July 2021

A&A TAX LEGAL CONSULTING

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Monthly Tax Update

In this edition of the Monthly Tax Update for July 2021, we provide the recent updates in legislation along with tax developments in the areas of corporate tax, individual tax and international tax. We also include the ATO's recent activities, including its publications, class rulings issued in the past month, latest Australian tax cases and other news in this edition.

Legislation Update

Since our last update, the following legislations have received assent:

Treasury Laws Amendment (More Flexible Superannuation) Bill 2020

The Treasury Laws Amendment (More Flexible Superannuation) Bill 2020 received assent on 22 June 2021 as Act No 45 of 2021.

The Act contains amendments to extend the bring forward rule for non-concessional contributions by enabling individuals aged 65 and 66 to make up to 3 years of non-concessional superannuation contributions from 1 July 2020, remove excess concessional contributions charges and allow recontribution of COVID-19 early release superannuation amounts outside of contribution caps.

For more details, please refer here.

Treasury Laws Amendment (Your Future, Your Super) Bill 2021

The Treasury Laws Amendment (Your Future, Your Super) Bill 2021 received assent on 22 June 2021 as Act No 46 of 2021.

The Act contains measures in the Your Future, Your Super package of reforms announced in the 2020–21 Budget, including:

- preventing the creation of multiple superannuation accounts for new employees;
- requiring APRA to conduct an annual performance test for MySuper products and other products specified in regulations;
- requiring trustees of registrable superannuation entities and SMSFs to act in the best financial interests of beneficiaries.

For further details, please refer here.

Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020

The Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020 received assent on 22 June 2021 as Act No 47 of 2021.

The Act increases the maximum number of allowable members in self-managed superannuation funds (SMSFs) from 4 to 6, applicable from 1 July 2021.

For further details, please refer here.

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Legislation Update (Cont.)

Private Health Insurance Amendment (Income Thresholds) Bill 2021

The Private Health Insurance Amendment (Income Thresholds) Bill 2021 has received assent as Act No 52 of 2021 on 24 June 2021.

According to the explanatory memorandum, pausing income tiers for another two years means $90,000 remains the base tier income threshold for Medicare Levy Surcharge (MLS) liability for a singles policy, and $180,000 remains the base tier income threshold for MLS liability for a family policy for the period from 1 July 2021 to 30 June 2023.

The thresholds are used to determine rebate amounts that may apply for consumers with eligible PHI cover, and the Medicare Levy Surcharge income thresholds and rates. Annual indexation will recommence from 1 July 2023 at the current income thresholds.

For further details, please refer here.

Treasury Laws Amendment (2021 Measures No 3) Bill 2021

The Treasury Laws Amendment (2021 Measures No 3) Bill 2021 has received assent as Act No 61 of 2021 on 29 June 2021.

The Act contains amendments to:

- increase the Medicare levy and Medicare levy surcharge thresholds;
- make certain government payments to thalidomide survivors exempt from income tax;
- makes disaster recovery grant payments in relation to the storms and floods that occurred in February and March 2021 non-assessable non-exempt income;
- make changes to allow various entities to be deductible gift recipients under the income tax law.

For more details, please refer here.

Treasury Laws Amendment (COVID-19 Economic Response) Bill 2021

The Treasury Laws Amendment (COVID-19 Economic Response) Bill 2021 has received assent as Act No 71 of 2021 on 30 June 2021. The Bill :

- amends the income tax law to make certain state and territory grants received in the 2021–22 financial year non-assessable non-exempt income for eligible businesses. The concessional tax treatment is currently limited to eligible payments received in the 2020–21 financial year;

- amends the Taxation Administration Act 1953 to allow protected information to be disclosed to Services Australia for the purposes of administering the COVID-19 Disaster Payment.

For further details, please refer here.

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Legislation Update (Cont.)

The following new Commonwealth tax legislation has been introduced into Federal Parliament:

Treasury Laws Amendment (2021 Measures No 5) Bill 2021

The Treasury Laws Amendment (2021 Measures No 5) Bill 2021 was introduced on 24 June 2021.

The Bill proposes a number of amendments including to taxation law as follows:

- increase the producer offset for films that are not feature films released in cinemas from 20% to 30% of total qualifying Australian production expenditure, and to make various threshold and integrity amendments across the three screen tax offsets;
- makes a number of miscellaneous and technical amendments to various laws in the Treasury portfolio, which include:
    - clarify that a country by country (CbC) reporting entity is to provide details on the global operations of other members of the relevant CbC reporting group for all or part of the current income year, rather than the previous income year, for income years starting on or after 1 July 2020;
    - clarify how a company may change its loss carry back choice;
    - ensure a franking credit arises for a company in particular circumstances where the company's tax offset refund is subsequently reduced;
    - clarify that capital works are included within the requirement to spend AUD 100 million on certain assets for the purposes of the alternative test for eligibility for the temporary full expensing measure;
    - expand the operation of the tax consolidation cost setting rule that applies to finance leases so as to cover all leases;
    - allow the Commissioner, in certain circumstances, to recover amounts overpaid under Pt 4B of the Superannuation (Unclaimed Money and Lost Members) Act 1999;
    - clarify that, for the purposes of applying the alternative eligibility test for temporary full expensing, s 40-45 and s 40-215 of ITAA 1997 are disregarded when calculating an entity's total cost of investment for the 2016–17 to 2018–19 income years.

For more details, please refer here.

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OECD and Other Updates

OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors

The OECD Secretary-General has published a report in July to provide an overview of the latest developments in the OECD's international tax agenda, including the recent digital tax developments, as well as the tax policy aspects of climate change, and progress made in support to developing countries in building sustainable tax systems.

For more details, please refer here.

G7 finance ministers agree on global tax reform

The finance ministers of the G7 have reached agreement which requires large multinationals to pay tax in countries in which they operate, as well as the principle of at least 15% global minimum corporation tax, as part of their agreement on historic global tax reform.

Members of the G7 (or the Group of 7) include Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, as well as the European Union.

Under Pillar One of the G7 agreement - large, profitable multinationals will be required to pay tax in the countries where they operate, and not just where they have their headquarters. These rules would apply to global firms with at least a 10% profit margin — and would see 20% of any profit above the 10% margin reallocated and then subjected to tax in the countries they operate.

Under Pillar Two of the G7 agreement - the G7 agreed to the principle of at least 15% global minimum corporation tax operated on a country by country basis, creating a more level playing field and cracking down on tax avoidance.

The agreement is to be discussed at the G20 Financial Ministers and Central Bank Governors meeting in July 2021. There is significant detail to be addressed even if a global agreement is forthcoming later this year, including detail on implementation, template legislation and a multilateral convention.

For more details, please refer here.

Addressing the tax challenges arising from the digitalisation of the economy

130 member jurisdictions of the G20/OECD Inclusive Framework on BEPS recently joined an agreement to address the tax challenges arising from the digitalisation of the economy. Since then, Peru has joined, bringing the total to 131.

The two-pillar package will provide much-needed support to governments needing to raise necessary revenues to repair their budgets and their balance sheets while investing in essential public services, infrastructure and the measures necessary to help optimise the strength and the quality of the post-COVID recovery.

For more details, please refer here.

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ATO Rulings and Activity

Extension of STP reporting exemption

The ATO has issued draft legislative instrument STP 2021/D1 Draft Taxation Administration – Single Touch Payroll – 2021-22 year Withholding Payer Number Exemption 2021, which proposes to exempt entities that do not have an Australian Business Number (ABN) but instead have a withholding payer number (WPN) from reporting under Single Touch Payroll (STP) for the 2021-22 income year.

Entities within this class will be fully exempt from the requirement to report under s 389-5 of sch 1 to the TAA for the 2021–22 financial year, in addition to the 2018–19 to 2020–21 financial years.

STP 2021/D1 is proposed to commence retrospectively on 1 July 2021.

The closing date for comments was 8 July 2021.

For further details, please refer here.

Taxation Ruling TR 2021/2 - car parking benefits

The ATO has issued Taxation Ruling TR 2021/2 which sets out the ATO's view of when the provision of car parking is a car parking benefit for Fringe Benefits Tax (FBT) purposes.

Specifically, TR 2021/2 provides guidance on the term 'in the vicinity of', when a car park should be considered a commercial car parking facility and how to determine the lowest representative fee charged.

This Ruling replaces Taxation Ruling TR 96/26 F*ringe benefits tax: car parking fringe benefits*, which was withdrawn on 13 November 2019.

This Ruling should be read in conjunction with Chapter 16 of *Fringe benefits tax - a guide for employers* (Employers' guide) which provides guidance to help employers calculate the taxable value of a 'car parking fringe benefit and provides practical examples. However, it does not address the concept of 'primary place of employment' as a result of the decision in Virgin Australia Airlines Pty Ltd v Commissioner of Taxation [2021] FCA 523.

TR 2021/2 applies before and after the date of its issue except in respect of the view that car parking facilities that have a primary purpose other than providing all day car parking are considered commercial parking stations, which applies from 1 April 2022. Note also the release of Ruling Compendium TR 2021/2EC which summarises key issues considered by the ATO in drafting TR 2021/2.

For more details, please refer here.

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ATO Rulings and Activity (Cont.)

ATO fact sheet on Seasonal Worker Program

The ATO has provided updated guidance on the taxation arrangements of seasonal workers who have changed from a Temporary Work (International Relations) subclass 403 visa (subclass 403 visa) to a different temporary visa and the obligations of their approved employers in the seasonal worker program (SWP).

The fact sheet reflects changes to the law ensuring that seasonal workers continue to be taxed at a concessional rate of 15% when changing to a different temporary visa. This is done by an employer withholding a final tax of 15%.

The fact sheet also indicates that affected workers are not required to lodge an Australian income tax return but if they did, the ATO will process the return and apply the correct tax rate to the employment income from the SWP and tax any other income declared at the applicable tax rate.

This applies from 24 March 2020 to ensure the arrangements under the subclass 403 visa continue to apply.

The guidance supersedes the previous SWP fact sheet that was issued on 29 October 2020.

For more details, please refer here.

Draft guidance on R&D "at risk rule"

The ATO has issued a draft Taxation Ruling TR 2021/D3 on the "at risk rule" for expenditure on research and development (R&D) activity.

The Ruling sets out the Commissioner's view on whether expenditure is at risk for the purposes of the R&D tax offset. The at risk rule in s 355-405 of ITAA 1997 denies or reduces a notional deduction for the R&D tax offset if, at the time an entity incurs the expenditure, the R&D entity or one of its associates had received (or could reasonably be expected to receive) consideration as a result of that expenditure, regardless of the results of the activities on which the expenditure was incurred.

For the purposes of determining whether the at risk rule is satisfied, the amount of consideration includes both monetary benefits and the value of any non-monetary benefits. The Commissioner considers that a broad interpretation of the term "consideration" applies for the purposes of Div 355, incorporating a notion beyond consideration in a contractual sense. Where an entity receives consideration as a result of incurring both R&D and non R&D expenditure, the at risk rule only denies a notional deduction for the portion of consideration attributable to the R&D expenditure.

The draft Ruling also provides a number of examples of how the at risk rule applies in relation to certain circumstances.

The ruling is proposed to apply both before and after its date of issue when finalised, to the extent that it does not conflict with terms of settlement of a dispute agreed to before the date of issue.

Comments can be made on the draft Ruling by 23 July 2021. For further details, please refer here.

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ATO Rulings and Activity (Cont.)

Draft guidance on software royalties

On 25 June 2021, the ATO released draft Taxation Ruling TR 2021/D4 which deals with the circumstances in which receipts from the licensing and distribution of software will be royalties as defined under Australian domestic tax law.

Draft Taxation Ruling TR 2021/D4 provides guidance on when receipts in relation to packaged software, digital distribution of software and cloud computing arrangements will be royalties within the meaning of s 6(1) of ITAA 1936.

According to draft TR 2021/D4, an amount is a royalty to the extent that it is paid or credited as consideration for the:

- grant of a right to do something in relation to software that is the exclusive right of the owner of the copyright in the software — for example, the grant of a licence permitting the reproducing, modifying, adapting or sub-licensing of software
- supply of know how in relation to software — for example, the supply of source code relating to software
- supply of assistance furnished as a means of enabling the application or enjoyment of a supply of software.

The following amounts are not considered royalties as defined in s 6(1):

- consideration for the grant of a licence which allows only the simple use of software
- consideration for the grant of distribution rights in relation to software where the distributor is not permitted to do anything in relation to the software that is the exclusive right of the owner of the copyright in the software
- consideration for the transfer of all rights relating to the copyright in software
- proceeds from the sale of goods where hardware and software are sold to an end-user in an integrated form without being separately priced, or where physical carrying media on which software is stored is sold to an end-user, provided in either case that the end-user is only granted simple use rights
- consideration for the provision of services in the modification or creation of software.

The nature of receipts from the licensing and distribution of software depends upon the terms of agreement between the parties. Apportionment may be required to determine the extent to which a receipt is a royalty. In determining the character of receipts or apportioning receipts, all the facts and circumstances of a particular case must be taken into account.

Draft TR 2021/D4 replaces Taxation Ruling TR 93/12 Income tax: computer software, which has been withdrawn with effect from 25 June 2021. The ATO intends to publish guidance in TR 93/12 (now withdrawn) on the assessability of receipts relating to software and treatment of software as trading stock on its website.

Draft TR 2021/D4 is proposed to apply both before and after its date of issue when finalised, to the extent that it does not conflict with terms of settlement of a dispute agreed to before the date of issue. The proposed date of effect will not prevent TR 93/12 from applying prior to its withdrawal to the extent that it has been relied upon.

The last day for comments is 23 July 2021.

For further details, please refer here.

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ATO Rulings and Activity (Cont.)

Guideline on corporate tax residency updated

Foreign incorporated companies will have more time to revise their governance arrangements to bring them in line with the ATO's view on "central management and control" for the purposes of determining their Australian tax residency status.

The guidance in Practical Compliance Guideline PCG 2018/9 assists foreign-incorporated companies to apply the principles in Taxation Ruling TR 2018/5.

A transitional compliance approach (which ended on 30 June 2021) is in place for companies that are taking active and timely steps to change their governance arrangements such that the ATO has stated it will not use compliance resources to disturb such a company's foreign tax resident status.

This period will be extended until 31 December 2021 for an early balancer taxpayer with a 31 December year end and 30 June 2022 for a taxpayer with a 30 June year end. However, if amendments to relevant legislation that clarify the corporate tax residency rules are enacted earlier than these respective dates, the transitional period will end on the date of assent.

These are amendments that would give effect to a 2020 Budget announcement that foreign incorporated companies will be treated as Australian tax residents where there is a "significant economic connection to Australia". A new para 104AA has been inserted into the PCG to reflect the extension.

For more details, please refer here.

Data matching programs for cryptocurrency

The ATO has provided notice that it will conduct a data matching program in respect of cryptocurrency.

Under this program, the ATO will access account identification and transaction data from cryptocurrency designated service providers for the 2020-21 to 2022-23 income years. The data will be used by the ATO to identify taxpayers that have failed to report a disposal of cryptocurrency in their income tax return or have not complied with other taxation obligations.

For more details, please refer here.

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ATO Rulings and Activity (Cont.)

Data matching programs for novated leases

The ATO has provided notice that it will acquire novated lease data from McMillan Shakespeare Group, Smartgroup Corporation, SG Fleet Group, Eclipx Group, LeasePlan, Toyota Fleet Management, LeasePLUS and Orix Australia for the 2018–19 to 2022–23 income years.

The data will be used by the ATO to conduct an information and education campaign, identify cases for administrative action, allow the ATO to provide tailored messages to taxpayers and generate insights to assist taxpayers when interacting with ATO systems.

A protocol document describing the program has been developed in consultation with the Office of the Australian Information Commissioner.

For more details, please refer here.

Class rulings issued:

- Class Ruling CR 2021/40 - Amaysim Australia Ltd — major distribution (special dividend and return of capital). The ruling applies from 1 July 2020 to 30 June 2021.
- Class Ruling CR 2021/41 - Xplore Wealth Ltd — scheme of arrangement. The ruling applies to the income year in which the implementation date of the relevant scheme of arrangement (2 March 2021) occurred.
- Class Ruling CR 2021/42 - APG Self Storage Trusts — scrip for scrip rollover. The ruling applies from 1 July 2020 to 30 June 2022.
- Class Ruling CR 2021/43 - Airservices Australia — early retirement scheme 2021. The ruling applies from 8 July 2021 to 30 June 2022.

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Latest Australian Tax Cases

- Collection and recovery; serious hardship - The AAT has affirmed a decision of the Commissioner not to release a taxpayer from her tax liabilities, finding her purchase of a new car and expenditure on a 2-month family holiday to Greece in the relevant time period unreasonable. [SYRF v FC of T 2021 ATC - 14 May 2021]

- CGT; foreign residents - The Full Federal Court has dismissed the taxpayers' appeals against the Federal Court decisions reported at 2020 ATC and 2020 ATC and held that gains made by resident trust estates from non-taxable Australian property that were distributed to non-resident beneficiaries could not be disregarded pursuant to s 855-10 of ITAA 1997. [Peter Greensill Family Co Pty Ltd (as trustee) v FC of T; Nicholas Martin & Anor v FC of T 2021 ATC - 10 June 2021]

- COVID-19; cash flow boost - The AAT has upheld the Commissioner's decision that an accounting firm was not eligible for the government's first cash flow boost (CFB) payment after finding that the company's reporting of a one-off wages payment in its March 2020 activity statement of $107,500 was a scheme for the sole or dominant purpose of obtaining the CFB payment. [VNBM v FC of T 2021 ATC - 7 June 2021]

- Superannuation guarantee - The AAT has affirmed the Commissioner's view that the relationship between a music school franchise and one of its music teachers was that of employer and employee. [Olias Pty Ltd as trustee for the Storer Family Trust v FC of T 2021 ATC - 28 May 2021].

- Assessable income; property subdivision - The AAT has held that the profit generated by the purchase and subdivision of a property and the subsequent sale of the subdivided lots was properly treated as ordinary income under s 6-5 of ITAA 1997. [McCarthy v FC of T 2021 ATC - 28 May 2021]

- FBT; car parking - The Federal Court has held that an aircraft could be (and was) the primary place of employment for the flight and cabin crew employees of 2 airline operators, resulting in the taxpayers' provision of car parking facilities to such employees being exempt from FBT. [Virgin Australia Airlines Pty Ltd & Anor v FC of T 2021 ATC - 18 May 2021]