



## Tax highlights

2 June 2014

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### Key developments this week

**Transfer Pricing Insights webinar:** The ATO recently released its first guidance on the application of the new transfer pricing rules. Two draft Taxation Rulings (TRs) and Practice Statements were released that detail the ATO's views on its power to reconstruct transactions between related parties, the penalties applicable to transfer pricing adjustments and transfer pricing documentation requirements.

Deloitte recently held a webinar featuring Michael Jenkins, Assistant Commissioner, ATO and specialist partners from Deloitte's National Transfer Pricing practice. The webinar provided the opportunity for a number of questions to be asked to Michael and to challenge the ATO's interpretation in some instances on:

- Practical changes to existing transfer pricing documentation requirements
- New steps that public officers need to take prior to making tax return declarations
- Circumstances in which the ATO will seek to ignore transactions put in place by taxpayers and reconstruct their international related-party dealings (including debt/equity structures)
- How the new penalty rules affect transfer pricing risk management and practice.

Click [here](#) to view the webinar.

**Bills introduced into Parliament last week:** The following Bills were introduced into the House of Representatives last week:

- **Tax Laws Amendment (Implementation of the FATCA Agreement) Bill 2014:** This Bill proposes to require Australian financial institutions, from 1 July 2014, to collect information about their customers that are likely to be taxpayers in the US and to provide that information to the Commissioner who will, in turn, provide that information to the US Internal Revenue Service
- **Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill 2014:** This Bill includes proposed amendments to:
  - The *Medicare Levy Act 1986* to increase the Medicare levy low-income thresholds. This measure applies to the 2013-14 income year and later income years
  - Introduce new legislative protection provisions for taxpayers who self-assessed relying on unenacted measures which will not proceed. Broadly, the proposed

measure has retrospective effect for statements made by a taxpayer from the date the announcement for the unenacted measure was 'on foot' until 14 December 2013, and

- Introduce an integrity rule to address dividend washing amendments. This measure applies to distributions made on or after 1 July 2013.
- **Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014:** This Bill includes proposed amendments to limit the immediate deduction in section 40-80 of the *Income Tax Assessment Act* (ITAA 1997) for the cost of mining, quarrying and prospecting rights and information first used for exploration to:
  - Mining rights and mining information acquired from an Australian Government authority
  - Geological and geophysical data packages acquired from mining information providers, or
  - Newly created mining information.

This measure applies to transactions to acquire mining rights and mining information entered into after 7.30 pm AEST, 14 May 2013.

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## Weekly tax news

### Business tax

**Bills on the move:** The following Bills were passed by the House of Representatives on 28 May 2014:

- **Tax Laws Amendment (Temporary Budget Repair Levy) Bill 2014 and 14 related bills.**

**Foreign pension funds – access to managed investment trust (MIT) withholding tax regime – administrative treatment:** The ATO has [released](#) its administrative treatment in relation to the proposed amendments to allow foreign pension funds to access the MIT withholding tax regime, which was previously [announced](#) by the former Government on 13 February 2013. The measure proposes that fund payments made by a MIT are subject to a final withholding tax rate of 15% where the payments are made to a resident of a country with an effective exchange of information agreement with Australia. Fund payments made to residents of non-exchange of information countries are subject to a final tax withholding rate of 30%. The amendment will apply retrospectively from 1 July 2008.

The ATO has advised that they will accept tax returns as lodged during the period up until the proposed law change is passed by Parliament. Once the legislation is enacted, taxpayers will need to review their positions for prior returns lodged back to 2008-09 income year.

Taxpayers who:

- Applied the law in accordance with the changes do not need to do anything
- Have not applied the law in accordance with the changes can seek amendments and if a reduction in liability results, interest on overpayments will be paid if applicable.

#### **Taxation Determination (TD) released:**

- [TD 2014/12](#): This TD sets out the accounting principles a financial report must be prepared in accordance with in order to satisfy sections 230-150(1)(a), 230-210(2)(a), 230-255(2)(a), 230-315(2)(a) and 230-395(2)(a) of the ITAA 1997. (These sections deal with elections in respect of the taxation of financial arrangements). Broadly, the TD states that the financial report must be prepared in accordance with those accounting standards and authoritative pronouncements of the Australian Accounting Standards Board which are relevant to financial arrangements. Previously issued as [TD 2013/D8](#).

#### **Capital support payments – TD scheduled for release on 4 June 2014:**

- TD 2014/14: Are the capital support payments described in this Determination deductible under section 8-1, section 40-880, section 230-15(2) or section 230-15(3) of the ITAA 1997? Previously issued as [TD 2014/D7](#).

**Business Communicator – May 2014:** The ATO has [released](#) the latest edition of Business Communicator. This month's issue includes:

- Software development industry tax ruling
- R&D tax incentive: related party transactions
- Non-resident GST obligations.

**Banking on Tax:** The Deloitte Banking on Tax publication is a quarterly newsletter covering the core tax issues that affect the banking industry. The latest edition is now available and includes articles on:

- [Recent global developments in cash management](#)
- [Issue of Basel III compliant capital instruments by mutual ADIs](#)
- [Board of Taxation discussion paper on debt/equity rules](#)
- [GST and the use of credit cards outside Australia](#)
- [OECD BEPS paper on hybrids and additional Tier 1 capital](#)
- [White Paper on tax reform](#)
- [Australian IGA for FATCA signed and new entity account onboarding delayed.](#)

Click to view the latest edition of [Banking on Tax](#).

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#### **[Indirect taxes](#)**

**Bills introduced:** The [Excise Tariff Amendment \(Product Stewardship for Oil\) Bill 2014](#) and the [Customs Tariff Amendment \(Product Stewardship for Oil\) Bill 2014](#) were introduced into the House of Representatives on 29 May 2014. The Bills amend the *Excise Tariff Act 1921* and the *Customs Tariff Act 1995* respectively to increase the excise duty and excise-equivalent customs duty on petroleum-based oils, greases and their synthetic equivalents from 5.449 cents to 8.5 cents per litre or kilogram. The increases are proposed to take effect from 1 July 2014. As announced in the 2014-15 Federal Budget, the rate increases are aimed at making the Product Stewardship for Oil (PSO) Scheme cost neutral. The Scheme comprises a levy-benefit system, aimed at encouraging increased collection and recycling of used oil in Australia by providing used oil recyclers with product stewardship benefit payments.

## **GST status of supplies of newly constructed strata lot residential premises – change to ATO**

**view:** The ATO has withdrawn [ATO ID 2013/57](#), replacing it with [ATO ID 2014/19](#). Both ATO IDs concern the GST treatment of newly constructed residential units developed and built by an entity under an arrangement entered into with a government body, that the entity was commercially committed to as at 27 January 2011, upon the granting of new individual strata lot leases over each individual unit.

ATO ID 2014/19 provides that the newly constructed residential units cease to be 'new residential premises' upon the granting of the individual strata lot leases, with the consequence that the subsequent supplies by the developer of the residential units to home owners and investors are input taxed supplies. Prior to the withdrawal of ATO ID 2013/57, the ATO's view was that in the particular circumstances, the terms of section 40-75(2B) and section 40-75(2C) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) operated in such a way that the supplies of the residential units that were made upon the grant of the strata lot leases were to be disregarded, such that the developer's sales of units to home owners and investors would be taxable supplies of 'new residential premises'.

Critical to the ATO's view in ATO ID 2013/57 was that section 40-75(2B) of the GST Act had no application, based on the ATO's finding that the lodging of the strata leasehold plan and obtaining grants of the individual strata lot leases was independent of the development arrangement between the developer and the government entity. In ATO ID 2014/19 however, the ATO treats the arrangement as including the lodging of the strata leasehold plan and the subsequent grant of the strata lot leases, on the basis that it was necessary to fulfil the intention of the parties when they entered into the development arrangement, namely that individual residential premises in the development would be sold to home owners and investors. Accordingly, section 40-75(2B) is treated as applying to the arrangement between the developer and the government entity, but subject to a transitional exception for cases where a commercial commitment had been made to a project before 27 January 2011. In effect, the ATO's view is that the provision that provides for the granting of the individual strata lot leases to be disregarded (i.e. section 40-75(2C)) does not prevail over the operation of the provision that requires that the granting of the individual strata lot leases **not** to be disregarded (i.e. transitional exception for section 40-75(2B)).

**GST Decision Impact Statement:** The ATO has released a [DIS](#) in relation to the decision of the Administrative Appeals Tribunal (AAT) in [Swanbat Pty Ltd and Commissioner of Taxation \[2013\] AATA 891](#). In that decision the AAT held that an assessment, issued by the Commissioner to recover an amount of GST that had been mistakenly refunded to the taxpayer, was defective. In 2008, the taxpayer had paid GST on supplies made to an overseas entity. In 2012, more than four years after the end of the tax period in question, the taxpayer obtained a private ruling that the supplies were GST-free and it then lodged a revised GST return for the tax period to adjust for the excess GST that it had paid. The Commissioner refunded the excess GST amount to the taxpayer, but shortly after informed the taxpayer that it was not entitled to the refund because it had failed to notify the Commissioner of its entitlement to the refund within the four year limit imposed by section 105-55 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). The Commissioner sought to recover the refunded GST amount by issuing an assessment of the net amount for the relevant 2008 tax period that included the refunded amount as 'GST on sales' made by the taxpayer. The AAT held that it was wrong for the Commissioner to assess the taxpayer for 'GST on sales' in respect of the refunded amount, contrary to the private ruling the Commissioner had issued, and that the

assessment was therefore excessive. In the DIS, the Commissioner acknowledges that his approach to recovering the GST amount from the taxpayer was inappropriate, and that in cases where a refund is mistakenly paid to a taxpayer outside of the four year period (per section 105-55), he should seek to recover the amount as an administrative overpayment under section 8AAZN of the TAA 1953.

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## **International tax**

### **Technical corrections to Australian foreign resident CGT regime – exposure draft (ED)**

**legislation released:** On 26 May 2014, Treasury released [ED legislation and explanatory material](#) setting out a proposed correction to the meaning of permanent establishment (PE) under section 855-15 of the ITAA 1997 so that foreign residents are subject to capital gains tax (CGT) in relation to CGT assets that they used in carrying on a business through a PE in Australia. Currently the meaning of PE under section 855-15 of the ITAA 1997 relies on the definition of PE in section 23AH of the *Income Tax Assessment Act 1936* (ITAA 1936), however this definition is directed at Australian residents with offshore PEs and section 855-15 of the ITAA 1997 is directed at foreign residents with an Australian PE. The amendment proposes to insert that a PE under section 855-15 of the ITAA 1997 will be within the meaning of the relevant international tax agreement or, if no treaty exists, the default statutory definition in section 6(1) of the ITAA 1936 will apply. The changes are to be retrospective and apply from the commencement of Division 855 in 2006. Submissions on the ED are due by 9 June 2014.

### **Taxation Ruling (TR) on the application of the ships and aircraft article in Australia's tax treaties released:**

- [TR 2014/2](#): This TR clarifies the circumstances in which the ships and aircraft article of Australia's tax treaties allocates Australia a right to tax amounts derived under section 129 of the ITAA 1936 by a non-resident shipowner or charterer. (Section 129 of the ITAA 1936 deems 5% of the amount paid or payable in respect of the carriage of passengers or goods shipped in Australia to be the taxable income derived by a shipowner or charterer whose principal place of business is out of Australia).

### **ATO Interpretative Decision (ATO ID) on the Australia-Canada Double Tax Agreement (DTA) released:**

- [ATO ID 2014/20](#): For the purposes of determining Australia's right to tax the remuneration of a Canadian resident employee working in Australia under Article 15 of the Australia-Canada DTA, the remuneration is deductible in determining the taxable profits of the deemed PE of the Canadian employer because the payment of the remuneration is attributable to the deemed PE under Article 7 of the Australia-Canada DTA.

**OECD BEPS Webcast:** On 26 May 2014, the OECD held a webcast on the progress of the base erosion and profit shifting (BEPS) project. The [powerpoint slides](#) and the [webcast recording](#) are now available. The webcast included an update on:

- Transfer pricing documentation and country-by-country reporting
- Transfer pricing of intangibles
- Tax treaty abuse
- The tax challenges of the digital economy, and
- Hybrid mismatch arrangements.



**UK treaty and nominee shareholders – TD scheduled for release on 4 June 2014:**

- TD 2014/13: This ruling relates to the interpretation of the Australia/UK tax treaty in respect of dividend withholding tax rates where a UK resident company held shares in an Australian company via a nominee shareholder. Previously issued as [TD 2014/D9](#).

**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](#).

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