



Tax highlights

16 June 2014

Contents:

Key developments

- Lodgment of income tax returns for 2014 income year
- PAYG withholding schedules
- Senate Committee hearing – questions concerning tax policy and tax administration

Weekly Tax News

- Business tax
- Employment taxes
- Individuals and family groups
- Non-profit organisations
- Superannuation
- Indirect taxes
- International tax

Key developments this week

Lodgment of income tax returns for 2014 income year: This [legislative instrument](#) was registered on 10 June 2014 and applies for the year of income ended 30 June 2014 (or an approved period in lieu). This instrument sets out who is required to lodge an annual income tax return and the due date for lodgment of the return.

PAYG withholding schedules: This [legislative instrument](#) was registered on 10 June 2014 and provides withholding schedules which specify the formulas and procedures to be used for working out the amount to be withheld by an entity under the pay-as-you-go (PAYG) system. This instrument applies from 1 July 2014.

Senate Committee hearing – questions concerning tax policy and tax administration: At the Senate Economics Legislation Committee estimates [hearing](#) on 5 June 2014, Committee members asked representatives from Treasury and the ATO several questions concerning tax policy and tax administration. Issues addressed included the following:

- **Interaction between company tax rate cut and paid parental leave (PPL) levy:** The Government is currently working through a series of technical design issues regarding the PPL, including the interaction between the company tax rate cut and the PPL levy. In particular, Mr Heferen (Treasury) indicated that there were some design issues that needed to be resolved in relation to the PPL levy:
 - The key issue was that the 1.5 per cent levy would not be frankable and the Government had no desire for it to cascade through the system in a situation where a company was a shareholder of another company. Mr Heferen indicated that consultation is currently underway with tax professionals about how to ensure the right amount of levy is paid while simultaneously ensuring there is no cascading and double taxation
 - A second-order design issue when considering a company's income tax instalments is whether the instalment would be based only on the 28.5 per cent company tax rate or 28.5 per cent company tax rate plus the 1.5 per cent levy
- **Future personal income tax cuts:** Senator Cormann (Minister for Finance) indicated that estimations in the Budget papers included an assumption that there would be personal income tax cuts in future years to adjust for "bracket creep" (i.e. the situation where lower income earners would progressively come within the higher income tax brackets)

- **Offshore voluntary disclosure initiative:** Mr Olesen (ATO) stated that approximately 100 people have come forward to claim an amnesty, with an additional large number of people expressing their interest
- **Section 25-90:** Mr Heferen indicated that further work is being done on the proposed integrity rule for section 25-90 of the *Income Tax Assessment Act 1997* (ITAA 1997) (regarding the deductibility of interest costs associated with the derivation of certain foreign non-assessable non-exempt income)
- **Small business prefill tax returns:** The Commissioner outlined the 'light touch return' to be adopted this year for individuals who have 'simplified tax affairs'. This will involve the ATO prefilling all of the taxpayer's income on to the return. The Commissioner indicated that the ATO is also looking at a lighter touch for small business. This would involve the small business preparing quarterly accounts using a standard business reporting format which would allow information to be sent directly to the ATO. This would allow the ATO to calculate quarterly instalments on actual results and allow the ATO to prepare the small business return for the taxpayer.

[Back to top](#)

Weekly tax news

Business tax

External Compliance Assurance Process (ECAP) pilot – further details: Further to the report in last week's *Tax highlights* on the proposed pilot of the ECAP, the Commissioner indicated in a keynote [address](#) to the Institute of Chartered Accountants Australia Practice Forum on 12 June 2014 that further details will be announced this week and the pilot is likely to commence in July 2014, starting with a small group of 32 taxpayers before going wider. Further, the Commissioner indicated that the ATO would look to set up a temporary joint steering group to seek guidance and advice through the pilot stage.

Taxation Determination (TD) TD 2014/15 released on design expenditure for research and development (R&D) purposes: This TD sets out when design expenditure incurred by an R&D entity is included in the first element of the cost of a tangible depreciating asset for the purposes of section 355-225(1)(b) of the ITAA 1997 and therefore not able to be deducted under section 355-205 of the ITAA 1997. This TD was previously released as [TD 2013/D9](#).

ATO Public Rulings Program – business tax final ruling – updated as at 1 June 2014:

Final ruling scheduled for release in the next two months	
Topic	Planned issue date
Petroleum resource rent tax: what does 'involved in or in connection with exploration for petroleum' mean?	30 July 2014

ATO Public Rulings Program – delayed final TDs: Previously, the ATO Public Rulings Program [indicated](#) that the following final TDs were scheduled to be released in June or July 2014. However, they are [now scheduled](#) to be released on a date “to be advised”:

- Five TDs on the application of the 2012 amendments to the tax consolidation rules
- Can the exemption in section 820-39 of the ITAA 1997 apply to the special purpose finance entity established as part of the 'securitised licence structure' used in some social infrastructure Public Private Partnerships?

ATO Practice Statements Program – business tax – updated as at 4 June 2014:

Practice statement scheduled for release within the next two months	
Topic	Planned issue date
Settlements: To clarify settlements policy	31 July 2014

Financial System Inquiry – interim report expected release date: The Financial System Inquiry's interim report is [expected](#) to be released on 15 July 2014. Following the release of the interim report, the Financial System Inquiry Committee will undertake a period of stakeholder consultation, which will include a second round of submissions, sector briefing sessions, public forums and stakeholder meetings.

Compliance effectiveness methodology (CEM): On 12 June 2014, the Australian National Audit Office (ANAO) released its independent performance audit report on the ATO titled [Compliance Effectiveness Methodology](#). The objective of the audit was to examine the application of the ATO's CEM in evaluating the effectiveness of key compliance activities and shaping the development of strategies to promote voluntary compliance.

The report concluded that the CEM is a sound evaluation methodology for assessing the effectiveness of the ATO's compliance activities and notes that it has been recognised by the OECD as an innovative approach that provides practical methods for systematically evaluating the impacts of compliance risk treatment strategies. However, the report notes that, in implementing the CEM as an ongoing business process from 1 July 2009, there has been a lack of strategic focus and direction on its application and outcomes, and on fully embedding the methodology into the ATO's core processes. As a consequence, the full benefits to be gained from the CEM as a means of improving the ATO's compliance strategies and treatments, resource allocation and external accountability have not been realised.

The ANAO made two recommendations with the aim of the ATO taking a more strategic approach to selecting the compliance risks to be evaluated and improving the conduct of compliance effectiveness evaluations and reporting of their results. The ATO has agreed with both of these recommendations.

Liable entities public information database – carbon pricing mechanism: The Clean Energy Regulator has [published](#) a list of entities that are potentially liable under the carbon pricing mechanism for the 2013-14 income year.

[Back to top](#)

Employment taxes

ATO Public Rulings Program – delayed draft TDs: Previously, the ATO Public Rulings Program [indicated](#) that the following draft TDs were scheduled to be released in June 2014. However, they are [now scheduled](#) to be released on a date “to be advised”:

- Is a Local Hospital network a 'public hospital' for the purposes of section 57A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986)?
- When are the duties of an employee of a government body exclusively performed in, or in connection with, a public or non-profit hospital for the purposes of section 57A(2) of the FBTAA 1986?

[Back to top](#)

Individuals and family groups

Equitable damages not received as constructive trustee: The High Court has dismissed the taxpayer's appeal against the decision of the Full Federal Court in [Howard v Commissioner of Taxation \[2012\] FCAFC 149](#) and found that the taxpayer did not receive an award of equitable damages as constructive trustee. The taxpayer was a director of a company (Disctronics) who, together with two other directors of Disctronics and two other individuals (who were not directors of the company), explored the acquisition and lease of a golf course whereby Disctronics would be an 'equity participant'. Upon agreement of the terms of the joint venture between the five individuals, Disctronics was not named as a joint venturer. The two individuals who were not directors of Disctronics subsequently acquired the golf course through a company of which they were directors. The taxpayer (and the two other directors of Disctronics) then successfully sued the other two individuals for breach of fiduciary duties and received a share of equitable damages awarded as compensation for losses sustained in the joint venture. The Federal Court held that the award of equitable damages was not assessable to the taxpayer as it was received in his capacity as a director of Disctronics. Both the taxpayer and the Commissioner appealed to the Full Federal Court, which held that the taxpayer did not receive the award of damages as a trustee for the company and was therefore assessable income in his hands. For a summary of the Full Federal Court's decision, refer to [Tax highlights 5 November 2012](#).

The issues before the High Court included:

- Whether the taxpayer received the equitable damages as constructive trustee for Disctronics. The taxpayer contended that, consistently with his fiduciary duties to the company, he could not retain the gain for himself to the exclusion of the company and therefore what he received came to him as constructive trustee for the company
- If not, whether the taxpayer had assigned the right to receive that amount such that the income was not derived by him beneficially. The taxpayer contended that the litigation agreement between the taxpayer and the other two directors of Disctronics with Disctronics effected the assignment of his right to the amount of the equitable damages and not the sum itself.

In dismissing the taxpayer's appeal, the High Court held that the taxpayer did not receive the equitable damages as constructive trustee for Disctronics because he did not receive the amount in circumstances where there was a conflict between his personal interest and his duties as a director of the company, nor did he obtain it by use or by reason of his fiduciary position. Further, the High Court

held that the litigation agreement provided for the assignment of any proceeds of the action, not for the assignment of taxpayer's right to receive equitable damages, and therefore the damages were derived by him beneficially – click to view [Howard v Commissioner of Taxation \[2014\] HCA 21](#) (11 June 2014).

Medicare levy exemption data matching program: On 10 June 2014, the Commissioner published a gazette notice containing details of a [Medicare levy exemption data matching program](#) to be conducted by the ATO. The ATO will acquire details of individuals who have been granted an exemption from paying the Medicare levy for the 2013, 2014 and 2015 income years. These details will be electronically matched with certain sections of ATO data holdings to identify non-compliance with registration, lodgment, reporting and payment obligations under taxation and superannuation laws.

ATO Public Rulings Program – individuals and family groups – final ruling – updated as at 1 June 2014:

Final ruling scheduled for release in the next two months	
Topic	Planned issue date
Matrimonial property proceedings and payments of money or transfers of property by a private company to a shareholder (or their associate)	30 July 2014

ATO Practice Statements Program – individuals and family groups – updated as at 4 June 2014:

Practice statement scheduled for release within the next two months	
Topic	Planned issue date
Deceased estates: To clarify and convert Chapter 32 of the ATO Receivables Policy into a practice statement	30 June 2014

[Back to top](#)

Non-profit organisations

Taxpayer engaged indirectly in charitable activities found to be a 'public benevolent institution': The Full Federal Court has dismissed the Commissioner's appeal against the decision of the Federal Court in [The Hunger Project Australia v Commissioner of Taxation \[2013\] FCA 693](#) and held that the taxpayer was a 'public benevolent institution' within the meaning of section 57A(1) of the FBTA 1986. The taxpayer is part of a worldwide collaboration of organisations operating under the name 'The Hunger Project' whose principal aim is the relief of hunger. The work carried out by the taxpayer included raising funds in Australia, supporting programs in developing countries and implementation of those programs through co-operation with other Hunger Project entities in program countries. The Federal Court found that a taxpayer, which carries out charitable activities indirectly as a fundraiser and does not directly provide aid or relief, qualifies as a 'public benevolent institution' within the meaning of section 57A(1) of the FBTA 1986. For a summary of the Federal Court decision, refer to [Tax highlights 22 July 2013](#).

The Full Court noted that, while there was no single or irrefutable test or definition, the ordinary meaning or common understanding of a 'public benevolent institution' includes an institution which is organised, or conducted for, or promotes the relief of poverty and distress. The Full Court was of the view that the ordinary or contemporary meaning or understanding of a 'public benevolent institution' is broad enough to encompass an institution, like the taxpayer, which raises funds for provision to associated entities for use in programs for the relief of hunger in the developing world. The fact that such an institution does not itself directly give or provide that relief, but does so via related or associated entities, is no bar to it being a 'public benevolent institution' – click to view [Commissioner of Taxation v Hunger Project Australia \[2014\] FCAFC 69](#) (13 June 2014).

ATO Public Rulings Program – non-profit organisations – updated as at 1 June 2014:

Draft ruling scheduled for release in the next two months	
Topic	Planned issue date
Special conditions for various exempt entities under Subdivision 50-A of Part 2-15 of the ITAA 1997	13 August 2014

[Back to top](#)

Superannuation

Lodgment of member contributions statements: This [legislative instrument](#) was registered on 10 June 2014 and applies for the year of income ended 30 June 2014 and later years (or approved periods in lieu). This instrument sets out the way in which superannuation providers in relation to superannuation plans (other than self managed superannuation funds) are required to lodge member contributions statements and the due date for lodgment.

[Back to top](#)

Indirect taxes

Taxpayer adequately 'notified' ATO of input tax credit entitlement: The Administrative Appeals Tribunal (AAT) has ruled in favour of the taxpayer in a dispute about whether the taxpayer had provided the Commissioner with adequate notification about the taxpayer's entitlement to unclaimed input tax credits totalling more than \$2.7 million. In doing so, the AAT set aside the unfavourable private ruling issued by the Commissioner to the taxpayer.

The taxpayer had begun a residential property development in 2004, lodging monthly activity statements (BAS) to claim input tax credits for acquisitions related to the development (the taxpayer made no sales during the development phase and thus had no output GST liabilities). The taxpayer did not lodge a BAS for December 2005 or January 2006 by the due date nor when subsequently directed by the Commissioner to do so by means of 'lodgment and payment' notices issued in February and March 2006. By June 2006 the taxpayer had been placed in receivership, and the receiver subsequently sold the partially completed development. In September 2009, the taxpayer wrote to the Commissioner reporting that the receiver had been appointed in 2006 and that the

receiver had taken possession of all of the taxpayer's records and would not return them or provide access to them. The letter indicated that the taxpayer was unable to complete and lodge the BAS for each of December 2005 and January 2006 until it could gain access to the records, and that the letter was to "provide notice that substantial GST refunds are due for these months".

Section 105-55 of Schedule 1 to the *Taxation Administration Act 1953* denies entitlement to a refund, payment or credit unless "you notify the Commissioner" of the entitlement within 4 years after the end of the relevant tax period. The present dispute centred on whether the taxpayer's letter contained sufficient information to "notify the Commissioner" that the taxpayer was entitled to the payment of input tax credits for the December 2005 and January 2006 tax periods. It was common ground before the AAT that no formal requirement applies to the content of a section 105-55 notification given to the Commissioner, and that there is no requirement to specify the amount of the claimed entitlement. Consistent with several previous Federal Court and AAT decisions, the AAT rejected the proposition that the notification must articulate the specific nature of the claimed entitlement and the circumstances under which it arose. The AAT noted that these decisions all support the apparent sufficiency of a notification that communicates a claim relating to a particular tax period in relation to a particular kind of tax liability, and none of them endorse any particular requirement for inclusion of details, grounds or circumstances in support of the claim.

The AAT noted the difficulty with the Commissioner's contention that the notification must "tell the Commissioner what **the** refund is", particularly in the absence of any requirement to specify the amount of the claimed entitlement or to set out the circumstances in which the claimed entitlement arose. The AAT went on to conclude that the taxpayer's letter did "notify" the Commissioner of the input tax credits to which section 105-55(1)(a) applied, because it specified the tax periods involved and that GST input tax credit entitlements existed. The AAT also indicated that, if it was necessary that the taxpayer's letter required more specificity in order to permit the Commissioner to be satisfied that a subsequent claim was covered by the notification, the letter also satisfied that requirement because it stipulated that the claims the taxpayer intended to make (i.e. via the BAS for each tax period) would be based on the records in the possession of the receiver.

The AAT went on to comment that it is the communication relied on as the notification that must provide the requisite information to the Commissioner, and that information previously provided to the Commissioner cannot be relied on to make up for deficiencies in the communication itself – click to view [North Sydney Developments Pty Ltd and Commissioner of Taxation \[2014\] AATA 363](#).

Luxury Car Tax Determination (LCTD) scheduled for release on 18 June 2014:

- LCTD 2014/2: What is the luxury car tax threshold and the fuel-efficient car limit for 2014-15 financial year? Previously issued as [LCTD 2013/1](#).

ATO Public Rulings Program – GST draft ruling and final determination – [updated as at 1 June 2014](#):

Draft ruling scheduled for release in the next two months	
Topic	Planned issue date
Goods and services tax: Treatment of Credit Card surcharges, EFTPOS surcharges and ATM service fees	30 July 2014

Final determination scheduled for release in the next two months

Topic	Planned issue date
Goods and services tax: do payments made by a vendor to a purchaser of real property when the rent received falls below a rental yield guaranteed by the vendor give rise to an adjustment event for the purposes of Division 19 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> ?	30 July 2014

ATO Public Rulings Program – delayed draft ruling: Previously, the ATO Public Rulings Program [indicated](#) that the GST draft ruling on development lease and similar arrangements was scheduled to be released on 25 June 2014. However, it is [now scheduled](#) to be released on a date “to be advised”.

[Back to top](#)

[International tax](#)

Taxation Ruling (TR) [TR 2014/3](#) released on permanent establishments (PE) in relation to substantial equipment: This TR sets out the Commissioner’s view that, if a company is taken to have a PE in relation to substantial equipment either under paragraph (b) of the definition of PE in section 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) or under a tax treaty, the requirement that a company “carry on a business at or through a PE” in section 23AH of the ITAA 1936 will not be satisfied unless the income is derived in actually carrying on a business at or through a PE in the foreign jurisdiction. This TR was previously released as [TR 2013/D8](#).

Joint Standing Committee on Treaties public hearing on Australia-US FATCA IGA: The Joint Standing Committee on Treaties is [scheduled](#) to hold a public hearing on 16 June 2014 on the [Australia-US intergovernmental agreement](#) (IGA) to improve international tax compliance and to implement the US Foreign Account Tax Compliance Act (FATCA).

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](#)

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