



Tax highlights

28 January 2014

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Key developments this week

Employee share schemes (ESS) and startups – consultation: On 21 January 2014, the Government [announced](#) that it would commence consultation with interested stakeholders on existing ESS arrangements for startups. Consultation will focus on the following:

- The 2009 ESS changes and the effect they had on businesses. The changes included the removal of the optional election to be taxed upfront on the discount received on an ESS interest
- The barriers to offering an ESS and potential steps to overcome these barriers
- The key characteristics of the type of startup that is more inclined to make use of ESS
- Any costs or issues associated with the implementation of an ESS.

The consultation will begin on 28 January 2014 and proceed for two weeks. Expressions of interest to be involved in consultation closed on 24 January 2014. Submissions can be made and are due by 7 February 2014. Submissions that were previously lodged will be considered as part of the consultation process.

“Support payments” – further draft tax determination to be released on 29 January 2014:

- TD 2014/D7: Are the capital support payments described in this Draft Determination deductible under section 8-1, section 40-880, section 230-15(2) or section 230-15(3) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

This draft TD is a further draft of [TD 2013/D3](#) which expressed the ATO's preliminary view that “support payments” made by a parent company to a subsidiary are capital in nature and not deductible (under either the general deduction provisions or the “black-hole” provisions) but are included in the cost base of the parent company's shares in the subsidiary. Support payments may be made by Australian groups who have found that their overseas subsidiaries have not been performing as might have been expected when the investment offshore was made. As a result of this, and the transfer pricing requirements of overseas jurisdictions, parent companies may have entered into market support arrangements to bolster the profitability of the subsidiary. Such arrangements are also common where the subsidiary is in a start-up phase or the subsidiary is having difficulties entering into a new market. The revised title to this further draft TD indicates that the ATO may have now sought to specifically describe the type of arrangements affected by the draft TD.

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Weekly tax news

Business tax

Tripartite working group on potential statutory remedial power for Commissioner: As foreshadowed in the ATO's [list of matters under consultation](#), the ATO is currently progressing the formation of a working group (comprised of the ATO, Treasury and private sector representatives) to discuss the feasibility and operation of a statutory remedial power for the Commissioner to overcome technical deficiencies in the law in favour of the taxpayer. The working group is expected to undertake intensive consultation over a period of three months in the first quarter of 2014.

Appeals update – Dickinson/Fabig: Dickinson's application for special leave to appeal against the Full Federal Court decision in [Commissioner of Taxation v Fabig \[2013\] FCAFC 99](#) is [scheduled](#) to be heard by the High Court on 14 February 2014. The Full Federal Court allowed the Commissioner's appeal, overturning the Administrative Appeals Tribunal's (AAT) 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](#).

Decision impact statement (DIS) released – Resource Capital Fund IV: The Commissioner has released a [DIS](#) concerning the decision of the Full Federal Court in [Commissioner of Taxation v Resource Capital Fund IV LP \[2013\] FCAFC 118](#). In that case, the Court held that the term "money" in section 255(1) of the ITAA 1936 was not confined to Australian currency and does include foreign currency. For a summary of the Full Federal Court decision, refer to [Tax highlights 19 August 2013](#).

The ATO is of the view that this decision is significant in that it confirms the ATO view that the reference to money in section 255(1) (b) of the ITAA 1936 is not confined to Australian currency, but extends to foreign currency. In particular, the ATO notes that the decision confirms that while the amount of tax due and payable by the non-resident entity is to be paid in Australian dollars, section 255 does not require the payment of this amount to come directly from the money which was the subject of the retention by the person having the receipt, control or disposal of money belonging to a non-resident taxpayer. Instead, all that is required by section 255 is for the controller to retain sufficient money to address the tax liability.

National Tax Liaison Group (NTLG) consultative workshop on Part IVA: The ATO has [released](#) the final minutes from the NTLG consultative workshop on the Part IVA amendments held on 18 July 2013. A summary of the key points raised in the workshop include:

- **Guidance on the reconstruction and annihilation limbs in terms of which limb should apply:** The ATO indicates that it is open to the Commissioner to apply both the annihilation limb and the reconstruction limb.
- **What constitutes a reasonable alternative under the reconstruction limb:** The ATO explains that the reasonable alternative under the reconstruction approach asks whether there were any other ways in which the substance of the scheme and its non-tax effects for the taxpayer could have been achieved. Further, the ATO indicates that this is a much

narrower application than the previous legislation and does not require any predictions about what the parties would have done if they hadn't entered into the scheme.

Also discussed at the workshop were a range of scenarios concerning the application of Part IVA with guidance on the possible outcomes.

Clarification about managed investment trust (MIT) withholding tax: The ATO has [released](#) clarification regarding [ATO ID 2013/63](#). ATO ID 2013/63 states that an Australian resident trust making a foreign resident beneficiary presently entitled to an amount that is reasonably attributable to an MIT fund payment received by the trust from an MIT must work out the amount to be withheld by reference to the withholding rate under section 12-390(6) (a) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) and the income year of the MIT to which the fund payment relates. The ATO states that the trustee of the MIT should give notice to the Australian resident trust in respect of any fund payment they receive. The notice should outline the details of what part of the payment that has a withholding tax obligation and the MIT income year to which the fund payment relates. The ATO indicates that it is reviewing its records to confirm that MIT withholding tax payments Australian trustees have reported are correct.

Closure of Australian Valuation Office (AVO): The Government has [announced](#) that the AVO, which is managed by the ATO, will close and cease to provide services by 30 June 2014. The Parliamentary Secretary to the Treasurer said that the AVO delivery of valuation services exclusively for the Government had become unsustainable and is expected to incur losses of up to \$4 million this financial year. The Parliamentary Secretary added that a compelling case for the Commonwealth providing its own valuation services no longer existed, particularly given the highly competitive market of private sector providers.

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[Employment taxes](#)

Decision impact statement (DIS) released – Stewart: The Commissioner has released a [DIS](#) concerning the decision of the AAT in [Stewart and Commissioner of Taxation \[2013\] AATA 845](#). In that case, the AAT held that the value of stapled securities acquired by a taxpayer following the exercise of options and acquisition of shares in a company related to his employer was not subject to tax under Division 13A of the ITAA 1936 (as an employee share scheme (ESS)) nor under section 6-5 (as ordinary income) or section 15-2 (as statutory income in respect of employment or services) of the ITAA 1997. For a summary of the AAT decision, refer to [Tax highlights 2 December 2013](#). The ATO accepts that it was open, on the facts as found, to find that the value of the stapled securities was not assessable to the taxpayer in the 2007 income year.

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[Indirect taxes](#)

Goods and services taxation determination (GSTD) released:

- [GSTD 2014/1](#) considers whether a taxpayer can object to a private ruling that relates to the way that section 105-65 of Schedule 1 to the TAA 1953 applies or would apply to them. The Commissioner has determined an objection can be lodged against a private ruling provided there has not been an assessment of the net amount which took into account GST that has been incorrectly paid. This view is primarily based on the decision in *Naidoo v Commissioner*

of *Taxation* [2013] AATA 443 where it was determined that section 105-65 does not alter the determination of a taxpayer's net amount under subsection 17-5(1) of the GST Act. Given this, the Tribunal concluded that it did not have jurisdiction to review the Commissioner's decision under section 105-65 to not give a GST refund. The tribunal noted a taxpayer's formal review rights are limited to certain judicial review proceedings. Please note that section 105-65 was subject to a repeal which was announced by the previous government, a measure that the Abbott Government has announced that it will be proceeding with.

Decision impact statement (DIS) released –*Snugfit Australia Pty Ltd v Federal Commissioner of*

Taxation: The ATO has published a [DIS](#) in relation to the decision of the Administrative Appeals Tribunal in [Snugfit Australia Pty Ltd v Federal Commissioner of Taxation \[2013\] AATA 802](#). In that decision the AAT held that a sleep positioning system designed to reduce snoring was a GST-free medical aid or appliance under s38-45(1) of the GST Act. The AAT decided that the taxpayer's sleep positioning system was, relevantly, "night-time positioning equipment modifications", on the basis that it modified the horizontal surface of a mattress and that "night-time positioning equipment" includes a mattress. In the DIS, the ATO notes that the decision does not have any broader impact on the meaning of the term 'modification' in other contexts. The ATO is currently examining whether it ought to revise or withdraw ATO Interpretative Decision 2002/525 which concerns the GST treatment of contoured pillows.

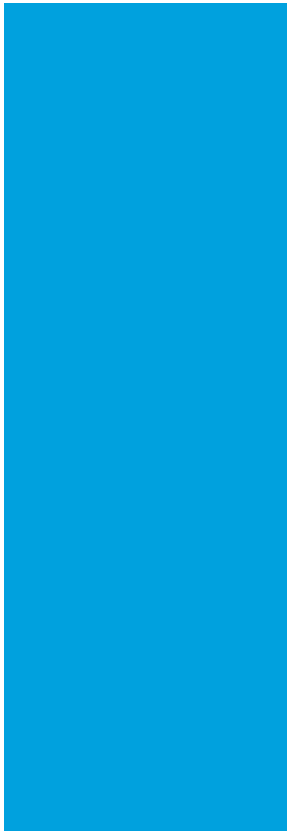
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[International tax](#)

Base erosion profit shifting (BEPS) and G20 comments: In his [address](#) to the World Economic Forum in Switzerland on 23 January 2014, the Prime Minister has commented that one of the side effects of globalisation is the ability to take advantage of different country's tax regimes. He noted that different national tax arrangements have not always kept up with the rise of services and the pervasiveness of digital technologies. Accordingly, when Australia chairs the G20 this year, it will continue to tackle businesses artificially generating profits to chase tax opportunities. Further, he said he hoped that the biggest issues (including digitalisation and its implications for tax, trade and global integration) would be discussed at the G20 Leaders Summit (to be held in Brisbane in November 2014) and for leaders to agree on the principles needed for taxation to be fair in the globalised economy.

OECD BEPS Action Plan Webcast: The OECD has [released](#) a webcast and accompanying slides which provide an update on the 2014 deliverables for the BEPS Action Plan as follows:

- **Digital economy**: The first meeting of the Task Force in October 2013 analysed business models and special features of digital economy players such as mobility, reliance on data and network effects. The next meeting is scheduled for February 2014 and a discussion draft is due for comment in March 2014
- **Treaty abuse**: Scoping work on anti-treaty abuse provisions in treaty and domestic law was prepared in September 2013. Full discussions by the working party are to take place in February 2014
- **Hybrid mismatch arrangements**: First meetings held in October and December 2013 considered arrangements that result in either a double deduction or a deduction with no matching income inclusion. A discussion draft will be issued for comments in early April 2014 with a public consultation in May 2014

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- **Transfer pricing aspects of intangibles:** The working party has concluded that they will not be replacing the arm's length principle and that special measures are necessary.. Finalisation of the discussion draft will take place in March and May 2014
 - **Harmful tax practices:** By September 2014 there will be a review of member regimes, with priority on transparency, including compulsory exchange of information on rulings and on requiring substantial activity for preferential regimes
 - **Transfer pricing documentation:** By February 2014, the working group will release a discussion draft of Chapter V of the Transfer Pricing Guidelines, including a Country-by-Country reporting template
 - **Multilateral instrument report:** The first phase of work will focus on feasibility of use of multilateral instruments to implement BEPS measures and amend bilateral tax treaties. Report expected to be finalised by September 2014.

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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