Where there has been a reduction in other
liabilities commensurate with the tax debt, and maintenance of a lifestyle enjoying middle-class comforts with a degree of discretionary expenditure (albeit not extravagant), the AAT said the correct and preferable conclusion is that a relieving discretion ought not be exercised.

*AAT Case [2014] AATA 691, Re KNNW v FCT*, AAT, Ref No: 2013/4923, O'Loughlin SM, 22 September 2014
TPB draft information sheets

The Tax Practitioners Board (TPB) has released for comment the following two exposure draft Information Sheets:

- **Draft Information sheet TPB(I) D23/2014 - the meaning of "fee or other reward" for tax (financial) advisers** - will assist entities to determine what constitutes a fee or other reward. The term is not defined in *Tax Agent Services Act 2009 (TASA)* and therefore takes its ordinary meaning. However, the phrase "fee or other reward" specifically excludes employees (who are unregistered) who provide tax (financial) advice services to their employer(s) for a salary, wage or other benefit. From 1 January 2016, any entity providing tax (financial) advice services for a fee or other reward will need to be registered with the TPB. If they are not, they will contravene the civil penalty provision in the *TASA*.
  - Where an employee representative provides a tax (financial) advice service, on behalf of, or to, their employer who is a registered tax (financial) adviser, that is not a fee or other reward.
  - Where an entity provides a tax (financial) advice service for a fixed amount, that is considered to be a fee.
  - The TPB says the following is a fee but is not an other reward: An entity provides a tax (financial) advice service in lieu of payment of an existing third party debt, or for a future benefit.

- **Draft Information sheet TPB(I) D24/2014 - the sufficient number requirement** for partnership and company registered tax (financial) advisers - explains the sufficient number requirement which will need to be met by partnerships and companies seeking registration, or renewal of registration, as a (tax) financial adviser under the standard option from...
1 January 2016. The TPB says it will consider whether the partnership or company has an appropriate number of registered individual tax agents and/or tax (financial) advisers to provide tax (financial) advice services to a competent standard and to carry out supervisory arrangements. The Board says there is no set formula for determining the sufficient number of registered individual tax agents or tax (financial) advisers a partnership or company is required to have to satisfy this requirement, but it outlines factors it will consider in determining the "sufficient number" such as:

- Having available adequate resources (including financial, technological and human resources) to provide the financial services covered by the license and to carry out supervisory arrangements;
- Maintaining the competence to provide those financial services;
- Ensuring that its representatives are adequately trained, and are competent, to provide those financial services.

The exposure drafts set out the preliminary views of the TPB and aim to assist entities to understand the TPB's approach to these requirements.

**Comments** on both drafts are due by 24 October 2014.

25/09/2014
ATO access to family court proceeding documents

The ATO has released a Decision Impact Statement on the decision of the Full Court of the Family Court in FCT & Darling and Anor [2014] FamCAFC 59. In that case, Full Court of the Family Court ruled that the Court at first instance wrongly applied its discretion to prevent FCT from using certain documents filed in the Court for the purposes of an audit of one of the parties to the proceedings (and related entities) in relation to the 1991 to 2010 income years.

In relation to the way in which the discretion should be exercised, the Full Court of the Family Court considered the following factors as relevant to the exercise of the discretion to release the FCT from the implied obligation:

- The FCT was performing an important public duty.
- The FCT was engaged in a substantial, targeted audit.
- Although many of the annexures to the affidavits may be available to the FCT from other sources, the parties’ own assertions about the history of acquisition of assets would be available only to the FCT by interview with the parties in which they may have an incentive not to be frank.
- The cogency of any evidence would be the subject of scrutiny in any proceedings that may be instituted after the FCT completes the audit and makes assessments.
- The release of the FCT from the obligation would not be “inconvenient” to the husband. Nor would there be any prejudice to the husband, unless the documents did establish he has not been meeting his taxation obligations.
• There are restrictions on the way in which the FCT can use the information obtained from the court file which would ensure that the documents do not venture into the public arena, thus ensuring there is no breach of s of the Family Law Act 1975.
• The affidavits and financial statements were sworn by the parties for the purposes of the proceedings and therefore in the expectation that they might be read in open court.
• The fact the FCT does not carry the burden of proving the accuracy of his assessment was irrelevant.
• Albeit brief, and expressed in general terms, the ATO officer sufficiently stated the purpose for which the documents were required in his affidavit.

It is understood the High Court refused the husband special leave to appeal against the decision of the Full Court of the Family Court. The ATO noted the High Court found that there was no point of law suitable to a grant of special leave: see High Court transcript - HCA Trans 178.

The ATO said the FCT accepts the decision of the Full Court of the Family Court that the implied obligation applies to the FCT as a stranger to the litigation. In addition, the ATO said its policies were updated in 2011 to instruct ATO officers not to seek to inspect or copy documents from court files by relying on access powers, because such conduct could constitute contempt of court.

The ATO said that where the FCT, as a non-party to litigation, seeks access to court documents for use other than in the proceeding in which the documents were filed, the FCT will make an application to the court for release from the implied obligation. It said the FCT will have regard to the factors considered by the Full Court of the Family Court in making any such application.

02/10/2014
ATO small business case studies

The ATO has released *small business case studies for the 2013-14 financial year* which cover the reduction of the instant asset write-off threshold from $6,500 to $1,000, and the removal of accelerated initial deduction for motor vehicles. The ATO notes the legislative changes are effective from 1 January 2014, meaning they may affect 2013-14 business income tax returns.

In relation to the instant asset write-off threshold reduction, assets costing less than $6,500 that were acquired and installed ready for use by 31 December 2013 can still be immediately written-off. Assets acquired on or after 1 January 2014 can only be immediately written-off if they cost less than $1,000. In relation to the removal of the accelerated initial deduction for motor vehicles, claims for vehicles costing more than $6,500 can still be made, as long as they were acquired and available for use by 31 December 2013.

**Instant asset write-off case study**

- **By 31 December 2013** - Steve bought a commercial coffee machine for $6,499.99 to go in his new cafe. He installed it on 31 December 2013, and uses it solely for business purposes. From 1 July - 31 December 2013, small businesses can claim an instant asset write-off for most assets that cost less than $6,500. The asset must be acquired and installed ready for use before 1 January 2014. Because Steve bought and installed the coffee machine before 1 January 2014, and because it cost less than $6,500, he can claim the instant asset write-off.

- **On or after 1 January 2014** - Delilah bought a computer for $3,000 on 31 December 2013, but installed it ready for use on 1 January 2014. It's used for her editing business 100% of the time. From 1 January 2014 onwards, small businesses can claim an instant asset write-off for most assets that cost less than $1,000. Even though Delilah bought the computer on 31 December 2013, she only installed it ready for use on 1 January 2014. This means the lower instant asset write-off rules apply. Because the computer cost $1,000 or more, Delilah can't claim the instant asset write-off.
General small business pool case study

- **By 31 December 2013** - Wilbur operates his own Dental Centre. To entertain his clients, he buys and installs a new TV in the ceiling above the dental chair. The TV cost $6,500, and he installed it on 23 November 2013. From 1 July - 31 December 2013, small businesses can claim an instant write-off for assets costing less than $6,500. Assets costing $6,500 or more should be depreciated through the general small business pool. Wilbur must allocate the cost of the TV to the general small business pool. He can claim a deduction of 15% in the first year of owning this asset and 30% in following years.

- **On or after 1 January 2014** - Ying owns a restaurant called The Little Pork Chop. In March 2014, Ying bought two new sets of tables and chairs, which cost $1,050 each set. From 1 January 2014 onwards, small businesses can only claim an instant write-off on assets costing less than $1,000. Assets costing $1,000 or more should be depreciated through the general small business pool. Ying must allocate the cost of her new tables and chairs to the general small business pool. She can claim a deduction of 15% in the first year of owning the assets, and 30% of the remaining cost in following years.

Accelerated initial deduction for motor vehicles case study

- **By 31 December 2013** - Andre owns a furniture restoration business that's growing. In October 2013, Andre bought and began using a new sedan for the business. It cost $40,000 and is used entirely for work. From 1 July - 31 December 2013, accelerated motor vehicle deductions apply. Eligible small businesses can receive an accelerated deduction of $5,000 for motor vehicles costing more than $6,500 and also claim a 15% deduction through the general small business pool. The remaining cost is deducted at a rate of 30% in following years. Because Andre bought and began using the car by 31 December 2013, Andre can claim an accelerated motor vehicle deduction.

- **On or after 1 January 2014** - Keenan bought a new car for his chauffeur business in February 2014. From 1 January 2014 onwards, there are no accelerated motor vehicle deductions. This means the full cost of the car must be allocated to Keenan's general small business pool. He can claim a deduction at 15% of the cost in the first year and 30% of the remaining cost in each year after that.

The ATO has also released information summarising the simplified depreciation rules for small businesses.

No penalties if tax return amendments within "reasonable time"

The above measures were part of the government's repeal of the mining tax: see the Minerals Resource Rent Tax Repeal and Other Measures Bill 2014 (which received Royal Assent on 5 September 2014 as Act No 96 of 2014). The ATO had previously provided that in relation to the small business instant asset write-off, and for those taxpayers who need to amend their 2013-14 tax returns, it does not intend to apply penalties or the Shortfall Interest Charge (SIC) if taxpayers request to amend their assessments within a reasonable period of time. In relation to the accelerated deduction for motor vehicles, the ATO had said no shortfall penalty will apply if taxpayers seek to amend their return within a reasonable time and the SIC will also be remitted to nil.

02/10/2014
Senate Committee inquiry into tax minimisation

- Senate has agreed to have the following matter referred to the Senate Economics Reference Committee for report:
  - Tax avoidance and aggressive minimisation by corporations registered in Australia and multinational corporations operating in Australia
- The report is due by the first sitting day of June 2015.

Senate Committee inquiry into tax administration

The Senate has voted 34 to 28 to agree to a motion by Greens Leader Senator Milne that the following matter be referred to the Senate Economics References Committee for report by the first sitting day of June 2015:

Tax avoidance and aggressive minimisation by corporations registered in Australia and multinational corporations operating in Australia, with specific reference to:

- The adequacy of Australia’s current laws;
- Any need for greater transparency to deter tax avoidance and provide assurance that all companies are complying fully with Australia’s tax laws;
- The broader economic impacts of this behaviour, beyond the direct effect on government revenue;
- The opportunities to collaborate internationally and/or act unilaterally to address the problem;
- The performance and capability of the ATO to investigate and launch litigation, in the wake of budget cuts to staffing numbers;
- The role and performance of ASIC in working with corporations and supporting the ATO to protect public revenue;
- Any relevant recommendations or issues arising from the government’s White Paper process on the “Reform of Australia’s Tax System”; and
- Any other related matters.

02/10/2014
Failure to provide security for tax liabilities

Soong v Director of Public Prosecutions (Cth) [2014] NSWSC 1030

- NSW Supreme Court has dismissed a company director’s appeal against a ruling that convicted and fined her for failing to provide security for tax liabilities
- Matter related to seven notices from the DPP to give security for due payment of future tax-related liabilities.

The NSW Supreme Court has dismissed a company director’s appeal against a Local Court ruling that upheld her being convicted and fined for failing to provide security for tax liabilities.

In January and April 2011, the director had received a total of seven notices from the DPP to give security for the due payment of future tax-related liabilities. On 20 March 2013, the director was convicted of five offences under s 255-110 of Sch 1 to the Taxation Administration Act 1953 in the Local Court for failing to provide security for tax liabilities as required by the FCT and was fined $1,000. The director appealed to the Supreme Court under s 55 of the Crimes (Appeal and Review) Act 2001 (NSW), seeking that the conviction and orders made by the Local Court be set aside.

The director argued that, in each case, the reason for the security not being provided was that it was impossible for her to do so, an impossibility for which she was not responsible. It is submitted that the impossibility arose in two respects: (i) the FCT stipulated an unreasonable time for compliance with each Notice; and, (ii) the FCT unreasonably withheld his cooperation in respect of each Notice by making compliance conditional on the plaintiff making a down payment of an arbitrary sum towards the FCT’s costs of preparing the mortgage documentation. It was argued that the prosecution bore the onus of proving that the plaintiff “failed” to comply with the notices and that the Magistrate should not have been so satisfied.

The Supreme Court denied the appeal. It held the time limits that had been stipulated for compliance were reasonable. The Supreme Court was of the view that the conclusion of the Local Court about this matter “was not only correct; it was inevitable”.

Soong v Director of Public Prosecutions (Cth) [2014] NSWSC 1030, NSW Supreme Court, Adams J, 31 July 2014
Tax (financial) adviser registration options: updates

The Tax Practitioners Board (TPB) has released the following updates:

- **Summary of qualifications and experience requirements for registration as a tax (financial) adviser under the standard option** - Table summarising the qualifications and experience requirements that apply from 1 January 2016.
- **Qualifications and experience for financial advisers** - Outlines the qualifications and experience requirements for registration as a tax (financial) adviser from 1 January 2016. Updated as at 25 September 2014

02/10/2014
Gift to family trust to defeat tax liability clawed back

Windoval Pty Ltd (Trustee) v Donnelly (Trustee), in the Matter of Donnelly (Trustee) [2014] FCAFC 127

• Full Federal Court has refused to order a retrial re declaration allowing a bankruptcy trustee to claw-back a former tax lawyer’s gift to his family trust
• It did so on the grounds that the gift was intended to defeat an impending tax liability.

Gift to family trust to defeat tax liability clawed back

*Windoval Pty Ltd (Trustee) v Donnelly (Trustee), in the Matter of Donnelly (Trustee)* [2014] FCAFC 127

The Full Federal Court has refused to grant a retrial in relation to a court declaration allowing a bankruptcy trustee to claw-back a former tax lawyer’s $5m gift to his family trust on the grounds that it was intended to defeat an impending tax liability: *Windoval Pty Limited (Trustee) v Donnelly (Trustee), in the Matter of Donnelly (Trustee)* [2014] FCAFC 127 (Full Federal Court, Jacobson, White & Gleeson JJ, 26 September 2014).

Background

The former tax lawyer (the taxpayer) had made $5m in contributions to a non-complying superannuation fund during the 1998-99 tax year. The contributions were made from fees he earned in his legal practice and tax advice business, including the marketing of employee benefit arrangements. In addition, he had advised more than 300 clients on similar controlling interest superannuation arrangements.

The taxpayer claimed a deduction for the superannuation contributions under former s 82AAE of the *ITAA 1936* relying on a private ruling obtained from the ATO. The private ruling was based on the assumption that the contributions would be for the purpose of making provision for superannuation benefits for the taxpayer and that he was an employee at common law. The taxpayer had also obtained two opinions from senior and junior counsel that the FCT could not apply Pt IVA of the *ITAA 1936* to the scheme. However, the advice from counsel did not mention all aspect of the scheme (as implemented) and raised the prospect that the deduction for the contributions could potentially be denied for lacking the relevant retirement benefit purpose.

In May 1999, the taxpayer decided to retire and cease his tax advice business. He wound up his superannuation fund on 1 July 1999 and the $5m was gifted to Windoval Pty Limited, as trustee of his family trust. By this stage, aggressively marketed employee benefit arrangements were firmly in the sights of the FCT. An ATO media release issued on 19 May 1999 had warned that many of the schemes were “contrived” and failed both at law and in their implementation.
In July 2004, the FCT disallowed the deduction claimed for the contributions and issued the taxpayer with an amended assessment for $4.5m (including a 25% additional tax penalty and $1.5m in interest). The taxpayer then engaged in extensive litigation with the FCT in relation to his objection to the amended assessment which was ultimately unsuccessful: see, for example, *Bonnell v FCT* (2008) 73 ATR 506.

The taxpayer's trustee in bankruptcy, Mr Donnelly, sought a court declaration that the transfer of the $5m to the trustee of family trust was void against him pursuant to the claw-back provisions in s 121 of the *Bankruptcy Act 1966*. The taxpayer argued that he did not gift the $5m to the family trust in order to put it beyond the reach of any creditor in the event that he became bankrupt. Rather, he submitted that, as the controller of the family trust, he would have called for the money from the trust to pay any tax liability in 2000. However, by the time of the amended assessment in 2004 he could no longer meet any tax liability.

**First instance decision**

In *Donnelly (Trustee) v Windoval Pty Limited (Trustee)* [2014] FCA 80, the Federal Court declared that the transfer of the $5m to the family trust was void against the trustee in bankruptcy. The primary judge found that the payment to the family trust had the prescribed purpose under s 121(1)(b) of the *Bankruptcy Act 1966* to defeat the taxpayer's impending creditors (namely the FCT). The Court noted that the taxpayer had a real apprehension in July 1999 that the FCT would disallow the deduction for the contributions. While the tax liability didn't crystallise until the amended assessment in July 2004, the Court ruled that it was an "impending liability" as it could be reasonably inferred from the circumstances at the time of the gift to the family trust that the taxpayer was about to become insolvent. In this respect, the Court ruled that the taxpayer had the requisite purpose under s 121(1)(b) to defeat an impending liability pursuant to the leading authorities in *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 61 ATR 642 and *Prentice v Cummins* (2006) 51 ATR 400. The fact that the FCT did not issue a revised assessment until July 2004 did not matter, the Court said.

**Decision**

On appeal, the Full Court found that the primary judge had made an incorrect statement of the evidentiary position by stating that there was "no evidence" nor any suggestion that the taxpayer would have used his position as controller of the family trust to call back the money in the event of an amended assessment. With respect, the Full Court said that it was plain from the words used by the primary judge in his reasons that he had accidentally overlooked the taxpayer's evidence of what he would have done.

Nevertheless, the Full Court dismissed the appeal after finding that the wrongful rejection of the taxpayer's evidence did not have any bearing on the outcome of the case to warrant a retrial. The Full Court noted that the taxpayer had never said that he would have caused the family trust to pay the tax in any situation in which he may be the subject of an amended assessment. Rather, the Full Court said that the taxpayer's evidence as to what he would have done was all directed to a hypothetical situation in respect of the possible disallowance of the deduction in his original assessment in 2000. It did not contain a statement of what he would have done in the event of an amended assessment during the ensuing four-year time limit. Accordingly, the Full Court ruled that there was no miscarriage of justice as the primary judge's error of fact did not affect the result of the trial. It followed that it was not appropriate to grant a new trial pursuant to s 28(1)(f) of the *Federal Court of Australia Act 1976*. 

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In addition, the Full Court rejected the appellant's attempt to distinguish the present case from the High Court authority in *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 61 ATR 642. In that decision, the bankrupt was aware at the time of the impugned transactions that he had incurred very substantial liabilities to the FCT, contingent only upon the FCT issuing assessments. The Full Court said the leading authorities make it sufficiently clear that the relevant intent to defeat creditors may be established even though there are no existing creditors at the date of the disposition.
Appeals update

- MBI Properties Pty Ltd v FCT [2013] FCAFC 112
  - High Court has released the transcript of FCT’s appeal against the Full Federal Court decision
  - High Court adjourned appeal to a date to be fixed
  - Full Federal Court had overturned an earlier decision and held taxpayer did not have an increasing adjustment re GST.

Appeals update: MBI Properties Pty Ltd

MBI Properties Pty Ltd v FCT [2013] FCAFC 112

The High Court has released the transcript of the FCT’s appeal against the Full Federal Court decision in MBI Properties Pty Ltd v FCT [2013] FCAFC 112. The appeal was heard by a Full Court of the High Court in Canberra on 11 September 2014. The High Court adjourned the appeal to a date to be fixed - FCT v MBI Properties Pty Ltd [2014] HCATrans 200. The Full Federal Court had overturned an earlier decision and unanimously held that a taxpayer that had purchased three residential apartments which were subject to leases, did not have an increasing adjustment within the meaning of Div 135 of the GST Act, as there was no continuing supply in terms of s 135-5(1).

18/09/2014
Appeals update

- AAT Case [2014] AATA 622, Re Coshott v FCT
  - Taxpayer has appealed to the Federal Court
  - AAT had affirmed taxpayer was liable to CGT on a payment received re settlement of litigation for negligence.

Appeals update: Coshott

AAT Case [2014] AATA 622, Re Coshott v FCT

The taxpayer has appealed to the Federal Court against the decision in AAT Case [2014] AATA 622, Re Coshott and FCT. In that case, the AAT affirmed that a taxpayer was liable to CGT on a payment made to her in respect of the settlement of litigation she pursued for breach of contract and negligence. In doing so, the AAT dismissed the taxpayer's claim that the payment of damages per se could not give rise to a profit or gain. It also found that she had failed to establish any relevant cost base for legal expenses that would otherwise reduce the assessable capital gain.

25/09/2014
TAX CONTROVERSY

ATO draft guidelines: professional firms and Pt IVA

ATO has released draft guidelines re assessment of Pt IVA risk applying to allocation of profits from professional firms. It applies to arrangements carried on through a partnership, trust or company where the income is not PSI. It sets out what ATO considers to be low risk and high risk arrangements and will be applied from 2014-15 income year.

ATO draft guidelines: professional firms and Pt IVA

The ATO has released draft guidelines on how it will assess Pt IVA risk applying to the allocation of profits from a professional firm carried on through a partnership, trust or company, where the income of the firm is not personal services income.

DCT Michael Cranston said the draft guidelines explain how professionals can assess the tax risks flowing from the use of partnerships of discretionary trusts and similar structures. "Professional practices may legitimately operate as a partnership of discretionary trusts or through similar structures. The ATO is reviewing remuneration arrangements used by accountants, lawyers and other professionals to make sure people are using these structures appropriately," he said. Firms which could be affected include, but are not limited to, those that provide accounting, architectural, engineering, financial, legal and medical services.

The ATO’s concerns

The ATO said in some cases, practice income may be treated as being derived from a business structure, even through the source of that income remains, to a significant extent, the provision of professional services by one or more individuals. The ATO said it was concerned that Pt IVA may apply to schemes which are designed to ensure that the Individual Practitioner Professional (IPP) is not directly rewarded for the services they provide to the business, or receives a reward which is substantially less than the value of those services. Where an individual attempts to alienate amounts of income flowing from their personal exertion (as opposed to income generated by the business structure), the ATO said it may consider cancelling relevant tax benefits under Pt IVA.

The ATO said it acknowledged that the general anti-avoidance provisions have historically been applied to assess individuals on income generated by their personal exertion or application of their professional skills, rather than profits or income generated by a business. However, the ATO said it considers that Pt IVA could apply where an IPP arranges for the distribution of business profits or
income to associates without regard to the value of the services the individual has provided to the business. This is particularly the case, where for example, the level of income received by the individual, whether by way of salary, distribution of partnership or trust profit, dividend or any combination of them, does not reflect their contribution to the business and is not otherwise explicable by the commercial circumstances of the business.

**Low risk and high risk arrangements**

Mr Cranston said the draft guidelines set out what the ATO considers to be low risk, legally effective arrangements, and what the ATO considers to be high risk arrangements that might attract attention. The draft guidelines set out circumstances that the ATO considers is "low risk" and not subject to compliance action on the issue. Broadly, a case would be considered "low risk" if the IPP meets one of the following guidelines regarding income from the firm:

- The IPP receives assessable income from the firm in their own hands as an appropriate return for the services they provide to the firm. In determining an appropriate level of income, the taxpayer may use the level of remuneration paid to the highest band of professional employees providing equivalent services to the firm, or if there are no such employees in the firm, comparable firms or relevant industry benchmarks eg industry benchmarks for a region provided by a professional association, agency or consultant; and/or
- 50% or more of the income to which the IPP and their associated entities are collectively entitled (whether directly or indirectly through interposed entities) in the relevant year is assessable in the hands of the IPP; or
- The IPP, and their associated entities, both have an effective tax rate of 30% or higher on the income received from the firm.

Where none of the low risk guidelines are met, the ATO will consider the arrangement to be "higher risk". In these cases, the lower the effective tax rate, the higher the ATO will rate the compliance risk and the greater the likelihood of compliance action. For example, an arrangement with an effective tax rate of 15% would be rated as higher risk than one with an effective tax rate of 25%. Note that in cases where other compliance issues are evident (eg late lodgment of returns, income injection to entities with carry forward losses, avoidance of Div 7A, inappropriate access to low income tax offsets or other benefits, etc), the taxpayer will be rated as higher risk.

**Date of effect and review**

The draft guidelines have been co-designed with industry representatives and have been issued as a working draft for ongoing public consultation. The ATO said the draft guidelines will be applied from the 2014-15 income tax year. The ATO said the guidelines will be reviewed during the 2016-17 year, subject to the possibility of judicial guidance pending an appropriate test case being identified.
ATO speech: global tax evasion

In a recent speech, DCT Mark Konza said the ATO has "broken new ground by working closely with a number of other countries' tax administrations to pool our knowledge of the global operations of some multinational enterprises and jointly analyse whether their tax planning complies with existing laws". He said the ATO saw this type of joint action "as being an integral part of the solution to base erosion and profit shifting – whether or not the international tax laws need to be improved".

Mr Konza said it may be that the existing law is not sufficient to achieve the G20 goal of ensuring that "profits should be taxed where the economic activities deriving the profits are performed and where value is created". "This is why the OECD is examining the existing law to see what change is necessary", he said. Further, Mr Konza said "the work of the ATO and other tax administrations is important here also because such considerations need to be founded on a sound understanding of what is currently occurring – media analysis based on publicly available data is no substitute for a proper examination of the facts."

Through its work, Mr Konza said the ATO "has been able to inform Treasury and the OECD about the types of arrangements it sees being put in place and the pressure points in the law". Mr Konza said in Australia, this has been reflected in the government seeking to tighten the thin capitalisation rules by reducing the "safe harbour" debt limits and removing a flaw in the exemption for foreign non-portfolio dividends.

04/09/2014
TAX REFORM

Draft legislation: miscellaneous amendments

- Government has released draft legislation to give effect to various amendments to tax and super laws
- Changes are minor and technical and include removing errors, updating cross referencing etc
- Proposed amendments also address some issues in Tax Issues Entry System (TIES)
- Comments due by 22 October 2014.

Draft legislation: miscellaneous amendments

Treasury has released for comment exposure draft legislation to give effect to various miscellaneous amendments to the taxation and superannuation laws, including minor changes the following acts:

- ITAA 1936.
- GST Act.
- Taxation Administration Act 1953.
- Superannuation Act 2005.
- Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Act 2012.
- Excise Act 1901.
According to Treasury, the changes are minor and technical in nature, and include removing errors, updating cross-referencing, repealing subsections which no longer have effect, and updating lists with new information.

However, the proposed amendments also address the following Tax Issues Entry System (TIES) issues by:

- Ensuring that taxpayers are not inappropriately denied automatic CGT roll-over relief for balancing adjustments in relation to certain depreciable assets (TIES reference number 005/2011); and
- Allowing corporate limited partnerships to effectively return capital to partners without anomalous tax outcomes (TIES issue 0009/2014).

Submissions

Comments are due by 22 October 2014 and can be sent to: Manager, Law Design Practice, The Treasury, Langton Crescent, PARKES ACT 2600 - email: TaxLawDesign@treasury.gov.au. Enquiries can be directed to Robert Kelly of the Treasury on tel (02) 6263 3689.

02/10/2014