

November 2023

Monthly Tax Update

In the November 2023 edition of Andersen in Australia's Monthly Tax Update, we provide recent legislative updates and outline the latest developments in the areas of corporate tax, individual tax, indirect tax and international tax. We also examine the ATO's recent activities, publications, rulings and other guidelines and discuss the latest Australian tax cases.

Legislation Update

Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023

Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023 (the Bill) has been passed by the House of Representatives and been referred to the Senate Economics Legislation Committee for review. The Senate Committee will provide its report on 23 November 2023.

The Bill contains a range of income tax measures including the:

- increase of the small business instant asset write-off threshold to \$20,000 for assets first or installed ready for use in the 2023-24 income year,
- small business energy incentive,
- amendments to the non-arm's length expenses rules for superannuation funds with non-arm's length general expenditure, and
- changes affecting deductible gift recipients.

Social Security and Other Legislation Amendment (Supporting the Transition to Work) Bill 2023

The Social Security and Other Legislation Amendment (Supporting the Transition to Work) Bill 2023 (the Social Security Bill) has been introduced to Parliament.

The Social Security Bill aims to increase choice and flexibility for older Australians in their retirement through an enhanced pension Work Bonus scheme. It also proposes to smooth the transition to work for income support recipients by doubling the employment income nil rate period and extending access to the nil rate period for recipients who enter full time work.

From 1 January 2024, all pensioners over Age Pension age and eligible Veterans will have a maximum Work Bonus balance limit of \$11,800, instead of \$7,800.

All new Age Pension recipients will have a starting Work Bonus income balance of \$4,000 (currently nil).

From 1 July 2024, income support recipients who obtain employment will be able to retain their concession cards for up to 24 weeks (currently 12 weeks).

The measures were announced as part of the government's Employment White Paper released in September 2023.

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Legislation Update (Cont.)

[A New Tax System \(Australian Business Number\) Amendment \(Display of Trading Names\) Regulations 2023 \(F2023L01416\)](#)

An instrument has been made that amends the A New Tax System (Australian Business Number) Regulations 2020 to allow trading names to continue to be displayed on the Australian Business Register (ABR) until 1 November 2025.

The ABR, which is operated by the ATO, provides a national system for issuing businesses with unique identifying numbers, known as Australian Business Numbers (ABNs). At the time it was established, the States and Territories remained responsible for maintaining business names registers. However, to assist users to identify businesses when searching the ABR, trading names (either business names registered under State and Territory laws or other names used for business purposes ie unregistered trading names) were included in ABR entries.

On 28 May 2012, a new national regime for business name registration commenced which is administered by ASIC, replacing the State and Territory registers. The Business Names Register (BNR) is designed to ensure consumers and others engaging with businesses can easily identify and contact the entities behind a business, and to avoid confusion by restricting the registration of identical or nearly identical names (as well as offensive, undesirable or potentially misleading names). From this time, registered business names would appear on the BNR and it was intended that, after a transitional period, unregistered trading names would no longer be displayed on the ABR. While business names registered with ASIC would continue to be included in, and publicly available from, the ABR, unregistered trading names could no longer be added or amended.

The transitional period following commencement of the national BNR regime provides time for entities with a trading name on the ABR to register a business name with ASIC for inclusion on the BNR, before the ABR ceases to display unregistered trading names. Initially a 12-month period, it has been extended several times to accommodate the large number of businesses yet to register under the new regime. The transitional period is currently due to expire on 1 November 2023. If an extension is not provided, a large number of businesses will not have a trading name publicly available on the ABR, inconveniencing users who rely on the registers to identify businesses.

The A New Tax System (Australian Business Number) Amendment (Display of Trading Names) Regulations 2023 extend the transitional period by 2 years to expire on 1 November 2025, with the ultimate aim to encourage affected businesses to register a business name in an orderly and efficient manner.

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Legislation Update (Cont.)

Other legislation update:

Treasury consults on amendments to thin capitalisation Bill

Draft technical amendments to a Bill before parliament reforming the thin capitalisation rules in Div 820 of ITAA 1997 have been released for comment.

The **Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023** was introduced into parliament on 22 June 2023. A Senate committee review recommended the Bill be passed, subject to technical amendments being made to ensure the rules operate appropriately.

As noted above the exposure draft proposes to make changes to the Bill to ensure the “new” rules operate appropriately.

The proposed changes are as follows:

- Simplifying the conditions for making and revoking choices and clarifying the ordering between a third party debt test choice and a group ratio test choice.
- Clarifying the operation of the rules in relation to identifying entities with an “obligor group”.
- Making changes to the calculation of an entity’s Tax EBITDA. The proposed amendments are summarised below:

Plantation and forestry entities (Amended s 820-52(1)(c))	The following deductions are added back to taxable income or tax loss when calculating an entity’s Tax EBITDA: <ul style="list-style-type: none"> ▪ general deductions that relate to forestry establishment and preparation costs ▪ capital costs of acquiring trees (s 70-120 of ITAA97)
Tax losses from earlier income years (New s 820-52(1A))	A corporate entity is assumed to deduct all of its tax losses from previous income years when calculating its taxable income or tax loss for Tax EBITDA purposes.
Dividends (Amended s 820-52(3))	Only dividends from an associate will be excluded from an entity’s Tax EBITDA.
Attribution managed investment trusts (New s 820-52(6A) and (6B))	Modifications are included to calculate the net income of an AMIT.
Notional deduction of R&D entities (New s 820-52(10))	An R&D entity that has a notional deduction for eligible expenditure must deduct the amount of the notional deduction when determining their taxable income/tax loss for tax EBITDA purposes.

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Legislation Update (Cont.)

Other legislation update:

Treasury consults on amendments to thin capitalisation Bill (Cont.)

- Amending the third party debt test to:
 - take into account an interest rate swap cost that relates to multiple debt interests,
 - allow the holder of the debt interest under the third party debt test to have recourse to a wider range of assets (e.g. moveable property situated on land if the property is incidental to and relevant to the ownership and use of the land and situated on the land for the majority of its useful life).

- Amending the debt deduction creation rules to:
 - clarify the order of application of Subdivision 820-EAA and all other provisions in Div 820. If debt deductions are disallowed under Subdivision 820-EAA, the disallowed debt deductions are disregarded for the purposes of applying all other provisions in Division 820;
 - exempt ADIs and securitisation vehicles from the operation of the debt deduction creation rules'
 - ensure the rules do not apply where the following assets are acquired from an associated entity:
 - a new membership interest in an Australian entity or a foreign entity that is a company, and
 - certain new tangible depreciating assets.
 - exclude certain related party lending arrangements,
 - exclude payments that are entirely referable to mere on-lending to an Australian associate, where the on-lending is on the same terms,
 - delay the start date of the rules to 1 July 2024 for arrangements entered into before 22 June 2023.

- Inserting new s 820-52(1)(ca) which allows eligible unit trusts to transfer their excess Tax EBITDA amounts to other unit trusts. An eligible unit trust must be a resident unit trust, a general class investor and using the fixed ratio test. In addition, the trust receiving the excess Tax EBITDA must have a 50% or greater interest in the eligible trust.

There is no change to the proposed 1 July 2023 start date. However, a one-year grace period (until 1 July 2024) from the debt deduction creation rules is proposed for arrangements entered into before 22 June 2023.

The last day to submit comments was 30 October 2023.

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

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OECD updates

OECD BEPS 2.0: fact sheet on multilateral convention for Amount A of Pillar One

The OECD has issued a [fact sheet](#) on the multilateral convention for Amount A of Pillar One (the MLC) as part of the BEPS 2.0 Two-Pillar Solution to address the tax challenges arising from the digitalisation and globalisation of the economy.

Amount A of Pillar One provides for a reallocation of taxing rights to market jurisdictions with respect to a share of the profits of the largest multinational enterprises operating in their physical presence. The MLC, published on 11 October 2023, reflects the current consensus achieved among members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting.

The fact sheet was published in conjunction with the technical webinar on the MLC held on 26 October 2023. It sets out a process map for applying Amount A and covers tax certainty issues related to Amount A. The fact sheet also discusses the removal and standstill of digital service taxes and relevant similar measures.

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

Other updates

ASIC takes civil penalty action against Telstra Super

ASIC has commenced civil penalty proceedings in the Federal Court against Telstra Super alleging failure to comply with internal dispute resolution requirements.

ASIC alleges that during the relevant period, 40% of Telstra Super's responses to complainants did not comply with its own dispute resolution procedures. This included 106 complainants who did not receive a response in the applicable 45-day timeframe.

ASIC also alleges that between 22 October 2021 and 13 January 2023, Telstra Super received 337 superannuation complaints and did not comply with notification requirements when it failed to:

- respond to 106 complainants within 45 days
- inform 85 complainants about why there was a delay in responding to their complaint, and
- inform 22 complainants about their right to take their complaint to the AFCA.

ASIC further alleges that Telstra Super failed to operate efficiently, honestly and fairly when it failed to comply with its procedures. It is alleged that Telstra Super sent delay notifications to complainants when it was not justified to do so, and did not have adequate resources to comply with its internal dispute resolution procedures.

Monthly Tax Update

Other updates (Cont.)

ASIC takes civil penalty action against Telstra Super (Cont.)

Declarations, pecuniary penalties and other orders are being sought by ASIC against Telstra Super.

This is the first proceeding under the new regime, which came into effect on 5 October 2021. The regime makes certain provisions of ASIC's Regulatory Guide for Internal Dispute Resolution ([RG 271 Internal dispute resolution](#)) are enforceable, including the requirement to respond to most superannuation complaints.

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

ATO Rulings and Activity

ATO lodgement penalty amnesty is ending soon

The ATO is reminding eligible small businesses they only have until 31 December 2023 to take advantage of the lodgement penalty amnesty.

The lodgement penalty amnesty program was announced by the government as part of the 2023–24 Budget. For eligible lodgements, failure to lodge (FTL) penalties will be remitted, without the need to apply to the Commissioner for a remission.

To be eligible for the amnesty, taxpayers are required to satisfy the following criteria:

- have aggregated turnover under \$10 million when the original lodgment was due,
- have overdue income tax returns, BAS or FBT returns that were due between 1 December 2019 and 28 February 2022, and
- have lodged the outstanding returns between 1 June and 31 December 2023.

The amnesty does not apply to privately owned groups, or individuals controlling over \$5 million of net wealth. Furthermore, directors who bring their company lodgements up to date can also have penalties remitted. This applies to eligible lodgements made between 1 June and 31 December 2023.

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

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ATO Rulings and Activity (Cont.)

ATO lodgement deferral for country-by-country reporting entities

The ATO has advised KPMG that it will grant a lodgement deferral for country-by-country (CbC) reporting entities that have a CbC reporting obligation for the year ended 31 December 2023. In light of the year-end holiday period, 31 December balancers will have until 31 January 2024 inclusive to lodge their Local file, Master file and CbC report which would ordinarily be due by 31 December 2023.

This deferral is automatically applied and a separate request to the ATO is not required.

The ATO noted that statements not lodged by 31 January 2024 may be subject to penalties.

New requirement to disclose R&D expenditure claims

The ATO has indicated that it is now required to publish information each year about research and development (R&D) entities and the R&D expenditure claims.

Tax agents with clients who claimed the R&D tax offset for the income year ended 30 June 2022 will soon be contacted by the ATO to review the R&D expenditure tax return data. The first ATO disclosure is expected to be published in September 2024 for claims made in the 2022 income year (for income years that commenced on or after 1 July 2021).

The information to be published will include:

- the name of the entity claiming the R&D incentives;
- the entity's Australian Business Number (ABN) or Australian Company Number (ACN), and
- total notional deductions claimed (label Z in Part A of the R&D tax incentive schedule), less any feedstock adjustments (label B in Part B of the schedule).

The data disclosed will be based on tax returns submitted or as amended by the taxpayer. However, if the Commissioner amended the return, the ATO is required to publish data as lodged by the company before the amendment. Taxpayers may lodge required amendments to correct any information in their returns.

The ATO also reminded taxpayers with an income year that ended on 31 December 2022 who are intending to claim the R&D tax offset that they must register eligible R&D activities by 11:59 pm (AEDT), Tuesday 31 October 2023. This must be done via the [R&D Tax Incentive customer portal](#).

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

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ATO Rulings and Activity (Cont.)

ATO updated the guidance for corporate taxpayers on the central management and control residency test

The ATO has updated Practical Compliance Guideline [PCG 2018/9](#) to include a risk assessment framework and provide further guidance on its ongoing compliance approach.

This Guideline contains practical guidance to assist foreign-incorporated companies and their advisors in applying the residency tests (in particular the central management and control test) as set out in Taxation Ruling [TR 2018/5](#). The updates to [PCG 2018/9](#) finalise the changes that were initially outlined in draft [PCG 2018/9DC1](#) (issued on 28 June 2023). In particular, an appendix setting out a risk assessment framework on the ATO's compliance approach has been added. Companies will be able to determine whether they are in the green (low), yellow (medium) or red (high) risk zones by reference to specified factors. The Commissioner would generally not allocate any resources to review the position of companies in the green zone. By contrast, companies in the red zone would more than likely be subject to review or compliance activity. Additional changes have been made to clarify the ongoing compliance approach for public groups.

The Guideline applies from 21 June 2018. The ATO has published a compendium of comments received on the draft updates in [PCG 2018/9DC1](#).

Simplified transfer pricing record-keeping options

The ATO has updated its guidance on simplified transfer pricing record-keeping options.

The update to Practical Compliance Guideline [PCG 2017/2](#) provides the maximum interest rate for low-level inbound loans and the minimum interest rate for low-level outbound loans for the 2023-2024 income year.

The new interest rate for both loans is 5.81%.

Draft instrument for working out monthly PAYG instalments

The ATO has issued a draft instrument to continue an alternative method for working out PAYG instalments for monthly payers.

Draft Legislative Instrument [LI 2023/D23](#) provides entities required to make PAYG instalments on a monthly basis with a simpler alternative method for working out the amount of their monthly instalment. Where conditions set out in the instrument are met, the additional method can be used instead of the method specified in s 45-114(1) in sch 1 to the *Taxation Administration Act 1953*.

When finalised, the instrument will commence on the day after it is registered and replace the 2013 instrument ([F2013L01933](#)) which will no longer apply from 1 April 2024.

Comments on the draft instrument and its accompanying draft explanatory statement are invited until 29 November 2023.

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ATO Rulings and Activity (Cont.)

ATO data-matching program for officeholders

The ATO has registered a gazette notice to acquire officeholder information from ASIC, the Office of the Registrar of Indigenous Corporations (ORIC) and the Australian Charities and Not-for-profits Commission (ACNC) for 2023-24 to 2024-25.

The objectives of the officeholder data-matching program include:

- to encourage increased uptake of the director ID through use of information available on the Australian Business Registries;
- to effectively link persons known to the ATO as officeholders to their associated companies, as recorded on ASIC, ORIC and ACNC registers;
- to issue correspondence to officeholders regarding their director ID obligations;
- to identify, deter and disrupt those promoting or engaging in illegal phoenix activity; and
- to better utilise registry data to combat unlawful activity.

The ATO estimates that records relating to approximately 11 million individuals will be obtained.

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

ATO visa data matching program

The ATO has registered a gazette notice to acquire visa data from the Department of Home Affairs for 2023–24 to 2025–26.

The data items to be acquired include identification details such as:

- address history for visa applicants and sponsors;
- contact history for visa applicants and sponsors;
- address history for migration agents;
- contact history for migration agents;
- active visas meeting the relevant criteria;
- all visa grants;
- visa grant status by point in time;
- migration agents (i.e. visa application preparers who assisted or facilitated the processing of the visa);
- all international travel movements undertaken by visa holders (arrivals and departures);
- sponsor details (457 visa); and
- visa subclass name.

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ATO Rulings and Activity (Cont.)

ATO visa data matching program (Cont.)

The objectives of the data matching program are to:

- help ensure that individuals and businesses are fulfilling their tax and super reporting obligations in respect of expatriates and workers from foreign jurisdictions;
- promote voluntary compliance by communicating how the ATO uses external data to help encourage taxpayers to comply with their tax and super obligations and to increase community confidence in the integrity of these systems;
- continue to refine the ATO's understanding of the tax and super risks across various types of visa holders and visa sponsors;
- develop and implement strategies to improve voluntary compliance, which may include educational or compliance activities as appropriate;
- help ensure visa populations fulfil their registration, lodgment, reporting and payment obligations in relation to tax and super;
- test the accuracy and strengths of the ATO risk detection models and treatment systems and practices and identify areas for improvement;
- identify potentially new or emergent approaches to fraud and those entities controlling or exploiting the visa framework;
- improve the integrity of the tax and superannuation systems by cancelling ABNs of ineligible ABN holders; and
- support compliance activities under Australia's foreign investment rules.

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

Non-commercial business losses

The non-commercial losses rules effectively restrict taxpayers operating businesses as sole traders or individual partners in a partnership from being able to offset their business losses against other non-business income unless the taxpayer is able to satisfy certain tests. The ATO has updated Practical Compliance Guideline [PCG 2022/1](#) which provides a safe harbour for individuals who make a loss from their business because the business was affected by special circumstances such as flood, bushfire or COVID-19 impacts (e.g. government-imposed lockdowns, business closures and/or restrictions).

The guideline has been updated to extend the application of the safe harbour to the 2023–24 income year. The safe harbour previously only applied for the 2020 – 2023 income years.

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ATO Rulings and Activity (Cont.)

ATO updated the FBT guide for employers

The ATO has updated Chapter 16 (Car parking fringe benefits) of the FBT guide for employers following the changes introduced in Taxation Ruling [TR 2021/2](#) which included providing guidance on:

- the concept of "primary place of employment" for the purposes of determining whether carparking is provided at or near an employee's primary place of employment,
- the FBT consequences of contemporary car parking arrangements, and
- the concept of a "commercial parking station".

Minor changes to style and expression have also been made throughout the chapter.

Please refer [here](#) for the updated FBT guide.

Draft FBT legislative instruments on records alternative to employee declarations

The ATO has released five draft legislative instruments on fringe benefit tax (FBT) record keeping measures for comment. The five FBT draft determinations specify the records that the Commissioner of Taxation will accept as an alternative to an employee declaration.

- **Draft Fringe Benefits Tax Assessment (Adequate Alternative Records – Temporary Accommodation Relating to Relocation) Determination 2023** specifies the records that the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits, housing fringe benefits or residual fringe benefits where:
 - the employer seeks to reduce the taxable value of a benefit in respect of providing temporary accommodation or temporary hire of household goods to an employee and their family members, and
 - the temporary accommodation is required solely because the employee is required to change their usual place of residence in order to perform the duties of their employment.
- **Draft Fringe Benefits Tax Assessment (Adequate Alternative Records – Otherwise Deductible Benefits) Determination 2023** specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of expense payment fringe benefits, property fringe benefits or residual fringe benefits, where the employer seeks to reduce the taxable value of the fringe benefit by applying the otherwise deductible rule.
- **Draft Fringe Benefits Tax Assessment (Adequate Alternative Records – Living-Away-From-Home Allowance – Maintaining an Australian Home) Determination 2023** specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of living-away-from-home allowance (LAFHA) fringe benefits.

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ATO Rulings and Activity (Cont.)

Draft FBT legislative instruments on records alternative to employee declarations (Cont.)

- **Draft Fringe Benefits Tax Assessment (Adequate Alternative Records – Fly-in Fly-out and Drive-in Drive-out Employees) Determination 2023** specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of LAFHA fringe benefits where the employee works on a fly-in fly-out or drive-in drive-out basis and the employer seeks to reduce the taxable value of the benefit.
- **Draft Fringe Benefits Tax Assessment (Adequate Alternative Records – Private Use of Vehicles Other Than Cars) Determination 2023** specifies records that the Commissioner will accept as an alternative to an employee declaration in respect of residual fringe benefits where the benefit consists of the private use of a motor vehicle other than a car and the employer seeks to reduce the taxable value of the benefit under the "otherwise deductible rule".

These instruments are proposed to commence on 1 April 2024. The last day for comments is 9 November 2023.

ATO updated guidance note on downsizer contributions

The ATO has issued an **addendum** to Law Companion Ruling LCR 2018/9 (Housing affordability measures: contributing the proceeds of downsizing to superannuation) and an update to Superannuation guidance note SPR **GN 2018/2**.

Downsizer contributions allow eligible individuals to contribute the proceeds of the sale of a current or former main residence into superannuation where certain requirements are satisfied. LCR 2018/9 and GN 2018/2 provide taxpayers with guidance on making downsizer contributions. The guidance has been updated to reflect legislative amendments since 2020, including lowering of the age threshold for making contributions.

Prior to 1 July 2022, an individual had to be aged 65 or over to be eligible to make a downsizer contribution. From 1 July 2022 to 31 December 2022 an individual had to be aged 60 or over to be eligible to make a downsizer contribution. From 1 January 2023 an individual has to be 55 or older to make a downsizer contribution.

ATO practice statement on collection of disputed debts rewritten

The ATO has rewritten its practice statement, **PS LA 2011/4** on the Commissioner's policy for managing the collection and recovery of disputed debts.

The rewritten **PS LA 2011/4** includes greater discussion around the Commissioner's risk assessment process when seeking to recover a disputed debt.

PS LA 2011/4 clarifies that the Commissioner will generally not seek to recover a debt when there is a dispute, save in exceptional circumstances when there is a significant risk to the revenue. The concept of risk to the revenue covers capacity to pay but also extends to other considerations. The Practice Statement further sets out the Commissioner's policy on entering 50/50 arrangements and explains how taxpayers can minimise their exposure to interest over the course of a dispute. The ATO's risk assessment process is based on the principles contained in Law Administration Practice Statement **PS LA 2011/6**.

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ATO Rulings and Activity (Cont.)

ATO draft guidance on corporate collective investment vehicle regime

The ATO has issued Draft Law Companion Ruling [LCR 2023/D1](#) on the tax treatment for corporate collective investment vehicles (CCIVs).

A CCIV is a new type of company limited by shares that is used for funds management. From a regulatory perspective, a CCIV is a registered company with all its assets and liabilities segregated into "sub-funds" and is operated by a single corporate director. For tax purposes, each CCIV sub-fund is treated as a separate tax entity that is a trust. The general trust taxation rules apply to CCIVs, subject to some modifications.

The Draft Law Companion Ruling provides the Commissioner's preliminary view on the operation of the CCIV regime. The draft Ruling supports the introduction of the CCIV regime. It is intended to provide guidance on the CCIV regime for those who have established a CCIV or are interested in establishing a CCIV as an alternative to existing investment structures such as legal form trusts. The draft Ruling outlines the operation of the CCIV regime, explains the deeming principle that treats CCIV sub-funds to be trusts for tax purposes, and provides views on specific tax interpretative issues.

The ruling will be effective from 1 July 2022 when finalised, being the commencement date of the CCIV regime.

Comments on the ruling, including on the proposed date of effect, are invited until 15 December 2023.

ATO Decision Impact Statement on Simplot Australia Pty Ltd

The ATO has published a [decision impact statement](#) on the Federal Court's decision in *Simplot Australia Pty Ltd v FC of T* 2023 ATC; [2023] FCA 1115.

This decision impact statement outlines the ATO's response to the case, which concerned whether 6 frozen food products were 'food of a kind marketed as a prepared meal'.

Briefly, the case concerned the GST classification of certain frozen food products supplied or imported by Simplot Australia Pty Limited (Simplot Australia). The products each contained a mix of vegetables along with spices or seasonings (some included grains). Some products were labelled as 'sides', while others provided serving suggestions, including through pictures that displayed the products served with added protein (for example, chicken or pork). The Commissioner issued assessments to Simplot Australia on the basis that the supply or importation of the products were subject to GST because they were 'food of a kind marketed as a prepared meal'. Simplot Australia objected to the assessments, the Commissioner disallowed the objections and Simplot Australia appealed to the Federal Court.

The Federal Court held that all the products in question were 'food of a kind marketed as a prepared meal' and therefore subject to GST rather than GST-free. The ATO further noted the decision confirms the Commissioner's classification of these particular products.

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ATO Rulings and Activity (Cont.)

ATO Decision Impact Statement on Simplot Australia Pty Ltd (Cont.)

The ATO is reviewing the impact of the decision on related advice and guidance products, including the:

- Goods and Services Tax Industry Issue GSTII FL1 Detailed Food List
- GST issues register Food industry partnership (including Goods and Services Tax Industry Issue GSTII FI3 Prepared food), and
- ATO Interpretative Decisions.

The ATO is also preparing further public advice on the implications of the decision and to explain how the principles from this decision apply to other products.

Comments on decision impact statement can be made until 8 December 2023.

GST implications on supplies of combination food

The ATO has issued provisional guidance on the GST implications of supplies of combination food, in light of the AAT decision in *Chobani Pty Ltd v FC of T* 2023 ATC 10-669, [2023] AATA 1664 (Chobani).

The draft Goods and Services Tax Determination ([GSTD 2023/D1](#)) explains when a supply of food is a combination food, which is subject to GST despite the food product having components that would otherwise be GST-free.

In *Chobani*, the AAT held that Chobani Flip Strawberry Shortcake flavoured yoghurt (product) was a combination food that was not GST-free.

The Commissioner's views on the meaning of "combination food" are:

- A supply of a combination food is the supply of a product comprising separately identifiable foods, at least one of which is a taxable food.
- A food is separately identifiable when it can be individually perceived by ordinary visual inspection. Being listed as an ingredient in a food alone is not sufficient to establish that a food is separately identifiable.
- The word "combination" in s 38-3(1)(c) takes its ordinary meaning as the "product or outcome of joining 2 or more things together in some way".
- Whether separately identifiable foods are sufficiently joined together so that they form a combination food is a matter of overall impression, having regard to factors including physical appearance and packaging, labelling, marketing, product design, manner of sale and consumer experience.
- Two or more foods that are separately identifiable and sufficiently joined will not be a combination food if the taxable food is so integrated into the overall product, or is so insignificant within that product, that it has no effect on the essential character of that product.
- Whether food is a combination food must be evaluated at the point of supply. An expectation or likelihood that the combination food may be later separated or mixed does not prevent it from being a combination food.

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ATO Rulings and Activity (Cont.)

GST implications on supplies of combination food (Cont.)

The following 3 principles apply when determining whether there is a supply of a combination food:

- There must be at least one separately identifiable taxable food.
- The separately identifiable taxable food must be sufficiently joined together with the overall product.
- The separately identifiable taxable food must not be so integrated into the overall product, or be so insignificant within that product, that it has no effect on the essential character of that product.

It is noted that *Goods and Services Tax Ruling GSTR 2001/8* (Goods and services tax: Apportioning the consideration for a supply that includes taxable and non-taxable parts) deals with identifying supplies that include taxable and non-taxable parts. The Commissioner said that *GSTR 2001/8* has no application to supplies of combination foods, as combination foods have no non-taxable parts. Combination foods are always treated under the GST law as a single taxable thing.

When the final determination is issued, it is proposed to apply both before and after its date of issue. In this regard, the Commissioner will continue to act in accordance with *Law Administration Practice Statements PS LA 2011/27* (Determining whether the ATO's views of the law should be applied prospectively only) and *PS LA 2012/2* (GA) (GST classification of food and beverage items).

Class rulings issued:

- Class Ruling *CR 2023/58* Vanguard retail funds — exchange of units for units in Vanguard wholesale funds. This ruling applies to the income year in which the unit exchange transaction occurred, being the year ended 30 June 2024.
- Class Ruling *CR 2023/59* Park AI Pty Ltd — ParkLog report for calculating car parking benefits. This ruling applies from 1 April 2023 to 31 March 2028.

Other rulings issued:

- Product Ruling *PR 2023/20* St. James's Place International Investment Plan II. It applies from 1 July 2023 to entities as specified that enter into the plan from 1 July 2023 until 30 June 2026.
- Product Ruling *PR 2023/21* St. James's Place International Investment Bond and International Investment Account. This ruling applies from 1 July 2023 to the entities specified in paragraph 4 of this ruling that enter into a Policy from 1 July 2023 until 30 June 2026.

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ATO Rulings and Activity (Cont.)

Other rulings issued (Cont.):

- Product Ruling [PR 2023/22](#) Swiss Life (Singapore) Pte Ltd Alpha Plus Variable Universal Life. This ruling applies from 1 July 2023 to the entities specified in para 4 of the ruling that enter into an Alpha Plus Variable Universal Life insurance policy from 1 July 2023 until 30 June 2026. However, the ruling only applies and may be relied on to the extent that there is no change in the scheme or in the entity's involvement in the scheme. If the scheme carried out is materially different from the scheme described in para 10 to 26 of the ruling, the ruling cannot be relied upon and may be withdrawn or modified.
- **Addendum** to Product Ruling PR 2020/2 Income tax: taxation consequences of investing in C2 Gateway Deferred Purchase Agreement. It amends PR 2020/2 to incorporate the application of ss 82KZM(1A) and 82KZMA(2A) of ITAA 1936. The addendum applies before and after its date of issue.
- **Addendum** to Product Ruling PR 2020/1 Income tax: tax consequences of investing in equities using Bell Geared Equities Investment (2019 Product Brochure). The addendum incorporates the application of ss 82KZM(1A) and 82KZMA(2A) of ITAA 1936 into the ruling.

Latest Australian Tax Cases

- **Capital gain from disposal of goodwill** - The High Court has refused the taxpayer's application for special leave to appeal against a decision of the Full Federal Court in *Hedges v FC of T* 2023 ATC; [2023] FCAFC 105. In that case, the Full Court affirmed the view of the Commissioner, the AAT and the Federal Court (2022 ATC; [2022] FCA 1389) that the taxpayer's capital gain from the disposal of goodwill in a partnership business was not reduced by his capital account shortfall. The offsetting of amounts owing against amounts owed on the partner's retirement was an accounting "convenience" that did not result in a reduction of the relevant capital gain.
- **Employee or contractor distinction** - The High Court has refused the Commissioner's application for leave to appeal against a Full Federal Court decision concerning the employee/independent contractor distinction in the context of superannuation guarantee obligations. In *JMC Pty Ltd v FC of T* 2023 ATC; [2023] FCAFC 76, the Full Federal Court held that a lecturer engaged by a provider of higher education programs was an independent contractor of the provider on the basis that the lecturer had a right of delegation and therefore was neither a common law employee or deemed employee for superannuation guarantee purposes. Accordingly, the provider was not liable to make superannuation guarantee contributions in respect of the lecturer.
- **Fully franked dividends** - The Commissioner has appealed to the Federal Court against the decision of the AAT in *Michael John Hayes Trading Pty Ltd ATF MJH Trading Trust & Ors v FC of T* 2023 ATC; [2023] AATA 3005. In that case, the AAT held that a distribution of fully franked dividends was not made as part of a dividend stripping operation because, even though the taxpayers received the dividends free of tax, the original ultimate shareholders did not receive any capital sum as a substitute for taxable dividends paid and the requisite tax avoidance purpose was not present.

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Latest Australian Tax Cases (Cont.)

- **Division 7A** - The Commissioner has appealed against the AAT decision in *Bendel & Anor v FC of T* 2023 ATC; [2023] AATA 3074. In that case, the AAT held that unpaid present entitlements of a corporate beneficiary to income or capital of a trust estate did not constitute loans from the company to the trust for the purposes of s 109D of Division 7A of ITAA36.

The ATO have issued an interim decision impact statement which can be accessed [here](#).

The Commissioner has noted that *"until the appeal process is finalised, the Commissioner does not intend to revise the current ATO views relating to private company entitlements to trust income, as set out in Taxation Determination TD 2022/11 Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?"*

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