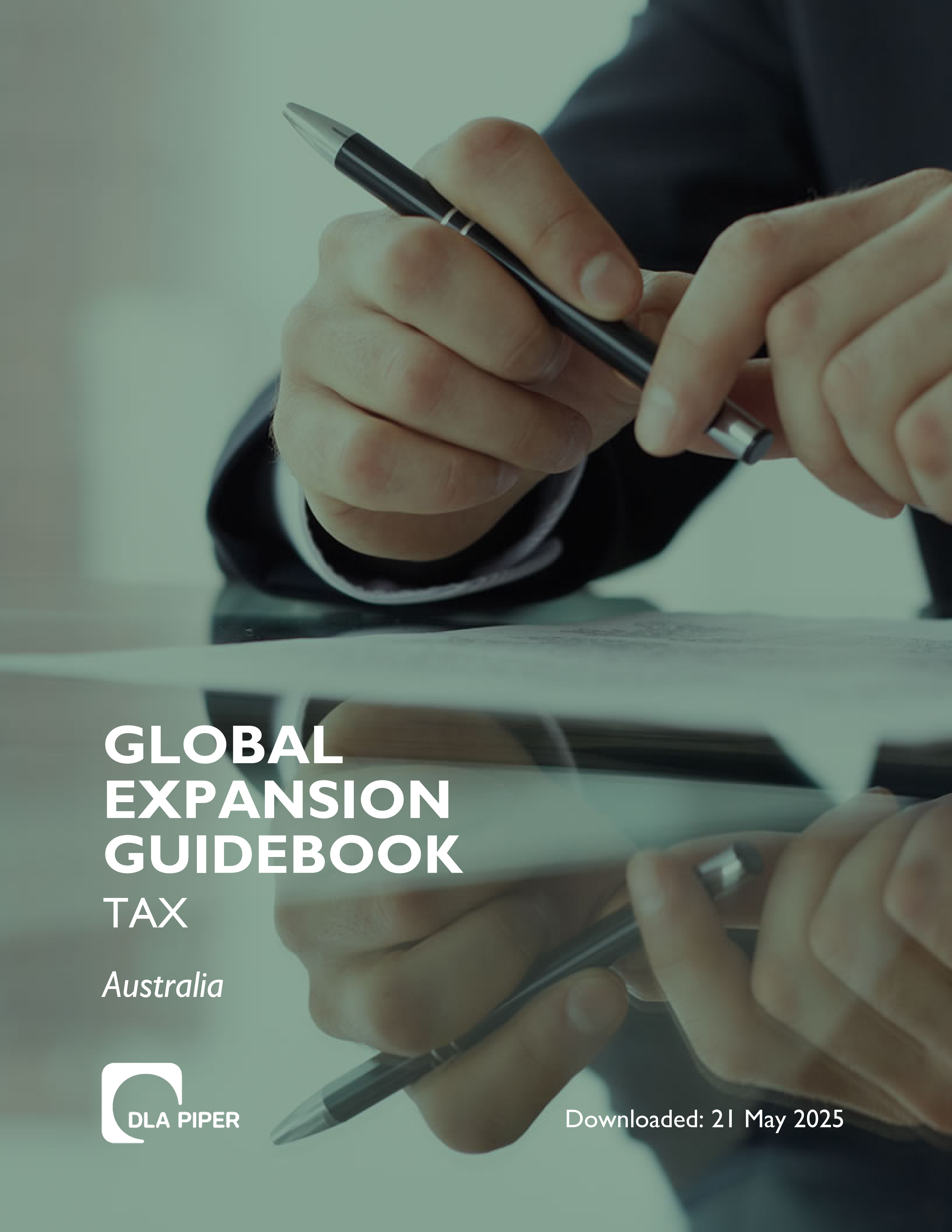

GLOBAL EXPANSION GUIDEBOOK

TAX

Australia

DLA PIPER

INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Tax.*

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know.

The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, intellectual property and technology, global equity and tax laws in key jurisdictions around the world.

TAX

Multinational companies continue to expand globally at an ever faster pace. Successful expansion depends, in part, on strategic and effective tax planning and compliance. This guide, brought to you by DLA Piper's Tax group summarizes the key features of tax laws in 41 popular jurisdictions.

This guide addresses common tax questions, by jurisdiction, including:

- Taxation of resident companies and non-resident companies
- Availability of tax holidays, rulings, and favorable tax regimes
- Ability to use losses to offset income
- Anti-deferral (ie CFC) rules
- Withholding taxes
- Employment tax issues

With more than 300 tax lawyers and economists in offices throughout the Americas, Europe and Asia Pacific, DLA Piper's global tax advisory services help multinational companies address the complex challenges of international commerce and business operations as well as manage and resolve tax audits. Our global tax group also assists clients in structuring a wide range of transactions, from private equity deals to corporate acquisitions and disposals. We provide these tax services across our global platform, while at the same time offering clients the benefits of the attorney-client and work-product privileges.

The information in this guide is an accessible, high-level summary of the tax laws in each jurisdiction. This is not a substitute for legal or tax advice. If you have specific questions or require detailed advice, we encourage you to contact one of the attorneys listed in the contributors section of this guide.

We hope that you find this guide valuable and we welcome your feedback.

This publication is provided to you as a courtesy, and it does not establish a client relationship between DLA Piper and you, or any other person or entity that receives it.

This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that tax law is dynamic, and the legal regime in the countries surveyed could change.

AUSTRALIA

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RESIDENCE AND BASIS FOR TAXATION

A resident company is a company that is incorporated in Australia. It also includes a company that carries on its business in Australia and either its central management and control is in Australia or its voting power is controlled by shareholders resident in Australia.

Crucially, the Australian Taxation Office's (ATO) current position is that, if a company's central management and control (CMC) is in Australia, the company may automatically be deemed to also carry on business in Australia. The ATO has previously issued Practical Compliance Guideline (PCG) 2018/9, which sets out its compliance approach with regards to the CMC test of residency. This included a transitional compliance approach under which the ATO would not apply resources to review or seek to disturb a foreign-incorporated company's status as a non-resident during a transitional period if it meets certain criteria. In November 2023, the ATO issued an update to the PCG which confirms that the transitional compliance approach ended on June 30, 2023 and provides a draft risk assessment framework against which companies can self-assess their tax residency risks.

As part of the Federal Budget 2020-21, the Australian Government announced that legislative amendments will be made to clarify that a company which is incorporated outside Australia will only be treated as an Australian tax resident if it has "significant economic connection" to Australia (*ie*, where a company has its central management and control and core commercial activities being undertaken in Australia). However, these measures announced under the former Government have not been introduced to date.

Domestic

A resident company is subject to income tax on all of its income and capital gain from sources anywhere in the world.

Foreign

A non-resident company is generally taxed only on income from Australian sources and capital gains recognized on taxable Australian property. A network of Double Taxation Agreements (DTA) operates to modify these rules, including reducing the rate of withholding taxes.

Australia is also a signatory to the OECD's multilateral instrument (MLI). The Australian Government has enacted legislation which gave the multilateral instrument the force of law in Australia from January 1, 2019. The multilateral instrument will progressively modify Australia's DTAs between Australia and other relevant signatory countries.

TAXABLE INCOME

Domestic

Taxable income of a resident company is equal to assessable income less allowable deductions.

Foreign

Taxable income of a non-resident equals Australian-sourced income less allowable deductions incurred in respect of that income. Residents of countries that have a DTA with Australia are only subject to income taxes on business profits in Australia if they carry on business in Australia at or through a permanent establishment. There is no branch profits tax in Australia.

TAX RATES

Both resident companies and non-resident companies (with Australian-sourced income) are subject to income tax at the company tax rate of 30 percent, unless they qualify for a lower rate (25 percent for the 2021-22 income year and later income years) by satisfying specific requirements (*ie*, having an aggregated turnover of less than AUD50 million and satisfying an active income test).

TAX COMPLIANCE

Federal income tax returns must be lodged annually. The Australian tax year, or year of income, ends on June 30. A Substituted Accounting Period may be adopted as the income tax year with the written approval of the Commissioner.

Increased administrative penalties are imposed on entities with annual global income of AUD1 billion or more that fail to adhere to tax disclosure and related obligations. The increased administrative penalties apply from July 1, 2017 and:

- Increased the maximum penalty to AUD782,000 for multinational companies which fail to meet their reporting obligations and
- Doubled the penalties related to making false and misleading statements to the ATO with a view to discourage multinationals from being reckless or careless in their tax affairs.

ALTERNATIVE MINIMUM TAX

Not applicable for this jurisdiction.

TAX HOLIDAYS, RULINGS AND INCENTIVES

Tax holidays

Not applicable for this jurisdiction.

Tax rulings

The ATO and the different state/territory revenue offices issue public rulings, determinations, interpretative decisions and practice statements that set out their views on the operation of the relevant federal or state law.

In addition, a taxpayer can seek certainty in respect of their tax affairs by applying for a private ruling. A private ruling is legally binding on the Commissioner.

Tax incentives

There are tax incentives for specific activities, including research and development, and deductions for certain

mining and primary production industries. In addition, lower withholding tax rates (15 percent) are available for distributions to certain non-residents from eligible withholding managed investment trusts (MITs). In the 2023-24 Federal Budget, the Government has announced that certain eligible Build-to-Rent projects could potentially qualify for the concessional MIT withholding tax rate of 15 percent after July 1, 2024.

From July 1, 2019, certain income derived by MITs considered to be active business income will no longer be eligible for the 15-percent MIT tax rate (*eg,* MIT cross staple arrangement income, MIT agricultural income and MIT residential housing income). Rental income from commercial and industrial real estate continues to be eligible for the 15-percent MIT tax rate.

CONSOLIDATION

For income tax purposes, an Australian head company of a wholly owned group of Australian resident entities can elect to consolidate with its wholly owned Australian subsidiaries and form a consolidated group. For a consolidated group, the group is treated as a single taxpayer and intra-group transactions are ignored for income tax purposes.

Goods and services tax (GST) grouping and payroll taxes grouping are also available.

PARTICIPATION EXEMPTION

A Capital Gains Tax (CGT) exemption is available for the sale of an active foreign business by an Australian resident company.

Dividends received by resident corporate tax entities (*eg,* companies and corporate limited partnerships) that have a 10-percent or more equity interest in a foreign subsidiary are generally exempt from further Australian income tax.

However, these need to be addressed on a case-by-case basis.

CAPITAL GAIN

Capital gains tax forms part of the income tax regime. CGT applies to net capital gains relating to assets and notional assets acquired after September 19, 1985. The capital gain or loss is calculated on the proceeds from the disposal of the asset less its cost base and any incidental costs associated with its purchase and disposal. The taxable part of the gain is treated as assessable income. Where the sale proceeds are less than the cost base, the taxpayer will incur capital losses. These losses may only be offset against current or future capital gains.

Some assets are exempt from CGT, and certain concessions are available for eligible Australian entities (*eg,* 50 percent CGT discount for resident individuals and trusts and a 33.3-percent discount for complying superannuation funds).

DISTRIBUTIONS

Dividend distributions by companies are taxable for shareholders. Subject to integrity measures, Australian resident shareholders may be entitled to a tax credit for corporate tax paid by the company. Dividends to foreign residents are prima facie subject to withholding tax at 30 percent, which may be reduced under a DTA, subject to satisfying the integrity measures under the MLI (*eg,* the Principal Purpose Test) where applicable. In addition, certain exemptions are available in domestic tax law (*eg,* for dividends paid out of taxed profits).

Capital distributions are taxable for shareholders to the extent they exceed the cost base of the shareholder's shares in the company.

LOSS UTILIZATION

Company tax losses can be carried forward indefinitely, subject to satisfying certain loss utilization tests.

For the 2022-2023 income year, eligible companies with annual turnover of less than AUD5 billion may also carry-back tax losses from the 2019-20, 2020-21, 2021-22 and/or 2022-23 income years to offset previously taxed profits in the 2018-19 or later income years, subject to satisfying the relevant requirements and integrity measures.

TAX-FREE REORGANIZATIONS

Tax-free reorganization provisions include CGT exemptions, exemptions for intragroup transactions in a consolidated group and a stamp duty exemption for corporate reconstructions.

ANTI-DEFERRAL RULES

Under the controlled foreign company (CFC) rules, a resident entity may be subject to income tax on a current basis on "attributable income" of the entity's controlled foreign companies.

FOREIGN TAX CREDITS

Where foreign-sourced income is included in a taxpayer's assessable income, foreign income tax offsets are available at the lesser of the foreign tax paid or the Australian tax payable.

SPECIAL RULES APPLICABLE TO REAL PROPERTY

Foreign residents are generally exempt from Australian CGT except where the relevant asset is a direct or indirect interest in Australian real property (including through an interposed entity).

From May 9, 2012, the 50-percent CGT discount allows for gains made by individuals on Australian real property to be reduced for any periods in which the taxpayer was a foreign resident during the period of ownership. Foreign resident CGT withholding tax (CGT WHT) regime applies in Australia. The CGT WHT rules provide that unless an exemption applies, purchasers of direct or indirect interests in Australian real property are required to withhold 12.5 percent of the purchase price (this will be increased to 15 percent for contracts entered into from January 1, 2025) and remit this to the ATO if at least one of the vendors is a foreign resident. The CGT WHT is not a final tax as the vendor may claim a credit for the tax withheld when lodging its tax return for the relevant year.

From December 12, 2019, a law change removed the CGT main residence exemption for foreign tax residents, except in certain limited circumstances.

TRANSFER PRICING

Arm's-length principles are applied to transactions between related parties under an international agreement.

Australian rules are similar in many respects to the OECD guidelines, with certain differences such as the transfer pricing documentation requirements and the Commissioner's reconstruction powers.

In addition to satisfying transfer pricing documentation requirements, multinational entities with an annual global income of AUD1 billion or more are required to provide the ATO with 3 statements (a master file, a local file and a country-by-country, or CbC, report) within 12 months after the end of their income tax year. These statements require multinationals to report details regarding their international related party dealings, revenues, profits and taxes paid by jurisdiction.

WITHHOLDING TAX

Dividends, royalties and interest

Generally, a 30-percent withholding tax rate applies to dividends (unless an exemption is available under domestic law (for example, dividends paid out of taxed profits – or DTA) and royalties and 10 percent for interest, which may be exempted under Australia's domestic law or reduced under a DTA.

The concessional withholding tax treatment for dividends, royalties and interests continue to be available under a DTA that is modified by the MLI, provided that the relevant integrity measures (*eg,* the Principal Purpose Test) are satisfied.

Crucially, the ATO has recently released a draft taxation ruling (TR) 2024/D1 which sets out the ATO's views on when amounts paid from Australia under a 'software arrangement' are subject to royalty withholding tax. This draft TR represents a significant rewrite of the ATO's previous rulings on this matter.

Service fees

Generally, no withholding tax applies to service fees, unless the services fees are regarded as royalties. Importantly, TR 2024/D1, which could potentially apply to recharacterize certain fees as royalties if they are deemed to be consideration for the usage of intellectual property.

CAPITAL DUTY, STAMP DUTY AND TRANSFER TAX

No capital duty. Stamp duties and transfer taxes may be imposed at the state and territory level on transfers of assets and other "dutiable transactions," which includes certain transfers of shares in "landholders."

Where applicable, exemption may be available on application to, and approval by, the relevant state/territory revenue office.

From July l, 2016, share transfer duty was abolished in all states and territories.

EMPLOYMENT TAXES

Employers must withhold federal income tax from wages paid to employees. Employers must also pay Fringe Benefits Tax and Payroll Tax where applicable.

OTHER TAX CONSIDERATIONS

Anti-avoidance regime and OECD BEPS-related developments

Australia has a general tax anti-avoidance regime. The regime empowers the Commissioner to deny a tax benefit if, where a taxpayer obtains a tax benefit in connection with a scheme, the tax benefit would not have arisen without the scheme, and under an objective test there was a dominant purpose of entering into the scheme to obtain the tax benefit.

In an effort to tackle multinational anti-avoidance, Australia's general tax anti-avoidance regime was amended with the introduction of the Multinational Anti-Avoidance Law (MAAL) which was operative from January 1, 2016. The MAAL applies to multinational entities with an annual global income of AUD1 billion or more and is targeted at multinational entities entering into contrived arrangements to avoid a taxable presence in Australia.

Further, Australia's general tax anti-avoidance regime was amended with the introduction of the Diverted Profits Tax (DPT), which applied from July 1, 2017. The DPT is targeted at multinational entities with an annual global income of AUD1 billion or more that have entered into contrived arrangements to shift taxable profits out of Australia.

Under Australia's domestic law, protection under DTAs is not available for Australia's general tax anti-avoidance rules, which include the MAAL and DPT.

In addition, the Australian Government has introduced rules targeting hybrid mismatches, which has generally applied from January 1, 2019. These rules are generally in line with OECD's BEPS Action 2, with certain modifications including a specific integrity rule targeting interposed entity structures.

OECD Pillars One and Two

The OECD and the G20 Inclusive Framework have been directing their efforts to address various tax challenges arising from digitalization by introducing a Two-Pillar Solution:

- Pillar One: aims to ensure fairer distribution of profits and taxing rights among countries over the largest multinational enterprises. Pillar One is essentially focused on the reallocation of the consolidated profit of multinational enterprises to market jurisdictions where their users and customers are located, as well as the standardization of the remuneration of routine marketing and distribution activities; and

- Pillar Two: aims to impose a floor on tax competition on corporate income tax by introducing a global minimum corporate tax rate of 15 percent

The Australian government has indicated that it intends to implement the OECD's Two-Pillar Solution. The implementation of Pillar One in Australia will be guided by the OECD's progress on the multilateral convention; however, the government would have to introduce domestic legislation to implement Pillar Two. The Government has announced that it will introduce rules from:

- January 1, 2024 for the Income Inclusion Rule and the Domestic Minimum Tax; and

- January 1, 2025 for the Under-Taxed Payment Rule.

Thin capitalization

In the 2022 federal budget, the Australian government announced several measures to tighten Australia's thin capitalization rules by:

- Replacing the current safe-harbor test limit with a test limiting debt deductions up to 30 percent of EBITDA. Any debt deductions denied under the 30-percent EBITDA test can be carried forward and claimed in a subsequent income year (for up to 15 years);

- Replacing the current worldwide gearing test with a test limiting debt deductions (for an entity in a group) up to the level of the worldwide group's net interest expense as a share of earnings (which may exceed the 30-percent EBITDA ratio); and

- Amending the arm's-length debt test so it is only available for an entity's external (3rd-party) debt – this test will no longer be available for related party debt.

The proposed changes would apply to income years commencing on or after July 1, 2023, however the draft legislation has not yet been finalized by the Government.

Deductions of payments for intangibles

As part of the 2022 federal budget, the government also announced the introduction of a new rule limiting multinational enterprises' ability to claim deductions for certain payments to related parties in relation to intangibles held in low or no tax jurisdictions. These jurisdictions are those with:

- A tax rate of less than 15 percent or
- A tax preferential patent box regime without sufficient economic substance.

The measures will have application to payments made on or after July 1, 2023; however, no draft legislation has been introduced into Parliament at this time.

Tax transparency

The Australian Government confirmed that it will introduce additional reporting requirements for certain types of taxpayers, increasing the level of tax related information they are required to publicly disclose:

- "Significant global entities" (broadly, those with global annual income of AUD1 billion or more) will be required to release to the public certain tax information on a country-by-country basis, including their approach to taxation. The precise details of the required information has not yet been announced
- Australian public companies (both listed and unlisted) will be required to disclose information regarding the number and tax domicile of their subsidiaries
- Entities tendering for Australian government contracts with a value of more than AUD200,000 will be required to disclose their country of tax domicile

These measures are to apply from July 1, 2023.

Superannuation

Employers must make superannuation contributions to their employees' nominated super fund, at the rate prescribed by the relevant legislation. The current superannuation rates for the years ended June 30, 2023 and June 30, 2024 are 10.5 and 11 percent respectively.

Workers' compensation

Employers are required to take out insurance with an approved insurer covering the employer's full liability for workers' compensation as well as damages.

Goods and Services Tax (GST)

GST is a form of value added tax (VAT). It applies at a rate of 10 percent to taxable supplies of goods, services and other things that are connected with Australia.

From July 1, 2017, GST has applied to inbound intangible supplies made to Australian Consumers, but GST will not usually apply if the same inbound intangible supply is instead made to an Australian business. This reform is referred to as the "Netflix Tax."

From July 1, 2018, GST has applied to inbound supplies of goods with a value of less than AUD1,000 which are made to Australian Consumers. This may capture online sales of goods made by non-residents to Australian consumers where the goods are shipped directly to Australian customers.

From July 1, 2019, offshore sellers of Australian commercial accommodation (including online sellers) are required to include sales of Australian accommodation in their GST turnover. Where the GST turnover totals AUD45,000 or move in a 2-month period, the offshore sells are required to register for, charge and pay GST.

KEY CONTACTS

Jock McCormack
Head of Tax, Australia
DLA Piper Australia
jock.mccormack@dlapiper.com
T: +61 2 9286 8253
View bio