

February 2023

Monthly Tax Update

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

Legislation Update

Treasury Laws Amendment (2022 Measures No 5) Bill 2022 awaits assent

Treasury Laws Amendment (2022 Measures No 5) Bill 2022 1997 has been passed by both houses of parliament and awaits assent.

The [Treasury Laws Amendment \(2022 Measures No 5\) Bill 2022](#) contains amendments to list the following as deductible gift recipients:

- Melbourne Business School Ltd, for gifts made on or after 1 July 2022
- Leaders Institute of South Australia Incorporated, for gifts made from 1 July 2022 to 30 June 2027
- St Patrick's Cathedral Melbourne Restoration Fund, for gifts made from 1 July 2022 to 30 June 2027
- Jewish Education Foundation (Vic) Ltd, for gifts made from 1 July 2021 to 30 June 2026
- Australian Education Research Organisation Ltd, for gifts made on or after 1 July 2021, and
- Australians for Indigenous Constitutional Recognition Ltd, for gifts made from 1 July 2022 to 30 June 2025.

The Bill will also amend the deductible gift recipient listings to:

- extend the listing of Sydney Chevra Kadisha to apply to gifts made from 1 January 2018 to 30 June 2024
- extend the listing of Australia Women Donors Network to apply to gifts made from 9 March 2018 to 8 March 2028, and
- remove the listing of Mt Eliza Graduate School of Business and Government Ltd, applicable from 1 January 2023.

February 2023

Monthly Tax Update

OECD Updates – Base Erosion and Profit Shifting (BEPS) 2.0, Pillar One and Pillar Two

OECD expects revenue gains from BEPS 2.0 to be higher than previously expected.

According to the new OECD analysis released on 18 January 2023, OECD expects revenue gains from the implementation of a historic agreement to reform the international tax system will be higher than previously expected.

The proposed global 15% minimum corporate income tax is now expected to result in annual global revenue gains of around US\$220 billion, or 9% of global corporate income tax revenues.

This is a significant increase over the OECD's previous estimate of US\$150 billion in additional annual tax revenues attributed to the minimum tax component of Pillar Two.

Pillar One, designed to provide a fairer distribution of taxing rights among jurisdictions over the largest and most profitable multinational enterprises (MNEs), is now expected to allocate taxing rights on about US\$200 billion in profits to market jurisdictions annually. This is expected to lead to annual global tax revenue gains of between US\$13-36 billion, based on 2021 data.

The new estimates reflect a significant increase compared to the US\$125 billion of profits in previous estimates. The analysis finds that low and middle-income countries are expected to gain the most as a share of existing corporate income tax revenues.

The new estimates on the economic impact of the two-pillar solution are based on updated data and incorporate most of the recently agreed design features included in the Amount A Progress Report and the GloBE Model Rules, many of which have not been accounted for in other studies.

For more details, please refer to the [OECD](#) website.

February 2023

Monthly Tax Update

OECD Updates – International Tax (Cont.)

OECD releases technical guidance for implementation of Pillar Two - Global Minimum Tax

On 2 February 2023, the OECD/G20 Inclusive Framework on BEPS released technical guidance to assist governments with implementation of Global anti-Base Erosion (GloBE) rules to ensure multinational enterprises (MNEs) will be subject to a 15% effective minimum tax rate.

The [Agreed Administrative Guidance for the Pillar Two GloBE Rules](#) clarifies interpretation of the GloBE rules to ensure coordinated implementation in domestic legislation and provide greater certainty for businesses. The document includes guidance on recognition of the United States' minimum tax (Global Intangible Low-Taxed Income or "GILTI") under the GloBE rules and on the design of Qualified Domestic Minimum Top-up Taxes. It also includes more general guidance on the scope, operation and transitional elements of the GloBE Rules to allow Inclusive Framework members that are in the process of implementing the rules to reflect this guidance in their domestic legislation in a co-ordinated manner. The guidance responds to stakeholder feedback on technical issues, such as the collection of top up tax in a jurisdiction in a period where the jurisdiction has no GloBE income, and the treatment of debt releases and certain tax credit equity structures.

The document will be incorporated into a revised version of commentary on the GloBE rules that will be released later this year and replace the original version of the Commentary issued in March 2022. Further Agreed Administrative Guidance will be released on an ongoing basis to ensure the GloBE rules continue to be implemented and applied in a coordinated manner.

The GloBE rules are part of Pillar Two of the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. Under Pillar One, technical work is ongoing with the aim to finalise a new multilateral convention by mid-2023 for entry into force in 2024.

For more details, please refer to the [OECD](#) website.

February 2023

Monthly Tax Update

Other updates

Digital Assets - Making crypto safer for consumers

In a joint media release, the Australian government says that it is acting to ensure the regulation of crypto assets protects consumers and positions Australia's economy to take advantage of new digital products and services. Treasury is consulting on which elements of the crypto ecosystem are sufficiently regulated and which require additional attention, through a "token mapping" exercise.

On 22 August 2022, the government announced "token mapping" - the foundational step in the government's multi-stage reform agenda that commits to developing appropriate regulatory setting for the crypto sector. Token mapping seeks to build a shared understanding of crypto assets in the Australian financial services regulatory context. This will explore how existing regulation applies to the crypto sector and inform future policy choices.

The multi-stage approach to the crypto sector has 3 elements:

- strengthening enforcement
- bolstering consumer protection, and
- establishing a framework for reform.

In terms of strengthening enforcement, the government says Australia's regulators are strengthening their focus on crypto asset providers to make sure they meet their obligations to Australian consumers.

ASIC is increasing the size of its crypto team and is upping enforcement measures. The regulator will take legal action where it identifies crypto offerings being marketed without the appropriate credit or financial services licence.

The Australian Competition and Consumer Commission (ACCC) is also stepping-up efforts to prevent scams, including those involving crypto assets. The government's National Anti-Scams Centre, located within the ACCC, will facilitate real-time data sharing and the coordinated prevention and disruption of scams. In a report published last year, the ACCC's Scamwatch noted that more scammers are seeking payment via crypto, with losses reported via this payment method totalling \$221 million in 2022, a 162% increase from the year earlier.

Digital currency exchanges are also regulated by AUSTRAC under the Anti Money Laundering and Counter Terrorism Financing Act for the purposes of preventing and detecting money laundering and terrorism financing.

The government says it will also reform the licensing and custody of crypto assets, particularly for the subset of crypto assets that currently fall outside the financial services regulatory framework. It will establish a set of obligations and operational standards for crypto asset service providers to ensure they adequately safe-keep assets for customers. This will ensure consumers are protected from avoidable business failures or from the misuse of their assets by service providers.

Consultation on the design of a custody and licensing framework will begin in mid-2023 to allow for sufficient consultation prior to the introduction of legislation.

Comments on this [consultation](#) are to be submitted by 3 March 2023. For further details, please refer [here](#).

February 2023

Monthly Tax Update

ATO Rulings and Activity

Variation of PAYG withholding for alienated PSI

The ATO has issued a draft legislative instrument to vary to nil the amount of PAYG required to be withheld from certain alienated personal services income (PSI) payments. The determination is Taxation Administration (Withholding Variation for Personal Services Income) Legislative Instrument 2023.

Draft Taxation Administration (Withholding Variation for Personal Services Income) Legislative Instrument 2023 (LI 2023/D1) continues existing arrangements under the legislative instrument Variation of withholding for personal services income (15/03/2013) (F2013L00522), which is due to sunset. The draft instrument will vary to nil the amount a personal services entity (PSE) is required to pay to the Commissioner in certain circumstances where it receives alienated PSI payments.

The variation applies to amounts a PSE is required to pay to the Commissioner under s 13-5 of sch 1 to the Taxation Administration Act 1953 where:

- the PSE receives an alienated personal services payment that relates to one or more individuals' PSI;
- the PSE pays salary or wages to the individual or individuals within 14 days after the end of the PAYG payment period in which it receives the alienated personal services payment,
- the salary or wages paid by the PSE is equal to or greater than either (i) 70%, or (ii) a "net PSI percentage", of the gross PSI (exclusive of GST) received by the PSE during the PAYG payment period.

The net PSI percentage is calculated by dividing the entity's PSI (less allowable deductions) for the previous income year by its gross PSI for the previous year.

The draft instrument is proposed to commence on 1 April 2023 and will repeal the 2013 instrument.

The closing date for comments is 21 February 2023.

For more details, please refer [here](#).

Tax deductions on holiday home expenses

The ATO has issued a guidance on its website on what holiday home expenses are eligible for tax deductions.

Briefly, taxpayers can only claim deductions to the extent their holiday home expenses are incurred for the purpose of producing rental income.

For further details, please refer to the [ATO](#) website.

February 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Inactive ABNs may be cancelled

The ATO reminded that inactive Australian Business Numbers (ABN) may be flagged for cancellation if there is no business activity reported in the tax return, or there are no signs of business activity in other lodgements or third-party information. According to the ATO, if it identifies an ABN as inactive, the holder will be contacted by email, letter, or SMS to inform them of the next steps.

If a holder is no longer in business, they will not need to do anything as the ATO will automatically cancel their ABN. As for holders who still require their ABN, the ATO will advise them on what they need to do to keep it.

It is reminded that holders who had their ABN cancelled and are still entitled to it will need to reapply for it. Same ABN can be re-applied unless the business structure has changed.

ABN holders are advised to keep their business details up to date, which includes cancelling their ABN if their business is no longer operating and informing the ATO of any changes to their business details within 28 days of the change.

For more information, please refer to the [ATO](#) website.

ATO Tax Payer Alert: TA 2023/1 – Division 7A - Interposition of a holding company to access company profits tax-free

The ATO is reviewing arrangements where an individual accesses the profits of a private company in tax-free form (that is, without an additional tax liability for the individual) by arranging for the profits to be passed to the individual through an interposed holding company.

Relevant arrangements described in TA 2023/1 typically involve a company being interposed between a private company with retained profits and its shareholder. A capital gains tax (CGT) rollover is applied to enable the shareholder to disregard the capital gain arising on disposal of shares in the private company. The private company then pays a franked dividend to the interposed company, which uses the proceeds to fund a loan to the individual shareholder on terms that do not comply with s 109N of ITAA 1936. The Taxpayer Alert also outlines features that these arrangements typically display with an illustrative example.

The ATO is concerned that these arrangements are being entered into under the misapprehension that they are effective in avoiding additional tax being paid by the individual taxpayer.

It is indicated on TA 2023/1 that the ATO is actively reviewing these arrangements. Taxpayers and advisers entering into arrangements of concern will be subject to increased scrutiny. Participants in and promoters of these types of arrangements may be subject to penalties, including promotor penalties under Div 290 of Sch 1 to the Taxation Administration Act 1953. Registered tax agents promoting these arrangements may also be in breach of the Tax Agent Services Act 2009.

This Alert applies to arrangements which, when viewed objectively, indicate that the dominant purpose of the arrangements is tax avoidance by enabling the individual to obtain a tax advantage or benefit.

For further details, please refer to the copy of the Tax Payer Alert [here](#).

February 2023

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Class rulings issued:

- Class Ruling [CR 2023/1](#) Euroz Hartleys Group Limited - capital return. This ruling applies from 1 July 2022 to 30 June 2023.
- Class Ruling [CR 2023/2](#) Euroz Hartleys Group Limited - employee share scheme - capital return. This Ruling applies from 1 July 2022 to 30 June 2023.
- Class Ruling [CR 2023/3](#) EFTsure Pty Ltd — employee share scheme — minimum holding period and exchange of options. This Ruling applies from 1 July 2021 to 30 June 2022.

Other ruling issued:

- Product Ruling [PR 2023/1](#) Utmost Executive Investment Account. This ruling applies prospectively from 1 July 2022 and applies only to the specified class of entities that:
 - enter into the scheme, and
 - are a resident of Australia for tax purposes during the period from 1 July 2022 to 30 June 2025, being its period of application; this Product Ruling will continue to apply to those entities even after its period of application has ended, as long as the Policyholder remains a resident of Australia for tax purposes.

This Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

Latest Australian Tax Cases

- **Income tax - Trust income** - This was an appeal from a decision of the Federal Court (Logan J) reported at 2021 ATC. This was an appeal from a judgment of the Federal Court in relation to the application of s 100A and Part IVA of the Income Tax Assessment Act 1936 (Cth) (ITAA 1936) to distributions made by Guardian AIT Pty Ltd (Guardian) as trustee for the Australian Investment Trust (AIT) to AIT Corporate Services Pty Ltd (AITCS), a corporate beneficiary. [FC of T v Guardian AIT Pty Ltd ATF Australian Investment Trust; FC of T v Springer – 24 January 2023.]
- **Income tax, Capital gains tax** - The applicant made a capital gain on the sale of a rental property in the year ended 30 June 2018. She included the amount of the gain in her return but objected to the assessment on the basis that she is entitled to a concession available to small business entities under Division 152 of the Income Tax Assessment Act 1997 (ITAA97). The court held that she was precluded from accessing the small business concessions because she was unable to satisfy the requirement that the asset in question was an active asset. – [Del Castillo v FC of T – 12 December 2022]

February 2023

Monthly Tax Update

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