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PRACTITIONER ARTICLES

[1]. AUSTRALIA'S 2016 BUDGET TARGETS MNES: A 40% DIVERTED PROFITS TAX; BEPS HYBRID MISMATCH RULES TO BE IMPLEMENTED; TRANSFER PRICING RULES STRENGTHENED – *BY TERRY HAYES, SENIOR TAX WRITER, THOMSON REUTERS*

The Australian Federal Budget for 2016-17 was handed down on 3 May 2016 by Treasurer Scott Morrison. In the lead up to the Budget, the Government repeatedly emphasised the need for Australia to "live within its means" and that the Government had to carefully examine its expenditures. That theme was strongly confirmed by the Treasurer in his Budget Speech.

In his Budget Speech, the Treasurer said the deficit in underlying cash balance terms is expected to reduce from AUD$39.9 billion in 2015-16 to AUD$37.1 billion, or 2.2% as a share of the economy in 2016-17. Mr Morrison said the deficit is then projected to fall to AUD$6.0 billion or just 0.3% of GDP over the next 4 years to 2019-20. "We are achieving this by policies that continue to control spending", he said.

Notably, significant new measures were announced directed at MNE tax avoidance eg a 40% diverted profits tax, hybrid mismatch measures, strengthened transfer pricing rules, and a significant increase in administrative penalties.

Diverted Profits Tax

The Government announced that it would introduce a 40% diverted profits tax (DPT), dubbed a "Google tax" when it was introduced in the UK in 2015. There are however, significant differences from the UK's DPT. In the Budget, the Government released a paper for consultation about implementing a DPT. The purpose of the paper is to outline how the DPT would apply in the Australian context. Comments are due by 17 June 2016.

The new tax is aimed at multinational corporations that artificially divert profits from Australia. **The**

tax is proposed to apply to income years commencing on or after 1 July 2017. The Government estimates this measure will have a gain to revenue of AUD$200 million over the forward estimates period (including 2019-20).

The new tax will target companies that shift profits offshore through arrangements involving related parties:

- that result in less than 80% tax being paid overseas than would otherwise have been paid in Australia;
- where it is reasonable to conclude that the arrangement is designed to secure a tax reduction; and
- that do not have sufficient economic substance.

Where such arrangements are entered into, the DPT will apply a 40% tax on diverted profits to ensure that large multinationals are paying sufficient tax in Australia.

This measure will apply to large companies with global revenue of AUD$1 billion or more.

Companies with Australian revenue of less than AUD$25 million will be exempt, unless they are artificially booking their revenue offshore.

Main features of the DPT

Australia's DPT will broadly adopt the main features of the second limb of the UK's DPT. It will:

- impose a penalty tax rate of 40% on profits transferred offshore through related party transactions with insufficient economic substance that reduce the tax paid on the profits generated in Australia by more than 20%;
- apply where it is reasonable to conclude based on the information available at the time to the ATO that the arrangement is designed to secure a tax reduction;
- provide the ATO with more options to reconstruct the alternative arrangement on which to assess the diverted profits where a related party transaction is assessed to be artificial or contrived;
- ***impose a liability when an assessment is issued by the ATO (ie it will not operate on a self-assessment basis)***;
- require upfront payment of any DPT liability, which can only be adjusted following a successful review of the assessment; and
- put the onus on taxpayers to provide relevant and timely information on offshore related party transactions to the ATO to prove why the DPT should not apply.

If a taxpayer falls within the scope requirements, an arrangement with a related party may be subject to the DPT if:

- the transaction has given rise to an ***effective tax mismatch***; and
- the transaction has ***insufficient economic substance***.

An effective tax mismatch will exist where an Australian taxpayer (Company A) has a cross-border transaction, or series of cross-border transactions, with a related party (Company B), and as a result, the increased tax liability of Company B attributable to the transaction is less than 80% of the corresponding reduction in Company A's tax liability.

Govt to implement BEPS hybrid mismatch arrangement rules

The Government announced that it would implement the OECD's rules in BEPS Action 2 to eliminate hybrid mismatch arrangements, taking into account the recommendations made by the Board of Taxation in its report on the Australian implementation of the OECD hybrid mismatch rules. The Government on 8 April 2016 had asked the Board of Taxation to undertake further work on how best to implement these rules in relation to regulatory capital as part of this measure.

This measure is aimed at multinational corporations that exploit differences in the tax treatment of an entity or instrument under the laws of 2 or more tax jurisdictions.

The measure targets instances where tax is either deferred or not paid at all. For example, a loan from a parent company to its subsidiary may be treated as equity in one country's tax law and debt in another. Without the Government's changes, the subsidiary of the multinational may have been allowed to claim a deduction for interest payments made to its parent but the parent company would not pay tax on those payments.

It will apply broadly to related parties, members of a control group and structured arrangements.

Date of effect: This measure will apply from the later of 1 January 2018 or 6 months following the date of Royal Assent of the enabling legislation and is estimated to have an unquantifiable gain to revenue over the forward estimates period.

Board of Taxation consultation on this issue commenced in August 2015 and the Board presented its report to the Government on 31 March 2016. The report, released publicly by the Government on 3 May 2016, made 17 recommendations, including:

- that Australia adopt BEPS Action 2 report recommendations on hybrid mismatches, with some minor modifications;
- that pre-existing arrangements should, as a general rule, not be grandfathered. However, as the legislation is developed, the report said there may be certain categories of arrangements that may be appropriate for grandfathering (such as third party arrangements where there is significant detriment to investors arising from application of the hybrid mismatch rules);
- that the hybrid mismatch rules do not include a: (i) de minimis test; or (ii) purpose test. However, the Board noted as an observation that a de minimis threshold should be considered as an option for simplifying the application of the imported mismatch rule;
- ***on timing differences*** (and this is a departure from the suggested approach in the BEPS Action 2 report), that:
    - OECD recommendation 1 should not apply to financial instruments with a term of 3 years

or less, where the hybrid mismatch is merely one of timing; and
    - for financial instruments with a term longer than 3 years, the OECD recommendation 1 primary rule should apply to delay the ability of the Australian borrower to claim a deduction until the income is recognised for tax in the counterparty jurisdiction. Also, where the defensive rule is triggered in the case of an Australian lender, an amount would be included in the assessable income of the Australian payee each year an accruals deduction is claimed in the counterparty jurisdiction (with such assessable income being credited against any actual receipt, or the actual receipt being treated as non-assessable in the year of receipt);
- that optional OECD recommendation 2.1 be adopted, but that optional OECD recommendation 2.2 not be implemented immediately;
- that a simple dual inclusion income approach be taken to avoid unnecessary complexity and minimise compliance costs for taxpayers. The report said excess amounts disallowed should be able to be carried forward to set off against dual inclusion income in another period;
- that consideration be given to possible mechanisms to reduce uncertainty and the potential compliance burden in applying the imported mismatch rule, whilst still ensuring an appropriate level of integrity. The Board also strongly recommended that careful consideration be given during the legislative design process to ensure the interpretation and compliance issues identified with s 974-80 are not replicated in the imported mismatch rule;
- ***on thin capitalisation***, the Board recommended that further consideration should also be given to:
    - whether, in circumstances where a debt deduction is denied by operation of the hybrid mismatch rules, the hybrid debt to which the deduction relates should be excluded from the adjusted average debt calculation in all cases; and
    - whether any other consequential changes are required to be made to the thin capitalisation rules as a result of the operation of the hybrid mismatch rules;
- that interest withholding tax should continue to apply to interest payments on hybrid debt financing, unless it falls within an existing interest withholding tax exemption;

Acknowledging that there is a possibility Australia will be one of the first countries to implement the hybrid mismatch rules, the Board recommended that a post-implementation review of Australia's hybrid mismatch legislation be undertaken, preferably after a number of other jurisdictions have implemented hybrid mismatch rules and in light of any further recommendations made or best practice approaches suggested by OECD Working Party 11 in relation to the implementation of the BEPS Action 2 Report.

Transfer pricing rules to be strengthened to implement 2015 OECD recommendations

The Government announced that it will amend Australia's transfer pricing law to give effect to the 2015 OECD transfer pricing recommendations.

Australia's transfer pricing legislation currently specifies that it is to be interpreted so as to best achieve consistency with the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as last updated in 2010. On 5 October 2015, the OECD released the report Aligning Transfer Pricing Outcomes with Value Creation to update the Guidelines – see 2015 ATB 41 [22].

The changes to the 2010 OECD Guidelines enhance guidance on intellectual property and hard-to-value-intangibles, and ensure that transfer pricing analysis reflects the economic substance of the

transaction. The Government says that applying these changes to Australia's transfer pricing rules will keep them in line with international best practice so that profits made in Australia are properly taxed in Australia.

Date of effect: **The amendment will apply from 1 July 2016.**

Administrative penalties to be greatly increased

The Australian Government announced that it will increase administrative penalties imposed on companies with global revenue of AUD$1 billion or more who fail to adhere to tax disclosure obligations.

Penalties relating to the lodgment of tax documents to the ATO will be increased by a factor of 100. This will raise the maximum penalty from AUD$4,500 to AUD$450,000, which the Government considers will help to ensure that multinational companies do not opt out of their reporting obligations.

Penalties relating to making false and misleading statements to the ATO will be doubled, to increase the penalties imposed on multinational companies that are being reckless or careless in their tax affairs.

Date of effect: **This measure will apply from 1 July 2017.**

Tax Avoidance Taskforce on MNEs to be established within the ATO

The Government announced in the Budget that it would provide AUD$678.9 million to the ATO over the forward estimates period to establish a new Tax Avoidance Taskforce. This is designed to enable the ATO to undertake enhanced compliance activities targeting multinationals (MNEs), large public and private groups and high wealth individuals. The Taskforce, with a team of over 1,000 experts, will pursue tax avoidance by multinationals and high wealth individuals.

The Tax Avoidance Taskforce will conduct operations to improve tax compliance in high tax risk sectors. The Taskforce will also directly target compliance cases against those exposed by the Panama Papers.

This initiative enhances and extends current compliance activities targeting large multinationals, private groups and high-wealth individuals to 30 June 2020, and will feature the collective efforts of over 1,000 experts, including 390 new specialised officers.

The Taskforce draws together the ATO's current work addressing the tax affairs of multinationals, large public and private groups and high wealth individuals into a single, targeted program overseen by the Tax Commissioner and assisted by a panel of eminent former Judges. External experts will be appointed to play a critical role in supporting the Taskforce, including the formation of a panel of eminent former Judges. The panel will review proposed settlements with the ATO to ensure they are fair and appropriate.

The Taskforce will have a critical role in delivering on the OECD/G20 BEPS recommendations released in October 2015.

As part of the work of the Taskforce, the ATO will be testing the law through Court cases where there is deliberate tax avoidance.

The Government expects the Taskforce to generate AUD$3.7 billion of additional revenue over the next 4 years.

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[2]. AUSTRALIA: ATO TAXPAYER ALERTS FOR MULTINATIONAL BUSINESS: NEED TO BE DOCUMENTATION-READY AND FACTOR IN RISK MANAGEMENT - *BY TONY COOPER, SYDNEY AND PETER J JANETZKI, MELBOURNE, PARTNERS, INTERNATIONAL TAX SERVICES, EY*

As reported at 2016 ATB 17 [27], on 26 April 2016, the Australian Taxation Office (ATO) issued 4 Taxpayer Alerts (TAs) in relation to practices being undertaken by certain multinational businesses (MNEs) where it has concerns about the tax outcomes being sought.

The objective of the TAs is to signal ATO preliminary concerns about tax outcomes being sought in 4 international tax areas. Jeremy Hirschhorn, Deputy Commissioner Public Groups, stated in a radio interview on 27 April 2016 that "we are hoping the companies never enter into these schemes rather than waiting for them to enter into the scheme and then capture them…".

The TAs are not formal binding ATO advice, but are intended as ATO warnings to MNEs involved in these activities to seek independent advice in relation to their positions, to highlight ATO compliance action with potential penalty exposures, and to prepare for ATO examination of the issues and willingness to contest the issues.

The 4 TAs are:

- ***TA 2016/1*** - "Inappropriate recognition of internally generated intangible assets and revaluation of intangible assets for thin capitalisation purposes." The ATO outlines general principles and specific examples of what in its view does not meet the requirements for recognition of assets and questionable revaluations.
- ***TA 2016/2*** - "Interim arrangements in response to the Multinational Anti-Avoidance Law (MAAL)." The ATO has seen certain specified arrangements to avoid the MAAL, which took effect on 1 January 2016, and the TA expresses concerns about these. Companies planning restructure proposals or approaching the ATO will benefit from reviewing this TA. Jeremy Hirschhorn, Deputy Commissioner Public Groups, stated on 27 April that the ATO is in discussions with about 170 groups on the MAAL.
- ***TA 2016/3*** - "Arrangements involving related party foreign currency denominated finance with related party cross-currency interest rate swaps." This covers certain related party cross-currency interest rate swap agreements which achieve, in the ATO's view, contrived thin capitalisation, withholding tax, and transfer pricing outcomes.
- ***TA 2016/4*** covers cross-border leasing arrangements involving mobile assets (particularly lease in lease out (LILO) arrangements).

Businesses involved in any arrangements that might potentially fall within the sphere of the TAs need to consider the TAs in their risk management strategies. They should ensure that any such arrangements are fully documented and they are ready for ATO scrutiny. The TAs also provide useful

pointers to arrangements which are more likely to be acceptable to the ATO.

The need for affected entities to prepare for ATO questions is heightened by the doubling of penalties for certain schemes entered into by significant global entities (broadly turnover in excess of A$1 billion) but not supported by a reasonably arguable position.

The ATO has been signalling for some time that these TAs were being developed. The timing and combination of their release follows the ATO's attendance at 21 April hearings by the Senate Economics References Committee inquiry into claimed corporate tax avoidance (Senate Inquiry) in which the ATO referred to some MNEs as "gaming the system". This suggests the ATO wishes to demonstrate its pursuit of MNEs using its existing powers. As the Senate Inquiry is proposed to continue until 30 September 2016, the ATO may refer to the TAs and their results when next called before the Senate Inquiry.

TA 2016/1 - thin capitalisation, asset recognition and valuation

This sets out the ATO's concerns in regard to taxpayers' use of inappropriate intangible asset recognition and valuation practices for thin capitalisation purposes. These concerns flow from practices and arrangements that effectively facilitate either additional debt deductions (which would have otherwise been denied under thin capitalisation rules), or an increase to entities' debt-loading capacity for future income years.

TA 2016/1 provides examples of arrangements of concern, including:

- choices to recognise internally generated items, where the item chosen does not meet the relevant intangible asset recognition criteria set out in the Australian Accounting Standard - *AASB 138 Intangible Assets* – thus impacting the thin capitalisation calculation; and
- specific asset revaluation practices involving unsound assumptions, generic materials, double counting of asset values across multiple intangibles, and economic returns that do not accrue to the taxpayer; and
- failures to impair the value of assets (as required by AASB 136 Impairment of Assets) where the fair value or cash generating unit has declined.

The ATO continues to review these arrangements and has commenced compliance activities in some cases, having received favourable external advice on the application of the relevant accounting standards. These have resulted, and will continue to result, in adjustments to taxpayers' tax assessments.

The TA also flags ATO action including:

- contesting the recognition of relevant assets, and
- adjusting the valuation of relevant assets.

As well, more broadly, the "Commissioner is also considering the extent of his power … to substitute more appropriate asset values where the Commissioner considers that an entity has overvalued its

assets, and the circumstance in which it would, or might be appropriate to exercise this power."

We expect the ATO will continue to be proactive in:

- qualitatively analysing arrangements through compliance activities;
- substituting asset values; and
- preparing and issuing guidance products on the technical accounting and tax law positions.

Taxpayers that have made choices to recognise or revalue assets for their thin capitalisation calculations, or are considering these options, need to ensure that the positions taken are both compliant with Australian Accounting Standards and supported by relevant documentation.

TA 2016/2 - MAAL: agency and purported distribution agreements

TA 2016/2 sets out the ATO's concerns in regard to certain taxpayer interim arrangements in response to the enacted MAAL. The concerns flow from what the ATO considers are artificial and contrived 'interim measures' solely designed to avoid the application of the MAAL.

It provides examples of arrangements of concern, including:

- purported agency agreements between the foreign entity and an Australian entity, which effectively preclude the application of the MAAL (agency case); and
- the substitution of licensing agreements (eg for the use of intellectual property) with distribution agreements, which the ATO considers to be an attempt to escape withholding tax obligations under the auspices of a distribution fee (re-characterisation case).

The core of the ATO's concerns relates to the large quantum of income tax involved and the qualitative nature of interim arrangements put in place in response to the MAAL. In the agency case, the ATO's concerns are that the functions undertaken, assets used, and risks assumed are neither appropriate nor consistent with parties dealing with each other at arm's length. In the recharacterisation case, the ATO's concerns focus on the foreign entity's lack of rights to make supplies under the purported distribution agreement.

Following the release of the ATO's MAAL Client Experience Roadmap in January 2016, the ATO continues to engage with taxpayers in regard to restructuring their arrangements in response to the MAAL and policing restructures.

In a radio interview on 27 April, Jeremy Hirschhorn, Deputy Commissioner Public Groups, noted that the ATO is "currently in discussions with 170 or so companies as to whether they are caught by that law and how they should respond to that law." This highlights the ATO focus on the MAAL.

Taxpayers proposing or using an 'agency' or 'recharacterisation' case to the ATO will be subject to greater scrutiny, which may include:

- whether the distribution and agency structure is tax-driven and legally effective; and
- if the arrangement is consistent with the economic substance and commercial realities of activities carried out in Australia.

The ATO is engaging with relevant taxpayers to explore the issues of concern and to ensure that arrangements "do not seek to avoid the application of the MAAL in an artificial and contrived manner."

Affected taxpayers need to consider the legal and tax consequences of these arrangements and prepare for ATO scrutiny and potential ATO compliance activities.

Preparation is all the more significant given the risk of penalties involved.

TA 2016/3 – cross-border related-party financing

TA 2016/3 sets out the ATO's concerns in regard to taxpayers' use of related-party financing involving foreign currency loans and derivatives. The ATO states its concerns are that multiple, linked, excessively complex arrangements appear to be designed to achieve contrived thin capitalisation, withholding tax, and transfer pricing outcomes.

It provides examples of features and associated issues, including:

- cross-border related-party derivative transactions which either claim or do not have a hedging/offsetting rationale, and/or hedges/offsets another cross-border related-party transaction;
- economic and/or accounting exposure or risk, which the derivative is claimed to hedge, is not required to be further addressed at the global group level;
- net pre-tax financial outcome to the Australian group is neutral or negative, with the net financial benefit to the group flowing from the Australian tax savings from the arrangement;
- incorrect pricing or mispricing of the related party derivative and/or an embedded high profit margin for the offshore related derivative counterparty;
- deductibility of payments under the related party derivative; and/or
- whether the related party derivative and/or the related party borrowing are on non-arm's length terms or involve non-arm's length considerations.

The ATO continues to review these arrangements, with compliance activities commenced in some cases. The ATO is expected to develop its technical position on the arrangements, and will canvass its concerns in due course.

Taxpayers that have entered into or are contemplating entering into related-party financing involving foreign currency loans and derivatives need to consider their position and prepare for ATO compliance activity.

TA 2016/4 - cross-border leasing arrangements

TA 2016/4 sets out the ATO's concerns in regard to taxpayers' use of cross-border leasing

arrangements involving mobile assets, particularly asset leasing between related parties. These concerns flow from arrangements featuring: the use of interposed companies for favourable tax treaty treatment, and disproportionate amounts of taxation relative to contributions made by Australian operations.

It provides examples of the ATO's concerns, including:

- transfer pricing and profit attribution approaches that are inconsistent with arm's length leasing arrangements and/or do not reflect the ATO view on the true Australian economic contribution;
- potential application of withholding tax to certain lease payments;
- the potential liability of a treaty resident head lessor to Australian tax as the head lease payments may be deemed by the relevant treaty to have an Australian source for Australian income tax law purposes; and
- sub-lessor entities having limited commercial activities or limited sound commercial reasons for their position in the leasing arrangement.

These concerns align with those raised to date by the ATO in its LILO project and interactions with taxpayers in the oil and gas services industry.

Going forward …

Going forward, we expect the ATO will continue to be proactive in:

- formalising the outcomes of the LILO project;
- reviewing common cross-border leasing arrangements;
- consulting with stakeholders to develop their commercial and tax technical understanding of these arrangements; and
- preparing and developing guidance on the transfer pricing and profit attribution issues associated with common cross-border leasing arrangements.

Taxpayers that have entered into, or are contemplating, cross-border leasing arrangements need to review and/or document positions to support the commercial and economic rationale of the leasing structure utilised to bring assets into Australia.

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ASIAN TAX AND TRADE NEWS AND UPDATES

SINGAPORE

[3]. OECD TAX MUTUAL ASSISTANCE CONVENTION ENTERS INTO FORCE FOR SINGAPORE

On 1 May 2016, the OECD-Council of Europe Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol entered into force for Singapore. The Convention, signed by Singapore on 29 May 2013, generally applies from 1 January 2017. However, it may apply for

earlier periods between Singapore and another signatory if agreed to, and applies in relation to any period regarding criminal matters.

The amended Convention is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance, a top priority for all countries.

It facilitates international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes, in particular with a view to combating tax avoidance and evasion. This co-operation ranges from exchange of information, including automatic exchanges, to the recovery of foreign tax claims.

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[4]. NEW CHAIR OF THE BOARD OF IRAS APPOINTED

The Minister for Finance has appointed Mrs Tan Ching Yee, incoming Permanent Secretary (Finance), as the Chairman of the Board of Inland Revenue Authority of Singapore ("IRAS Board") with effect from 1 May 2016. She succeeds Mr Peter Ong Boon Kwee who has been the Board Chairman of IRAS Board since 1 October 2009. Mr Ong will be relinquishing his Chairmanship appointment on the same day as he takes on his new appointment as Permanent Secretary (Prime Minister's Office)(Strategy) concurrently with his appointment as Head, Civil Service.

Under Mr Ong's stewardship, IRAS reviewed many rules and launched multiple initiatives to make taxpaying effortless and hassle-free. Singapore is now one of the top 5 tax jurisdictions recognised for our ease of paying taxes.

Mr Ong's focus on leveraging analytics and research to gain tax insights has propelled IRAS to build up its business analytics capabilities. This has enabled IRAS to better identify emerging trends to improve taxpayer service, and enhance compliance efforts. This also allowed IRAS and Ministry of Finance to exploit data analytics for tax policy formulation.

The Board of IRAS comprises 9 members, including the Chairman.

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[5]. IRAS WARNING ON LATEST SCAM AND FRAUDULENT ACTIVITIES

IRAS has warned that there have been reported cases of individuals receiving emails, letters, Short Message Services (SMS), or phone calls purportedly from IRAS, requesting you to do one or more of the following:

- Open an email link or file attachment to review your income or tax statement;
- Transfer a sum of money, supposedly for tax purposes, to accounts belonging to named individuals (usually an overseas account); and/or
- Pay sums of money to named individuals (usually a party not residing in Singapore) before an inheritance/estate of a deceased party is released.
- Provide your bank account numbers to claim tax refunds, enjoy cash rewards, or pay outstanding tax bills**.**

IRAS says it does not send out official emails from personal email accounts such as Hotmail, Gmail, or other unfamiliar email domains. IRAS will not ask you to provide your confidential personal details through emails.

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MALAYSIA

[6]. NO PLAN TO INCREASE GST RATE: PRIME MINISTER

Datuk Seri Najib Tun Razak has reiterated that the Government has no plan to increase the GST rate and the current rate of 6% would be maintained, *The Star Online has reported*.

"As the Prime Minister and Finance Minister, I reiterate that there is no plan at all to raise the GST rate now and that the current rate will be maintained," he said in the latest post on his blog.

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THAILAND

[7]. INDIVIDUAL INCOME TAX REDUCED RATES TO CONTINUE IN 2016

Thailand has continued the temporary reduction in the rates of individual (personal) income tax for the tax year of 2016.

Royal Decree No 600 (February 2016) was issued by the Thai Government to continue rate reductions in the individual income tax for 2016.

KPMG reports that accordingly, for the 2016 tax year - as was the case for the 2013-2015 tax years - the temporary reduction in the individual income tax rates will range from 0% to 35% with 7 income tax brackets. Without this extension, the individual income tax rates would range from 0% to 37%.

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VIETNAM

[8]. VIETNAM PM PLEDGES STRONGER SUPPORT FOR BUSINESS DEVELOPMENT

The Vietnamese Government will grant the most favorable support possible for the business development and start-up initiatives, Prime Minister Nguyen Xuan Phuc asserted as he met the business community in Ho Chi Minh City recently.

The Premier asserted that businesses are "the driving force for national economic development," and their legitimate rights and business right will therefore be protected.

The Prime Minister, leading other government officials, was speaking at an online conference attended by some 10,000 enterprises, representing the nationwide business community.

PM Phuc said all businesses will have equal access to capital, natural resource, land, market and business opportunities, irrespective of their scales and business models.

The Premier admitted that the current business and investment environment is not really favorable for enterprises.

There are still many difficulties hindering local firms, such as ambiguous policies, unclear law

enforcement guiding documents, bureaucracy, and slow administrative reform.

Local businesses currently have to suffer numerous high fees, repeated inspections, while there has yet to be mechanisms to encourage them to apply advance technologies and develop brands, according to the prime minister.

The government will therefore exert more efforts to boost administrative reform and fight corruption, and will seek to abolish unsuitable regulations to better support businesses.

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[9]. VIETNAM ISSUES GUIDANCE ON CORPORATE TAX INCENTIVES AND MORE

KPMG said Vietnam's tax authority issued guidance, also known as "official letters", in April 2016 concerning the following topics:

- For purposes of corporate income tax incentives, the requirements for determining "regular investment activities"
- A deduction allowed to companies for trade union fees paid in prior years
- "In kind" trade discounts require VAT invoices to be issued (as would be required for regular trading activities)
- No credit or refund of input VAT if the relevant contract and invoice are signed after the actual date of the export and customs declaration
- For foreign contractor tax purposes, a bonded warehouse is a physical location within the Vietnamese territory; thus, if a foreign party contracts to sell goods at a bonded warehouse, that foreign party is subject to Vietnamese foreign contractor tax

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[10]. AUTO IMPORTERS PETITION GOVERNMENT TO HOLD TAXES STEADY

The GDT has advised that auto importers in Việt Nam have petitioned Prime Minister Nguyễn Xuân Phúc and relevant sectors to consider problems related to some revised articles and supplements in the Law on Special Consumption Tax, which will become effective on 1 July 2016.

This is the second change of the tax calculation this year. The first was put into effect on 1 January. The changes, which were made in such a short time, reportedly made it difficult for auto businesses to set up their future plans.

The petitioners are official suppliers of giant automakers in the world, including Audi, Bentley and Lamborghini, BMW and Mini, Jaguar and Land Rover, Luxgen and Baic, Maserati, Renault, Rolls-Royce, Subaru and Volkswagen.

In an urgent petition sent to the Prime Minister, the ministries of industry and trade and finance, and the National Assembly's Economic and Budget Committee, they said the application of the revised law would face problems because the new tax calculation was unclear.

According to the current tax calculation method issued by a Government decree, which went into effect in January, the special consumption tax increased 5% in the price of imported cars.

However, this will change on 1 July 2016 when the revised law approved by the National Assembly takes effect. In the revised law, the rate will be calculated based on the average selling prices of dealerships with set price frames. However, the range of the price frames has not been specified.

Importers said there was not yet detailed information about the implementation of the law, even though it would come into effect in the next 2 months.

They said their transactions were based on a period of six months, from receiving the orders to delivering vehicles to the customers. Therefore, in this time, they cannot quote an exact price in Vietnamese đồng for those who place an auto delivery order after 1 July. "This will cause negative impacts on the auto importers' businesses and reduce the State budget's collection as well," said the petition.

With such difficulties, they asked the Government to keep the current method in place and delay the new tax calculation method until it is clearer.

This petition was not the first time auto importers called for help from the Government. In November last year, 8 auto importers sent a petition to relevant ministries about regulations on the calculation of special taxes, which took effect on 1 January. This calculation has caused the prices of many cars to increase by 15% to 30%.

The auto importers asked the Ministry of Finance to issue detailed instructions and a suitable time frame for them to apply the new tax calculation smoothly.

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CHINA

[11]. CHINA'S TAX OVERHAUL AIMS TO CUT BUSINESS COSTS

China has now rolled out a value-added tax (VAT) system across all industries that previously had a business tax, in the most ambitious overhaul of its tax regime in 3 decades.

Reuters said the Government first began experimenting with a VAT in 1979 and started applying the tax to specific sectors in 2012. The final 4 sectors to adopt a VAT on 1 May 2016 are construction, property, finance and life services - which includes food and beverage, healthcare and tourism industries.

Premier Li Keqiang had said the reforms would be adopted by 1 May in his work report at the annual parliament in March.

A business tax directly taxes businesses, whereas a VAT is borne by the end consumer, reducing the burden on companies which are facing rising costs and a slowing economy.

Consumers will pay varying levels of VAT, depending on the industry, China's Vice Minister Shi Yaobin told a news conference in April. Most of the services sector was previously subject to a business tax rate of either 3 or 5%.

The Government hopes the reforms will cut firms' tax burdens by more than 500 billion yuan (US$77.23 billion) this year, part of a broader push for "supply-side reforms" aimed at cutting red tape and scaling back the role of government in business to allow market forces greater room to

flourish.

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HONG KONG

[12]. HONG KONG IS EMBARKING ON THE BEPS JOURNEY: PWC

The Deputy Commissioner of Hong Kong's Inland Revenue has recently commented on the implementation of the BEPS project in Hong Kong. In a recent report, PwC says one clear message that emerged is that Hong Kong will need to respond to the rewritten international tax rules and update its tax system and legislation, at least in certain areas.

In implementing the BEPS project, priority will be given to the 4 BEPS action points where there are agreed minimum standards, namely:

1. review of harmful tax practices and spontaneous exchange of information on certain tax rulings (Action 5);
2. model anti-treaty abuse provisions in tax treaties (Action 6);
3. country-by-country (CbC) reporting requirements and automatic exchange of CbC reports (Action 13) and
4. improvements in cross-border tax dispute resolution (Action 14).

In particular, transfer pricing legislation and TP documentation requirements are likely to be the top priority, PwC says. The firm said the Deputy CIR also hinted that the simplified limitation on benefits (LOB) rule plus the principle purposes test (PPT) will probably be the norm for Hong Kong tax treaties in the future.

With the likelihood of introduction of specific TP legislation and documentation requirements in Hong Kong, PwC says groups with cross-border related party transactions will need to prepare themselves for closer scrutiny by the IRD on TP-related issues and greater disclosure of TP-related information of the groups.

With the possible incorporation of the simplified LOB rule and the PPT into the Hong Kong tax treaties, PwC says companies that hold their investments through Hong Kong investment holding platforms will need to review and assess whether their current structures can fulfil the conditions imposed by the new anti-treaty shopping rules and withstand potential challenges from Hong Kong's tax treaty partners, and evaluate the options available to ensure the sustainability of such structures under the new rules.

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INDIA

[13]. INDIA RECONFIRMS IT WILL IMPLEMENT A GAAR IN 2017

On 29 April 2016, the Indian Government issued a release reconfirming its commitment to implementing a general anti-avoidance rule (GAAR) from 1 April 2017 ie Assessment Year 2018-19 relevant to the Financial Year 2017-18.

The commitment of the Government was also reflected in the Budget Speech 2016 delivered on 29

February 2016 – see 2016 ATB 9 [26].

The provisions relating to the GAAR are contained in Chapter XA and s 144BA of the Income-tax Act, 1961. Necessary rules for implementing GAAR have also been notified.

Further, the Government will constitute a panel as mandated by the law and provide for guidelines on practical aspects relating to implementation of the GAAR, in due course.

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SOUTH KOREA

[14]. GOVERNMENT TO PROMOTE INDUSTRIAL RESTRUCTURING WITH A FOCUS ON R&D

Deputy Prime Minister Yoo Il Ho presided over the 6th Ministerial Meeting on the Economy on 28 April 2016, and discussed plans to tackle low growth, which include carrying out corporate restructuring and accelerating industrial restructuring.

The Ministry of Strategy and Finance said the Prime Minister announced that the Government would provide major support for industrial restructuring, which includes incentives for R&D and other support measures. The plans include:

- Up to 30% tax reduction for R&D investment in new growth engines.
- Up to 10% tax reduction for facilities investment to commercialise new technologies.
- Expanded tax reduction for R&D investment in new medicines.
- Expanded support for service sector job creation.
- New tax incentives to promote the content industry.
- KRW 1 trillion in new funding to support high-risk investment in new technologies and products.

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UNITED STATES

[15]. COURT CHALLENGE TO FATCA DISMISSED

A US District Court has dismissed a suit brought by Senator Rand Paul (R-KY) and several individual plaintiffs challenging the Foreign Account Tax Compliance Act (FATCA) and Foreign Bank Account Report (FBAR) requirements: *Mark Crawford, et al v United States Department of the Treasury, et al*.

The Court found that Senator Paul's alleged diminution of political power was an insufficient injury for purposes of establishing standing to sue, and that the other individual plaintiffs generally asserted largely hypothetical injuries or harms that were not traceable to actions of the US Government.

The plaintiffs in the case include Senator Paul, US citizens who live in foreign countries, dual citizens

of the US and another country, and former US citizens. The plaintiffs generally challenged the validity of FATCA's reporting and withholding requirements and the penalty for willfully failing to file an FBAR, and specifically challenged the validity of several countries' IGAs with the US as exceeding the proper scope of the Executive Branch's power. They further asserted, among other things, that they faced difficulties in establishing foreign accounts or were forced to divide assets as a result of FATCA, and that various elements of the overall reporting regime were unconstitutional.

The District Court for the Southern District of Ohio granted the Defendants' motion to dismiss the case, finding that the plaintiffs lacked standing to bring it and that the proposed amendments would be futile.

Senator Paul argued that he had standing based on his institutional duty to advice and consent under the Constitution ie that the IGAs exceeded the scope of the Executive Branch's power and should have been submitted for Senate approval. The court, however, rejected this argument in the earlier proceeding, and now also rejected the proposed amendment to this part of the plaintiffs' complaint.

In the end, the court found that none of the plaintiffs has suffered an invasion of a legally protected interest - concrete and particularised, actual or imminent - and that no alleged injury was fairly traceable to the actions of the Defendants.

Source: Thomson Reuters International Taxes Weekly – on CHECKPOINT™ WORLD

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AUSTRALIA

[16] HOW SHOULD OECD MANDATORY DISCLOSURE OF TAX INFORMATION RULES BE FRAMED IN AUSTRALIA? CONSULTATION PAPER RELEASED

On 3 May 2016, the Government announced that it will seek community input on the OECD's proposals for Mandatory Disclosure Rules, which require tax advisers and/or taxpayers to make early disclosures of aggressive tax arrangements (often before income tax returns are lodged), to provide tax authorities with timely information on arrangements that have the potential to undermine the integrity of the income tax system. Mandatory Disclosure Rules are discussed in the Final Report of Action Item 12 of the BEPS Project.

The Government has released a Consultation Paper to seek community views on how Mandatory Disclosure Rules should be framed in the Australian context, having regard to the disclosure rules that are currently available to the ATO. The Paper also provides an outline of the OECD's key recommendations, and the Government's preliminary views in relation to those recommendations.

The Government says that, consistent with the OECD's Final Report, it will be focused on finding a way to appropriately balance competing policy priorities, including enhancing information available to the ATO to crack down on tax avoidance and avoiding unnecessary compliance burdens on taxpayers. A key priority will be ensuring that there is no unnecessary overlap with existing disclosure rules.

Some of the consultation questions posed in the Paper include:

- How new Mandatory Disclosure Rules should be framed in the context of Australia's current

disclosure rules, and in particular, how they should be targeted towards specific taxpayer cohorts to preclude duplication with existing rules.

- The Government's preliminary position that Mandatory Disclosure Rules should apply to tax advisers who are involved in the design, distribution and management of aggressive tax arrangements.
- The Government's preliminary position that broad discretion should be provided to the ATO in determining "aggressive tax arrangements" that would trigger Mandatory Disclosure Rules.
- The Government's preliminary position that there should be clear legislative guidelines on the type of information that should be required to be disclosed under the Mandatory Disclosure Rules. In particular, views are sought on how these legislative guidelines should be designed.
- The Government's preliminary position that information should not be required earlier than 90 days of the publication of the ATO's statement. Views are also sought on the proposed mechanism for tax advisers seeking the ATO's approval for extending the timeframe for making a disclosure.
- The Government's preliminary proposal on what should happen if tax advisers do not comply with the Mandatory Disclosure Rules.

Comments on the Paper are due by 15 July 2016.

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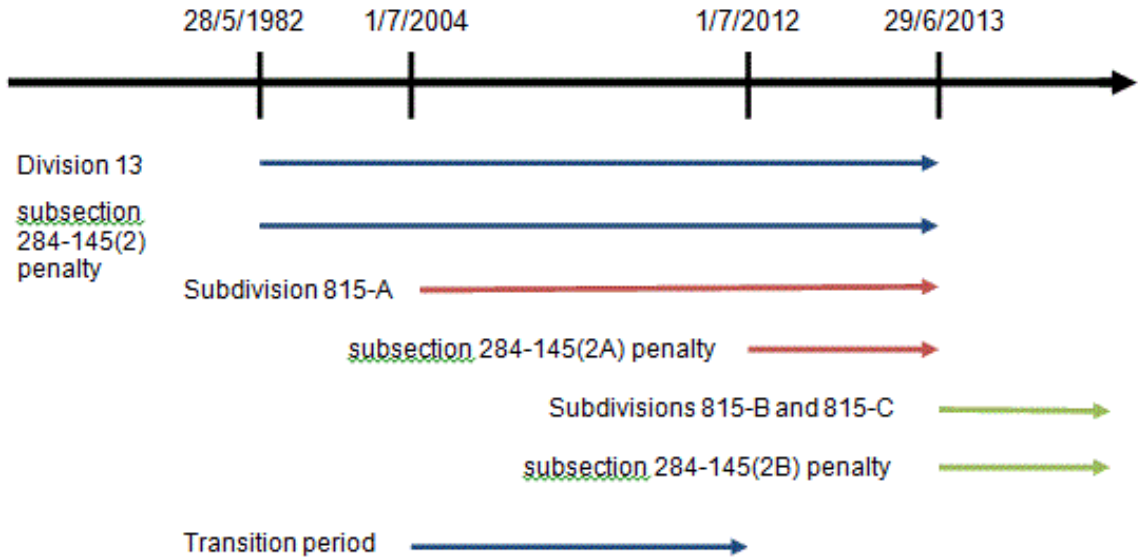
[17]. TRANSFER PRICING PENALTIES – ATO PRACTICE STATEMENT RELEASED

The ATO on 5 May 2016 released Practice Statement Law Administration PS LA 2016/2 - *Administration of scheme penalties arising from the application of Subdiv 815-A for income years which started on or after 1 July 2004 and before 1 July 2012 (transition period)*.

For income years which commenced within the transition period, the Practice Statement explains when liability for a transfer pricing scheme penalty arises, how to apply a scheme penalty, how to assess an entity's scheme penalty and matters the Commissioner considers in remitting such penalty.

For income years which commenced on or after 1 July 2004 and before 29 June 2013, Subdiv 815-A of the ITAA 1997 applies to bring to tax a "transfer pricing benefit" by empowering the Commissioner to make a determination under s 815-30, by increasing taxable income, decreasing tax losses, or decreasing net capital losses, as appropriate. Subdivision 815-A is only relevant to entities to which one of Australia's tax treaties containing the transfer pricing articles applies; that is, where the entity is a resident of one or both of the contracting states to the tax treaty.

The Practice Statement includes a useful diagram of when the transfer pricing rules, including relevant scheme penalty provisions, apply:



The ATO says if the Commissioner makes a Subdiv 815-A Determination in respect of an income year commencing within the transition period, "ATO personnel are to exercise sound judgment in each instance in deciding whether the Commissioner should allocate resources to assess a scheme penalty". In so deciding, ATO personnel need to take into account, whether:

- extra complexity and/or costs arise in applying Division 13, and
- the scheme penalty, if assessed, would be remitted in full in accordance with the guidelines set out in the Practice Statement.

The Practice Statement states that no further resources should be allocated to applying Division 13 in order to impose a scheme penalty if ATO personnel decide that:

- applying Division 13 will be overly complex and/or gives rise to unnecessary costs [Division 13 of the ITAA 1936 was repealed by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*], and/or
- it is appropriate to fully remit the scheme penalty that otherwise applies.

In the vast majority of instances, the ATO says the amount of the transfer pricing benefit negated under Subdiv 815-A will be the same as the difference between the arm's length and actual consideration under Division 13 for the same cross-border dealings. In such instances, the scheme shortfall and scheme penalty amounts applicable will also be the same.

Remission of transfer pricing scheme penalties

When making remission decisions concerning transfer pricing penalties for income years commencing within the transition period, the Practice Statement says ATO personnel must ensure that the Commissioner's discretion under s 298-20(1) is exercised in accordance with the principles set out below (the ATO says that for consistency, these principles have been drawn from paras 36 to 40 of former Taxation Ruling TR 98/16).

ATO personnel should exercise the Commissioner's discretion regarding transfer pricing penalties to reduce the base penalty amount otherwise applying from 10% to nil, where the taxpayer:

1. has genuinely made a reasonable attempt in good faith to comply with the arm's length principle in preparing the tax return, having regard to what a reasonable business person in the taxpayer's circumstances would do;
2. has used its best endeavours to document the process of selecting and applying an arm's length method at the time the transaction was negotiated, or at the time the relevant income tax return was prepared, on the basis of the information in the taxpayer's possession and any other information that was reasonably available to the taxpayer at the time;
3. can satisfy the ATO that there was no tax avoidance intention or purpose in adopting the pricing outcomes arrived at from performing the process mentioned in (2) above; and
4. where the transfer pricing adjustment is made as a result of audit action, the taxpayer has fully co-operated with the ATO, including providing all relevant information in the taxpayer's possession or reasonably available to the taxpayer so as to achieve an expeditious conclusion of the audit.

Date of effect: The Practice Statement applies to income years that commenced between 1 July 2004 and 28 June 2013 inclusive.

TR 98/16 withdrawn

At the same time, the ATO withdrew its longstanding penalty ruling Taxation Ruling TR 98/16 - *Income tax: international transfer pricing - penalty tax guidelines* with effect from 5 May 2016. . TR 98/16 does not apply to schemes entered into in relation to the 2000-01 or later income year(s).

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[18]. VOLUNTARY TAX TRANSPARENCY CODE FOR COMPANIES – BOARD OF TAXATION REPORT RELEASED

On 3 May 2016, the Australian Government announced the release of the Board of Taxation's final report on a voluntary tax transparency code (TTC). On 11 December 2015, the Board released a consultation paper. The Board completed its development of a tax transparency code and provided its report to Government on 16 February 2016. The code is designed to encourage greater public disclosure of tax information by businesses, particularly large multinationals. In the 2016-17 Federal Budget, the Government encouraged all companies to adopt the Code from the 2016 financial year onwards.

The Board divided TTC disclosure into 2 parts:

- Part A – large and medium businesses – minimum standard of information would be:
  - A reconciliation of accounting profit to tax expense and to income tax paid or income tax payable.
  - Identification of material temporary and non-temporary differences.
  - Accounting effective company tax rates for Australian and global operations (pursuant to AASB guidance).
- Part B – large businesses - minimum standard of information would be:

- Approach to tax strategy and governance.
- Tax contribution summary for corporate taxes paid.
- Information about international related party dealings.

The Board recommended that:

- "Large businesses" should adopt Part A and Part B of the TTC. "Large businesses" are defined as businesses with aggregated TTC Australian turnover of AUD$500 million or more.
- "Medium businesses" should adopt Part A of the TTC. "Medium businesses" are defined as businesses with aggregated TTC Australian turnover of at least AUD$100 million but less than AUD$500 million.

The TTC will be a minimum standard of content and the Board expects that many businesses will provide additional disclosures.

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[19]. TAXATION CONDITIONS ON FOREIGN INVESTMENT IN AUSTRALIA REVISED

Australia's Foreign Investment Review Board (FIRB) says the 2016-17 Federal Budget makes important protections to the integrity of Australia's tax base, designed to ensure that all individuals and businesses pay the right amount of tax.

The application of tax conditions to foreign investors, where it is decided that a particular foreign investment application presents a risk to Australia's revenue, is an important part of the tax integrity agenda.

Following the Treasurer's 22 February 2016 announcement that standard tax conditions would be applied to foreign investment approvals, there have been consultations between Treasury, the Australian Taxation Office and industry to discuss the practical application of these conditions.

Following these consultations, FIRB said the Treasurer released on Budget night 3 May 2016 a revised set of 8 conditions that effectively target those foreign investments that pose a risk to Australia's revenue and to make clear the requirements and expectations for investors. The revised conditions include:

- The applicant must comply with the taxation laws of the Commonwealth of Australia in relation to the action, and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action. An applicant does not breach this condition if it has taken reasonable care to comply with the relevant taxation laws and has a reasonably arguable position.
- The applicant must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group comply with the taxation laws of the Commonwealth of Australia in relation to the action and any transactions, operations or assets in connection with the assets or operations acquired as a result of the action.
- The applicant must provide any documents or information that is required to be provided to the Australian Taxation Office (ATO) in accordance with the taxation laws of the Commonwealth

of Australia in relation to the action and any transactions, operations or assets in connection with assets or operations acquired as a result of the action.
- The applicant must pay its outstanding taxation debt under the taxation laws of the Commonwealth of Australia, and must use its best endeavours to ensure, and within its powers must ensure, that entities in its control group pay any outstanding taxation debt under the taxation laws of the Commonwealth of Australia, which is due and payable at the time of the proposed action. This condition does not apply to payment arrangements agreed with the ATO or where the ATO has exercised its discretion to defer part or all of the payment of a disputed amount, to the extent that those arrangements are complied with.

Two ***possible additional conditions*** for cases where a particular tax risk is identified are:

- The applicant must engage in good faith with the ATO to resolve any tax issues in relation to this transaction and its holding of the investment.
- The applicant must provide information as specified by the ATO on a periodic basis including at a minimum a forecast of tax payable.

The Government stressed that it continues to welcome foreign investment that is not contrary to Australia's national interest.

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[20]. AUSTRALIAN TRUSTED TRADER (ATT) PROGRAMME GETS FUNDS BOOST FOR IMPLEMENTATION

Faster and more streamlined trade for trusted Australian businesses is one step closer, with the Government on 29 April 2016 announcing almost AUD$70 million for the implementation of the Australian Trusted Trader (ATT) programme.

ATT is a partnership between the Australian Government and private industry aimed at enhancing trade by improving the international competitiveness of Australian businesses.

The Minister for Immigration and Border Protection, Peter Dutton, announced the pre-budget funding of AUD$69.9 million over 4 years in Sydney while meeting with the first businesses to enter into an Australian Trusted Trader agreement – IKEA Supply AG; Pacific Brands Holdings Pty Ltd; Techwool Trading Pty Ltd; and Teys Australia Beenleigh Pty Ltd.

"This is an important investment that will help Australian businesses remain economically competitive on the world stage, while also strengthening international trade and security," Mr Dutton said. "The volume of goods crossing our borders is growing, with an expected increase of 14% in sea cargo and 26% in air cargo between 2014-15 and 2018-19.

The Australian Logistic Council estimates that as much as AUD$1.5 billion can be saved for every one per cent increase in efficiency of transport and logistics supply chains. These savings will flow directly and indirectly to industry and the Australian economy.

Under ATT, businesses that meet or exceed international supply chain and trade compliance standards will receive priority treatment and other incentives. Benefits include a dedicated account manager; faster cargo clearances at the border; Mutual Recognition Arrangements with key trading

partners; duty deferral (from financial year 2017-18) and periodic reporting (from financial year 2017-18).

"By offering incentives to ATT businesses, a growing proportion of international trade will become secured to an internationally recognised standard," Mr Dutton said.

"This will allow Australia's border agencies to focus their intelligence and operational capabilities on high-risk activities and will help combat transnational crime at our borders.

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RECENT TAX ARTICLES

[21]. RECENT TAX ARTICLES OF INTEREST

[Citing tax and related articles from various journals of interest to practitioners, advisers and corporate tax departments; a useful research and reference tool]

Taxation Today [Thomson Reuters NZ] - Volume 94, May 2016

"Staithes decision provides new interpretation of Associated Persons Rules" [p 4]
Trustee tax residence in New Zealand: Is it relevant and how is it determined?" [Part 2] [p 14]

Weekly Tax Bulletin [Thomson Reuters Australia] – Issue 19, 6 May 2016

"A 40% diverted profits tax ("Google tax") to give the ATO a big stick against MNEs" - by Cameron Allen, Partner - Corporate and International Tax, and Sharon Arasu-Koh, WTS Australia

[NOTE: From time to time, the Asia Tax and Trade Bulletin [formerly the ASEAN Tax Bulletin] will contain cross-references to different Issues of the Bulletin. They will appear as, for example, 2016 ATB 1 [12] – this means Issue 1 para [12] of the 2016 Asia Tax and Trade Bulletin.]

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