ANDERSEN

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Monthly Tax Update

In this last edition of Andersen in Australia's **Monthly Tax Update** for 2024, 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

Bills to codify government collection of payment now law

A package of Bills to formalise a long-standing Commonwealth practice of charging payment surcharges for payments made via card received assent on 2 December 2024.

The package includes the following legislation:

- The Commonwealth Entities (Payment Surcharges) Bill 2024 (Act No 101 of 2024). The Bill was passed by both Houses on 29 November 2024 with some minor Senate amendments in relation to authority for Commonwealth entities to surcharge.
- The Commonwealth Entities (Payment Surcharges) (Consequential Provisions and Other Matters) Bill 2024 (Act No 103 of 2024). The Bill was passed by both Houses on 28 November 2024.
- The Commonwealth Entities (Payment Surcharges) Tax (Imposition) Bill 2024 (Act No 102 of 2024 (Imposition Act)). The Bill was passed by both Houses on 28 November 2024.

Under the amendments introduced in the package of Acts, Commonwealth entities authorised to collect payments (whether under Commonwealth, State, or Territory laws) are expressly granted legislative authority to charge and collect a payment surcharge on those payments. The Imposition Act allows for the retrospective collection of payment surcharges by imposing a tax equivalent to the surcharge amount, ensuring its collection even if it falls outside the other powers of the Commonwealth Parliament.

The amendments apply retrospectively from 1 January 2003 to align with when the Reserve Bank first regulated payment surcharging as part of the then broader payments systems reforms.

The amendments in the Acts will enable quick and efficient adoption of any changes to future government surcharging policies, as part of the Reserve Bank's ongoing review of merchant payment costs and surcharging.

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Legislation Update (Cont.)

Bill to establish tax incentives for hydrogen and critical minerals production introduced

A Bill to establish new tax offsets for hydrogen production and critical minerals processing has been introduced in Parliament, as announced in the 2024–25 Budget.

Hydrogen Production Tax Incentive

The Hydrogen Production Tax Incentive (HPTI), outlined in Schedule 1 of the Future Made in Australia (Production Tax Credits and Other Measures) Bill 2024, aims to encourage companies to initiate medium to large-scale renewable hydrogen production in Australia. The HPTI will be administered through the tax system as a refundable tax offset, providing $2 per kilogram of eligible hydrogen for companies that meet the specified eligibility criteria.

The main eligibility criteria for the HPTI are as follows:

- The company must be a constitutional corporation that is subject to tax in Australia.
- The company must hold the production profile under which the hydrogen was produced, allowing it to issue the Production Guarantee of Origin (PGO) certificate for the hydrogen.
- The company must have complied with the rules implementing the community benefit principles for the HPTI made by the Treasurer.
- The hydrogen must have been produced in Australia in the income year, which must have commenced on or after 1 July 2027 and ended before 1 July 2040.
- The hydrogen must have been produced during the offset period (the period in which the hydrogen production tax offset can be claimed) for the production profile under which it was produced and at a time when that production profile was certified by the Clean Energy Regulator (CER) for the purposes of the tax offset. For the profile to be eligible to be certified, the facility set out in the profile must be a single site located in Australia with a production capacity at least equivalent to an electrolyser with 10 megawatts and a final investment decision must have been made in relation to the facility before 1 July 2030.
- The hydrogen must be the subject of a registered PGO certificate for which the initial reconciliation period has expired and for which no correction notice is in force, that indicates the hydrogen has been produced with an emissions intensity of not exceeding 0.6 kilogram of carbon dioxide for each kilogram of hydrogen and if produced using electricity from a grid, the electricity meets the grid matching requirements.
- A correction notice must not be in force for the PGO certificate for the hydrogen.

The HPTI will be jointly administered by the ATO and the CER. Taxpayers receiving government support under the Hydrogen Headstart program would see these payments proportionally reduce if they also receive the HPTI.

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Legislation Update (Cont.)

Bill to establish tax incentives for hydrogen and critical minerals production introduced (Cont.)

Critical Minerals Production Tax Incentive

The Critical Minerals Production Tax Incentive (CMPTI), detailed in Schedule 2 of the Bill, is designed to support the downstream refining and processing of Australia's critical minerals, enhancing supply chain resilience. The CMPTI will be implemented through the tax system as a refundable tax offset, equal to 10% of a company's eligible expenditure.
The main eligibility criteria for the CMPTI are as follows:

- The company must be a constitutional corporation.
- The company carries out one or more CMPTI processing activities for which it is registered within the income year, which must have commenced on or after 1 July 2027 and ended on or before 30 June 2040. CMPTI processing activities involve substantially transforming a feedstock that contains a critical mineral through extractive metallurgical processing into a purer or more refined form of the critical mineral that is chemically distinct from the feedstock, or are specified in regulations as producing an outcome in relation to one or more critical minerals.
- The company incurred CMPTI expenditure for the income year through carrying out one or more of these processing activities.
- The company satisfies the residency requirements, ie it is an Australian tax resident, has an ABN and is carrying on the activity, or it is a foreign resident with a permanent establishment in Australia through which the registered CMPTI processing activities are carried on, and has an ABN.
- The company must have complied with the rules implementing the community benefit principles for the CMPTI made by the Treasurer.

The Industry Secretary is responsible for registering CMPTI processing activities, while the ATO oversees the administration of the CMPTI tax offset. The tax offset is available for eligible activities for a period of up to 10 consecutive income years. The Bill also contains amendments to bring the 2 refundable tax offsets within the ambit of the general anti-avoidance rules in ITAA 1936, as by default, these rules do not apply to tax offsets.

The main provisions in Sch 1 and 2 are set to commence on the first day of the first quarter to occur after the later of the date the Bill receives assent and the day the *Future Made in Australia (Guarantee of Origin) Act 2024* commences. That Act is yet to be enacted and is currently a Bill before parliament (Future Made in Australia (Guarantee of Origin) Bill 2024). If enacted, it will establish the voluntary Guarantee of Origin scheme to certify renewable electricity and products such as hydrogen and provide for the creation of certificates that contain information about the attributes of the renewable electricity or product that they represent. If this Bill is not enacted, the amendments establishing the tax incentives will not commence.

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Other Legislation Update

Exposure draft legislation: beneficial ownership reforms

Exposure draft legislation has been released to ensure disclosure of who effectively owns, and controls entities listed on Australia's financial markets.

These beneficial ownership reforms eliminate a major loophole that has allowed sophisticated investors to conceal their interests in some of Australia's most significant listed companies through the use of complex financial products.

The draft amendments also enhance the Australian Securities and Investments Commission's (ASIC) investigative and enforcement powers, enabling it to act swiftly to freeze opaque holdings that may be used to evade legal obligations or facilitate criminal activities, including those involving offshore actors.

An open register of ownership will show who ultimately owns, controls, or receives profits from a company or legal vehicle operating in Australia.

This will assist regulators and law enforcement agencies to address tax evasion, money laundering and other financial crime facilitated by complex legal structures and arrangements.

Submissions can be made online until 13 December 2024. Please refer to the treasury website for more information

Tax incentives and integrity Bill introduced

A Bill has been introduced to refine the definition of "fuel-efficient vehicle" align the indexation rates for luxury car tax (LCT) thresholds, disallow deductions for interest charges, and extend the ATO's notification period for retaining refunds. These measures aim to incentivize the adoption of fuel-efficient and electric vehicles.

The Treasury Laws Amendment (Tax Incentives and Integrity) Bill 2024, Sch 1, will amend s 25-1 of the *A New Tax System (Luxury Car Tax) Act 1999* by updating the definition of a fuel-efficient car by:

- reducing the maximum fuel consumption for a car to be considered fuel-efficient for the LCT to 3.5 litres per 100 kilometres from the current 7 litres per 100 kilometres, and
- amending the index number used to index the LCT threshold from All Groups Consumer Price Index (CPI) to the motor vehicle purchase sub-group of the CPI.

The amendments aim to promote the adoption of fuel-efficient and electric vehicles while ensuring that the concessional treatment of fuel-efficient cars aligns with the government's National Electric Vehicle Strategy.

Schedule 1 to the Bill will commence on the first day of the first quarter following assent. The amendments will apply to taxable supplies and taxable importations of luxury cars on or after 1 July 2025.

Schedule 1 fully implements the "Luxury Car Tax – modernising the luxury car tax for fuel-efficient vehicles" measure announced in the 2023–24 MYEFO.

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Other Legislation Update (Cont.)

Tax incentives and integrity Bill introduced (Cont.)

Denying deductions for interest charges

Schedule 2 of the Bill will amend sections 25-5 and 26-5 of the *ITAA 1997* to disallow income tax deductions for amounts of general interest charge (GIC) and shortfall interest charge (SIC) incurred by taxpayers in income years commencing on or after 1 July 2025.

GIC and SIC are incurred where tax debts have not been paid on time, or a tax liability has been incorrectly self-assessed and resulted in a shortfall of tax paid, respectively. Both GIC and SIC are currently tax-deductible for all entities. Schedule 2 to the Bill will commence on the first day of the first quarter following assent.

Schedule 2 fully implements the "Denying deductions for interest charges" measure in the 2023–24 MYEFO.
Extending ATO notification period for retaining refunds

Schedule 3 of the Bill will amend the *Taxation Administration Act 1953* to extend the period within which the Commissioner must notify a taxpayer of the decision to retain a refund amount for verification of information. This period will increase from 14 days to 30 days for refunds arising from a BAS or other notifications under the BAS provisions.

Schedule 3 to the Bill will commence on the first 1 July following assent. The amendments apply to amounts due to be refunded on or after the commencement of Sch 3.

Schedule 3 to the Bill partially implements the "Strengthening Tax Compliance – Australian Taxation Office Counter Fraud Strategy" measure in the 2024–25 Budget.

Other Legislation Update (Cont.)

DGR and other miscellaneous amendments Bill introduced

A Bill has been introduced to amend the listing of deductible gift recipients (DGRs) in ITAA 1997.

Schedule 5 of the Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Bill 2024 designates Skip Foundation Ltd as a deductible gift recipient (DGR) for gifts made between 1 July 2024 and 30 June 2029. Additionally, it removes the following specifically listed DGRs:

- Don Chipp Foundation Ltd
- Ian Clunies Ross Memorial Foundation
- Ian Thorpe's Fountain for Youth
- Layne Beachley — Aim for The Stars Foundation Limited
- National Congress of Australia's First Peoples Limited
- Sir William Tyree Foundation
- SouthCare Helicopter Fund Pty Limited, and
- Lingiari Policy Centre Limited.

The amendments in Sch 5 will commence on the first day of the first quarter to occur after the day the Bill receives assent. Several miscellaneous amendments are contained in Sch 6 to the Bill to make technical changes, including:

- further amendments consequential to the thin capitalisation reforms made by *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Act 2024* to ensure associate entities of general class investors are correctly categorised under the rules, to apply to income years starting on or after 1 July 2023, and
- amendments to the *Corporations Act 2001* to clarify tax residency disclosures required for subsidiaries of public companies under s 295(3A).

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Other updates

IGTO to review management of financial abuse within the tax system

The Inspector-General of Taxation and Taxation Ombudsman (IGTO) will be reviewing how the ATO identifies and deals with financial abuse within the tax system, to combat financial abuse and support victim-survivors.

The IGTO will examine how the ATO's current systems, policies and processes identify and deal with financial abuse within the tax system and will focus on the following areas:

- how the ATO detects or identifies instances of financial abuse within the tax or superannuation systems
- what the ATO can do to best support or provide relief from debt for victim-survivors and hold perpetrators to account
- how ATO systems may be used to identify perpetrators of financial abuse within the tax and superannuation systems and potentially third parties involved, and
- how far the ATO can go to minimise the broader impact of financial abuse within the tax system on other government services, such as social security or child support.

The IGTO will examine best practice approaches to assist the ATO to design products and processes that effectively support victim-survivors of financial abuse and minimise the risk of further victimisation within the tax system.

Contribution or input on the terms of reference can be made by 10 December 2024. The final report is expected to be delivered in March 2025.

For more information, please refer here.

Terms of reference released for review into R&D system, panel announced

The Federal Government has released the terms of reference for the upcoming review of Australia's research and development (R&D) system.

First announced in the 2024 Federal Budget, the review aims to strengthen the alignment of government priorities to improve innovation and R&D outcomes.

According to the terms of reference, the panel will consider opportunities to:

- maximise the value of existing investment in R&D, across government, universities, philanthropy and industry;
- strengthen linkages between research and industry, enabling greater mobility of researchers and innovators between sectors and addressing barriers to meaningful collaboration;
- support the achievement of national priorities, including mechanisms to improve coordination and impact of R&D funding and programs across Government and through our science agencies;
- drive greater R&D investment by industry, and boost industry adoption of innovation; and
- uplift Australia's overall R&D intensity.

The panel members include Robyn Denholm, Ian Chubb, Fiona Wood and Kate Cornick.

The review will run until 31 December 2025.

For more information, please refer here.

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Other updates (Cont.)

Consultation on Crypto-Asset Reporting Framework and related amendments

Treasury has released a consultation paper inviting feedback on options for Australia's implementation of the OECD-developed rules for the Crypto-Asset Reporting Framework (CARF) and related amendments to the Common Reporting Standard (CRS).

The consultation paper considers 2 policy options — adopting the OECD CARF Model into Australian tax law or implementing a bespoke set of rules.

The OECD CARF is a new tax transparency standard designed for the automatic exchange of crypto-related account information between tax authorities globally. In general, crypto assets are digital representations of value that can be transferred, stored, or traded electronically. Common examples include Bitcoin, investment tokens, and non-fungible tokens (NFTs).

The OECD developed the CARF to address the rapid global growth of the crypto asset market. The CARF aims to establish a global minimum standard for tax information exchange, building upon the existing Common Reporting Standard (CRS). The CRS allows participating tax authorities to exchange information on traditional financial accounts held by foreign tax residents, acting as a deterrent to tax evasion.

The CARF will enhance visibility of income generated through crypto assets, promoting compliance with local tax laws through the automatic exchange of information between tax authorities. It requires crypto asset intermediaries operating in Australia to report data on crypto-related transactions to the ATO. The ATO can then share this information with global counterparts who have also adopted the OECD CARF model. Similarly, the ATO will receive data regarding Australian residents from other participating authorities.

Interested parties are invited to comment on this consultation until 24 January 2025.

For more information, please refer to the Treasury website.

Other updates (Cont.)

Consultation paper on updates to digital asset guidance published

The Australian Securities and Investments Commission (ASIC) has released a consultation paper on updated guidance on digital assets and related products.

The Consultation Paper 381, Updates to INFO 225: Digital Assets: Financial Products and Services (CP381), proposes several updates to INFO 225. This includes the addition of 13 practical examples illustrating how the current financial product definitions apply to digital assets and related products, aiming to provide "greater clarity about the current law."

According to ASIC, CP 381 seeks feedback on:

- its updated guidance in INFO 225, including the worked examples;
- the application of the existing Australian Financial Services (AFS) licence processes, ASIC guidance and standard conditions to digital asset businesses;
- practical licensing issues for wrapped tokens and 'stablecoins', issues arising from the potential transition to the Federal Government's proposed digital asset platform and payment stablecoins regimes, and consideration of potential regulatory relief; and
- a potential class 'no action' position for digital asset businesses that are in the process of applying for or varying an AFS licence, Australian Markets Licence or Clearing and Settlement Facility licence.

Consultation on CP 381 closes on 28 February 2025.

ASIC states that it intends to publish a final version of the updated INFO 225 in mid-2025.

For more information, please refer to ASIC website.

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OECD Updates

The Global Forum on Transparency and Exchange of Information for Tax Purposes held its 17th Plenary meeting, in Asunción, Paraguay from 26 – 28 November 2024, bringing together over 400 delegates from more than 110 jurisdictions and 13 international bodies. The event marked 15 years of significant progress in transparency and exchange of information for tax purposes worldwide, including a major advance on the implementation of the recently developed Crypto-Asset Reporting Framework (CARF).

Over 60 jurisdictions have so far committed to implement the CARF in time to commence exchanges in 2027 or 2028, and 48 jurisdictions have now signed the CARF Multilateral Competent Authority Agreement to begin the implementation of their commitment.

The latest 2024 Global Forum annual report details the scale of global tax co-operation, and its continued and remarkable impact on tax transparency and exchange of information. The following reports were also released during the Plenary:

- Delivering Tax Transparency to Crypto-Assets: A Step-by-Step Guide to Understanding and Implementing the Crypto-Asset Reporting Framework, a guide to facilitate further Crypto-Asset Reporting Framework (CARF) commitments and broaden the scope of implementation.

- Capacity-Building Strategy for the Widespread and Effective Implementation of the Crypto-Asset Reporting Framework, presenting a strategy developed by the Global Forum to support the widespread and effective implementation of the CARF.

- Peer Review of the Automatic Exchange of Financial Account Information – 2024 Update, which presents the latest conclusions of the assessment carried out by Global Forum regarding the effectiveness in practice of the international standard for Automatic Exchange of Information (AEOI) of financial accounts.

- Administrative Compliance Strategy Programme: Enhancing the Effectiveness of the Implementation of the Standard on Automatic Exchange of Financial Account Information – 2023/2024 Interim Report, providing an overview of the impact of the Administrative Compliance Strategy Programme, aimed at supporting jurisdictions strengthening their domestic legal frameworks to enforce compliance with the Common Reporting Standard for the Automatic Exchange of Financial Account Information.

- Preliminary Maturity Assessments: A 2024 Initiative to Catalyse Developing Countries' Participation in Automatic Exchange of Information, providing an overview of the Preliminary Maturity Assessments Initiative, aimed at engaging members not already committed to a specific date to commence AEOI to explore a practicable timeline for successful implementation.

For more information, please refer here.

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ATO Rulings and Activity

ATO granted lodgment deferral for CbC reporting statements

The ATO has granted automatic lodgment deferral until 31 January 2025 to Country-by-Country (CbC) reporting entity in respect of lodgement of Country-by-Country reporting statements.

This deferral applies to local files, master files and CbC reports due to be lodged by 31 December 2024, including those that have a replacement reporting period ending on 31 December 2023.

As the lodgment deferral automatically applies, no separate request is required.

CbC reporting entities are advised to ensure these CBC reporting statements are lodged by 31 January 2025 to avoid any penalties.

Guidance on applying for exemptions and administrative relief from CbC reporting obligations

The ATO has released guidance on its approach toCbC reporting exemption requests received from 1 January 2025 and eligibility for administrative relief from CbC reporting obligations.

Exemption from CBC reporting obligations

In certain circumstances, a taxpayer may qualify for an exemption from submitting one or more of their Country-by-Country (CBC) reporting statements. The ATO typically considers granting exemptions in three specific situations:

- An exemption from the requirement to file a CBC report may be granted to an Australian CBC reporting parent, or a member of a group consolidated for accounting purposes with an Australian CBC reporting parent, if the group has no foreign operations—meaning there are no constituent entities or permanent establishments outside of Australia.
- An exemption from the requirement to file a CBC report may also be granted if the annual global income of a foreign CBC reporting parent is A$1 billion or more, but falls below the CBC reporting foreign currency threshold in the jurisdiction of the foreign CBC reporting parent.
- Finally, an exemption from filing a CBC report and a master file may be granted if the taxpayer was a CBC reporting entity in the preceding year due to their membership in a group of entities, but left that group during the CBC reporting year due to a demerger or sale to a third party. This exemption applies if the taxpayer will not be a CBC reporting entity under their new structure for the foreseeable future.

In addition to the 3 defined circumstances, the ATO may grant an exemption in exceptional cases, taking into account matters relevant to the Commissioner's exercise of the exemptions power.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Guidance on applying for exemptions and administrative relief from CbC reporting obligations (Cont.)

Administrative relief from CbC reporting obligations

In some circumstances, a taxpayer may be eligible for administrative relief without the need to request an exemption.

There are two scenarios in which a taxpayer may qualify for administrative relief from filing a CbC report. These concessions are designed to align domestic CbC reporting obligations with the OECD model.

The ATO will not require a CbC report from a taxpayer if their CbC reporting parent is resident for tax purposes in a foreign jurisdiction and one or more of the following conditions apply:

- their CbC reporting parent is under an obligation to file a CbC report in their jurisdiction of tax residence and Australia has an active CbC exchange agreement with that jurisdiction
- their CbC reporting parent or another entity in their global accounting group (a “surrogate parent entity”) voluntarily files a CbC report in its jurisdiction of tax residence for exchange under an active CBC exchange agreement with Australia.

If a taxpayer is relying on a filing by a surrogate parent entity, they should confirm with that entity that it has filed the CbC report in that capacity.

Administrative relief – local file

Generally, no administrative relief is available for the local file for reporting periods starting on or after 1 January 2024. The two exceptions to this are tax-exempt entities under Division 50 of the *ITAA 1997* and National Tax Equivalent Regime (NTER) entities.

For more information, please refer to the ATO website.

ATO compliance approach on restructures and the thin capitalisation and debt deduction creation rules

Draft PCG 2024/D3 outlines the ATO's compliance approach and risk assessment framework regarding the application of certain anti-avoidance provisions to restructures in response to the Act. The term "restructure" for the purposes of the guideline refers to any restructure or refinance, including changes or reorganisations of group structures, business affairs, or financial arrangements. The Commissioner considers "restructure" to include any part of a broader restructure or a restructure that is in progress but yet to be completed.

Draft PCG 2024/D3 has been reissued with updates to include Schs 3 and 4 — the thin capitalisation schedules. The draft guidelines were previously issued on 9 October 2024 to include Schs 1 and 2 on the debt deduction creation rules.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

ATO compliance approach on restructures and the thin capitalisation and debt deduction creation rules (Cont.)

Schedule 3

Schedule 3 to draft PCG 2024/D3 provides targeted compliance approaches in the following circumstances:

- determining whether s 820-427A(3)(c) of ITAA 1997 is satisfied with respect to:
  - restructuring to remove recourse for payment of a debt to assets that are not Australian assets
  - whether assets are considered “minor or insignificant”
- restructuring to comply with s 820-427C(1)(d) of ITAA 1997.

Where applicable, the ATO will not apply compliance resources beyond verifying the application of the targeted compliance approaches. The following requirements apply to all compliance approaches in Schedule 3:

- Any restructure that occurs to ensure the debt arrangement can satisfy the third party debt conditions is undertaken in a straightforward manner having regard to the circumstances, without any associated contrivance or artificiality and is on arm’s-length terms.
- The restructure will not attract the application of Pt IVA of ITAA 1936.
- Prior to and following any restructure, the original arrangement satisfies the third party debt conditions (other than the condition to which the compliance approach applies).
- The use of the financial arrangement does not change.
- The quantum and rate of the financing arrangement do not materially change.

The ATO will review these compliance approaches as it implements the third party debt test and will consult on any material changes.

Schedule 4

Schedule 4 to draft PCG 2024/D3 provides the ATO’s view on compliance risks associated with certain restructures in response to the thin capitalisation rules.

The risk assessment framework in draft PCG 2024/D3 applies to the restructuring examples in Sch 4.

Concerns have been raised about the potential for the ATO to apply Part IVA to cancel all or part of a tax benefit when a taxpayer restructures in response to the thin capitalisation changes but maintains tax benefits moving forward. Schedule 4 provides examples of restructures that the ATO considers to be low-risk and high-risk restructures.

Draft PCG 2024/D3 is being reissued to allow for comments on Schs 3 and 4 only. Schedules 3 and 4 should be read in conjunction with draft TR 2024/D3.

Interested parties are invited to submit comments on Schs 3 and 4 of draft PCG 2024/D3 and draft TR 2024/D3 by 7 February 2025.

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ATO Rulings and Activity (Cont.)

Draft guidance and compliance approach on thin cap third party debt test

The ATO has issued provisional guidance on the third party debt test for thin capitalisation purposes in Subdiv 820-AA of ITAA 1997 and updated its provisional compliance approach to restructures carried out in response to reforms to the thin capitalisation rules made by the Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Act 2024 (the Act).

The Act introduced three thin capitalisation tests in Subdivision 820-AA to limit the amount of debt deductions for general class investors. These tests are the fixed ratio test, the group ratio test, and the third-party debt test. The third-party debt test also applies to financial entities that are not authorised deposit-taking institutions. Additionally, the Act introduced debt deduction creation rules in Subdivision 820-EAA of the ITAA 1997, which disallow debt deductions arising from certain related-party arrangements.

Draft Taxation Ruling TR 2024/D3 sets out the Commissioner's views on the third party debt test, with a particular focus on the third party debt conditions in s 820-427A. These conditions are relevant to working out an entity's third party earnings limit, and therefore the amount of debt deductions (if any) disallowed under the third party debt test in the thin capitalisation rules in Div 820.

The draft ruling provides guidance on the Commissioner's interpretation of key concepts and terms in s 820-427A, including examples to illustrate and explain:

- when a debt deduction is paid directly to an associate entity within the meaning of s 820-427A(2)(b)
- the expression "recourse for payment of the debt" in the context of s 820-427A(3)(c)
- the term "Australian assets" for the purpose of s 820-427A(3)(c)
- the expression "commercial activities in connection with Australia" for the purpose of s 820-427A(3)(d), and
- the credit support rights covered by s 820-427A(5) that are prohibited under the third party debt conditions.

Draft TR 2024/D3 should be read in conjunction with Schs 3 and 4 of Draft Practical Compliance Guideline PCG 2024/D3.

When finalised, the ruling is proposed to apply both before and after its date of issue.

Draft compliance approach on capital raised for the purpose of funding franked distributions

The ATO has issued its draft compliance approach in relation to the integrity measure in s 207-159 of ITAA 1997 that operates to make certain distributions funded by capital raising unfrankable.

Draft Practical Compliance Guideline PCG 2024/D4 outlines the framework the ATO uses to assess the level of risk that the integrity measure in section 207-159 will apply, potentially denying franking credits attached to a distribution.

The integrity measure is designed to deter arrangements where capital is raised to fund the payment of franked distributions and the release of franking credits in a manner that does not materially alter the entity's financial position. It targets arrangements entered into with the primary purpose (other than an incidental purpose) of accelerating the release of franking credits to entity members in ways that cannot be explained by standard distribution practices, and which are typically artificial or contrived.

ATO Rulings and Activity (Cont.)

Draft compliance approach on capital raised for the purpose of funding franked distributions (Cont.)

The draft guideline applies to corporate tax entities that have made a distribution that purports to be a frankable distribution, as defined in section 202-40 of the *ITAA 1997*. The risk assessment framework outlined in the draft guideline consists of three zones—white, green, and red. The level of engagement a taxpayer can expect from the ATO depends on the risk zone that applies to the arrangement.

The framework in the draft guideline can be used to understand the:

- level of compliance risk present in an arrangement in relation to the integrity measure, enabling the taxpayer to make informed decisions about the likelihood that they will be subject to compliance action
- features of arrangements that the ATO considers present greater compliance risk, and
- types of documentation that the ATO considers to be relevant when assessing the compliance risk associated with an arrangement.

Taxpayers may be required to, or asked by the ATO to, report their risk rating under the draft guideline through the reportable tax position schedule.

Arrangements not specifically covered by draft PCG 2024/D4

The draft guideline does not provide guidance on the ATO's compliance approach to arrangements outside the white, green, and red zones. For arrangements not specifically addressed in the draft guideline, the following factors can help guide taxpayers on the types of arrangements the ATO is more likely to scrutinize when considering the application of the integrity measure:

- whether franked distributions paid are unusually large and not consistent with the ordinary distribution practice of the entity;
- whether there is minimal or no substantial net change in the financial position of the entity from the arrangement;
- whether there is a lack of clear and genuine commercial purpose for issuing equity (other than access to franking credits) as part of the arrangement; and
- the extent of alignment in timing and amount between the issue of equity interests and the making of a distribution that the company purports to be frankable.

If an arrangement falls outside the zones outlined in the draft guideline, it does not necessarily indicate a high risk of the integrity measure applying. However, the ATO may engage with the taxpayer to gain a better understanding of the arrangement. A taxpayer may also apply for a private ruling to receive advice tailored to their specific circumstances.

Application

When finalised, the guideline is proposed to apply to distributions made on or after 28 November 2023.

Comments on the draft guideline can be submitted until 31 January 2025.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Guidance finalised on s 99B trust income and 'resident taxpayer' tests

The ATO has finalised its view on the relevant factors to consider under the "hypothetical resident taxpayer tests" in s 99B(2)(a) and (b) of ITAA 1936.

Taxation Determination TD 2024/9 sets out that for the purposes of the hypothetical resident taxpayer tests contained in s 99B(2)(a) and (b), the only characteristic of the hypothetical taxpayer is that they are an Australian resident. It cannot be assumed that the taxpayer has any other characteristics. Accordingly, certain concessions (such as the CGT discount available under Div 115 of ITAA 1997 which is only available to specific classes of resident taxpayers) are not taken into account when determining whether an amount would or would not be included in the assessable income of a hypothetical resident taxpayer.

This Determination also provides clarity on:

- the meaning of corpus in paragraph 99B(2)(a);
- the characteristics that may be ascribed to the hypothetical resident taxpayer;
- the circumstances giving rise to the amounts which are relevant for the hypothetical resident taxpayer tests; and
- why it is relevant to consider how the property paid or applied to the beneficiary became a trust asset.

ATO compliance approach to s 99B for distributions from non-resident trusts

The ATO has finalised its compliance approach to arrangements that may be subject to section 99B of the ITAA 1936. These arrangements involve situations where the property of a non-resident trust (or property accumulated while the trust was a non-resident) is paid to, or applied for the benefit of, an Australian resident beneficiary.

Practical Compliance Guideline PCG 2024/3 outlines the ATO's compliance approach to distributions and benefits received by a resident beneficiary that are considered low risk. The guideline also provides clarity on common scenarios where section 99B of the ITAA 1936 should be considered and offers practical guidance on record-keeping requirements to demonstrate that a reduction applies.

The guideline applies to trust property accumulated by a trust during any period that it was a non-resident of Australia for tax purposes. A non-resident trust, for the purposes of PCG 2024/3, includes a resident trust to the extent that it is dealing with amounts accumulated during a period in which it was a non-resident.

The Commissioner considers that s 99B may need to be considered in the following common scenarios involving a:

- non-resident migrating to Australia with interests in a non-resident trust
- resident beneficiary receiving a distribution, gift or loan from a non-resident trust
- trustee allowing a resident beneficiary to use non-resident trust property
- beneficiary receiving an amount from a non-resident deceased estate, or
- resident beneficiary receiving a loan from a non-resident trust that is later forgiven.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

ATO compliance approach to s 99B for distributions from non-resident trusts (Cont.)

If section 99B(2) applies to reduce the relevant amount or property, the onus is on the resident beneficiary to provide the ATO with supporting information and documentation. If the onus is not met, the ATO may allocate compliance resources to determine whether the amount is taxable under section 99B(1). The guideline provides examples of documentation that should be obtained, which may include an executed trust deed, a will, trustee minutes, distribution statements, and the trust's financial accounts.

The ATO's compliance approach considers :

- common scenarios where s 99B may apply, namely, where distributions or benefits are provided from a non-resident deceased estate, and where trust property is made available for a beneficiary's use, including loan arrangements.
- the practical aspects of record keeping to evidence that subsection 99B(2) applies to reduce the amount that section 99B would otherwise include in assessable income.
- the ATO's compliance approach to distributions and benefits which the Commissioner considers to be low risk, and the record keeping expected to substantiate this.

The guideline applies both before and after its date of issue. It was issued alongside Taxation Determination TD 2024/9, which sets out the Commissioner's view on factors taken into account in applying the hypthetical resident taxpayer tests in s 99B(2)(a) and (b).

The guidelines were issued as draft PCG 2024/D1 and a compendium has been released on the feedback received.

This Guideline should be read in conjunction with Taxation Determination TD 2024/9 Income tax: factors taken into account applying paragraphs 99B(2)(a) and 99B(2)(b) of the Income Tax Assessment Act 1936.

ATO Decision Impact Statement on Came V FC [2023] AATA 3951

The ATO has published a decision impact statement on the AAT's decision in *Came v FC of T* 2023 ATC; [2023] AATA 3951.

This Decision Impact Statement outlines the ATO's response to this case, addressing the circumstances under which a taxpayer can choose to have applicable fund earnings from a payment made by a foreign superannuation fund assessed to an Australian complying superannuation fund instead of to themselves.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Supply of burial right in public cemetery not subject to GST

The ATO has finalised its view on whether the supply of a burial right in respect of a public cemetery is subject to GST in Goods and Services Tax Determination GSTD 2024/2.

The determination explains how the rules in Div 81 of the A New Tax System (Goods and Services Tax) Act 1999 (GST Act) and the associated regulations in Div 81 of the A New Tax System (Goods and Services Tax) Regulations 2019 (GST Regulations) operate to exempt the supply of a burial right made by an Australian government agency from GST. For the purposes of GSTD 2024/2, such supplies are referred to as supplies of burial rights in public cemeteries.

GSTD 2024/2 provides that the following supplies made by an Australian government agency are not subject to GST:

- the supply of a burial right in a public cemetery
- the renewal of a burial right in a public cemetery, and
- the supply of any permission that must be obtained under state or territory legislation to exercise a burial right by physically burying human remains or creating a memorial at the location covered by the burial right.

The fees or charges payable to an Australian government agency for recording the granting or transfer of a burial right in a public cemetery are not considered consideration for a supply and, as such, are not subject to GST.

Fees or charges payable to a public cemetery operator, funeral director, or another entity for the supply of goods and services related to a burial or cremation, such as memorial plaques and gravedigging services, are considered consideration for a supply. The supply of these goods or services is a taxable supply if the other requirements in section 9-5 of the GST Act are met.

Where an Australian government agency operating a public cemetery receives fees or charges for supplying burial rights that are not subject to GST, along with fees or charges for supplying other goods or services that are subject to GST, the operator must apportion the total amount of fees or charges. This involves separating the amount related to the supply of the burial right, which is not subject to GST, from the amount related to the taxable supplies of other goods or services on which GST must be accounted for.

A funeral director who arranges the supply of a burial right in a public cemetery, including acting as an agent for the Australian government agency operating the cemetery or for the purchaser in relation to the supply of the burial right, must ensure that GST is not applied to any amount they receive that is payable to the government agency for the burial right. The funeral director is, however, liable for GST on any taxable supplies of goods, services, or other items that they themselves provide to the purchaser of the burial right.

The GST exemptions in Division 81 of the GST Act and Division 81 of the GST Regulations only apply to supplies made by Australian government agencies. Therefore, GSTD 2024/2 and the exemptions it explains do not apply to the supply or renewal of a burial right by an entity that is not an Australian government agency. A burial right granted or renewed by a non-government entity is subject to GST if the grant or renewal meets the definition of a taxable supply under section 9-5 of the GST Act.

The determination was previously issued as draft GSTD 2021/D2. It applies on and after 4 December 2024 to the extent that it does not conflict with the terms of settlement of a dispute agreed to before that date.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Ruling on time limits for claiming an input tax or fuel tax credit

The ATO has finalised guidance setting out the Commissioner's view on the 4-year entitlement period for claiming input tax credits or fuel tax credits (tax credits) in Miscellaneous Taxation Ruling MT 2024/1. Miscellaneous tax: time limits for claiming an input tax or fuel tax credit sets out the Commissioner's view on:

- when and the extent to which a tax credit has been taken into account in an assessment
- when the 4-year entitlement period ends
- the exceptions to the limiting provisions – s 93-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999*, and s 47-5(1) of the *Fuel Tax Act 2006;*
- when an objection to an assessment may preserve an entitlement to a tax credit; and
- the interaction between the limiting provisions and private ruling and amendment requests.

The ruling was previously issued in draft form as MT 2024/D1.

Addenda to GST and miscellaneous taxes rulings issued

The ATO has issued the following:

- Addendum to GST Ruling GSTR 2014/2 which deals with treatment of ATM service fees, credit card surcharges and debit card surcharges. The addendum amends GSTR 2014/2 to reflect changes to how the ruling defines "ATM" and "ATM services", consistent with the decision in *Banktech Group Pty Ltd v FC of T*; [2023] AATA 3850. The amendments also ensure currency of legislative and other citations, and make editorial changes where required to meet accessibility requirements.

- Addendum to GST Ruling GSTR 2002/2 which deals with the GST treatment of financial supplies and related supplies and acquisitions. The addendum amends GSTR 2002/2 to make minor consequential updates to the definition of "ATM" as part of the updates to GSTR 2014/2, to reflect the decision in *Banktech Group Pty Ltd v FC of T*, [2023] AATA 3850. The amendments also ensure currency of legislative and other citations, and make editorial changes where required to meet accessibility requirements.

- Addendum to Miscellaneous Taxation Ruling MT 2012/2 which deals with the application of the income tax and GST laws to deferred transfer farm-out arrangements. The addendum amends MT 2012/2 to update references to legislative instruments and address accessibility issues.

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ATO Rulings and Activity (Cont.)

Draft instrument on reporting exemptions for EDP operators

The ATO has issued a draft legislative instrument to provide reporting exemptions to certain operators of electronic distribution platforms (EDP).

Under the Sharing Economy Reporting Regime, operators of electronic distribution platforms (EDPs) are required to report information about certain supplies made through their platforms to the Commissioner. This instrument helps reduce the compliance costs for EDP operators by exempting transactions that the Commissioner deems to be low risk to the broader taxation revenue base, as well as certain transactions that are already reported to the Commissioner by other EDP operators.

Taxation Administration (Reporting Exemptions for Electronic Distribution Platform Operators) Determination 2025 (LI 2024/D9) aims to repeal the Taxation Administration (Reporting Exemptions for Electronic Distribution Platform Operators) Determination 2024 that exempted operators of EDPs from having to include specified classes of transactions.

According to the explanatory statement, the 2025 Determination includes the same exemptions as the 2024 Determination and introduces a new exemption for certain transactions where the operator of the electronic distribution platform (EDP) is treated as a supplier under the *A New Tax System (Goods and Services Tax) Act 1999*.

The intention of the 2025 Determination is to reduce compliance costs by exempting transactions which the Commissioner of Taxation considers to be "low risk to the broader taxation revenue base".

The draft determination is scheduled to commence on 1 July 2025.

Consultation closes on 17 January 2025.

For more information, please refer here.

Non arm’s length income

The ATO has updated Law Companion Ruling LCR 2021/2 and Taxation Ruling TR 2010/1 in draft form to reflect amendments made to the non-arm’s length income (NALI) rules in s 295-550 of ITAA 1997 by Sch 7 to the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024* (the 2024 amendments).

- LCR 2021/2DC Non arm's length income – expenditure incurred under a non arm's length arrangement

  The proposed changes to this Ruling clarify the ATO's view on how the amendments to section 295-550 of the Income Tax Assessment Act 1997, introduced by the Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024, apply in situations where the parties involved do not deal with each other at arm’s length. Specifically, the changes address scenarios where the trustee of a small complying superannuation fund (a complying superannuation entity with no more than six members, including self-managed superannuation funds) incurs non-arm’s length expenditure—or fails to incur expenditure—in gaining or producing ordinary or statutory income.

Monthly Tax Update

ATO Rulings and Activity (Cont.)

Non arm’s length income (Cont.)

- LCR 2021/2DC Non arm's length income – expenditure incurred under a non arm's length arrangement (Cont.)

  The draft Ruling also confirms the removal of the compliance approaches in Appendix 1 to LCR 2021/2, given the 2024 amendments.

  This draft Ruling assists trustees in understanding the application of the non-arm's length expenditure provisions, considering the 2024 amendments, in relation to their specific circumstances. To provide further support, the draft Ruling includes additional guidance and updated examples.

- TR 2010/1DC2 Income tax: superannuation contributions

  The proposed changes to this Ruling clarify the ATO's view on the interaction between the non-arm’s length income provisions, as amended by the Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024, and the rules governing superannuation contributions. It confirms that the compliance approach outlined in Appendix 2 of the previous draft Ruling TR 2010/1DC, issued on 28 July 2021, will no longer apply from the date of this updated draft Ruling. Additionally, the Ruling includes minor updates and removes references to the maximum earnings test for deducting personal contributions, which ceased to apply from 1 July 2017.

  The draft Ruling is relevant for trustees in determining the application of the non-arm’s length and contribution provisions to their circumstances

Monthly Tax Update

ATO Rulings and Activity (Cont.)

ATO's updated practice statements

The ATO has updated the following practice statements in line with current ATO style and accessibility requirements:

- Practice Statement Law Administration PS LA 2012/1 (GA) - How to calculate input tax credits and bad debt adjustments when a dividend is paid to creditors.
- Practice Statement Law Administration PS LA 1999/2 - Calculating joint car expense deductions.
- Practice Statement Law Administration PS LA 2005/20 - Signature requirements for approved virtual forms, lodged electronically or given by phone.
- Practice Statement Law Administration PS LA 2009/8 - The Commissioner's determination under paragraph 71(1)(e) of the Superannuation Industry (Supervision) Act 1993 that an asset is not an in-house asset of a self-managed superannuation fund.
- Practice Statement Law Administration PS LA 2011/2 - Administering penalties for failing to electronically notify or pay goods and services tax or pay as you go liabilities.
- Practice Statement Law Administration PS LA 2011/8 - The registration of entities.
- Practice Statement Law Administration PS LA 2009/5 - Provision of advice and guidance by the Australian Taxation Office in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulations 1994 to self-managed superannuation funds.
- Practice Statement Law Administration PS LA 2017/1 - Petroleum resource rent tax: amendment period for transfers of exploration expenditure.

The content of all practice statement have been checked for technical accuracy and currency.

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ATO Rulings and Activity (Cont.)

Class rulings issued:

- Class Ruling CR 2024/72 Transport for New South Wales – free Opal card scheme. This ruling applies from 1 April 2024 to 31 March 2029.
- Class Ruling CR 2024/73 Aristocrat Leisure Limited – Non-Executive Director Rights Plan. This ruling applies to entities that enter into the scheme during 1 October 2024 to 30 September 2029.
- Class Ruling CR 2024/74 Smartgroup Corporation Ltd – Smartgroup Logbook Solution for car logbook records and odometer records. This ruling applies from 1 April 2023 to 31 March 2028.
- Class Ruling CR 2024/75 Southern Cross Payments Ltd – return of capital by in specie distribution of shares in ISX Financial EU Plc. This ruling applies from 1 July 2021 to 30 June 2022.

Other rulings issued:

- Product Ruling PR 2024/19 National Rural Independents Ltd – Prepayment Program. This ruling applies from 13 November 2024 to a customer that enters into the scheme from 13 November 2024 until 30 June 2027. However, the ruling only applies and may be relied on to the extent that there is no change in the scheme or in the customer's involvement in the scheme.
- Addendum to Taxation Ruling TR 92/2 to address changes in relation to who may approve any university, college, institute, association or organisation in writing for the purposes of s 73A of ITAA 1936, which deals with expenditure on scientific research.
- Erratum to Class Ruling CR 2024/57 Macquarie Group Limited – Macquarie Capital Notes 7. The erratum corrects a typographical error in CR 2024/57 at para 100 by omitting “Macquarie Capital Notes 6” and substituting “MCN7”. The erratum applies from 18 September 2024.
- Addendum to Class Ruling CR 2013/25 Goods and services tax: the GST treatment of fees and charges imposed by NSW councils in relation to cemeteries, facilities, leases, legal services, libraries and sales. It amends CR 2013/25 to change the taxable status of “Interment right fee” from taxable to exempt under ss 81-10(1) and (4) of the A New Tax System (Goods and Services Tax) Act 1999, reflecting the view in the Goods and Services Tax Determination GSTD 2024/2 Goods and services tax: is the supply of a burial right in respect of a public cemetery subject to GST?. Editorial changes have also been made in the ruling to allow it to meet modern publishing accessibility requirements. The addendum applies from 4 December 2024.
- Addendum to Product Ruling PR 2023/19 Fringe benefits tax consequences for employers under an Origin electric vehicle subscription agreement. It amends PR 2023/19 to incorporate new scheme documents. The addendum applies both before and after its date of issue.

December 2024

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Latest Australian Tax Cases

- Assessable income - The Federal Court has ruled that payments totaling nearly $33 million, received by an Australian resident between 2005 and 2015 from the bank accounts of a business in Vanuatu where he was formerly the general manager, did not qualify as income under ordinary concepts. Instead, the court determined that all payments were capital transfers, characterized as gifts from a loving sister to her trusted brother. [*Cheung v FC of T* 2024 ATC; [2024] FCA 1370, 29 November 2024.]

- Research & Development (R&D) - The Federal Court has rejected a taxpayer's appeal against an AAT decision, which upheld that activities related to the development of a basketball shoe did not qualify as "core R&D activities" under section 355-25(1) of the ITAA 1997. The court determined that the AAT had appropriately conducted the review it was authorised to undertake and had correctly interpreted and applied section 355-25(1). [*Active Sports Management Pty Ltd v Industry Innovation and Science Australia* 2024; [2024] FCA 1346, 25 November 2024.]

- Luxury car tax - The Full Federal Court has determined that the AAT misinterpreted sections 9-5 and 15-30 of *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act) in *GHTZ v FC of T* 2024 ATC; [2024] AATA 453. The AAT had allowed the taxpayer to claim decreasing luxury car tax (LCT) adjustments for 13 "new" luxury cars. As a result, the Full Court has remitted the case to the Administrative Review Tribunal (ART) for rehearing. [*FC of T v Patrix Prestige Pty Ltd*; [2024] FCAFC 148, 14 November 2024.]

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