



Tax highlights

10 February 2014

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Key developments this week

Deloitte publications on the latest international tax developments:

- **OECD's latest discussion draft on transfer pricing documentation and country-by-country reporting:** As mentioned in last week's edition of *Tax highlights*, the OECD on 30 January 2014 issued for comment a revised discussion draft of Chapter V of the OECD transfer pricing guidelines (the revised draft). This paper is focused on transfer pricing documentation requirements and country-by-country reporting. Deloitte Australia has prepared a publication which sets out Australian taxpayers' key takeaways from the revised draft – click [here](#) to view. This revised draft is also discussed in a special edition of Arm's Length Standard (Deloitte's global transfer pricing publication) – click [here](#) to view. The ATO is **expected** to release a draft taxation ruling setting out the ATO's views on transfer pricing documentation on 16 April 2014.
- **Third version of exposure draft (ED) legislation for third element of Investment Manager Regime (IMR):** As mentioned in last week's edition of *Tax highlights*, Treasury has released a [third version of ED legislation](#) for the third and final element of the IMR, which also amends already-enacted elements of the IMR. Deloitte has prepared an alert which provides an overview of the IMR, sets out changes from the previous ED and highlights issues that have not been addressed – click [here](#) to view.

Legislation proposed for introduction in the 2014 Autumn sittings (between 11 February and 27 March):

- **Tax and Superannuation Laws Amendment (2014 Measures No. 1) Bill** (proposed for introduction and passage in the Autumn sittings):
 - Phase out the net medical expenses tax offset by 1 July 2019. See the [2013-14 Budget Paper No. 2](#) and Treasurer and Assistant Treasurer's [joint media release of 6 November 2013](#)
 - To provide the ATO with the power to direct self-managed superannuation fund (SMSF) trustees to undertake education when they have contravened legislation
 - Impose administrative penalties on SMSF trustees for contravention of the superannuation legislation
 - Direct SMSF trustees to rectify contraventions of the legislation

- **Tax and Superannuation Laws Amendment (2014 Measures No. 2) Bill:**
 - To restate and standardise the special conditions (particularly the ‘in Australia’ conditions) that apply to tax exempt entities. See the [2009-10 Budget Paper No. 2](#) and Assistant Treasurer’s [media release of 14 December 2013](#)
 - To make miscellaneous amendments to the Farm Management Deposit rules. See the [2013-14 Budget Paper No. 2](#) and Treasurer and Assistant Treasurer’s [joint media release of 6 November 2013](#)
 - To clarify the restrictions on goods and services tax (GST) refunds. See the [2012-13 Mid-Year Economic and Fiscal Outlook](#) and Treasurer and Assistant Treasurer’s [joint media release of 6 November 2013](#)
 - To transfer lost member accounts to the ATO (increasing the threshold). See the [2013-14 Budget Paper No. 2](#) and Treasurer and Assistant Treasurer’s [joint media release of 6 November 2013](#)
- **Excise Tariff Amendment (No. 1) Bill and Customs Tariff Amendment (No. 1) Bill** (proposed for introduction and passage in the Autumn sittings):
 - To index tobacco excise to average weekly ordinary time earnings instead of the Consumer Price Index
 - To increase tobacco excise and excise-equivalent customs duty through a series of four staged increases of 12.5 per cent each, commencing on 1 December 2013See the [2013-14 Budget Paper No. 2](#), the [2013 Economic Statement](#) and Treasurer and Assistant Treasurer’s [joint media release of 6 November 2013](#).

Click to view the [list of legislation proposed for introduction](#).

Debate scheduled to resume in the Senate: According to the [draft legislation program](#), debate is scheduled to resume in the Senate this week on the following tax-related Bills:

- [Clean Energy Legislation \(Carbon Tax Repeal\) Bill 2013 and related bills](#)
- [Clean Energy \(Income Tax Rates and Other Amendments\) Bill 2013](#)
- [Minerals Resource Rent Tax Repeal and Other Measures Bill 2013](#)
- [Social Services and Other Legislation Amendment Bill 2013](#).

Improving tax compliance – discussion paper released: On 7 February 2014, Treasury [released](#) a [discussion paper](#) concerning the proposal to improve tax compliance by introducing formal third party reporting regimes and data matching (on 6 November 2013, the Government [announced](#) that it intended to proceed with the 2013-14 Federal Budget measure “Tax Compliance – improving compliance through third party reporting and data matching”). Under the proposed regime, the ATO will collect the following information from third parties:

- Sales of real property
- Sales of shares and units
- Sales through merchant credit and debit services
- Government grants and payments.

Submissions on the discussion paper are due on 11 March 2014.

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Weekly tax news

Business tax

Taxpayer liable for withholding tax for royalties: The Federal Court has held that a taxpayer, who was a distributor of software that was developed by a Canadian resident entity, was liable for withholding tax on payments made to the Canadian entity for a percentage of the software and template fees as the payments were considered as 'royalties' under article 12(3)(a) of the Australia/Canada Double Tax Agreement (DTA).

In reaching its decision the Federal Court held that for the purposes of determining whether the payments were royalties, it was necessary to consider whether Article 12(7) of the DTA applied to exclude the payments on the basis that the payments were for the supply of source code. The taxpayer argued that the payments should be excluded because the right to use the software was limited and neither the taxpayer nor the licensees of the software had the right to modify the source code.

The Federal Court determined that in order to ascertain the meaning of Article 12(7) of the DTA, it must be interpreted in accordance with the Vienna Convention, OECD commentary and the explanatory memorandum to the *International Tax Agreements Amendment Bill (No 2) 2002*. From this commentary, it was understood that Canada treats as royalties all types of payments for computer software, and the exclusion under Article 12(7) applies only where a program is acquired for operation by the end user and the rights acquired in relation to the supply or use of that software are no more than to enable the effective operation of the program by that end user.

The Court concluded that the payments were not excluded under Article 12(7) of the DTA 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. The payments were for the commercial exploitation of that software by the taxpayer through the right to copy the software for sale and the right to use the copyright for the purposes of developing its own template to sell in conjunction with the software and were therefore royalties – click to view [Task Technology Pty Ltd v Commissioner of Taxation \[2014\] FCA 38](#) (6 February 2014).

Consultation Hub – list of matters under consultation updated: The ATO has [updated](#) its list of matters under consultation. The current list of consultation matters and their progress is as follows:

Trusts	
Awareness and application of trust-specific anti-avoidance rules (section 100A of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) - reimbursement agreements) – developing published guidance	A draft fact sheet was sent to members of the Trust Reform and Compliance Group for comment on 9 December 2013.

Alienation of income through discretionary trust partners – consultation on TA 2013/3 for purpose of producing guidance in an online publication	UPDATED: A draft of a revised publication will be circulated to the Professional Firms' Working Group for comment prior to a further meeting of the Group in March 2014.
Small business capital gains tax (CGT) concessions and unpaid present entitlements – technical clarification of calculation of trust's maximum net asset value	Consultation is expected to occur in early 2014.
Income tax treatment of 'tax deferred' and other tax distributions for unit holders subject to CGT rules	UPDATED: The ATO is not progressing a public ruling on this issue.
Income tax consolidation	
Guidance on the application rules to the rights to future income amendments	NEW ISSUE: Five draft taxation determinations – TD 2014/2 - TD 2014/D6 were issued on 15 January 2014. Comments can be made on these drafts until 21 February 2014.
International	
Application of the new transfer pricing laws (Division 815 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997)) – consultation on new rulings and practice statements	First meeting of the Division 815 Technical Working Group held on 17 December 2013.
Treatment of forex gains and losses arising from hedging transactions for the purpose of applying the foreign income tax offset (FITO) limit – provision of further guidance	UPDATED: The draft tax ruling is due for publication on 26 March 2014.
Attribution and inter-branch derivatives – discussion of TR 2001/11 and TR 2005/11 and banking industry practice	Consultation process was agreed with the Australian Bankers Association (ABA) on 9 December 2013.
Application of Subdivision 820-D of the ITAA 1997 to ADIs and its interaction with the consolidation regime and APRA's prudential standards	The consultation process was discussed with the ABA on 11 September 2013.
Market support payments – consultation in respect of TD 2013/D3	UPDATED: A second draft TD was released on 29 January 2014; comments due on 28 February 2014
2014 International Dealings Schedule (IDS) and 2014 IDS Instructions – consultation on changes	Consultation with professional and industry bodies in progress.

Taxation of financial arrangements	
Application of recent amendments to the TOFA rules – identify and prioritise issues requiring interpretative products as a result of amendments in <i>Tax and Superannuation Laws Amendment (2013 Measures No 2) Act 2013</i>	UPDATED: Consultation now complete, interpretative products in progress; outcomes to be published in February 2014.
Capital allowances	
Income tax treatment of exploration expenditure – develop the ATO view of exploration and prospecting in the context of a rewrite of TR 98/23	Matter will be discussed with industry in early 2014
Petroleum Resource Rent Tax	
Meaning of exploration – consultation on TR 2013/D4	Final ruling expected first half of 2014
Apportionment of PRRT payments for procured services – developing published guidance	UPDATED: Completed – guidance published on the ATO website
Indirect taxes	
Inform the industry of the ATO's compliance focus in respect of the wine equalisation tax (WET) producer rebate	Extensive industry visitation program has been undertaken. Comments are due on WETR 2013/D1 on 14 February 2014. Matter will be completed by April 2014
WET earlier producer rebate – consult to determine practical difficulties	NEW ISSUE: Consultation in progress
Superannuation	
Limited recourse borrowing arrangements – in-house asset exclusion – consultation on draft legislative instrument	UPDATED: A draft legislative instrument and explanatory statement was been issued for public comment. Submissions closed on 31 January 2014.
Apportionment of expenses incurred by a superannuation entity only partly in gaining its assessable income – consultation on draft ruling TR 2013/D7	Comments closed on 29 January 2014. Consultation will continue until final ruling issued.
Advice	
Amending PS LA 2008/3 to expand the circumstances in which the ATO can provide administratively binding advice – ATO may expand the range of existing written advice product	Internal consultation led by Public Groups and International is occurring and is expected to be finalised by March 2014.

Miscellaneous	
Guidance on ensuring that a partner in a limited partnership is not subject to double taxation – guidance on administration of section 94M(2) of the ITAA 1936	Appropriate consultation partners and process are being identified.
Feasibility and potential operation of statutory remedial powers for the Commissioner of Taxation – working group will examine statutory remedial power (SRP) for the Commissioner to address technical deficiencies in the law in a manner that is favourable to the taxpayer	UPDATED: A series of meetings will be held in February and March 2014 following the establishment of a tripartite limited-life working group.
Review of the effective life of assets used in the ready-mix concrete manufacturing industry	NEW ISSUE: A draft of the effective life determined for each of the various assets will be referred to an independent review panel expected to be held in April 2014. If approved, the effective life determinations will apply to assets purchased on or after 1 July 2014.
Review of the effective life of assets used in the scientific, medical and pharmaceutical research industry	NEW ISSUE: Draft life determinations released for comment by 28 February 2014.
Compliance	
ATO approach to reviewing governance and the associated review of PS LA 2004/14 (Access to corporate board documents on tax compliance risk)	Meeting planned for early February 2014 where revised PS LA 2004/14 will be tabled and issues progressed.
Use of standardised accounting data to improve compliance case selection	NEW ISSUE: Commenced consultation with pioneering users of XBRL for financial reporting.
Feasibility of use of External Compliance Assurance Processes for basic ATO assurance work e.g. use of registered company auditors	Concept design will be progressed in February and March 2014.

ATO Interpretative Decision (ATO ID) released:

- [ATO ID 2014/1](#): This ATO ID states that where the method of accounting changes from cash to accruals basis in an income year, section 118-20 of the ITAA 1997 does not apply to reduce any capital gain made when a debt that arose from the provision of services in the previous income year is discharged.

Pre-Budget submissions – CPA and ICAA: In response to the Government's [invitation](#) for submissions from individuals, businesses and community groups on their priorities for the 2014-15 Federal Budget, the [CPA](#) and [ICAA](#) have released their submissions which include recommendations

relating to tax and superannuation, such as:

- Reducing the company tax rate
- Addressing base erosion and profit shifting
- Allowing all Australians, regardless of work circumstances, to claim a tax deduction for personal superannuation contributions
- Reviewing the level of superannuation contribution caps
- Reforming the GST by raising the rate of GST and/or broadening the GST base
- Easing the compliance burden.

New Inspector-General of Taxation (IGT) Work Program: On 9 February 2014, the IGT [announced](#) the commencement of public consultation for developing his new work program for 2014 onwards.

Some potential review topics for the new work program include:

- A taxpayer bill of rights
- The ATO's application of the general anti-avoidance rules
- The ATO's administration of the public ruling system.

Submissions are due by 21 March 2014.

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Individuals and family groups

Small business webinars: The ATO has released [webinars](#) covering tax basics for small business and include topics such as income tax deductions and concessions for small business.

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Superannuation

Bilateral agreements – superannuation obligations when an employee is working overseas:

The ATO has released [information](#) for employers which sets out their superannuation obligations when an employee is working overseas and Australia has an agreement with the overseas country addressing the issue of 'double superannuation coverage'. This refers to a situation where an eligible employee works temporarily in another country and an employer (or the employee) must make super contributions (or equivalent) under the laws of both countries for the same work.

Paying Division 293 tax: The ATO has released [information](#) on how Division 293 tax is to be paid. (Division 293 is a 15% tax on superannuation contributions of individuals earning income greater than \$300,000.)

Webinar for self-managed super fund (SMSF) trustees: The ATO has [released](#) a webinar which provides an overview of the role and responsibilities of trustees running SMSFs.

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Indirect taxes

Goods and services taxation determination (GSTD) released:

- [GSTD 2014/2](#): Sets out the Commissioner's view that, where real property is acquired following the exercise of a call option, the call option fee does not form part of the

consideration for the acquisition of the property for the purposes of the GST margin scheme. GSTD 2014/2 replaces [ATO ID 2004/729](#), which was withdrawn on 5 February 2014.

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State and Territory taxes

NSW – Mortgage duty not increased by deferral of payment for loan notes: The NSW Court of Appeal has unanimously allowed the taxpayer's appeal against the decision in *Bondi Beachside Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 21. The dispute relates to the amount of mortgage duty payable by the taxpayer in relation to secured debt and effectively confirms that the taxpayer was liable for no more than the \$5 nominal duty originally paid.

A 'no advance', deferred purchase price loan note financing structure was entered into in late 2007 in connection with the purchase of the Swiss Grand Hotel at Bondi Beach. This involved the lender subscribing for notes issued by a Special Purpose Vehicle with a total face value of about \$92 million. The lender on-lent the proceeds to the taxpayer on terms requiring the taxpayer to pay the purchase price for the notes on 3 April 2009 (although the taxpayer had the option of deferring payment until a later date). Capitalised interest was also payable. The deferred purchase price and interest was secured by several securities, including a charge over NSW assets. This charge was initially stamped with nominal duty of \$5 on the basis that it did not secure an 'advance' for the purposes of section 206(a) of the *Duties Act 1997* (NSW) (the Act). Prior to 3 April 2009 and several times after that date, the arrangements were varied to extend the due date for payment of the deferred purchase price and interest. Amendments to the Act in mid-2009 provided that additional duty was payable if securities secured 'further advances', calculated by comparing the amount secured by the securities following the 'further advance' against the amount secured when the most recent duty liability had arisen. In late 2010, the Chief Commissioner issued an assessment for mortgage duty on the full amount of the purchase price, plus capitalised interest, in respect of the notes as at 28 August 2009 (i.e. \$102.6 million).

At first instance Gzell J ruled that the extensions of the dates for payment of the deferred purchase price for the notes, where occurring after the Act was amended, amounted to a 'forbearance' of the requirement to pay the money owing, and thus were an 'advance' within the meaning of section 206(a) of the Act. His Honour found that the additional mortgage duty was to be calculated on the principal sum (i.e. \$92 million), but not on the interest that was payable (i.e. capitalised interest was not an 'advance' for mortgage duty purposes).

The Court of Appeal ruled that, in the circumstances of the taxpayer's arrangements, there was not an 'advance' by way of forbearance within the terms of section 206(a)(iii). The Court stated that for a forbearance to be an 'advance' in this context, it must result in the actual or constructive provision or obtaining of funds by way of financial accommodation. The Court found that all that relevantly occurred was that the payment date for the purchase price for the notes was amended and hence the taxpayer was granted further time to pay. Even if the extension of the date for payment gave the taxpayer a financial benefit, it did not give the taxpayer an advance in the sense of an actual or constructive provision of funds in the form of the continued use of funds equivalent to the notes' purchase price.

In relation to Gzell's J's conclusion that capitalised interest is not an 'advance' for mortgage duty purposes, the Court made obiter observations that his Honour erred in treating the requirement to pay capitalised interest differently from the requirement to pay the purchase price. In the present case however, since the deferral of the taxpayer's obligation to pay the interest also did not involve the actual or constructive provision or obtaining of funds by way of financial accommodation, there was no question of the forbearance to require payment of that amount being an advance for the purposes of section 206(a) – click to view [Bondi Beachside Pty Ltd v Chief Commissioner of State Revenue \[2014\] NSWCA 6](#) (7 February 2014).

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International tax

Foreign Account Tax Compliance Act (FATCA) Online Registration User Guide: The IRS has updated its [user guide](#) on the FATCA online registration process.

Joint Standing Committee on Treaties public hearing on tax treaties: The Joint Standing Committee on Treaties is [scheduled](#) to hold a public hearing on 10 February 2014 in Canberra on the following tax treaties:

- [Australia/Switzerland Double Tax Treaty](#) (signed on 30 July 2013 in Sydney)
- [Australia/Uruguay Tax Information Exchange Agreement](#) (signed on 10 December 2012 in Montevideo).

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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