

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 128

Issued by authority of the Assistant Treasurer

Income Tax Assessment Act 1936

Income Tax Amendment Regulation 2013 (No. 1)

Subsection 266(1) of the *Income Tax Assessment Act 1936* (the Act) provides, in part, that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which by the Act are required to be prescribed, or necessary or convenient to be prescribed for giving effect to the Act.

The purpose of the *Income Tax Amendment Regulation 2013 (No. 1)* (the Regulation) is to amend the *Income Tax Regulations 1936* (the Principal Regulations) to make technical amendments to the way in which the amount of seniors and pensioners tax offset (SAPTO) is determined in the case of foreign residents for tax purposes.

The Regulation corrects an unintended consequence arising from amendments to the Principal Regulations which took account of the legislative amendments to the personal income tax rates and thresholds made as part of the Government's *Clean Energy Future Plan* in 2012. The *Income Tax Amendment Regulation 2012 (No. 1)* amended the Principal Regulations to reflect the merger of the pensioner tax offset (PTO) and the senior Australians tax offset (SATO) into the SAPTO in the Act.

The SAPTO is a tax offset that is available to certain low income aged persons and pensioners who are eligible to receive an Australian Government pension, including taxpayers who are foreign residents for tax purposes. The tax offset is provided under section 160AAAA of the Act, and the method of determination is provided under the Principal Regulations. The tax offset is generally limited to the amount of income tax otherwise payable, however, in the case of a person with a spouse, there is provision for any unused part of one partner's offset to be transferred to the other partner where both are entitled to the SAPTO.

The 2012 amendments amended the way in which the amount of SAPTO that can be transferred between one eligible member of a couple and the other member is determined. The intention was that the maximum amount of SAPTO that one eligible member of a couple could transfer to the other would remain the same as it was in 2011-12. This was achieved by specifying the 2011-12 tax-free threshold and tax rate in the formula used to calculate SAPTO.

The 2012 amendments achieved their stated purpose in relation to taxpayers who are Australian residents for tax purposes. However, incorporating the 2011-12 tax free threshold into the formula increased the amount of SAPTO available for transfer for foreign residents whose eligible spouse had taxable income greater than \$6,000, which was not intended. The amount of SAPTO for foreign residents with a spouse receiving SAPTO who had taxable income greater than \$6,000 was increased because subsections 150AE(12) and 150AF(9) applied a formula which effectively allowed the individual a \$6,000 tax free threshold, when foreign residents are not usually afforded a tax-free threshold under the tax laws.

The Regulation amends subsections 150AE(12) and 150AF(9) so that these subsections only apply to taxpayers who are Australian residents, whose taxable income for the year is greater than \$6,000, and who have a spouse who is also receiving SAPTO. For these subsections, it does not matter if the spouse is an Australian resident for tax purposes, or not.

The Regulation also inserts new subsections into sections 150AE and 150AF to deal with the transfer of SAPTO between foreign residents. The new subsection 150AE(13) applies to foreign residents whose taxable income for the year is greater than \$6,000, and provides that the amount of excess tax offset which may be transferred is the amount mentioned in paragraph 150AE(1)(b), that is, the amount of any unused tax offset of the taxpayer. By directing the taxpayer to apply paragraph 150AE(1)(b), when calculating the excess offset, the relevant foreign resident tax rates apply. This reinstates the operation of the offset in regard to foreign residents as it was prior to the 2012 amendments, which is the intended outcome.

The new subsection 150AF(10) mirrors the above treatment in section 150AE(13) in regard to a taxpayer who is a trustee.

The Regulation commences on the day after it is registered and applies in relation to the 2012-13 income year and later income years.

Eligibility for SAPTO for members of a couple is determined by the Australian Taxation Office on assessment of personal income tax returns, which generally occurs at the end of the income year. Given that the Regulation commences before the end of the 2012-13 financial year, the Regulation does not have retrospective effect, since the determination of how much SAPTO may be transferred from one member of a couple to another does not crystallise until 30 June 2013.

The Act specifies no conditions which need to be satisfied before the Governor-General's power can be exercised.

There was no consultation carried out on this Regulation because the amendments are minor and machinery in nature.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Income Tax Amendment Regulation 2013 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Income Tax Amendment Regulation 2013 (No. 1)* is to amend the *Income Tax Regulations 1936* to make technical amendments to the way the seniors and pensioners tax offset is determined in the case of foreign residents for tax purposes.

Human rights implications

The right to equality and non-discrimination is expressed in article 26 of the International Covenant on Civil and Political Rights as: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Engagement with these rights depends on viewing residency for tax purposes as falling within ‘other status’.

There is a well-established body of international law and practice recognising that taxation laws of a State can differentiate between the tax treatment of residents of that State and the tax treatment of non-residents. For example, treaties to prevent double taxation use residence status as a way to allocate taxing rights between States. At the same time, discrimination between residents of the same State on the basis of their nationality is prohibited.

The differential treatment in this measure according to an individual’s residence status (as opposed to their nationality) is consistent with that body of international law and practice.

In light of this, there is no basis to conclude that this different treatment amounts to discrimination on the basis of ‘other status’ under the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Conclusion

This Legislative Instrument is compatible with recognised human rights and freedoms.