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Tax highlights

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Key developments this week

Proposed restrictions on GST refunds only to apply prospectively: On 17 February 2014, Treasury released a new set of exposure draft materials relating to the measure to restrict GST refunds in certain circumstances.

This measure was announced by the former Government in August 2012, and legislation to implement it was introduced into Parliament on 26 June 2013, i.e. Schedule 3 of *Tax Laws Amendment (2013 Measures No 4) Bill 2013* (2013 Bill). The 2013 Bill lapsed when Parliament was prorogued prior to the Federal election. In November 2013, the new Government announced that it would proceed with the measure but with some changes.

The measure involves amending the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and the *Taxation Administration Act 1953* (TAA) to overcome problems with the operation of section 105-65 of Schedule 1 to the TAA, the provision under which the Commissioner determines a taxpayer's entitlement to a refund of GST that has been overpaid as a result of the taxpayer incorrectly treating a supply or arrangement as taxable to any extent. Under the proposed measure, a new Division 142 would be inserted into the GST Act to specify the circumstances in which a refund of excess GST is allowed. In general, it would be taxpayers who would determine if they are entitled to a refund, by reference to objective conditions including whether the GST has been passed on to another entity. The Commissioner would have a residual discretion to refund excess GST in (exceptional) circumstances where the application of the new provisions to deny a refund would be inappropriate. Significantly, all GST overpayments, however occurring, would be subject to the restrictions placed on refunds by Division 142. This would include, for example, amounts overpaid as a result of a miscalculation.

The main changes proposed to the previously introduced legislation would have the effect of:

- Giving the provisions restricting GST refunds prospective application only (i.e. from the date of Royal Assent). Under the 2013 Bill, the measure was to have applied for tax periods commencing on or after 17 August 2012, subject to exceptions for refunds claimed before the date of the 2013 Bill's introduction into Parliament
- Ensuring that taxpayers are able to seek a merits review of decisions by the Commissioner to deny refunds under section 105-65. This is to address the finding of the Administrative

Appeals Tribunal in *Naidoo v Commissioner of Taxation* [2013] AATA 443 that a decision made by the Commissioner under section 105-65 was not part of the assessment process and therefore did not qualify for a merits review

- Clarifying that tax invoices are only *prima facie* evidence of amounts having been passed on to another entity to the extent that the amount of GST ascertained from the tax invoice has been paid to the Commissioner.

The closing date for submissions about the exposure draft is Friday 28 February 2014.

G20 Finance Ministers and Central Bank Governors meeting: On 22-23 February 2014, the first G20 Finance Ministers and Central Bank Governors meeting under Australia's presidency was held in Sydney. The communique from the meeting has been released and includes the following points in respect of tax reform:

- The G20 is committed to a global response to BEPS based on sound tax policy principles. Profits should be taxed where economic activities deriving the profits are performed and where value is created
- The group will continue to fully support the G20/OECD BEPS Action Plan. It is expected that effective, practical and sustainable measures to counter BEPS will start to be delivered by the G20 Leaders Summit in Brisbane (scheduled to be held on 15-16 November 2014)
- The G20 endorses the Common Reporting Standard for automatic exchange of tax information on a reciprocal basis and is expected to detail its implementation plan at the September meeting (scheduled to be held on 20-21 September 2014). The group expects to begin to exchange information automatically on tax matters among G20 members by the end of 2015
- The G20 also stated that they "stand ready to give tougher incentives" to those 14 jurisdictions (such as Vanuatu and Nauru) that have not qualified for Phase 2 of the evaluations.

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Weekly tax news

Business tax

Revenue from privatised state assets: On 19 February 2014, the Treasurer confirmed that the Government is considering making amendments to tax arrangements for privatised assets. The proposed changes would involve compensating states for loss of tax revenue after state assets have been privatised. Currently states receive tax equivalent revenue from their non-privatised assets, but once privatised the Federal Government receives the tax. By providing compensation the Federal Government hopes that this will encourage states to privatise their assets to fund new infrastructure projects.

Appeals update – *Dickinson/Fabig*: The transcript of the hearing at which the High Court refused Dickinson's application for special leave to appeal against the Full Federal Court decision in *Commissioner of Taxation v Fabig* [2013] FCAFC 99 has been released. The Full Federal Court allowed the Commissioner's appeal, overturning the Administrative Appeals Tribunal's decision in *Dickinson and Commissioner of Taxation* [2013] AATA 25 and *Fabig and Commissioner of Taxation* [2013] AATA 26 and held that capital gains tax scrip-for-scrip roll-over relief was not available to two

taxpayers who received a percentage of the consideration for the sale of shares that differed from the percentage of shares they held in the company. For more information, refer to *Tax highlights 2 September 2013*.

Taxation determination (TD) scheduled for release on 26 February 2014:

- TD 2014/1: Is the 'dividend access share' arrangement of the type described in this TD a scheme 'by way of or in the nature of dividend stripping' within the meaning of section 177E of Part IVA of the ITAA 1936? Previously issued as TD 2013/D5.

Inspector-General of Taxation (IGT) reports on reviews into the ATO's compliance approaches:
On 21 February 2014, the Assistant Treasurer released the following reports of reviews conducted by the IGT:

- Review into the ATO's compliance approach to individual taxpayers – use of data matching: The IGT found that the ATO's data matching program was generally effective in detecting instances of omitted income. However, he has made 13 recommendations which are mainly aimed at improving the timeliness and effectiveness of data matching projects. The ATO has agreed with all of the recommendations with a qualification in respect of one (relating to consideration of remission of the shortfall interest charge due to delay in commencing data matching activities)
- Review into ATO's compliance approach to individual taxpayers - income tax refund integrity program: The IGT has made 13 recommendations, some of which are aimed at enhancing the ATO's communication and engagement with taxpayers and tax agents (including better differentiation of potentially fraudulent taxpayers from those who may have merely overstated refund claims by mistake). The ATO has agreed in full with 12 recommendations and agreed in principle with the other
- Review into aspects of the ATO's use of compliance risk assessment tools: The IGT reviewed a range of risk assessment tools and has made 16 recommendations which include the adoption of a set of guidelines to assist the ATO with designing more effective risk assessment tools for the future, as well as recommendations to improve existing risk assessment tools with which taxpayers have raised the most concern. The ATO has agreed with all of the recommendations.

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Employment taxes

Payment for relinquishment of rights in profit participation plan found to be ordinary income:
The Federal Court has found that an amount received by a taxpayer to relinquish his rights in a profit participation plan on termination of his employment was deferred compensation as a reward for services as an employee and therefore assessable as ordinary income.

The taxpayer worked as an employee of Glencore International, or one of its wholly-owned subsidiaries, from 1 November 1991 to 1 January 2002 in various countries, before taking up a position with Glencore Australia on 2 January 2002. The taxpayer became a resident of Australia on 2 January 2002 and retains this status to date. From about May 1994, the taxpayer participated in a profit participation plan which granted employees of Glencore International (and its subsidiaries) the right to receive certain financial benefits. While working with Glencore Australia, the taxpayer continued to receive entitlements under the profit participation plan (and subsequent plans that

replaced it over the years). On 31 December 2006, the taxpayer's employment with Glencore Australia was terminated and he ceased to be an employee of the Glencore group of companies.

On 15 March 2007, the taxpayer executed certain documents and became entitled to receive USD160,033,328.25 (payable by quarterly instalments over a five year period) in relinquishment of "his claim to payments with respect to [profit entitlements] allocated in his name together with all preferential and ancillary rights". In his 2007 income tax return, the taxpayer treated the 15 March 2007 event as giving rise to a capital gain of AUD100,802,046 (AUD equivalent of USD160,033,328.25) less the cost base (nil) reduced by 50% as a discount capital gain.

In reaching its conclusion, the Federal Court considered the Commissioner's three alternative heads of assessability, i.e. broadly, that the USD160,033,328.25 was received as:

- Dividends or non-share dividends included in assessable income under section 44(1) of the ITAA 1936. However, the Federal Court held that the profit sharing certificates issued to the taxpayer under the profit participation plan by Glencore International were not equity interests as they were not a financing arrangement, (and therefore not non-share equity interests) in Glencore International, such that the amounts paid to the taxpayer by Glencore International could not be dividends or non-share dividends
- Deferred compensation as a reward for services as an employee and therefore assessable as ordinary income. The Federal Court considered whether the reward for services was the contractual right to be paid the amount conferred by the terms of the profit participation agreement or the money constituting the amount, and concluded it was the latter. Accordingly, the Federal Court held that the payments were deferred compensation as a reward for services rendered and derived on a receipts basis as and when it was paid to him or applied on his behalf
- Eligible or employment termination payments included in assessable income under sections 27A and 27B of the ITAA 1936 or section 82-130 of the ITAA 1997. Given the Federal Court's conclusion above, it was of the view that the payments were not made to the taxpayer in consequence of the termination of his employment.

Click to view *Blank v Commissioner of Taxation* [2014] FCA 87 (21 February 2014).

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Individuals and family groups

Appeals update – *SCCASP Holdings*: The transcript of the hearing at which the High Court refused the taxpayer's application for special leave to appeal against the Full Federal Court decision in *SCCASP Holdings Pty Ltd as trustee for the H&R Super Fund v Commissioner of Taxation* [2013] FCAFC 45 has been released. The Full Federal Court held that a resolution to distribute a capital gain from a trust was 'special income' derived by a self-managed superannuation fund (SMSF) under former section 273(6) of the ITAA 1936 even though the amount was actually not received by the SMSF or applied or dealt with in any way on its behalf. For more information, refer to *Tax highlights 20 May 2013*.

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Non-profit organisations

Practice Statement Law Administration (PS LA) released:

- PS LA 2014/1: This practice statement provides guidance to ATO personnel on:
    - How the Commissioner administers penalties for failure to comply with the ancillary fund guidelines (which are rules that an ancillary fund and its trustees must comply with in order to be endorsed, and remain endorsed, as a deductible gift recipient)
    - When directors of a corporate trustee may have a defence to the administrative penalties
    - When the Commissioner will remit such penalties.

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Superannuation

ATO Interpretative Decision (ATO ID) released:

- ATO ID 2014/7: A contravention of section 34 of the *Superannuation Industry (Supervision) Act 1993* occurs where a SMSF shares a bank account with related unit trusts as a SMSF is required to keep its assets and money separate from that of other entities.

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International tax

Korea and Australia Free Trade Agreement (FTA): The Government has announced that the FTA between Korea and Australia has been confirmed and is awaiting on signatures to proceed.

OECD comments received on Model Tax Convention: The OECD has now published the comments it received on the discussion draft on technical changes to be included in the next update to the OECD Model Tax Convention.

OECD update of BEPS timetable: The OECD has released an updated timetable in respect of its BEPS Project. The timetable indicates that discussion drafts on Tax Treaty Abuse and The Tax Challenges of the Digital Economy will be released in March 2014.

US Foreign Account Tax Compliance (FATCA): The US Treasury has released key amendments to the FATCA regulations which make additions and clarifications to the previously issued FATCA regulations and provide guidance to coordinate FATCA with pre-existing due diligence, reporting, and withholding requirements under other provisions of the Internal Revenue Code.

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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