

## TAX UPDATE

September 2011

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### R&D Bills Pass Parliament with Amendments - New Start Date 1 July 2011

The Tax Laws Amendment (Research and Development) Bill 2010 and the Income Tax Rates Amendment (Research and Development) Bill 2010 have finally passed Parliament and are awaiting Royal Assent.

These Bills introduce the new refundable tax offset regime which will replace the existing R&D concessions. The rate of the tax offset and whether it is refundable, depends primarily on the aggregated turnover of the R&D entity.

Some amendments have been made to the Bills- notably the commencement date for the new regime has been extended from 1 July 2010 to 1 July 2011. Amendments will also allow the Government to make regulations that will enable an eligible R&D entity to receive quarterly R&D tax offset credits.

### GST and Financial Supplies - Draft Legislation

A majority of financial supplies are input taxed under the GST legislation. Entities that make financial supplies generally cannot claim input tax credits for their related acquisitions. Treasury has released draft legislation which will implement a number of the recommendations arising out of Treasury's Review of the GST financial supply provisions.

Of note is the amendment to the financial acquisitions threshold. Businesses that make only a limited number of financial supplies may claim full input tax credits provided they don't exceed the financial acquisitions threshold. The draft legislation proposes to increase this threshold from \$50,000 to \$150,000.

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## Determining Whether a Worker is an Employee - Victorian Revenue Ruling PTA.038

The Victorian State Revenue Office has released a Public Ruling to assist taxpayer's in determining whether or not their workers are common law employees or independent contractors for Payroll Tax purposes. Factors to consider include:

- » The degree of control and direction the business operator has a right to exert over the worker, whether or not that control is actually exercised;
- » The wording of the relevant contract compared to the practical day to day relationship;
- » Whether the worker is paid to achieve a result. On this aspect the Ruling notes that a contract for a 'labour only' service where payment is for commissions, can indicate that the contract is not for a given result;
- » Whether the worker carries on their own independent business;
- » Whether the worker has the power to delegate, i.e. subcontract;
- » Whether the worker bears any risk in performing the work (do they hold their own insurance policy?);
- » Whether the worker provides their own tools and equipment.

Note that where it is determined that an employer/employee relationship does not exist, this will not necessarily mean that payments to the worker are free from Payroll Tax. One must still consider the application of the contractor provisions which can deem independent contractors to be employees for Payroll Tax purposes.

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## Trust Investments, Capital or Revenue Account? - TD 2011/21

This Taxation Determination discusses whether a gain or loss made on an investment by a trust will be treated as revenue or capital in nature for tax purposes. The Determination states that the gain or loss is on revenue account if no provision of the tax law specifically treats it as being on capital account and, after a wide survey and exact scrutiny of all of the relevant factors, it is determined that the gain or loss was from:

- » A normal operation in the course of carrying on a business of investment;
- » An extraordinary operation by reference to the ordinary course of that business but one entered into with the intention of making a profit or gain; or
- » A one-off or isolated transaction where the investment was acquired in a business operation or commercial transaction for the purpose of profit-making.

Factors to consider in determining the tax treatment of an investment include:

- » The investment style employed (i.e. buy and hold or regular turnover of investments);
  - » The purpose of the trust (i.e. a view to preserve or increase value of investments held over time versus a view to generate profits);
  - » The personal circumstances/goals of the beneficiaries
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## Share Trading Business During the GFC - Case AATA 545 2011, Administrative Appeals Tribunal

In this case the Tribunal has held that the taxpayer was a share trader during the 2008 financial year. In doing so the Tribunal was satisfied that the taxpayer held a profit making intention and listed the following factors in support of the taxpayer:

- » The particular investment strategy adopted by the taxpayer was inherently risky and he used a sophisticated stock picking and research service called Stockval;
- » Use of a margin loan facility, being an expensive form of finance which one would not typically use for long term investing;
- » The taxpayer owned \$1.5mil worth of shares in 2008;
- » The reason the taxpayer held 'blue-chip' companies typical of a long term investor as opposed to a share trader, was to satisfy margin loan requirements;
- » Whilst the taxpayer did not conduct his business from an 'office', advances in modern technology meant that he could record his transaction via software available on the Commsec website and conduct his research from his laptop and iPhone.

In light of the above, whilst the taxpayer's trading activity for 2008 involved predominately share acquisitions, the lack of share sales did not negate his status as a share trader because this could be explained by the unexpected events of the GFC which meant that there were more opportunities to acquire shares than there were to sell. By concluding that the taxpayer was in the business of share trading, any losses derived from trading could be deducted as revenue losses.

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## New National Business Names Register - Draft Legislation

Draft legislation has been released for the proposed national business name register. Currently, business names are registered in each State and Territory that a business trades in (unless they are trading under their own personal or company name).

New entities intending to carry on business under a name other than their own will complete a single application and pay a single fee to register the business name nationally. Where identical business names are currently registered to separate businesses in different locations, each will be automatically rolled-over to the national register with a distinguishing expression, for example the geographical identifier (e.g. VIC) after the business name. The business name itself will not change. Going forward ASIC will not allow any new applications for identical or nearly identical business names.

Lower registration fees will apply under the national system compared to the current State/Territory based systems.

The Bills provide that the fees related to the registering of a business name will be imposed as a 'tax' in order to comply with the Australian Constitution.

The national register is expected to commence in 2012 however this date depends on each State and Territory passing legislation to refer their relevant powers to the Commonwealth.

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## Refund of Excess Concessional Contributions - Consultation Paper

Treasury has released a Consultation Paper on the Government's proposal to introduce an option for eligible individuals to receive a refund of their excess concessional superannuation contributions. Concessional contributions include compulsory contributions made by an employer, salary sacrificed contributions and personal contributions for which an income tax deduction is being claimed by the individual.

If an individual exceeds their annual concessional contributions cap (for 2012 the cap is \$25,000 or \$50,000 for those over 50 years of age), excess contributions tax (ECT) applies with an effective tax rate of 46.5% (ECT of 31.5% plus the 15% contributions tax paid by the fund). Under the proposal, eligible individuals can elect to have their contribution refunded and instead pay tax at their potentially lower marginal tax rates and receive a tax offset for the 15% contribution tax already paid.

In order for an individual to be eligible for the refund option:

- » the excess concessional contribution must be \$10,000 or less;
- » it must be the first time the individual has had excess concessional contributions in the 2011-12 or a later year; and
- » the individual must have lodged an income tax return for the relevant year.

Only the first eligible breach will be refundable. Once an individual has received an offer for a refund, whether or not taken up, they will no longer be eligible for the refund option in subsequent years. If an individual makes excess concessional contributions of greater than the \$10,000 limit, they are not eligible for the refund and will not be eligible for the refund in subsequent years.