PwC's Monthly Tax Update

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

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Corporate Tax Update

Digital Games Tax Offset Rules made

The digital games tax offset is a refundable tax offset calculated at the rate of 30% of a company's qualifying Australian development expenditure on digital games, as determined by the Arts Minister, incurred on or after 1 July 2022. To support the new offset, the Income Tax Assessment (Digital Games Tax Offset) Rules 2023 have been made and set out rules to govern how companies can apply for the requisite Digital Games Tax Offset (DGTO) certificate which must be issued by the Arts Minister in order that a company can be eligible to claim the DGTO.

A key eligibility criterion is minimum qualifying Australian development expenditure of $500,000, undertaken on development activity to complete a new game (Completion Certificate), development activity to port an existing game (Porting Certificate) or ongoing development activity on one or more games in a single income year (Ongoing Development Certificate).

The procedural rules outline how companies apply for a Completion Certificate, Porting Certificate or Ongoing Development Certificate, or provisional forms of those certificates. It also specifies the rules for the processing and assessment of such applications, including seeking expert advice and inputs and ensures that sufficient information will be provided to the Arts Minister to enable the Minister to decide whether to issue a certificate under the DGTO.

ATO consultation on capital management

The Australian Taxation Office (ATO) has published a consultation paper dealing with capital management. The paper invites feedback on future needs for advice and guidance relating to publicly listed and multinational businesses undertaking returns of capital and pre-sale dividend payments to shareholders.

Comments can be made to the ATO by 11 August 2023.

Draft legislation for tax law for general insurers under new accounting standard

The Commonwealth Treasury has released draft legislation for the 2023-24 Federal Budget proposal to amend the tax law for general insurers to broadly align the treatment of general insurance contracts with the new accounting standard AASB 17 (which replaced AASB 1023 from 1 January 2023). The amendments are proposed to apply to income years starting on or after 1 January 2023, which is consistent with the general application of the AASB 17, and subject to transitional arrangements to ensure that no permanent tax differences arise.

The last day for comments on the proposed legislation was 21 July 2023.

Benchmark interest rate for Division 7A loans

The ATO has advised that the benchmark interest rate for Division 7A purposes for the 2023-24 income year for Division 7A purposes is 8.27 (previously 4.77) per cent per annum.

This benchmark interest rate is relevant to determine if a private company loan made in the 2023-24 income year is taken to be a dividend, and to calculate the amount of the minimum yearly repayment for the 2023-24 income year on an amalgamated loan taken to have been made prior to 1 July 2023.

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No R&D tax incentive for offshore R&D expenditure

The Federal Court has dismissed the taxpayer's appeal in the matter of T.D.S. Biz Pty Ltd v Commissioner of Taxation [2023] FCA 710 which considered the taxpayer's entitlement to the research and development (R&D) tax incentive in relation to expenditure it incurred on supporting R&D activities that were conducted in China. R&D activity conducted for an R&D entity solely outside Australia will only qualify if it is covered by a finding in force under paragraph 28C(1)(a) of the *Industry Research and Development Act 1986* (Cth) ("Overseas Advanced finding").

The Court found that the Administrative Appeals Tribunal (AAT) did not err in its construction and application of the R&D provisions nor deny the taxpayer procedural fairness by not extracting evidence from its witnesses.

The Commissioner of Taxation had reduced the taxpayer's refundable tax offset on the basis that there was no "Overseas Advanced finding" in respect of the overseas activities conducted in the relevant year. The taxpayer contended that the approved supporting activities were the mere supply of parts and components from China for the dominant purpose of supporting the core R&D activities, which were solely conducted in Australia, and thus an overseas finding was not applicable as no R&D activities were conducted outside Australia.

The Federal Court dismissed the taxpayer's appeal, finding that the argument advanced by the taxpayer as to error on the part of the AAT depended on a misreading of the legislative regime. The Court noted that it was not to the point that the core R&D activity took place in Australia for which a tax offset could be, and was, claimed and upheld - at all times, the issue was eligibility to claim a tax offset for the overseas component of the expenditure, for which an Overseas Advanced finding was required.

The Court found there to be no denial of procedural fairness on the basis that no submissions or evidence advanced by the taxpayer could realistically have produced a different outcome given the undisputed absence of an overseas finding.

Employment Taxes Update

Wage Trust: Decision on 'ordinary time earnings'

The Federal Court in Target Australia Pty Ltd v Shop, Distributive and Allied Employees' Association [2023] FCAFC 66 has held unanimously that the meaning of 'ordinary time earnings' for the purposes of calculating annual leave payments should include penalties that an employee would have earned for working their ordinary hours, rather than just amounts paid at an ordinary rate of pay.

Whilst this decision does not specifically deal with the definition of 'ordinary time earnings' under the *Superannuation Guarantee (Administration) Act 1992* (Cth), the reasoning and principles may be of some assistance to employers when interpreting the term in a Superannuation Guarantee context.

In particular, the Court held that the ordinary meaning of 'ordinary time earnings' refers to remuneration in relation to ordinary hours, which in this case, was established by the provisions of the applicable industrial instrument and excluded overtime. In contrast, the appellant had sought to argue that the term should be read as being limited to the ordinary or base rate payable in respect of ordinary hours of work, whereas the court's finding resulted in the inclusion of penalty rates (where paid in respect of ordinary hours) within the scope of ordinary time earnings.

The Court also made some observations as to the purpose of annual leave loading. Specifically, the Court made the observation that, whilst the historical genesis of the entitlement was to compensate for the notional loss of opportunity to derive overtime, the evolution of the entitlement in the current industrial environment has resulted in some loss of purpose. This finding can be contrasted with the finding in *Finance Sector Union of Australia v Commonwealth Bank of Australia [2022] FedCFamC2G 409* (CBA Case), which found significance in the historic purpose for the purpose of determining whether annual leave loading should be classified as ordinary time earnings (refer to this separate Alert summarising that decision).

FBT: Reasonable travel and meal allowances for 2023-24

The Australian Taxation Office (ATO) has set out in TD 2023/3 the amounts considered to be reasonable in relation to claims made by employees for the 2023-24 income year for:

- Overtime meal expenses: Reasonable amount for overtime meal expenses is $35.65.
- Domestic travel expenses: Reasonable accommodation, food and drink and incidental amounts are provided for three different salary levels.
- Employee truck drivers: Reasonable breakfast, lunch, and dinner amounts for employee truck drivers
- Overseas travel expenses: Reasonable meals and incidentals amounts for overseas travel, which vary depending on salary and overseas location.

ACT Budget - Payroll tax measures

The Chief Minister and Treasurer of the Australian Capital Territory (ACT), Mr Andrew Barr, delivered the Budget for 2023-24 on 27 June 2023. The following payroll tax measures were announced in the ACT Budget:

- From 1 July 2025, a payroll tax surcharge for large businesses will be introduced. The surcharge will be an additional 0.25 per cent on ACT wage above the payroll tax threshold for businesses with Australia-wide wages above $50 million and 0.5 per cent on ACT wages above the payroll tax threshold for businesses with Australia-wide wages above $100 million.
- Universities with an ACT campus will be exempt from the above surcharge.
- The ACT government will also provide $5 million in funding for increased payroll tax compliance activity.

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Global Tax and Trade Update

ATO's draft update to guidance on central management and control test of residency

The Australian Taxation Office (ATO) has issued a draft update to Practical Compliance Guideline PCG 2018/9 (PCG 2018/9DC1) which deals with the central management and control (CMC) test of residency for foreign incorporated companies. The draft update confirms that the ATO's transitional compliance approach ended on 30 June 2023 and provides a draft risk assessment framework against which foreign incorporated companies can self-assess to understand the likelihood of the ATO applying compliance resources to review their residency.

Read more in our Tax Alert which considers the key issues arising from the draft approach.

ATO's findings report on APA program review

The ATO has published the findings of its advanced pricing arrangement (APA) review. The review was conducted with a focus on how to best invest ATO resources in the delivery of the APA program to provide certainty to taxpayers and encourage cooperative compliance, while supporting ATO efforts to assure tax risks across the large market, proactively prevent transfer pricing disputes and manage double taxation risk in the most effective and efficient manner possible.

The ATO agrees that Bilateral APAs (BAPAs) offer a greater degree of tax certainty and are therefore preferable. In this respect, it intends to have a greater focus on dedicating resources to BAPAs. It also recognises there are circumstances where unilateral APAs (UAPAs) are appropriate and UAPAs will remain available under certain circumstances. This approach is said to closely align with the Organisation for Economic Co-operation and Development (OECD) and global best practices.

The ATO also agrees that the APA product is best suited to significant transactions with greater levels of potential uncertainty or double taxation or both.

The ATO has indicated it will refocus the scope of the APA program to transfer pricing issues, and acknowledge that the APA program entry criteria needs to be clearer and applied more consistently.

Following the consultation process, the ATO developed the following set of recommendations:

- re-focusing the scope of the APA program
- setting out clearer APA program entry criteria
- better defining collateral issues to an APA
- outlining how to address collateral issues
- resolving collateral issues
- clarifying when an APA would be exited
- setting out mutual obligations, and
- delivering governance improvements.

The ATO commits to continue to provide annual reporting statistics, perform quarterly internal reporting and to continue to accept feedback from APA participants.

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OECD update on progress of Pillar One and Pillar Two

On 12 July 2023, the OECD published a press release and Outcome Statement following the 15th plenary meeting of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS). The Outcome Statement provides an update on the status and timeline for implementing the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. While it reports that progress has been made on both Pillars, it also acknowledges that differences remain between countries. Importantly, the timeline for releasing a multilateral convention for Amount A of Pillar One has been delayed to the second half of 2023 (with a goal of it entering into force during 2025) and the standstill on Digital Services Taxes was conditionally extended. Read more in this PwC Tax Alert.

In addition, progress on ongoing reforms to the international tax system, including the Two-Pillar Solution, tax and crime, tax transparency, administration, tax and climate change, and work on indirect taxes, was reported by the OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors for their meeting on 17-18 July 2023.

Furthermore, the OECD/G20 Inclusive Framework on BEPS released the following important documents related to Pillar One and Pillar Two:

Pillar One

- A public consultation document outlining the design elements of Amount B of Pillar One. Interested parties have been invited to submit their comments on the consultation document by 1 September 2023. Amount B is intended to simplify pricing for baseline marketing and distribution activities in accordance with the arm's length principle in order to enhance tax certainty. Refer to this PwC Tax Alert which summaries the key aspects of this consultation.

Pillar Two

- A report and model treaty text to give effect to the Subject-to-Tax-Rule (STTR). Refer to this Tax Alert which outlines the purpose and operation of the STTR.
- A second set of Administrative Guidance on the Pillar Two GloBE Model Rules which include a permanent safe harbour for jurisdictions that introduce a Qualified Domestic Minimum Top-up Tax (QDMTT) and a new transitional safe harbour giving relief from the application of the UTPR (formerly known as Undertaxed Profits Rule) for fiscal years commencing on or before the end of 2025. Refer to this PwC Tax Alert for further information.
- An updated version of the GloBE Information Return which sets out a standardised information return to facilitate compliance with and administration of the GloBE Rules. The document incorporates transitional simplified reporting requirements that allow reporting of GloBE calculations at a jurisdictional level.
- Background material on Pillar Two, including a summary of the Pillar Two Model Rules and frequently asked questions, has also been updated.

Other OECD updates

Progress on other tax initiatives by the OECD include:

- new analysis on enhancing international tax transparency on real estate
- a report on unleashing the potential of automatic exchange of information for developing countries
- a report on facilitating the use of tax-treaty exchanged information for certain non-tax purposes, and
- an update to the MLI Matching Database, a new and improved version of the database supporting the application of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (BEPS MLI) which allow users to make projections on how the MLI modifies a specific tax treaty.

Indirect Tax Update

No entitlement to input tax credits

The Administrative Appeals Tribunal (AAT) has held in Semmens v FC of T [2023] AATA 2060 that a taxpayer who had not provided a valid notification of his entitlement to input tax credits within four years of the end of the relevant tax periods was not entitled to a goods and services tax (GST) refund.

In May 2021 the taxpayer lodged business activity statements for the quarterly tax periods between 1 July 2004 and 30 June 2008 (relevant periods). The Commissioner determined that the taxpayer was not entitled to a refund of the net amounts or credits claimed on his activity statements for the relevant periods as he did not notify his entitlement within four years after the end of the relevant periods as required.

The taxpayer submitted that, in accordance with Miscellaneous Taxation Ruling MT 2009/1, he had orally notified the Commissioner of his entitlement to input tax credits in a number of phone calls between March 2006 and December 2014.

The AAT affirmed the decision under review, finding that the taxpayer did not provide a valid notification of an entitlement to input tax credits within four years of the end of the relevant periods. The taxpayer's evidence in no way established that any form of relevant notifications was made.

Overhead costs apportioned to GST-free supplies entitled to input tax credits

The Federal Court considered in the matter of Hannover Life Re of Australasia Ltd v Commissioner of Taxation [2023] FCA 680 a question of whether and, if so, to what extent a life insurance company is entitled to input tax credits for certain acquisitions being commissions paid to licensed distributors and "overheads" that it made in its operation as an insurance company.

Under share reinsurance agreements with its holding company, the taxpayer reinsured part of its risk in respect of Australian policy holders with its parent company and passed on an equivalent portion of the premium income (less minor expenses). It was uncontroversial that the reinsurance with the parent entity constituted a GST-free supply. On that basis, the taxpayer claimed that it was entitled to allocate part of the GST paid on commissions and overheads that were referable to the relevant types of business and claim that allocation as input tax credits.

The Federal Court allowed the taxpayer's appeal in part. It found that the commission payments related exclusively to input taxed supplies with the result that they were not, to any extent, creditable acquisitions. The Court considered that the inquiry is not whether something was acquired in carrying on the enterprise but, rather, to what extent, if any, the acquisition relates to making supplies that would be input taxed. Accordingly, the Court found that there was no connection between the commission agreements under which the actual services were rendered and the reinsurance agreement. The relationship of the services acquired through commission sales to the GST-free acquisition supply of the reinsurance was lost and not applicable.

The Court held that the overhead acquisitions were creditable acquisitions to the extent that they related to the taxpayer's GST-free supplies, including to/from the parent entity, and that, subject to one adjustment to exclude an amount attributable to the taxpayer's input taxed investment supplies, the taxpayer's proposed methodology of apportionment was fair and reasonable in the circumstances of its enterprise.

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Payment of part of contract price was not a deposit

The AAT has held in Container Homes Designer Domain Pty Ltd and Commissioner of Taxation [2023] AATA 1815 that a payment of 50 per cent of a contract price to a taxpayer for the supply of container homes was not a deposit held as security for the performance of an obligation for the purposes of Division 99 of the *A New Tax System (Goods and Services Tax) Act 1999*, and accordingly GST was not payable upon forfeiture of the amount once the purchaser withdrew from the supply agreement.

The AAT was of the view that the inconsistent, if not incidental, descriptions of the payment as a deposit and the conduct of the parties are not a sufficient foundation for an inference to be drawn that the payment was a deposit. Furthermore, the character of the payment is to be determined at the time it was made, and not unduly coloured by the subsequent events.

Correcting GST errors

The ATO has issued a draft legislative instrument that proposes, once it is finalised, that a taxpayer will be allowed to correct GST errors that were made in working out the net amount for an earlier tax period in a later tax period in specified circumstances, instead of requesting the Commissioner to amend the assessment for the earlier tax period.

This is proposed to apply only to errors relating to an amount of GST, an input tax credit or a GST adjustment and does not apply to any error that results in the net amount for an earlier tax period being incorrect due to the operation of the Wine Equalisation Tax or the Luxury Car Tax. It also will not apply to errors that were made in working out a net amount for a tax period that started before 1 July 2012.

Comments can be made on the draft by 2 August 2023.

Personal Tax Update

Consultation on individual tax residency framework

The Government is consulting on a new, modernised individual tax residency framework based on recommendations made by the Board of Taxation in its 2019 report *Individual Tax Residency Rules – a model for modernisation.* The objective of the consultation process is to inform the development of robust principles that will underpin an enduring framework and achieve the policy intent and help to inform the Government's decision on whether to proceed with this measure.

The details of the framework and consultation questions are outlined in a Treasury consultation paper.

The new framework will provide a set of clear rules based on the key features of the Board's model that encapsulate what it means to be a tax resident of Australia. The Board had proposed a two-step approach broadly consisting of:

1. Primary tests - The 183-day test (a primary "bright line" test, under which a person physically present in Australia for 183 days or more in any income year will be a tax resident) and the Government Officials Test (to ensure that federal, state and territory government officials deployed overseas in the service of an Australian government are tax residents throughout their deployment).
2. Secondary tests for commencing/ceasing residency.

Comments on this consultation can be made up until 22 September 2023.

ATO guidance on income from use of person's fame

The ATO has issued final Taxation Determination TD 2023/4 which indicates the Commissioner's view that income from the use of an individual's fame cannot be alienated to a related entity, such as a family trust or company and that such income will be ordinary income assessable to the individual.

The ATO's view is that under Australian law, an individual with fame has no property in that fame and cannot vest or transfer any property in their fame to another entity. As such, the Determination provides that where a related entity is allowed to use a person's "fame", and receives fees from third parties for their authorised use of the fame, the fee will be taken to be derived by the individual, and not the related entity.

This can be distinguished from the case where a related entity engages the individual with fame to provide services (such as attending product launches and promotional events) for a third party) where the contractual payments by the third party to the related entity can be assessable to the related entity. However, the Determination cautions that consideration would also need to be given in these circumstances to the potential application of the personal services income rules or the general anti-avoidance provisions.

This is a departure from previous guidance relating to professional sports persons that has since been withdrawn (including PCG 2017/D11 which had proposed a "safe harbour approach" where a portion (up to 10 per cent) of such income could be alienated to the related entity).

The Determination applies to years of income commencing both before and after its date of issue. However, if individuals have already entered into an arrangement in good faith on the basis of PCG 2017/D11, the ATO will not devote compliance resources to apply the position in this Determination for the 2018-19 to 2022-23 income years.

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Private health insurance rebate income thresholds for 2023–24

The Australian Taxation Office (ATO) has reported the income thresholds that apply to access the private health insurance rebate for 2023-24. These thresholds determine rebate amounts that may apply for individual taxpayers with eligible private health insurance cover.

Passenger movements data-matching program

The ATO has Gazetted its intention to undertake a data-matching program in relation to Australian inbound and outbound passenger movements from data obtained from the Department of Home Affairs for 2023–24 through to 2025–26.

The ATO will collect an individual passenger's full name; date of birth; arrival date; departure date; passport information and status type.

The data will be electronically matched with certain sections of ATO data holdings to identify taxpayers that can be provided with tailored information to help them meet their tax and superannuation obligations, or to ensure compliance with taxation and superannuation laws.

State Tax Update

ACT Budget

The Chief Minister and Treasurer of the Australian Capital Territory (ACT), Mr Andrew Barr, delivered the ACT Budget 2023–24 on 27 June 2023.

While the deficit position ($442.7 million) for the 2023-24 financial year has increased when compared with the 2022-23 Budget, the Headline Net Operating Balance position is expected to return to surplus in the 2025-26 ($141.9 million) and 2026-27 ($212.1 million) financial years, with the fiscal position expected to be improved by over $800 million over four years.

The ACT government continued its commitment to its tax reform program, continuing the transition away from transaction-based taxes to broad-based land taxes. Further, the Budget includes a package of carefully sequenced measures to raise revenue including changes to payroll tax, the Fire and Emergency Services Levy, the Utilities (Network Facilities) Tax, and the Lease Variation Charge. All revenue measures are discussed further below.

Duties and general rates

The government has mandated that it will continue to phase out "inefficient and unfair duties", noting that since 2012-13, insurance and conveyance duty rates have decreased with the revenue foregone being replaced by incremental increases in general rates (a more stable and predictable source of revenue). Total insurance and conveyance duty revenue was estimated to account for approximately 26 per cent of the total "own source taxation revenue" at 2012-13. It is now expected to fall to 9.6 per cent of total revenue in 2026-27.

Insurance duty was fully abolished in 2017, while conveyance duty is being phased out gradually over time to minimise transitional impacts.

Key duty and general rates updates, applicable from 1 July 2023, are set out below:

- the eligible property threshold for the 'off the plan unit duty exemption' has increased by $100,000
- the lowest residential conveyance duty rate has decreased to 0.49 per cent from 0.6 per cent
- the commercial conveyance duty threshold has increased by $100,000 to $1.8 million
- second-hand hybrid electric vehicles and plug-in hybrid electric vehicles with tailpipe emissions of no more than 130g/km of CO_2 will be subject to nil duty on establishment or transfer of the vehicle, and
- the average general rates for residential (unit titled and non-unit titled) and commercial properties to continue to increase by 3.75 per cent per year.

Land tax

In 2023-24, fixed charges in relation to land tax will be increased by 5 per cent, and the land tax marginal rates that will apply to residential properties will be as follows:

- $0 to $150,000.00 - 0.54 per cent
- $150,001 to $275,000 - 0.64 per cent
- $275,001 to $2,000,000 - 1.12 per cent
- $2,000,001+ - 1.14 per cent

Land tax revenue in 2022-23 was $190.5 million, surpassing 2022-23 Budget Estimates by $18.5 million. Going forward, revenue from land tax is forecasted to increase by 13.3 per cent in 2023-24, based on compliance activities, average unimproved value increases, and increased rental property demand from international migration and student arrivals.

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Payroll tax

The Budget has introduced a payroll tax surcharge for "very large businesses" from 1 July 2025, comprising an additional 0.25 per cent or 0.5 per cent on ACT wages above the payroll tax threshold for businesses with Australia-wide wages above $50 million or $100 million, respectively. For this and further payroll tax measures, refer to the Employment Taxes section in this update.

Levies

The Police, Fire and Emergency Services Levy (formerly the Fire and Emergency Services Levy) has increased, with residential and rural properties being subjected to a fixed charge of $375 and commercial properties being subjected to rates of up to 0.8443 per cent, depending upon the average unimproved value of the property. This levy is charged on all rateable properties in the ACT and is imposed to cover costs associated with these services for the ACT.

The Safer Families Levy has also been increased by $5 to $45, as part of a staged increase of $5 per year over four years taking the Levy to $50 per household in 2024-25.

Utilities Network Facilities Tax

The Government is set to increase the Utilities Network Facilities Tax rate by 2.5 percentage points above the Wage Price Index for the year ending 31 March 2024. This tax is paid by owners of a utility network facility that is installed on or under land in the ACT. Utility networks include networks for transmitting and distributing electricity, gas, sewage, water, and telecommunications.

Betting Operations Tax

The Betting Operations Tax determined rate has been increased to 25 per cent (from 20 per cent). The Betting Operations Tax is payable by all betting operators whose net betting revenue exceeds the tax-free threshold of $150,000 in a financial year.

Lease Variation Charge

A Lease Variation Charge is applied when a Crown lease holder receives permissions from the ACT government to vary their lease to enable new or additional development. This charge is partially designed to capture windfall gains, given the significant increases in land value over time.

From 1 July 2023, the charge for varying a Crown lease so that the number of dwellings on the unit titling are specified (i.e. where the lease previously did not specify the number of units) will be increased to $40,000 per dwelling (from $30,000 in 2022-23). This is expected to be incrementally increased over the next five years to $55,000 per dwelling.

Further, charges have been updated from 1 July 2023 onwards for variations to increase the number of residential dwellings permitted in the Crown lease, and variations to increase the maximum gross floor area of building on the land under a commercial or industrial lease. This is to reflect inflation in market values.

NSW Land tax: Exemption for land used for approved childcare and education services

In *Mourched & Anor v Chief Commissioner of State Revenue (NSW)* [2023] NSWSC 668 the NSW Supreme Court considered the taxpayer's right of appeal in relation to whether land used as a place where children were educated or cared for attracted the land tax child care exemption under section 10(1)(u) of the *Land Tax Management Act 1956* (NSW). For the exemption to apply, the parcel of land must be the place where the actual conduct of educating or caring for children in an approved facility takes place.

In this case, one parcel of land was used as a childcare centre and clearly exempt, while on the second parcel, there was wastewater treatment and septic that was necessary for the operation of the childcare centre and for which there was a development application to build a commercial car park, for which the Commissioner issued a land tax assessment.

The Court found that the Appeal Panel was correct in refusing the taxpayer's leave to appeal in the circumstances and nor was the Appeal Panel in error in upholding the Tribunal's decision that it was not satisfied on the balance of probabilities that the second parcel of land was solely used as a place where children were educated or cared for. The use of the land was a question of fact, and even when the facts were examined, the Tribunal's conclusion was not shown to be in error. Accordingly, there is no right of appeal to the Supreme Court from such a determination.

Superannuation Update

Draft guidance on how non-arm's length income rules interact with CGT provisions

The Australian Taxation Office (ATO) has issued draft Taxation Determination TD 2023/D1 which considers how the non-arm's length income (NALI) and capital gains tax (CGT) provisions interact to determine the amount of a superannuation fund's statutory income that is NALI.

According to the draft determination, an amount of statutory income for the purposes of the NALI provision (i.e. subsection 295-550(1) of the *Income Tax Assessment Act 1997* (Cth)) can include a part of the net capital gain. The draft determination explains that where a capital gain arises as a result of a non-arm's length dealing, the NALI is determined by reference to the amount of the non-arm's length capital gain, being the capital proceeds less the cost base arising from the scheme in which the parties were not dealing at arm's length. This non-arm's length capital gain is subject to the relevant CGT market value substitution rules (if any) and is then reduced by any attributable deductions to calculate the non-arm's length component.

Specifically, the draft determination provides guidance as to how to calculate the "amount" of statutory income that is NALI where a superannuation fund makes a capital gain as a result of non-arm's length dealings. The draft determination provides a number of practical examples to demonstrate these calculations.

A number of alternative views are also expressed in the draft which are not accepted by the Commissioner.

The last day for comments on the draft was 28 July 2023.

Constitutional challenge of a superannuation commutation notice

The Administrative Appeals Tribunal (AAT) has affirmed the Commissioner's "transfer balance determination" in the matter of Stern v FC of T [2023] AATA 2010.

The taxpayer had two 'capped defined benefit income streams' (i.e. defined benefit pensions) from two different schemes. The Commissioner concluded the taxpayer's superannuation transfer balance exceeded the transfer balance cap of $1.6 million (across several superannuation schemes). The transfer balance determination was accompanied by a "default commutation notice" which obliged a superannuation income stream provider to commute (pay out in a lump sum) the amount of the excess.

The Tribunal rejected the taxpayer's argument that the discretion granted to the Commissioner in section 136-10(1) of Schedule 1 of the *Taxation Administration Act 1953* (Cth) to issue an excess balance determination requiring commutation of the pension was only capable of exercise if requested by the authorised holder of the superannuation interest because to construe it otherwise would cause it to be "a law with respect to the acquisition of property otherwise than on just terms" and be contrary to section 51(xxxi) of the Australian Constitution.

The taxpayer also claimed that the discretion was conditional upon consulting the individual taxpayer over their preference regarding commutation or incurring excess transfer benefit tax. The AAT did not accept that the Commissioner was required to provide any consultation beyond that required in the legislation.

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Legislative Update

Federal Parliament resumed on 31 July 2023. No tax or superannuation related Bills have been introduced since our last edition of the Monthly Tax Update.

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

- the Treasury Laws Amendment (Military Superannuation Benefits) Regulations 2023 which make consequential amendments to some aspects of tax and superannuation law relating to certain military invalidity benefits.
- the Taxation Administration (Reporting by Electronic Distribution Platform Operators) Legislative Instrument 2023 which replaces the default annual reporting period with six-monthly reporting periods for operators of electronic distribution platforms that are required to report information about certain supplies made through their platforms to the Australian Taxation Office.
- the Taxation Administration (Defence Related International Obligations and Other Matters – Indirect Tax Refunds) Determination 2023 which allows the Minister for Defence to make specific decisions to provide refunds of indirect tax paid in relation to certain acquisitions made by members of visiting forces of Japan, the Independent State of Papua New Guinea, the Republic of Singapore and the United States of America engaged in defence-related activities.
- the Notice of Intention to Propose Customs Tariff Alteration (No 2) 2023 which advises of the alteration to extend the temporary decrease in duties for goods imported from Ukraine to the end of 3 July 2024.
- the Notice of Intention to Propose Customs Tariff Alteration (No 3) 2023 which advises of a duty rate of "Free" to goods for use in connection with an international sporting event to which the Australian Government has agreed to provide a customs duty concession.
- the Customs Legislation Amendment (Status of Forces Agreements) By-Laws 2023 (Amendment By-Laws) which enables relevant goods such as motor vehicle, personal effects, furniture and household goods, imported into Australia by members of a Japan Visiting Force to be eligible for the concessional customs duty rate of "Free", provided certain conditions are met.
- the Taxation Administration (Remedial Power - Remission of Charges and Penalties) Determination 2023 which clarifies the Commissioner of Taxation's power to make remission decisions in relation to the general interest charge, the shortfall interest charge and failure to lodge penalties for classes of entities, as well as in circumstances where a charge or penalty has not yet become due and payable (but may become due and payable in the future). This will continue the long-standing practice of providing remission in cases of:
  - remissions as an administrative response to a natural disaster or other serious and external adverse event impacting the community
  - low value or low risk remissions, and
  - agreement-based remissions, where a remission is agreed to prior to the relevant liability arising.

Parliament next resumes for the Spring sittings on 31 July 2023.

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Other News Update

Draft legislation for proposed small business energy incentive

The Commonwealth Treasury released for consultation draft legislation for the proposed Small Business Energy Incentive which was announced in the 2023-34 Federal Budget.

Under this proposal, small and medium businesses (i.e. those with an aggregated annual turnover of less than $50 million) have access to a temporary bonus deduction equal to 20 per cent of expenditure (capped to a maximum of $100,000) on eligible depreciating assets or improvements to existing depreciating assets that support electrification or more efficient energy use. Some types of assets and expenditure are ineligible for the bonus deduction even where they would otherwise meet the requirements. This includes, among other things, assets and expenditure on assets that can use fossil fuel, or which have the sole or predominant purpose of generating electricity (such as solar panels), and motor vehicles (including hybrid and electric vehicles).

The Small Business Energy Incentive is temporary and will apply where the eligible asset is first used or installed ready for use, or the improvement cost incurred, between 1 July 2023 and 30 June 2024.

CGT improvement threshold

The Commissioner of Taxation has determined the capital gains tax (CGT) improvement threshold, used to determine when a capital improvement to a pre-CGT asset is a separate asset and when a CGT rollover may be available for a capital improvement. The threshold has been set at AUD 174,465 for the 2023-24 income year.

Draft legislation for deductible gift recipient status for community foundations

The Commonwealth Treasury released for consultation draft legislation to give effect to the 2022-23 October Budget proposal to allow deductible gift recipient status for community foundations.

The exposure draft legislation proposes:

- a new general DGR category in the income tax law for "community charity funds". The Minister has the power to declare an entity a community charity fund where it satisfies certain criteria, and
- a compliance regime under which the Minister must make guidelines for the operation of community charity funds, including administrative penalties in circumstances where trustees or directors' fail to comply.

The government proposes to consult separately on the proposed ministerial guidelines.

ATO's motor vehicle data-matching program

The ATO has commenced a new data matching program under which it will collect motor vehicle registry data from state and territory motor vehicle registry authorities for 2022-23 through to 2024-25 financial years.

The data will be acquired and matched to ATO data holdings to identify relevant cases for administrative action, determine a tax compliance risk profile of taxpayers buying, selling or acquiring motor vehicles and provide the ATO with information to deliver products and tailored education strategies to support taxpayers in managing their tax obligations, and identify taxpayers at risk of not complying with their tax or superannuation obligations. It will also be used to identify cases for investigation of taxpayers of interest, such as sellers, licenced dealers, fleet managers, leasing companies or representatives of these taxpayers to determine if the use of interposed proxy ownership is used to conceal the real accumulation of wealth.

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No deduction for acquisition of interest in mining lease

The Administrative Appeals Tribunal (AAT) held in Richmond and Commissioner of Taxation [2023] AATA 1915 that payments associated with the purchase of an interest in a joint venture through a farm-in agreement was on capital account and not deductible to the taxpayer under either the general deduction provision or the capital allowance provisions.

The taxpayer, who carried on a business of exploration and prospecting, was a 10 per cent owner of a Western Australian mining lease which was the subject of a joint venture agreement to which the taxpayer and another were parties. In broad terms, the taxpayer acquired a greater interest in the joint venture through a farm-in agreement. Pursuant to the agreement the taxpayer paid an amount for the other party to make "Confidential Information" available to the taxpayer and agreed to incur a minimum amount of "Exploration Expenditure" on the tenement which would give him the option to solely fund exploration expenditure to define a minimum amount of mineral resources following which he could exercise the option to acquire the 75 per cent interest in the tenement.

The AAT rejected the taxpayer's arguments that the amount paid in respect of the agreement was deductible as the payment was a payment for a right of exclusive use of and access to the tenement and those rights were limited by time and thereby not enduring. The AAT found that the payment made by the taxpayer was on capital account. The fact that under the farm-in agreement the taxpayer may have acquired some right to access, or that he may have been entitled to receive certain information, did not alter the fundamental character of the payment as being for the eventual purchase of a 75 per cent interest in the income-producing asset. Insofar as the taxpayer may have acquired those rights to access and information under the agreement, they were ancillary to, and for the purpose of, facilitating the sale of the interest in the joint venture to the taxpayer, which was inherently of a capital nature.

The Tribunal also rejected the taxpayer's alternative arguments that the payment was deductible under the capital allowance provisions as the payment did not result in the taxpayer having a depreciating asset, but rather a CGT asset.

Draft guidance on Commissioner's discretion regarding "control"

The ATO has released draft Taxation Determination TD 2023/D2 which provides draft guidance on issues arising from the administration of the Commissioner's discretion in section 328-125(6) of the *Income Tax Assessment Act 1997* (ITAA 1997) on when an entity does not "control" another entity.

Where an entity has a control percentage between 40 and 50 per cent in a test entity, section 328-125(6) provides discretion to the Commissioner to determine that the entity does not control the test entity. This is relevant to work out the test entity's aggregated turnover which includes the annual turnover of another entity that is "connected with" the test entity - a test which is based on control as defined.

The statutory condition for exercising the Commissioner's discretion requires that the Commissioner positively conclude that there is actual control by a third entity or entities. It is not sufficient to merely show that the first entity is not a controller.

The principal concern considered by the draft Determination is to provide guidance on the following specific issues relating to the concept of 'control' which the ATO has had to consider in administering the Commissioner's discretion:

- requests for the Commissioner's discretion to be exercised where a third entity has sole or primary responsibility for day-to-day management of the affairs of the test entity, but holds relatively insignificant or no interests in the income or capital of the test entity, or in shares carrying voting rights (if the test entity is a company), and
- applicants suggesting that their control percentage interests of between 40 and 50 per cent should be disregarded because the remaining holders of interests in the test entity will together necessarily control the entity, irrespective of their number or relationship to each other.

This draft determination does not seek to deal comprehensively with the concept of "control" for the purposes of considering the Commissioner's discretion, nor the wide range of circumstances in which it will be relevant for the exercise of the Commissioner's discretion. Additional public guidance may be considered in future if there is a need to clarify the ATO's views on further discrete issues arising from the ongoing administration of the discretion.

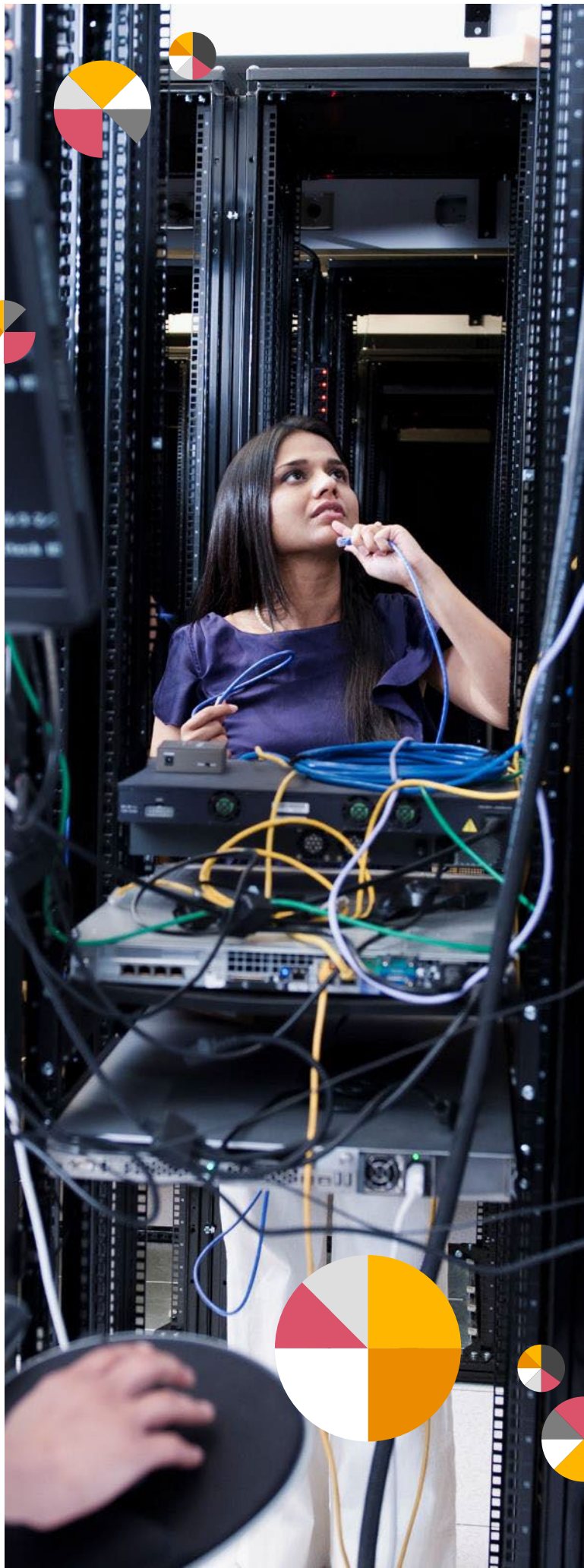
The last day for comments on the draft was 28 July 2023.

Residency disclosure for tenderers of large government contracts

From 1 July 2023, in accordance with the October 2022-23 Federal Budget measure, any entity that tenders for a Commonwealth government contract of a value higher than $200,000 will be required to disclose their country of tax residency (including their ultimate parent entity's country of tax residence), as part of the general business identifier information required in the Commonwealth Government procurement tender application process.

The key aspects of this new requirement are as follows:

- The new disclosure requirement applies to all businesses (not just Australian businesses) tendering for a Commonwealth Government procurement contract.
- If an entity has multiple tax residencies, each of these countries of which it is a tax resident will need to be disclosed. Tax tie-breaker rules are not relevant for these disclosure purposes.
- An entity's tax residency will not be used to exclude a potential supplier from participating in a procurement, nor will it be used to exclude a tenderer from further consideration in a procurement evaluation process.



Draft determination on correcting fuel tax errors

The ATO has issued a draft legislative instrument that proposes, once it is finalised, that a taxpayer will be allowed to correct an error that has been made in working out a net fuel amount for an earlier tax period to be corrected when a fuel tax return for a later tax period is lodged, removing the requirement for an amended assessment for the earlier period.

The draft determination is proposed to apply for errors made in working out a net fuel amount for a tax period starting on or after 1 July 2012. Comments can be made on the draft by 4 August 2023.

Refreshed ATO Charter

The ATO has issued a refreshed ATO Charter, previously known as the Taxpayers' Charter, which explains what people can expect when they interact with the ATO, the ATO's commitments to them, what the ATO asks of them, and steps people can take if they are not satisfied.

Editorial

PwC's Monthly Tax Update is produced by the PwC's Financial Advisory Marketing and Communications team, with technical oversight provided by PwC's Tax Markets & Knowledge team.

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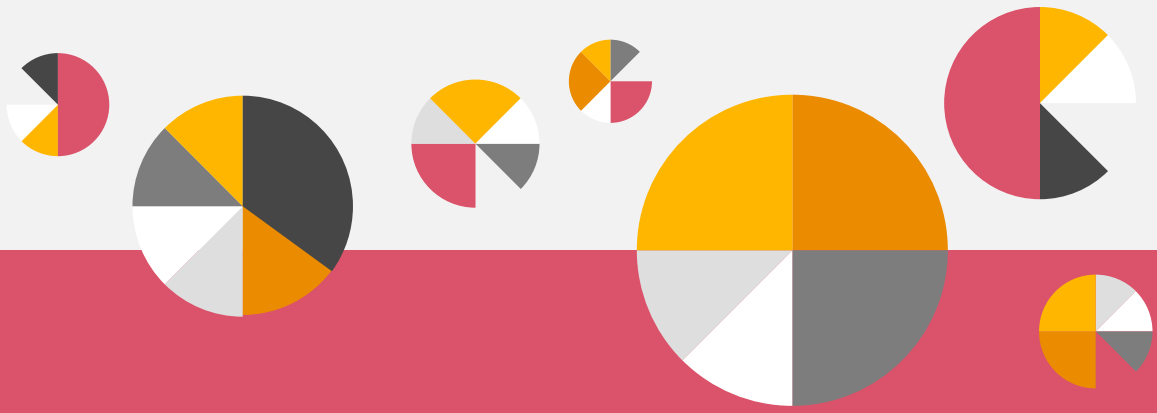

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