



RSM AUSTRALIA'S RESPONSE TO: DIGITAL GAMES TAX OFFSET SUBMISSION

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1. INTRODUCTION

RSM Australia (RSM) is the largest nationally owned mid-tier accounting firm in Australia and forms part of RSM International, which is the sixth largest independent accounting and consulting firms worldwide. In Australia, RSM is one of the fastest growing mid-tier firms with 182 Partners and Principals and over 1,500 employees operating from 30 locations throughout Australia. Our staff operate across a range of industries, public, private, Government and not-for-profit-sectors.

RSM provides audit, tax, and a wide variety of corporate financial and advisory accounting services. This includes R&D Tax and Government Incentives services for a broad array of industries and technologies and assists entities ranging from start-ups to SMEs through to multinationals.

RSM appreciates the opportunity to make a submission to Treasury in response to the “*Digital Games Tax Offset*” (DGTO) regarding the following:

- Exposure draft Treasury Laws Amendment (Measures for Consultation) Bill 2022: Digital Games Tax Offset (Exposure Draft); and
- Exposure Draft Explanatory Materials (EM).

The statistics and metrics regarding digital games are impressive. RSM note the global gaming market was valued at USD \$198.40 billion in 2021 and is expected to reach a value of USD \$339.95 billion by 2027, that equates to a Compounded Annual Growth Rate of 8.94%¹. With technological advancements in cloud gaming and 5G enabled technologies improving user experience and opportunities for game developers to create and improve digital games, the release of the DGTO is an exciting prospect for digital games developers.

RSM has previously made many submissions to Reviews, in the form of Reports and Papers, participated in public hearings before the Senate Economics Legislation Committee in respect to the R&D Tax Incentives, as well as more recent submission in respect to the “Patent Box” Regime. These in combination with extensive experience in supporting clients to access the R&D Tax Incentive and other Government Incentives has been the basis of our views and submission on the DGTO.

2. RESPONSE

It is understood the Australian Government has announced the introduction of a DGTO to come into effect for income years commencing on or after 1 July 2022, to support and promote the growth of the Australian digital games industry by providing a refundable income tax offset of 30% on eligible, qualifying Australian game development expenditure. This will be enacted as new Division 378 of ITAA 1997, and we note has the following design features:

In accordance with Section (s) 378-20 an eligible company is issued with one of the following certificates by the Arts Minister:

- A “Completion Certificate” for completing a new digital game;
- A “Porting Certificate” for porting a game to a new platform; and
- An “Ongoing Development Certificate” for the ongoing development of completed digital games during an income year.

As per Section 378-25, the Arts Minister in issuing certificates, makes a determination on the qualifying Australian Development Expenditure, which is stated in each of the respective certificates, where qualifying Australian Development Expenditure is addressed in Subdivision 378-C, Sections 378-30, 378-35, 378-40 and 378-45. The offset is then claimed in the company tax return.

RSM views are summarised below in the following sections:

Participants

The Australian Government² recognises Australia has businesses and individuals working in world leading animation and visual effects (VFX) industries, where animators and graphics engineers employ gamification. As such, these companies may not be pure gaming companies and their development may not meet the eligibility for one of the three certificate eligibility requirements. As per the EM 1.31, a digital game is not eligible if it is a game primarily developed for industrial, corporate, or institutional purposes. Furthermore, as per the EM 1.35, eligible games that are complete but not sold or otherwise made available to the general public are not games on which development expenditure can be claimed. Such ineligibility clauses are counterintuitive to the Digital Games Economy³, that conveys that talent in the gaming sector has transferable digital capabilities that can be applied to other sectors including defence, innovation, medical technology, education technology, emergency planning, construction, agtech and modern manufacturing. It would be prudent to ensure that such industries and organisations can access the DGTO if they are in fact developing a digital game that aligns to such strategies, to ensure the Australian Government strategy can be met.

Administrative Responsibilities

Unlike the R&D Tax Incentive (RDTI) which is dually administered by Industry, Innovation and Science Australia (through AusIndustry) and the ATO, we note the amount of the company’s qualifying Australian Development Expenditure will be determined by the Arts Minister under section 378-25. A 30% refundable tax offset rate is proposed, with the maximum allowable tax offset for the DGTO being \$20 million for an income year.

As companies that are looking to access the DGTO are often also undertaking R&D activities, and given that AusIndustry and the ATO are experienced in jointly administering the RDTI, which involves a refundable tax offset, and that companies that are looking to access the DGTO are also likely accessing the RDTI, it is likely to reduce compliance costs for both companies and the Government if the DGTO was jointly administered in

a similar manner to the RDTI. For example, for a game development company that is looking to access the RDTI for R&D activities and access the DGTO for game development or porting it would likely make sense for a similar single annual registration form to be completed regarding the DGTO rather than multiple applications for certificates. Companies could indicate what type of certificate is being applied for and a best estimate of qualifying Australian Development expenditure, similar to the process for the RDTI. Certificates could then be issued by AusIndustry annually in a similar manner to the annual R&D tax registration process. This would also enable AusIndustry to have oversight of both the RDTI and DGTO in combination with the ATO, which would strengthen oversight of the DGTO. Detailed annual data would then also be available for the Government to track the DGTO program cost for budgeting purposes, rather than potential significant costs occurring when games are completed or ported.

Complexity of Certificate and Expenditure Process

The legislation proposes that a company must seek certificates for game development and game porting as follows:

- New Games – Certificate to be sought upon completion of the game and refundable tax offset able to be accessed in the income year that the game is completed. Requirement is to track qualifying Australian Development Expenditure over all income years until game completion for each individual game, which for each game must be more than \$500,000 of qualifying Australian Development expenditure;
- Ported Games - Certificate to be sought upon porting of the game and refundable tax offset able to be accessed in the income year that the game is ported. Requirement is to track qualifying Australian development expenditure over all income years until porting completion for each individual game, which for each game must be more than \$500,000 of qualifying Australian Development expenditure; and
- Existing Games – Certificate to be sought as part of an annual process for ongoing development. Requirement is to track all game development expenditure for an income year with a minimum of \$500,000 and a maximum of \$66.7 million of qualifying Australian Development expenditure in an income year.

As the expenditure cannot also be claimed under the RDTI, for companies also looking to claim the RDTI for certain activities rather than the DGTO, it will be necessary for companies to track all game development expenditure for the different programs and consider the eligibility rules for both. The compliance cost of having to track expenditure over multiple income years under the DGTO and ensure that none of this expenditure is claimed under the RDTI will be substantial.

Complexity and compliance cost for companies could be reduced for the DGTO by having an annual registration process that will enable companies to consider the RDTI and DGTO simultaneously. It is suggested that the annual “Ongoing Development,” minimum expenditure threshold of \$500,000 and maximum of \$66.7 million of qualifying Australian Development expenditure be applied across new games, ported games, and ongoing development. Complexity would also be reduced through removing the separate \$500,000 qualifying Australian Development Expenditure requirement for each individual new game, or ported game.

Qualifying Australian Development Expenditure Complexity

Related Company Rules:

Significant complexity also exists regarding the grouping expenditure rules. The requirement in the draft legislation is that for an income year only \$20 million in tax offsets can be claimed, however this threshold applies to the company and its related group of companies. This requires that all companies that meet the “connected” or “affiliates” rules must determine between them, which companies are claiming what qualifying Australian Development expenditure for an income year and each apply for the relevant certificates. These rules are problematic because entities that are merely affiliates of each other, or are connected may not wish to share this qualifying Australian Development Expenditure information with other related entities. Also, understanding precisely if a company meets the “connected” or “affiliates” test for an income year may necessitate the company seeking to claim the DGTO to incur additional compliance costs in seeking tax advice or applying for a private ruling with the ATO. The reasoning for requiring related groups to only access \$20 million in tax offsets for an income year is understood, however modifying the rules such that the \$20 million tax offset cap applies to wholly owned groups of companies would result in a significant simplification for companies looking to access the DGTO and these groups of companies are more likely to be able to share this development expenditure information within the wholly owned group structure.

Requirement to Incur Expenditure to Australian Tax Residents:

The draft legislation currently only enables qualifying Australian Development expenditure where the expenditure is being incurred to Australian tax residents. This is to be contrasted to the RDTI where the requirement is that the R&D activity is undertaken in Australia. This additional requirement creates additional complexity, uncertainty and cost for companies looking to access the DGTO and it is uncertain how companies could with certainty be expected to determine whether all development expenditure is being incurred to tax residents. It is suggested that similar to the RDTI that the same policy objective of incentivising Australian game development could be achieved through the requirement that all game development be undertaken in Australia.

Integrity Rules:

The draft legislation currently prevents the subcontracting of game development for expenditure to meet the qualifying Australian Development expenditure requirements. The EM explains that this is an integrity provision. In addition, integrity rules exist that prevent the following expenditure being claimed under the DGTO:

- “Expenditure incurred in connection with a transaction in which the company and another party to the transaction did not deal with each other at arm’s length;” and
- “Expenditure incurred in relation to an entity that is not wholly independent from the company.”

Where various related parties are all involved in game development, but have different specialisations or skills there could be a requirement to engage with related parties, which from a policy perspective the Government may wish to incentivise through the DGTO. It is therefore suggested that rather than excluding related party and subcontractor expenditure, similar rules to the RDTI could be considered, such as the associate rules and requiring the removal of any “markup” on the cost of qualifying Australian Development expenditure.

3. CONCLUSION

Thank you for providing the opportunity for RSM to contribute to this submission. We trust that you find our contributions helpful however, please do let us know if you would like to discuss any aspects of this submission further.

4. REFERENCES

1. Mordor Intelligence Gaming Market Growth, Trends, Covid 19 Impact and Forecasts (2022-2027) <https://www.mordorintelligence.com/industry-reports/global-gaming-market>
2. Australian Government Global Business and Talent Attraction Taskforce <https://www.globalaustralia.gov.au/industries/digital-games>
3. Australian Government Australia's Digital Economy <https://digitaleconomy.pmc.gov.au/fact-sheets/investment-incentives>

5. CONTACT DETAILS

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