



Tax highlights

17 November 2014

Contents:

Key developments

- G20 meeting announcements on BEPS
- Final guidance on ATO's controversial transfer pricing 'reconstruction' powers

Weekly tax news

- Business tax
- Indirect taxes
- State taxes
- International tax

Key developments this week

G20 meeting announcements on BEPS: At the conclusion of the G20 Brisbane Summit on 16 November 2014, the G20 Leaders issued a [communiqué](#) committing to the following tax related measures:

- Finalising the G20/OECD Base Erosion and Profit Shifting (BEPS) Action Plan to modernise international tax rules in 2015, including transparency of taxpayer specific rulings found to constitute harmful tax practices
- Beginning to exchange information automatically with each other and other countries by 2017 or end- 2018, subject to completing necessary legislative procedures
- Improving transparency by implementing the [G20 High-Level Principles on Beneficial Ownership Transparency](#). This is an anti-corruption measure which requires countries to ensure that beneficial ownership information of trust and company structures is maintained onshore, that information is adequate, accurate, and current and that competent authorities (such as tax authorities) have timely access to such information. It is suggested that countries could implement this, for example, through central registries of beneficial ownership of legal persons or other appropriate mechanisms
- Deeper engagement with developing countries in the BEPS project, assisting to build their tax administration capability and their implementation of the Automatic Exchange of Information Standard. Further to this statement, the Treasurer and Prime Minister have [advised](#) that Australia will assist the Philippines to implement the automatic exchange of information.

The communiqué also mentioned that progress had been made on taxation of patent boxes. This was further supported by [comments](#) by the Treasurer welcoming recent proposals to amend certain intellectual property regimes or 'patent boxes' to ensure that they are not inappropriately used for tax avoidance (a possible reference to the recent [UK announcements](#) grandfathering some of their more generous patent box concessions).

Final guidance on ATO's controversial transfer pricing 'reconstruction' powers: Two days before the G20 leaders gathered in Brisbane to address multinationals' tax avoidance, Taxation Ruling [TR 2014/6](#) was released, representing the Commissioner of Taxation's guidance on the application of section 815-130 of the *Income Tax Assessment Act 1997* (ITAA 1997).

The Ruling drives home Australia's message that it is taking a tough stand against multinationals' base erosion and profit shifting activities, and that the ATO will use its strong and wide-ranging powers to challenge such activities.

Overview of the reconstruction provisions

Section 815-130 of the ITAA 1997 is often referred to as the 'reconstruction' provision, as it provides the Commissioner with wide powers to reconstruct actual transactions undertaken by Australian taxpayers. Such 'reconstruction' may result in transfer pricing adjustments being made on the basis of how independent parties would hypothetically have dealt with one another, as well as where the form of actual commercial or financial relations between Australian taxpayers and their international affiliates is inconsistent with the substance of those relations.

TR 2014/6 also addresses the interaction of sections 815-130 and 815-140 of the ITAA 1997. The Ruling confirms that section 815-140 requires the arm's length interest rate on inbound intra-group debt to be applied to the debt actually issued, rather than to the arm's length amount of debt – though this arm's length debt amount is important in determining the applicable interest rate.

Deloitte comments

Disappointingly, TR 2014/6 does little to allay taxpayers' concerns about the ATO's ability to reconstruct Australian taxpayers' cross-border related party transactions and creates uncertainty about how and when the reconstruction provisions will apply.

In particular, the tone of TR 2014/6 does not align with that of the OECD Transfer Pricing Guidelines' sections dealing with the recognition of actual transactions undertaken. These sections of the OECD Guidelines make it explicitly clear that, other than in 'exceptional circumstances', tax administrations should not disregard actual transactions or substitute other transactions for them. TR 2014/6 adopts a different – that is, very wide ranging – interpretation of when the reconstruction provisions will apply.

With the finalisation of ATO guidance on the reconstruction provisions, the concern from taxpayers is that these rules will encourage ATO auditors to second-guess business decisions. This takes us into a space fraught with guesswork, where the ATO will be hypothesising about what would have happened in the real world.

Taxpayers fear that ATO auditors will ask the question: "why did you do it like that?", and to answer it with "you could have made more profits if you'd done it like this, so that's what an independent party would have done and that's what we'll be taxing you on". The concern here is the tension that will arise if and when the ATO tries to tell taxpayers how to run their businesses, bringing with it the inevitable potential for differing views, greater disputes, and unrelieved double taxation.

What should taxpayers do in response to TR 2014/6?

Section 815-130 is a wide ranging and uncertain provision, and taxpayers need to be mindful when implementing, analysing and documenting their transfer pricing arrangements that the section's requirements for reconstruction are not met. Importantly, taxpayers should be aware that the reconstruction provisions can apply to arrangements implemented before the provisions' introduction, if relevant arrangements affect an Australian tax position in a year covered by the new transfer pricing rules.

Further, with Australia's transfer pricing rules being brought into the self-assessment regime, the reconstruction provisions are not reserved for just the ATO to apply. Accordingly, taxpayers need to prepare and maintain documentation to demonstrate that they have addressed the steps involved in applying section 815-130. This imposes additional – and potentially significant – compliance obligations on taxpayers, beyond those required under the previous transfer pricing rules in Division 13 of the *Income Tax Assessment Act 1936* (ITAA 1936).

In addressing sections 815-130 and 815-140 of the ITAA 1997, taxpayers should:

- Ensure pricing policies with international affiliates reflect the underlying substance of the parties' commercial or financial relations, and that such relations are consistent with those that would have been entered into by independent entities in comparable circumstances
- Undertake and document regular reviews confirming whether their operating models are consistent in practice with the form of their legal arrangements, and evaluate and document what independent parties would have done in similar circumstances. The reconstruction provisions do not require related parties to choose options that have the highest tax outcomes, but the commercial thinking behind why such options were considered and rejected should be documented
- In relation to inbound, intra-group debt, prepare and maintain documentation to demonstrate that section 815-140 has been appropriately applied (i.e. supporting both the arm's length quantum and pricing of inbound intra-group debt). This will require a detailed analysis of intra-group loans' terms and conditions
- Consider preparing Reasonably Arguable Position papers on the application of the reconstruction provisions to transactions with material transfer pricing risks – e.g. significant business restructures (especially where they lead to lower profits and tax in Australia) and material financing transactions.

If you have any questions, please contact [Cameron Smith](#) of Transfer Pricing.

[Back to top](#)

[Weekly tax news](#)

[Business tax](#)

Inspector-General releases two follow up reviews into the ATO: On 14 November 2014 the Inspector-General of Taxation (IGT) released two reports:

- [Follow up review into delayed or changed Australian Taxation Office views on significant issues \('U-turns' review\)](#) which looks at the ATO's implementations of recommendations made in the [original report](#), released 17 March 2010. The IGT found that the ATO has fully implemented three of the four administrative recommendations, while the fourth has been partially implemented. The review also took into account issues highlighted in the Federal Court litigation in [Macquarie Bank Limited v Commissioner of Taxation](#). As a result, the IGT has made two new recommendations aimed at:
 - ensuring ATO officers apply the administrative approach in [PSLA 2011/27 Matters the Commissioner considers when determining whether the ATO view of the law](#) throughout the compliance process and during settlement negotiations

- enhancing ATO officers' research and communication with taxpayers when considering 'U-turn' issues
- implementing escalation processes for independent and objective reviews of 'U-turn' disputes, and
- publishing information regarding 'U-turn' matters.

The ATO has accepted these additional recommendations. There is a residual concern that legislative change may still be needed to address 'U-turn' matters. However, the IGT is of the view that a legislative solution should only be pursued if issues continue to arise after the above two recommendations have been implemented.

- [Follow up review into the Australian Taxation Office's implementation of agreed recommendations in five reports released between August 2009 and November 2010](#) which looks at the ATO's implementation of agreed recommendations made in five separate reports;
 1. [Review of the Tax Office's administration of public binding advice](#), released 7 August 2009
 2. [Review into the underlying causes and the management of objections to Tax Office decisions](#), released 11 August 2009
 3. [Review into the non-lodgement of individual income tax returns](#), released 16 October 2009
 4. [Review into aspects of the Tax Office's settlement of active compliance activities](#), released 1 December 2009
 5. [Review into the Australian Taxation Office's administration of the Superannuation Guarantee Charge](#), released 24 November 2010.

The report found that all recommendations had been actioned, were being actioned or will be addressed in later IGT reviews.

Latest ATO rulings and determinations released: On 12 November 2014, the ATO released the following rulings and determinations:

Final transfer pricing tax ruling

- [TR 2014/6](#) – Income tax: Transfer pricing: the application of section 815 of the *Income Tax Assessment Act 1997* (ITAA 1997). This Ruling provides the Commissioner's views about the application of section 815-130 of the ITAA 1997 which specifies the relevance of the actual commercial or financial relations to the identification of the arm's length conditions. The identification of these conditions is relevant to ascertaining whether an entity gets a transfer pricing benefit from the actual conditions which operate between the entity and another entity in connection with their cross-border dealings. For further commentary see *Key developments* above.

Draft GST ruling

- [GSTR 2014/D5](#) – Goods and services tax: development lease arrangements with government agencies. This draft GST Ruling sets out the Commissioner's preliminary views regarding the GST treatment of particular transactions arising in the context of development lease arrangements entered into between government agencies and private developers.

Draft tax determinations on debt and equity interests

- [TD 2014/D18](#) – This draft TD outlines the Commissioner’s preliminary view that where a non-resident entity has decided to invest indirectly in an Australian resident company through one or more interposed entities and the final leg in the chain is a debt interest, that will not of itself be sufficient to form a conclusion under paragraph 974-80(1)(d) of the ITAA 1997 that there is a scheme, or a series of schemes, designed to operate so that the returns on the debt interest are used to fund returns on an equity interest held by another person (the 'ultimate recipient')
- [TD 2014/D19](#) – This draft TD outlines the Commissioner’s preliminary view that reference to 'the interest' referred to in the phrase at the end of subsection 974-80(2) of the ITAA 1997 is the interest held by the 'ultimate recipient' and not the interest held by the 'connected entity'.

Anti-avoidance supply of goods or provision of services by an associate :

On 14 November 2014 the ATO released [ATO ID 2014/34](#) (ATO ID) which confirms that subsection 82KK(2) of the *Income Tax Assessment Act 1936* (ITAA 1936) can have application to a loss or outgoing that a taxpayer incurs in respect of the provision of legal services by an associate. The ATO ID fact scenario outlines that:

- Legal services were provided to the taxpayer by an associate in the 2014 income year
- The invoice by the associate for the legal services was issued in the 2014 income year
- The loss or outgoing by the taxpayer relating to the legal services was, but for the application of the provision, incurred in the 2014 income year
- The taxpayer was on an accruals basis of accounting
- The provision of legal services is a provision of service, and
- All other relevant preconditions were satisfied.

As a result the anti-avoidance provision of subsection 82KK(2) of the ITAA applied to the taxpayer.

Tax file number – proof of identity – individuals and businesses resident outside of Australia:

The ATO has released details of the [proof of identification documents](#) required for individuals, companies, partnerships, trusts, and other organisations seeking registration of tax file number.

[Back to top](#)

Indirect taxes

GST – ATO requests contact from inbound tour operators by 10 December 2014: The ATO has released a [Decision Impact Statement](#) (DIS) about the decision of the Full Court of the Federal Court in *ATS Pacific Pty Ltd v Commissioner of Taxation* [2014] FCAFC 33, following the High Court’s recent [refusal](#) to grant the taxpayer special leave to appeal against the Full Court’s decision.

The taxpayer is an inbound tour operator that entered into contracts with non-resident travel agents relating to the provision, in Australia, of the various components of a tour package, by Australian providers to non-resident tourist clients of the non-resident travel agents. The components include accommodation, transfers, car hire, entry to events/attractions, meals, etc. The dispute with the Commissioner centred on the characterisation, for GST purposes, of the supplies made by the

taxpayer to the non-resident travel agents.

The Full Court held that the supply made by the taxpayer in each case was a single, taxable supply of a promise to ensure that the tour components were provided to the non-resident tourists. The Full Court concluded, contrary to the finding of the judge at first instance, that the taxpayer did not also make a separate, GST-free supply of an arranging service to the non-resident travel agent. The Full Court held that if arranging services were supplied, they were ancillary or incidental to the supply of the promise.

The DIS sets out the ATO's view that:

- The decision relates to all inbound tour operators who are engaged by non-resident travel agents to enter into contracts with Australian providers, **as principal**, for the provision of tour components to non-resident tourists
- The decision has no implications for inbound tour operators who are engaged by non-resident travel agents to enter into contracts with Australian providers, **as the non-resident travel agent's agent**, for the provision of tour components to non-resident tourists (and the resident travel agent has rights against the provider if a component is not provided to a tourist).

The DIS includes a request for all inbound tour operators who have transacted as principal, and who have an outstanding GST liability because they have treated all or part of their supplies as being GST-free, to contact the ATO by 10 December 2014 to resolve the amount owed. The DIS suggests that timely voluntary engagement with the ATO will be taken into consideration in relation to the application of GIC and penalties.

The DIS also requests all inbound tour operators who consider that the Full Court's decision does not affect them (because they have transacted as agent) to contact the ATO by 10 December 2014.

GST and crowdfunding: The ATO has released [information](#) on the GST treatment of crowdfunding for a promoter operating in Australia. Crowdfunding involves using the internet and social media to raise funds for specific projects or particular business ventures. The ATO information discusses the GST treatment according to the type of crowdfunding model used to attract funding (i.e. donation-based, reward-based, equity-based or debt-based funding) and provides examples.

[Back to top](#)

[State taxes](#)

Amendment of Payroll Tax Rebate Scheme - NSW Bill awaiting Assent: On 12 November 2014 the *Payroll Tax Rebate Scheme (Jobs Action Plan) Amendment (Fresh Start Support) Bill 2014 (No 2)* (the Bill) passed the Legislative Council and is now awaiting Assent. The Bill amends the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* to provide for an additional payroll tax rebate in respect of the employment of persons whose employment with particular employers has been terminated because of redundancy between 1 January 2014 and 30 June 2015. The additional rebate is a one-off amount of \$1,000, available to employers at the first anniversary of an eligible employee's employment start date. The amendments outlined in the Bill will commence on the date of Assent.

[Back to top](#)

International tax

German parliament approves draft bill that includes anti-hybrid rule: On 7 November 2014, Germany's upper house of parliament approved a draft tax bill that includes a new anti-hybrid rule and several other tax related measures. The proposed changes include:

- **Anti-hybrid and anti-double-dip rule:** The proposed anti-hybrid rule would disallow a deduction of business expenses for German tax purposes in two situations:
 1. To the extent the corresponding income is not included for tax purposes at the level of the direct or indirect recipient of the payment; or
 2. To the extent the income is treated as being tax exempt at the level of the recipient.

In both cases, the non-inclusion would have to be based on a mismatch relating to the underlying debt instrument, e.g. in the case of a hybrid instrument that qualifies as debt at the level of the German borrower and as equity at the level of the foreign recipient. In addition, a proposed "anti-double-dip rule" would disallow a deduction for German tax purposes to the extent there is a deduction for tax purposes for the same expenses in another jurisdiction. The proposed rules would become effective for the fiscal year in which they are formally published. *Comment: The introduction of the anti-hybrid rule and the anti-double dip rule would exceed the recommendations of the OECD and would have broad scope of application.*

- **Capital gains from the sale of portfolio shareholdings would no longer qualify for the 95% participation exemption**

For further information on the proposed changes, please click [here](#) to view the Deloitte Germany Tax Alert.

BEPS Central: For a one-stop shop for information on the OECD BEPS Project, with links to all the official documents and Deloitte's comments, visit Deloitte [BEPS Central](#).

Dbriefs Bytes: Deloitte Dbriefs Bytes is a short weekly video summary of the significant international tax developments impacting the Asia Pacific region – click to view the latest [Dbriefs Bytes](#).

Back to top

Contacts



David Watkins

Partner – Tax Services

Email: dwatkins@deloitte.com.au

Tel: +61 (0) 2 9322 7251

This publication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively the “Deloitte Network”) is, by means of this publication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this publication.

This document and the information contained in it is confidential and should not be used or disclosed in any way without our prior consent.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/au/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

About Deloitte

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and deep local expertise to help clients succeed wherever they operate. Deloitte’s approximately 170,000 professionals are committed to becoming the standard of excellence.

About Deloitte Australia

In Australia, the member firm is the Australian partnership of Deloitte Touche Tohmatsu. As one of Australia’s leading professional services firms, Deloitte Touche Tohmatsu and its affiliates provide audit, tax, consulting, and financial advisory services through approximately 5,400 people across the country. Focused on the creation of value and growth, and known as an employer of choice for innovative human resources programs, we are dedicated to helping our clients and our people excel. For more information, please visit our web site at www.deloitte.com.au.

Liability limited by a scheme approved under Professional Standards Legislation.

Member of Deloitte Touche Tohmatsu Limited

© 2014 Deloitte Tax Services Pty Ltd.