

# ***TR 2011/5A1 - Addendum - Income tax: objections against income tax assessments***

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# Addendum

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## Taxation Ruling

### Income tax: objections against income tax assessments

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 2011/5 to clarify various issues and update the ruling as a result of recent amendments made by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013*.

#### TR 2011/5 is amended as follows:

**1. Paragraph 8**

After the paragraph; insert:

8A. In 2013, changes were made to the definition of assessment. Prior to the change, an assessment did not extend to the ascertainment of the total of a taxpayer's tax offset refunds for an income year. The change results in taxpayers being able to object against the amount of their tax offset refund (including nil amounts) in relation to assessments for the 2013-14 and later income years made on or after 1 July 2013.<sup>2A</sup> The change was introduced by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013*. This Act introduced the loss carry back measure which allows corporate entities who had paid tax in the past to obtain a refund of it if they were subsequently in a tax loss position by claiming a refundable tax offset. Although the change was introduced in the context of the loss carry back measure, the change applies to all refundable tax offsets.

**2. Paragraph 12**

(a) Omit the words 'but only' in the second sentence.

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<sup>2A</sup> There are transitional rules that apply in relation to objection rights for amounts of total tax offset refunds for the 2012-13 income year. For the 2012-13 income year, the Commissioner may issue a notice specifying the amount of a taxpayer's total tax offset refunds. For full self-assessment taxpayers, the Commissioner is deemed to provide a notice when the taxpayer lodges its 2012-13 income tax return. The calculation of this amount is not an assessment. However, taxpayers have a separate right to object against this notice: see subsections 67-115(2) and 67-135(1) of the *Income Tax (Transitional Provisions) Act 1997*.

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(b) Omit the last sentence of this paragraph; substitute 'It also applies in relation to objections against assessments where the taxpayer is seeking an increase in the total of the taxpayer's tax offset refunds.<sup>2B</sup> However section 175A of the ITAA 1936 does not apply to the ascertainment of a tax loss.'

### 3. Footnote 10

Omit the footnote; substitute:

<sup>10</sup> *AAT Case 5540* (1990) 21 ATR 3083 at 3090; *Case X2 90 ATC* 105 at 111-112.

### 4. Paragraph 21

Omit the dot points; substitute:

- the amount of the taxable income or net income as the case may be (or that there is no taxable income or net income) of the taxpayer;
- the tax payable on that taxable income or net income as the case may be (or that no tax is payable); or
- the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refund).<sup>14A</sup>

### 5. Footnote 18

At the end of the footnote; insert 'at 4097.'

### 6. Paragraph 29

Omit the second sentence and footnote; substitute 'However, if an assessment is a nil assessment, a taxpayer cannot object against it unless they are seeking an increase in their tax liability or seeking an increase in the total of the taxpayer's tax offset refunds.<sup>21</sup>'

<sup>2B</sup> As a result of the change to the meaning of assessment referred to in paragraph 8A, the right to object against an assessment under section 175A of the ITAA 1936 now encompasses the right to object against the total of a taxpayer's tax offset refunds for assessments made on or after 1 July 2013 for the 2013-14 and later income years. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their total tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

<sup>14A</sup> The right to object against an assessment of a taxpayer's tax offset refunds under section 175A of the ITAA 1936 was introduced by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013* and applies to assessments for the 2013-14 and later income years made on or after 1 July 2013. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

<sup>21</sup> Subsections 175A(2) and 175A(3) of the ITAA 1997. See also *Re Creative Bottle Decorators Pty Ltd and Federal Commissioner of Taxation* [2010] AATA 847; (2010) 80 ATR 793. The right to object against an assessment of a taxpayer's tax

**7. Paragraph 33**

Omit the words 'However, where' in the first sentence; substitute 'Where'.

**8. Paragraph 49**

Omit the paragraph; substitute:

49. The taxpayer has the burden of proving to the AAT or the Federal Court that an assessment is excessive. For assessments made on or after 1 July 2013 in relation to the 2013-14 or later income years, the taxpayer has the burden of proving that the assessment is excessive or where the taxpayer contends that the assessment should be higher, that the assessment is incorrect. In all cases, the taxpayer must also prove what the correct amount of the assessment is.<sup>33</sup>

**9. Paragraph 54**

After the paragraph; insert:

54A. For the 2013-14 and later income years the term 'assessment' also includes the ascertainment of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds).<sup>38A</sup>

**10. Paragraph 55**

Omit 'Medicare levy surcharge.<sup>39i</sup>'; substitute 'Medicare levy (fringe benefits) surcharge.<sup>39i</sup>'.

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offset refunds only applies in relation to assessments for the 2013-14 and later income years made on or after 1 July 2013. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

<sup>33</sup> Paragraphs 14ZZK(b) and 14ZZO(b) respectively. See also paragraphs 7.36 to 7.38 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013. The High Court's decision in *Federal Commissioner of Taxation v. Dalco* 90 ATC 4088 at 4092 and 4093 confirms that the taxpayer must prove, not just that the assessment is too high, but what the correct amount of the assessment ought to be.

<sup>38A</sup> This extended definition of 'assessment' applies to assessments made on or after 1 July 2013 for these income years.

<sup>39</sup> Medicare levy is imposed on a taxpayer's taxable income by section 5 of the *Medicare Levy Act 1986* (MLA). A levy surcharge is imposed in the circumstances listed in sections 8B to 8G of the MLA and on reportable fringe benefits in accordance with section 10 of the *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999*. Medicare levy and Medicare levy (fringe benefits) surcharge are assessed under the ITAA 1936: subsection 251R(7) of the ITAA 1936. Section 251X of the ITAA 1936 requires an income tax notice of assessment issued under section 174 of the ITAA 1936 to specify the total of Medicare levy or

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## 11. Paragraph 56

After the paragraph; insert:

56A. For the 2013-14 and later income years, the term 'assessment' also includes the ascertainment of the total of a taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).<sup>41A</sup>

## 12. Paragraph 59

After the second sentence; insert 'From the 2013-14 income year, the definition also includes ascertaining the total of a taxpayer's tax offset refunds for an income year or that the taxpayer can get no such refunds.'<sup>41B</sup>.

## 13. Paragraph 65

Omit the quotation; substitute:

From the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:

- (a) the amount of the taxable income or that there is no taxable income) of any taxpayer;
- (b) the amount of the tax payable thereon (or that no tax is payable); and
- (c) the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).<sup>46A</sup>

## 14. Paragraph 67

After the first sentence; insert 'For the 2013-14 and later income years, the assessment also includes the ascertainment of the taxpayer's total of the tax offset refunds (including nil amounts).'<sup>46B</sup>.

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Medicare levy (fringe benefits) surcharge payable by a taxpayer for the income year.

<sup>41A</sup> This extended definition of 'assessment' applies to assessments made on or after 1 July 2013 for these income years.

<sup>41B</sup> This extension to the definition applies to assessments made on or after 1 July 2013 for the 2013-14 and later income years.

<sup>46A</sup> Section 166 of the ITAA 1936 was amended by the *Tax and Superannation Laws Amendment (2013 Measures No. 1) Act 2013* to include a reference to an assessment of the total of a taxpayer's tax offset refunds. This amendment applies to assessments for the 2013-14 and later income years made on or after 1 July 2013.

<sup>46B</sup> This applies to deemed assessments arising on or after 1 July 2013 for the 2013-14 and later income years.

**15. Paragraph 73**

Omit the dot points; substitute:

- the taxable income derived by a taxpayer in that year or any part of that year (or that there is no taxable income)
- the tax payable on that taxable income (or that no tax is payable), and
- the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).<sup>46C</sup>

**16. Paragraph 83**

At the end of the first sentence; insert the following footnote:

- <sup>50A</sup> For the 2013-14 and later income years, the assessment also includes the ascertainment of the taxpayer's total of the taxpayer's tax offset refunds (including nil amounts).

**17. Paragraph 94**

Omit the second sentence; substitute:

Subsections 175A(2) and 175A(3) of the ITAA 1936 provide that taxpayers can only object against a nil assessment if they are seeking an increase in their tax liability.<sup>59A</sup>

**18. Footnote 63**

Omit the footnote; substitute:

- <sup>63</sup> See Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* which outlines the Commissioner's interpretation of section 284-225 of Schedule 1 to the TAA, which applies to voluntary disclosures.

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<sup>46C</sup> Section 168 of the ITAA 1936 was amended by the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013* to include a reference to an assessment of the total of a taxpayer's tax offset refunds. This amendment applies to assessments for the 2013-14 and later income years made on or after 1 July 2013.

<sup>59A</sup> Taxpayers also have the right to object against an assessment if the taxpayer is seeking to increase the total of the taxpayer's tax offset refunds. The right to object against an assessment of a taxpayer's tax offset refunds only applies in relation to assessments made on or after 1 July 2013 for the 2013-14 and later income years. As a transitional measure, a separate objection right has also been introduced for taxpayers in relation to their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

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## 19. Footnote 66

Omit the footnote; substitute:

<sup>66</sup> See Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* which outlines the Commissioner's interpretation of section 284-225 of Schedule 1 to the TAA, which applies to voluntary disclosures.

## 20. Paragraph 110

Omit the second dot point; substitute:

- the tax payable on that taxable income or net income as the case may be (or that no tax is payable); for example, whether a tax offset should be allowed, or
- for the 2013-14 and later income years the ascertainment of the total of a taxpayer's tax offset refunds (or that the taxpayer can get no such refund).

## 21. Paragraph 111

At the end of the second sentence; insert the following footnote:

<sup>72A</sup> Prior to the changes introduced by the *Tax and Superannation Laws Amendment (2013 Measures No. 1) Act 2013*, an assessment did not extend to the ascertainment of a taxpayer's tax offset refunds even though details of these amounts were included in a taxpayer's notice of assessment.

## 22. Paragraph 120

At the end of the paragraph; insert footnote 78A:

<sup>78A</sup> In determining the exact date on which the amendment period ends, the following should be noted:

- Section 36 of the *Acts Interpretation Act 1901* states that, if an Act requires or allows a thing to be done; and the last day for doing the thing is a Saturday, a Sunday or a holiday; then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday. However the application of this rule is subject to a contrary intention in the relevant Act or provision: see subsection 2(2) of the *Acts Interpretation Act 1901*. There is no such contrary intention in relation to the TAA.
- Subsection 163(1) of the *Evidence Act 1995* provides that a letter from a Commonwealth agency addressed to a person at a specified address is presumed (unless there is contrary evidence) to have been sent (and therefore given to a taxpayer) by prepaid post to that address on the fifth business day after the date that purports to be the date on which the letter was prepared.

- Subsection 160(1) of the *Evidence Act 1995* provides that a letter sent by prepaid post addressed to a person at a specified address in Australia was received at that address on the fourth working day after having been posted. In this section, working day means a day that is not a Saturday or Sunday or a public holiday in the place where the letter was addressed. This presumption will apply in relation to letters sent by the ATO if the presumption in subsection 163 of the *Evidence Act 1995* does not apply.

**23. Paragraph 122**

- (a) In the first sentence; omit '60 days in which to object against the amended assessment.'; substitute '60 days in which to lodge an objection against the amended assessment.'
- (b) At the end of the second sentence; insert 'An objection against the amended assessment is subject to the limitation in section 14ZV.<sup>80A</sup>

**24. Paragraph 123**

Omit the paragraph; substitute:

123. *Skye receives an original assessment on 1 August 2010. In May 2011 the Commissioner issues an amended assessment to Skye including an extra \$100 of interest income. Skye received the amended assessment on 20 May 2011.*

**25. Paragraph 125**

- (a) Omit 'object'; substitute '*lodge an objection*'.
- (b) Omit from the diagram 'Amended assessment issued'; substitute 'Amended assessment received'.

**26. Paragraph 126**

Omit the paragraph; substitute:

126. *Bill receives an original assessment on 1 August 2010. The Commissioner identified that Bill had made an error in relation to his claim for work related expenses and issued an amended assessment disallowing \$500 of the deduction claimed. Bill received the amended assessment on 1 July 2012.*

<sup>80A</sup> See section 14ZV and Case 1 [2007] AATA 45. Limitations on lodging objections against amended assessments are discussed in further detail in paragraphs 152 to 174.



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## 27. Paragraph 128

(a) Omit the paragraph; substitute:

128. *The last day for Bill to lodge an objection against his amended assessment is 30 August 2012, which is the later of either two years after the receipt of the original assessment or 60 days after receipt of the amended assessment.*

(b) Omit from the diagram 'Amended assessment issued'; substitute 'Amended assessment received'.

(c) Omit from the diagram '29/8/12'; substitute '30/8/12'.

## 28. Paragraph 143

At the end of the paragraph; insert 'or for the 2013-14 and later income years the total of the taxpayer's tax offset refunds'.

## 29. Paragraph 145

Omit the first sentence; substitute 'The Commissioner is duty-bound to assess the correct amount of a taxpayer's taxable income or net income (as the case may be), tax payable on that income (including nil amounts) and for the 2013-14 and later income years the total of the taxpayer's tax offset refunds notified under the assessment process.'

## 30. Paragraph 150

After the paragraph; insert:

150A. If an objection decision has been made in relation to a private ruling then the right of the taxpayer to object against the relevant assessment relating to the matter ruled on is limited to a right to object on grounds that neither were, nor could have been, grounds for the taxation objection against the ruling.<sup>88A</sup> This avoids duplication of objections.

## 31. Paragraph 152

Omit the paragraph; substitute:

152. The effect of subsections 175A(2) and 175A(3) of the ITAA 1936 is that taxpayers cannot object against a nil assessment unless they are seeking an increase in their liability or an increase in the total of the taxpayer's tax offset refunds.<sup>88B</sup>

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<sup>88A</sup> See section 14ZVA.

<sup>88B</sup> The right to object against an assessment of the total of a taxpayer's tax offset refunds for an income year only applies in relation to assessments made on or after 1 July 2013 for the 2013-14 and later income years. As a transitional measure, a separate objection right has been introduced for taxpayers in relation to

**32. Footnote 104**

Omit the footnote; substitute:

<sup>104</sup>The Commissioner may nevertheless take a second look at the relevant particular and determine whether it may be appropriate to amend the assessment in accordance with section 170 of the ITAA 1936 – see item 6 in the table in subsection 170(1) of the ITAA 1936. This is consistent with the approach set out in Corporate Management Practice Statement PS CM 2007/01 *Respecting clients' rights of review* and Corporate Management Procedure and Instruction CMPI 2007/01/02 *Handling requests for review*.

**33. Paragraph 193**

After 'ITAA 1997'; insert 'for'.

**34. Paragraph 199**

Omit the second sentence; substitute 'In addition, the Commissioner will generally provide reasons for the objection decision and inform taxpayers of their external review rights if they are dissatisfied with the decision.<sup>106A</sup>'.

**35. Paragraph 206**

At the end of the first sentence; insert footnote 107A:

<sup>107A</sup> See paragraphs 217 and 218 for an explanation of the rules that apply once an objection decision has been made.

**36. Paragraph 213**

Omit the paragraph; insert:

213. Where the Commissioner is within the limited amendment period, applying to the original assessment<sup>111</sup> a taxpayer's assessment may be amended at any time within this limited amendment period to arrive at the taxpayer's correct tax position for a given year.

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their tax offset refunds for the 2012-13 income year: see Division 67 of the *Income Tax (Transitional Provisions) Act 1997*.

<sup>106A</sup> Generally in practice, the reasons for the decision and information on review rights are provided to the taxpayer with the notice of the objection decision.

<sup>111</sup> This is the amendment periods for original assessments referred to in items 1 to 4 of the table in subsection 170(1) of the ITAA 1936.

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## 37. Footnote 114

Omit the second sentence; substitute 'The majority noted that the Commissioner cannot use the former equivalent to item 6 in the table in subsection 170(1) of the ITAA 1936 for original assessments.'

## 38. Paragraph 219

Omit the paragraph; substitute:

219. Where an objection decision is made within the limited amendment period applying to the original assessment, the Commissioner continues to have the power to amend the assessment about matters unrelated to the objection until the end of that period.

## 39. Paragraph 226

At the end of the paragraph; insert footnote 122A:

<sup>122A</sup> Note also the decision in *Healy v. FC of T* 2013 ATC 10-311; [2013] AATA 281 where the AAT held at paragraph 45 that it is not bound by the grounds on which the decision maker reaches his decision. The AAT is required to reach the correct and/or preferable decision and is not constrained by the decision-maker's reasoning. In this case, the AAT also held (at paragraph 44) that its jurisdiction was enlivened by the objection decision itself, rather than the reasons attached to that decision.

## 40. Paragraph 230

Omit the paragraph; substitute:

230. The taxpayer has the burden of proving to the AAT or the Federal Court (as the case may be) that an assessment is excessive. For assessments made on or after 1 July 2013 in relation to the 2013-14 and later income years, the taxpayer has the burden of proving that the assessment is excessive or where the taxpayer contends that the assessment should be higher, that the assessment is incorrect. In all cases, the taxpayer must also prove what the correct amount of the assessment is.<sup>123A</sup>

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<sup>123A</sup> Paragraphs 14ZZK(b) and 14ZZO(b) respectively. See also paragraphs 7.36 to 7.38 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013. The High Court's decision in *Federal Commissioner of Taxation v. Dalco* 90 ATC 4088 at 4092 and 4093 confirms that the taxpayer must prove, not just that the assessment is too high, but what the correct amount of the assessment ought to be.

**41. Paragraph 234**

Omit the paragraph; substitute:

234. Subsection 6(1) of the ITAA 1936 defines 'assessment' as:

- (a) the ascertainment:
  - (i) of the amount of taxable income (or that there is no taxable income); and
  - (ii) of the tax payable on that taxable income (or that no tax is payable); and
  - (iii) of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or

Note 1: A taxpayer does not have a taxable income if the taxpayer's deductions equal or exceed the taxpayer's assessable income: see subsection 4-15(1) of the *Income Tax Assessment Act 1997*.

Note 2: A taxpayer may have no tax payable on an amount of taxable income if that income is below the tax-free threshold or if the taxpayer's tax offsets reduce the taxpayer's basic income liability to nil.

- (b) for a taxpayer that is the trustee of a unit trust that is a corporate unit trust (within the meaning of section 102J) – the ascertainment:
  - (i) of the net income of the trust (within the meaning of section 102D) (or that there is no net income); and
  - (ii) of the tax payable on that net income (or that no tax is payable); and
  - (iii) of the total of the taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or
- (c) for a taxpayer that is the trustee of a unit trust that is a public trading trust (within the meaning of section 102R) – the ascertainment:
  - (i) of the net income of the trust (within the meaning of section 102M) (or that there is no net income); and
  - (ii) of the tax payable on that net income (or that no tax is payable); and
  - (iii) of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or

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- (d) for a taxpayer that is the trustee of a trust estate (other than a trustee to which paragraph (b) or (c) applies or the trustee of a complying superannuation fund, a non-complying superannuation fund, a complying approved deposit fund, a non-complying approved deposit fund or a pooled superannuation trust) – the ascertainment:
- (i) of so much of the net income of the trust estate as is net income in respect of which the trustee is liable to pay tax (or that there is no net income in respect of which the trustee is so liable); and
  - (ii) of the tax payable on that net income (or that no tax is payable); and
  - (iii) of the total of a taxpayer's tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income); or
- (e) the ascertainment of the amount of interest payable under section 102AAM (about distributions from non-resident trust estates); or
- (f) the ascertainment of an amount of additional tax under section 128TE; or
- (g) the ascertainment of an amount of tax under section 159ZZZH; or
- (h) the ascertainment of the amount of income tax payable on the no-TFN contributions income as defined by section 295-610 of the *Income Tax Assessment Act 1997* (or that no tax is payable); or
- (i) the ascertainment of an amount of FHSA misuse tax (within the meaning of the *Income Tax Assessment Act 1997*) (or that no tax is payable).

This definition applies in relation to assessments made on or after 1 July 2013 for the 2013-14 income year or later income years.

## 42. Related Rulings/Determinations

Omit 'MT 2008/1'; insert 'MT 2012/3'.

## 43. Legislative references

Insert:

- Acts Interpretation Act 1901 2(2)
- Acts Interpretation Act 1901 36
- Evidence Act 1995 160(1)
- Evidence Act 1995 163
- Evidence Act 1995 163(1)
- ITAA 1936 175A(3)
- Income Tax (Transitional Provisions) Act 1997 67-115(2)
- Income Tax (Transitional Provisions) Act 1997 67-135(1)

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- Tax and Superannuation Laws Amendment (2013 Measures No. 1) Act 2013

**44. Case references**

- (a) At the end of Case 1/2007 2007 ATC 101; insert '[2007] AATA 45'.
- (b) Insert:
  - Healy v. FC of T [2013] AATA 281
  - Re Creative Bottle Decorators Pty Ltd and Federal Commissioner of Taxation (2010) 80 ATR 793

**45. Other references**

Insert:

- PS CM 2007/01
- CMPI 2007/01/02

This Addendum applies on and from 21 May 2014.

**Commissioner of Taxation**

21 May 2014

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ATO references

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