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15 January 2016

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Australia: December immigration changes

Overview

The Australian Federal Government has announced a number of immigration-related bills and legislative instruments. This is in addition to the launch of the National Innovation & Science Agenda, including the announcement of a new visa to further attract entrepreneurial talent to Australia.

Charging for a migration outcome

Migration Amendment (Charging for a Migration Outcome) Act 2015 ("Act") received Royal Assent on 30 November 2015. Designed to prevent the exploitation of visa applicants, the Act introduces a new criminal and civil penalty regime that will allow both criminal and civil sanctions to be imposed on employers and other third parties who engage in 'payment for visas' activity. The legislation also introduces discretionary powers to cancel a visa where the visa holder has engaged in such activities. Inspectors will have increased powers to gather relevant information.

The legislation covers 'sponsorship-related events', including a person entering into a sponsorship arrangement, lodging a nomination, or entering into a work agreement, in return for an undue benefit. Undue benefits could include a payment, real or personal property, an advantage, service, or gift. Crucially, these sanctions can still be imposed if the sponsorship-related event ultimately does not occur.

The following sponsored visas are currently affected by this amendment:

- Subclass 457 (Temporary Work (Skilled));
- Subclass 401 (Temporary Work (Long Stay Activity));
- Subclass 402 (Training and Research) in the Research stream;
- Subclass 420 (Temporary Work (Entertainment));
- Subclass 488 (Superyacht Crew);
- Subclass 186 (Employer Nomination Scheme); and
- Subclass 187 (Regional Sponsored Migration Scheme).

Offences will be punishable by a maximum of two years imprisonment or a fine equivalent to AU$64,000 for an individual person or AU$324,000 for a body corporate. Civil penalties will equate to AU$43,200 for an individual person or AU$216,000 for a body corporate. In determining any conviction or penalty, the courts will be required to give consideration to:

- What action, if any, was taken by an officer towards ensuring that the body corporate's employees, agents, and contractors had a reasonable knowledge and understanding of the requirements to comply with the new amendment, insofar as those requirements affected the employees, agents, or contractors concerned.
- What action, if any, the officer took when he/she became aware that the body was committing the sponsorship-related offence.

Importantly, the payment of reasonable, market-value amounts for legitimate, professional services, such as immigration or recruitment advice, does not constitute conduct that would contravene the Act.

China Australia Free Trade Agreement ('ChAFTA') and Labor Market Testing ('LMT')

Ministerial determination – IMMI 15/149 – F2015L01940 – Migration Act 1958 – Determination of International Trade Obligations Relating to Labor Market Testing 2015 was signed on 4 December 2015, superseding the Minister's previous determination.

This new determination specifies LMT is inconsistent with the terms of the ChAFTA and, therefore, does not need to be conducted for the following natural persons covered under the terms of the ChAFTA:

- Executives, senior managers, and managers as intracorporate transferees (this was intercorporate transferees in the previous determination);
- Specialists as intracorporate transferees;
- Independent executives; and
- Contractual service suppliers.

This determination will commence immediately once ChAFTA comes into force on 20 December 2015.

National Innovation & Science Agenda

On 7 December 2015, the Minister for Immigration & Border Protection announced the creation of a new entrepreneur visa to attract innovative talent to Australia.

The new visa is designed to attract individuals with unique skillsets, ideas, and entrepreneurial talent. The visa will be available for emerging entrepreneurs with innovative ideas and financial backing to develop their ideas in Australia.

The National Innovation & Science Agenda also included changes to pathways to permanent residence for certain overseas students in Australia. Targeted at recent graduates from Australian institutions with specialized doctorate-level and masters-by-research qualifications, the changes will be aimed at the science, technology, engineering, and mathematics (STEM) or specific information and communications technology (ICT) fields.

The reforms are expected to be introduced in the second half of 2016.

Deloitte's view

Deloitte supports the diversification of Australia's migration program, including initiatives to attract skilled entrepreneurial foreign talent to Australia, which will create growth opportunities for the economy. Innovation and science are critical for Australia to deliver new sources of growth, maintain high-wage jobs, and seize the next wave of economic prosperity.

The changes to remove impediments to the movement of talent connected to the China Australia Free Trade Agreement are welcome. As Australia's largest trading partner, the movement of skilled labor is integral to the success of Australia's economic relationship with China.

Deloitte welcomes the measures to maintain the integrity of Australia's migration program, both in terms of its regulatory and monitoring regime, but also its contribution to ongoing economic growth.

— Mark Wright (Sydney)
Partner
Deloitte Australia
mawright@deloitte.com.au

Beth Fitzpatrick (Brisbane)
Director
Deloitte Australia
bfitzpatrick@deloitte.com.au

Fiona Webb (Melbourne)
Director
Deloitte Australia
fwebb@deloitte.com.au

Sasha Grimm (Perth)
Director
Deloitte Australia
sgrimm@deloitte.com.au

Australia:
Rental property update

Overview

The Australian Taxation Office (ATO) has further strengthened data matching capabilities by announcing it will acquire details of real property transactions from various State Revenue Offices and tenancies boards.

As part of this latest data matching program, the ATO will obtain the following information, dating back as early as 20 September 1985:

- Rental bond details;
- Full name and address of landlord;
- Period of lease;
- Date of property transfer;
- Property sales contract and settlement date; and
- Valuation details.

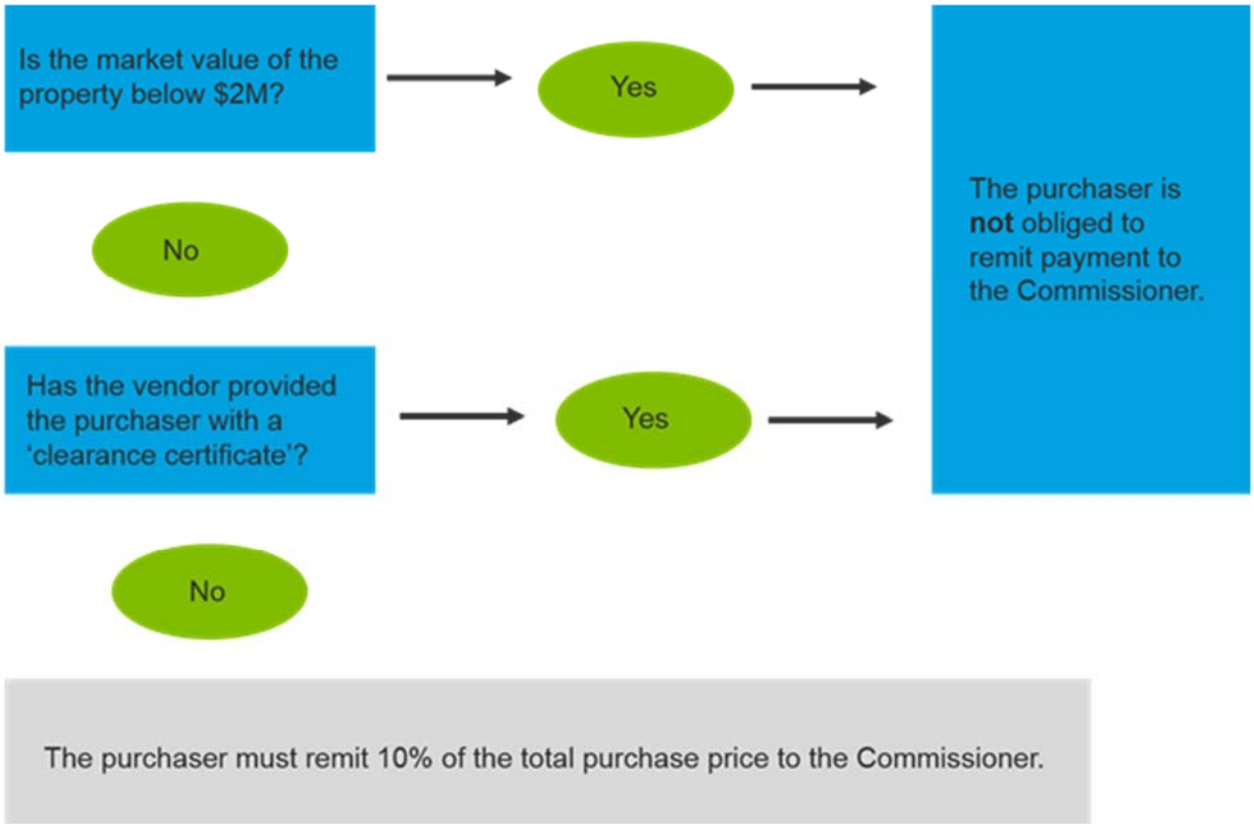
The purpose of this data matching program is to ensure that taxpayers are correctly meeting taxation obligations in relation to dealings with property holdings (e.g., reporting and lodgment requirements associated with rental income and any capital gains transactions).

Other announcements

Parliament is also discussing legislation regarding the introduction of a 10% withholding tax to be remitted by purchasers who acquire Australian property from foreign residents. The legislation, if passed, will have the following impact:

- The measure will apply from 1 July 2016 to Australian property sold by a foreign resident.
- It will only apply to sales where the market value of the property exceeds AUD 2 million.
- The purchaser of the property will have to remit 10% of the total purchase price to the Commissioner of Taxation (the “Commissioner”).
- The tax is not a final tax and the foreign resident vendor will be required to lodge an Australian income tax return and will receive a credit for the amount remitted by the purchaser.
- Australian resident vendors will need to apply for a clearance certificate from the Commissioner to confirm their Australian residency status and avoid having the purchaser remit 10% of sales proceeds to the Commissioner.
- The Commissioner intends to implement an automated process for issuing clearance certificates. A vendor may apply for a clearance certificate at any time, even prior to the property being listed for sale. The Commissioner may set a time period for which the clearance certificate is valid.

Refer to the following flow chart to determine whether a purchaser has a withholding obligation in respect of an interest in Australian property:



Deloitte's view

- Both of these measures indicate increased ATO scrutiny on taxpayer compliance.
- Specifically, these measures will allow the ATO to obtain further information about foreign resident taxpayers who may not currently be meeting Australian tax obligations and requirements.
- If the withholding tax proposal becomes legislated, it will allow the ATO access to tax proceeds at source, rather than having to wait until the taxpayer lodges an Australian income tax return. This should also encourage greater compliance for taxpayers who have had withholding tax deducted, in order to obtain any refund amount they may be entitled to (i.e., due to carryforward capital losses).
- All vendors disposing of Australian property will be deemed to be foreign residents. This puts the obligation to address the residency issue on the vendor.

Australian tax resident vendors may wish to consider applying for the clearance certificate at the time of listing as processing may take up to 14 days in straightforward cases. It would be beneficial for the vendor to hold the certificate prior to sale to ensure the purchaser does not deduct 10% from the sales proceeds.

— Shelley Nolan (Brisbane)
Partner
Deloitte Australia
shnolan@deloitte.com.au

Rob Basker (Sydney)
Partner
Deloitte Australia
rbasker@deloitte.com.au

Ciaran Devery (Melbourne)
Director
Deloitte Australia
cdevery@deloitte.com.au

Stephen Coakley (Sydney)
Partner
Deloitte Australia
scoakley@deloitte.com.au

Paul Rubinstein (Melbourne)
Partner
Deloitte Australia
prubinstein@deloitte.com.au

Kathy Saveski (Sydney)
Director
Deloitte Australia
ksaveski@deloitte.com.au

George Kyriakacis (Perth)
Partner
Deloitte Australia
gkyriakacis@deloitte.com.au

Michael Ward (Sydney)
Director
Deloitte Australia
michaelward1@deloitte.com.au

The Netherlands: New salary thresholds for Highly Skilled Migrants

Overview

On January 1, 2016, the salary thresholds for Highly Skilled Migrants (HSM) in the Netherlands changed to the following gross monthly amounts (excluding 8% holiday allowance):

- HSM 30 years or older: € 4.240;
- HSM younger than 30 years: € 3.108;
- HSM subsequent to graduation in the Netherlands or after search year/highly educated persons: € 2.228; and
- European Blue Card Holders: € 4.968.

In order to meet the salary threshold, monthly salary components can be included that are gross, guaranteed, and paid directly into the bank account of the employee. Benefits in kind or nonguaranteed salary components (for example, a yearly performance bonus) cannot be included to meet the monthly salary threshold.

The new salary thresholds apply to applications filed after January 1, 2016. For applications submitted in 2015, the current (2015) salary thresholds are applicable.

Deloitte's view

The salary thresholds are indexed annually by the Dutch authorities. Over the last few years, the Dutch authorities have regularly changed their policy on which salary components can be included to meet the monthly salary threshold. During 2015, the Dutch authorities have indicated that the statutory holiday allowance and a guaranteed 13th month, no longer can be included to meet the salary threshold. These salary components are in addition to the monthly salary threshold.

— Gwen Keller (Amsterdam)
Senior Manager
Deloitte The Netherlands
gkeller@deloitte.nl

United Kingdom:
The Scottish rate of income tax: Rate announced

Overview

On 16 December 2015, the Scottish Government confirmed the Scottish Rate of Income Tax (SRIT) will be set at 10%.

This means that from 6 April 2016, Scottish taxpayers will see their official UK rate reduced by 10% and the SRIT of 10% then added. The effect of this is that there will be no differentiation from the proposed UK tax rates for 2016/17 (i.e., the year ended 5 April 2017).

Deloitte's view

The formal announcement of a 10% SRIT ends the immediate speculation regarding the impact of different tax rates throughout the UK. The additional tax powers in the Scotland Bill 2015 will, however, if passed, provide more flexibility to the Scottish Government in the future.

Scottish taxpayer

The latest guidance from HMRC was issued in October 2015 and provided greater clarification on the definition of a Scottish taxpayer for the purposes of SRIT.

An individual must firstly be UK tax resident under the UK Statutory Residence Test and as such if an individual is not UK tax resident, then they cannot be a Scottish taxpayer.

If an individual is UK tax resident, they will be a Scottish taxpayer if they are either:

- A Scottish Parliamentarian;
- Having a "close connection" to Scotland;
- Having no "close connection" to any part of the UK, but spend more time in Scotland.

There is no statutory definition of "close connection" and each individual's case should be considered separately. However, the guidance takes readers through a series of examples/scenarios designed to identify where an individual has his/her normal "home." If this "home" is in Scotland, then this individual is a Scottish Taxpayer. An individual's nationality will have no bearing and neither will the location of an individual's work duties.

HMRC has confirmed that no day count will be required when an individual has more than one residence on an ongoing basis if one property is clearly his/her "home."

Deloitte's view

In most cases, it will be straightforward to determine where an individual's "home" is and therefore whether they are a Scottish Taxpayer, but there will be cases where a day count may be in order to determine where an individual has his/her main "home" throughout the year.

Employee considerations

HMRC has started to issue letters to individuals that it believes are Scottish taxpayers. It is, therefore, important for individuals to ensure that HMRC records correctly reflect their circumstances (e.g., most recent address). This can be done online (https://www.gov.uk/tell-hmrc-change-of-details/change-name-or-address), or by contacting HMRC by phone.
URL: https://www.gov.uk/tell-hmrc-change-of-details/change-name-or-address

Responsibility for ensuring HMRC records are up to date falls with the employee and not employers.

Deloitte's view

While there may be no current change in rates, individuals should still be encouraged to contact HMRC on an ongoing basis to ensure that HMRC's records are as up to date as possible.

Employer considerations

Although there will be no change to the effective rate of tax for employees, there are still a number of steps that employers need to take in preparation for the introduction of the SRIT.

HMRC will issue S codes to the individuals it believes to be Scottish taxpayers. It is, therefore, important for employers to ensure that their payroll provider/payroll software can process these tax codes accordingly.

When reporting the tax withheld via payroll to HMRC, it will be necessary to report the UK tax and the SRIT separately on the End of Year Payroll Summary. Employers must ensure that their payroll provider/software facilitate this. No separate identification is required on Form P60.

Deloitte's view

Despite there being no change in rate, employees may continue to have queries on the position and are more likely to contact their HR/payroll department as opposed to HMRC. Employers may therefore wish to provide additional information to employees to alleviate any concerns.

HMRC clarification on specific matters

HMRC has recently clarified some specific points with regards to the implementation of SRIT.

SRIT is a covered tax for the purpose of the UK tax Treaty framework. An individual's Scottish Taxpayer status is, however, unaffected by an individual's Treaty resident status. For example, if an individual is resident in both US and UK but US resident under the residence tie breaker, the individual is still liable to SRIT rates if assessed as a Scottish Taxpayer due to the fact that they remain domestically resident in the UK. However, an individual who is not UK resident under UK law cannot be a Scottish taxpayer, even if he/she lives and works exclusively in Scotland while in the UK.

Many employers have differing reward structures which may include some form of bonus plan or equity award which may indicate the award is earned over a particular period. HMRC has confirmed that a bonus or equity award crystalizing a charge in a tax year is taxed in the jurisdiction of residence (Scottish or rest of UK) at the time of crystallization and at the prevailing rates for the year of crystallization, irrespective of the residence within the UK in the tax years over which the award was earned. Normal overseas split year/sourcing rules apply however.

Under modified PAYE arrangements, the employer chooses the tax code and notices are not normally sent by HMRC. To facilitate the application of SRIT, HMRC has amended the modified arrangements to allow the employer to reflect SRIT where applicable and use the appropriate 'S' coding without issue of a P6.

Deloitte's view

The additional clarification on these specific points is welcomed and would appear to indicate that the practical operation of SRIT may be more straightforward. Any rate differential introduced in the future may, however, raise concerns for affected employees irrespective of a straightforward practical approach to implementation. Employers should therefore consider their longer-term compensation and reward policy and how this should handle a rate differentiation.

— Ian McCall (Edinburgh)
Partner
Deloitte United Kingdom
ianmccall@deloitte.co.uk

Helen Kaye (Leeds)
Partner
Deloitte United Kingdom
hkaye@deloitte.co.uk

Derek Henderson (Aberdeen)
Partner
Deloitte United Kingdom
dehenderson@deloitte.co.uk

Harvey Smith (Birmingham)
Director
Deloitte United Kingdom
hasmith@deloitte.co.uk

James Macpherson (London)
Partner
Deloitte United Kingdom
jmacpherson@deloitte.co.uk

John Lewis (Reading)
Partner
Deloitte United Kingdom
jlewis@deloitte.co.uk

James Warwick (London)
Partner
Deloitte United Kingdom
jwarwick@deloitte.co.uk

Eira Jones (Cardiff)
Director
Deloitte United Kingdom
eirjones@deloitte.co.uk

Global Rewards Updates:
Australia: Tax Office announces changes to ESS annual reporting requirements

Background

Since 2009, providers of Employee Share Scheme (ESS) interests in respect of employment in Australia must provide ESS statements to employees by 14 July, and file an ESS annual report to the Australian Taxation Office (ATO) by 14 August, annually after the end of each relevant financial year.

As part of the ATO's *modernisation programme*, increased data-matching and automation of processes is being implemented across a broad sweep of employment tax-related obligations. As such, the ATO has announced changes to the following ESS obligations for tax years beginning from 1 July 2015:

- The method of filing of the employer ESS annual report, and
- The information to be included in the ESS annual report and ESS statement.

Changes to filing of the ESS annual report to the ATO

ESS annual reports have historically been accepted by the ATO generally as:

1. A paper based form; or
2. A report created using the ATO's "bulk load excel spreadsheet"; or
3. A report prepared and filed online in compliance with the ATO's official software specifications (version 1.0.1).

For tax years beginning from 1 July 2015, the first two of these methods will no longer be accepted by the ATO. Instead, the following two alternatives will be available:

1. A new "Online ESS" webpage-based portal will be available for providers reporting for 20 or fewer individuals; or
2. Online filing in accordance with the ATO's updated software specifications (version 2.0.0).

The paper-based filing and bulk load spreadsheet will only remain available for the amendment of 2014/15 or earlier ESS annual reports.

As a result of this change, many companies who currently meet their ESS reporting obligations in-house may face difficulties with preparing and filing the ESS annual report for the 2015/16 tax year onwards. This change in filing process essentially means that such companies must

either purchase or familiarise themselves with dedicated complying software or seek professional advice.

Key changes to the ESS Annual Report

Assessable vs gross amounts: Many organizations have ESS participants in Australia and overseas so the taxation on such ESS interests may be 'sourced' according to the location(s) that the employee was providing his/her services. This can be further complicated by the individual's tax residency and the domestic tax treatment of ESS income.

For tax years beginning from 1 July 2015 onwards, the ATO will require disclosure of whether the amounts reported are the "gross" amount or the "assessable" amount for individuals who have worked overseas. This indicator is intended to identify whether the reported amount has been adjusted for periods of overseas employment (i.e. "assessable"), or has not been apportioned (i.e. "gross") regardless of any period of overseas employment.

Assignment dates of mobile employees: For individuals who have worked in multiple jurisdictions, the ATO will also require disclosure of his/her overseas assignment start date and assignment end date. The ATO has indicated that in the event an individual is selected by the ATO for a compliance audit, the dates supplied in the annual report would be cross matched with other sources (such as the individual's personal income tax returns).

Where an individual has more than one overseas assignment period, again the ATO has suggested that only the first set of assignment dates should be included in the annual report. It is not yet clear how this would work in practice or how this would affect the ATO's assessment in a compliance audit.

The ATO has also indicated that one set of assignment dates should be reported for each award, rather than just once per employee.

This additional information being requested by the ATO demonstrates the greater emphasis the ATO is placing on ESS income reported in respect of international assignments. There is an increased need for companies to ensure that amounts are being correctly and consistently apportioned across individuals, as well as to ensure appropriate communications is made to affected individuals. This will in turn require companies to more closely manage and track the movements of their international employees and their Australian income tax residency status.

Start-up company concessions: A number of significant taxation concessions for start-up companies have been introduced in Australia effective 1 July 2015 as part of the Australian Government's agenda to increase innovation and attract talent in the Australian start-up sector. For more information, please see Global Rewards Update, July 2015.
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-gru-australia-2-july-2015.pdf

To account for these changes, the ESS annual report will also require details of the specifics to which the start-up concessions have been applied, including whether a company meets the start-up conditions and number and market value of shares/rights acquired under the start-up concessions.

Changes to the ESS statement

The ESS statement has historically been a one-page statement which provides employees with the total taxable ESS amounts for the relevant tax year. The ATO has indicated that the ESS statement will also be updated to include additional information. It is not yet known what the new statement will contain or what the new format will be, but we expect that it will include additional fields in relation to the start-up concessions and could also include additional fields for assignment-related information.

Deloitte's view

The significant shift in filing methods puts many companies currently preparing their own ESS reporting in a difficult position as the commonly used bulk load spreadsheet will no longer be available. Deloitte has obtained approval from the ATO to offer an automated solution to help companies meet their ESS reporting obligations and the ATO's new online filing requirements.

The additional information required by the ATO through the ESS annual report reflects the increased use of data-matching being undertaken by the ATO and emphasises the increasing need for employers to ensure they are reporting consistent data across the board for their various tax and employer obligations.

The additional information being requested in respect of international assignments shows that the ATO is placing further scrutiny on ESS interests for internationally mobile employees. This increases the need for employers to ensure they have accurate and up-to-date assignment and tax residency information. Ensuring this data is now accurately held by the company is key.

With more information being requested by the ATO, it is important that providers update their communication documents that accompany the employee ESS statement so each participant has a greater understanding of the amounts reported on their behalf.

With a greater amount of information being requested by the ATO, employers must be mindful of data-security and authorisation by third-parties to access the personal information of their employees.

— Mark I. Miller (San Jose)
Principal
Deloitte Tax LLP
mamiller@deloitte.com

Rive Rutke (Chicago)
Director
Deloitte Tax LLP
rrutke@deloitte.com

Peter Simeonidis (New York)
Principal
Deloitte Tax LLP
psimeonidis@deloitte.com

Sean Trotman (New York)
Principal
Deloitte Tax LLP
strotman@deloitte.com

Have a question?
If you have needs specifically related to this newsletter's content, send us an email at clientsandmarketsdeloittetax@deloitte.com to have a Deloitte Tax professional contact you.

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