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CHARTERED ACCOUNTANTS

Tax Update – August 2021

A round up of the important details for the month

Inside

COVID-19 disaster payments are now tax-free to the individuals who receive them.

A range of Victorian and NSW business lockdown business support payments have also been declared eligible to be non-assessable non-exempt (NANE) income. However, the outstanding issue for the ATO is whether business entities that receive COVID-19 support payments classified as NANE income will need to apportion expenses so that a portion is treated as non-deductible.

And, new guidance on holding costs relating to vacant land deductions raise some interesting issues.

As always, we're here if you there are any questions you have!

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From Government

COVID-19 support payments for business

Several new financial assistance packages or top-ups were announced across the month. In addition to this, NSW support measures have been extended for large tourism, hospitality, and recreation businesses.

Federal

- Supporting more small and medium sized business to access funding

ACT

- Increased support for ACT businesses impacted by COVID-19
- Extended support for ACT businesses impacted by COVID-19
- Support for ACT businesses impacted by COVID-19

New South Wales

- JobSaver payment – large tourism, hospitality and recreation businesses
- Over $388 to fund six priority services for NSW arts and cultural sector
- Land tax relief to help landowners and tenants affected by COVID-19 restrictions

Northern Territory

- Lockdown support package for Territory businesses

Queensland

- $600 million package to help Queenslandbusinesses

South Australia

- Support for South Australian smallbusinesses impacted by COVID-19

Tasmania

- $20 million package to help Tasmanian businesses

Victoria

- Support for businesses in regional Victoria
- More support for Melbourne businesses in lockdown
- Helping Victorian businesses that need it most
- Backing Melbourne businesses and their workers

Western Australia

- Assistance grants for WA tourism businesses impacted by COVID-19

ASIC Fees for financial advisers reduced to 2018-19 levels

The Treasurer has announced relief for financial advisers from escalating ASIC fees by reducing ASIC levies charged for personal advice to retail clients restored to their 2018-19 level of $1,142 per adviser for the next two years (relating to 2020-21 and 2021-22).

More information

- Temporary and targeted relief on ASIC levies for financial advisers

From the Regulators

Common errors in claiming the loss carry back offset

Many practitioners and clients are encountering the temporary loss carry back rules in practice for the first time as they prepare 2021 company tax returns. There are a number of key issues to consider when applying these rules and it appears that the ATO is concerned about common errors that are being made.

Some of the common errors that are noted by the ATO to date include:

- Companies using an incorrect tax rate to calculate the tax offset. The calculation uses the company's tax rate in the income year in which it made the loss, not the year(s) it is carried back to.
- Using an incorrect income tax liability amount. The amount used is the amount at label T5 Tax payable in the calculation statement of the client's company tax return for the year the loss is being carried back to.
- Not reducing the offset to the company's franking account balance. The offset cannot exceed the company's franking account balance at the end of the year in which the offset is claimed.
- Failing to complete all relevant labels.

More Information

- Avoid mistakes when claiming loss carry back

Free mental health support service for small business owners

Stepping away from technical points, the ATO's small business newsroom has advertised the availability of a program called "NewAccess" operated by BeyondBlue. The service is a free mental health coaching program offering flexible phone and video call support options for small business owners so they can manage stress and improve their mental wellbeing. All coaches in the program have a small business background.

If you or your clients are finding it difficult to deal with the impacts of lockdowns or the uncertainties of your business, we encourage you to take advantage of this or similar programs.

More Information

- NewAccess for Small Business Owners

Amounts that can be excluded from business income

The ATO has provided some updated guidance on the types of payments that are not generally included in assessable income for business taxpayers.

The ATO confirms that items such as receipts from a hobby, gifts or inheritances, GST, prizes and awards not related to the business, borrowed funds and personal funds contributed to the business should not generally be included in assessable income.

The guide also makes some limited comments on government grants that are not taxable, including a list of grants that have been made specifically non-assessable non-exempt income. Other categories of non-taxable grants can include disaster relief payments (e.g., relating to bushfires or floods for example) and some payments for sustainable rural water use and infrastructure programs.

More Information

- What to exclude from your business's assessable income

Privately owned and wealthy groups: Items that attract the ATO's attention

The ATO has a reasonably detailed guide dealing with specific issues relating to privately owned and wealthy groups, including comments on transactions and business structure features that tend to attract the ATO's attention.

The ATO has recently updated this guide and it should be a useful reference point in identifying issues and features of client groups that are subject to a higher level of risk. When clients are involved in these types of transactions or arrangements then it is important to ensure that the tax impact has been analysed carefully, that the tax details are reported correctly to the ATO and that there is appropriate supporting evidence.

More information

- Transactions and taxes
- Business structure

Impact on super contribution caps of financial services compensation payments

The ATO has released a factsheet on the impact on superannuation contributions caps where an amount of compensation is received by a super fund from financial services providers. In some cases, these compensation payments are treated as contributions.

Firstly, where the super fund is the entity that engaged the financial services provider and received the compensation it should not be treated as a contribution.

However, where a member engaged the financial service provider personally and is entitled to compensation the outcome can be different. If the compensation is paid directly by the financial service provider to the super fund other than at the member's direction, the compensation will be a concessional contribution in the financial year it is received by the fund.

On the other hand, where the compensation was paid to the individual and subsequently contributed as a personal contribution to the super fund, or the member directs the financial service provider to pay the compensation that was payable to the member personally into the super fund, the compensation will be a non-concessional contribution in the financial year it is received by the fund.

Further, if an amount is paid to the super fund and neither the member nor the trustee of the super fund has a right to seek compensation (e.g., may be the case for some unsolicited payments), the amount will also be a concessional contribution in the financial year it is received by the fund.

These compensation amounts will need to be taken into account in determining whether a member has exceeded their concessional or non-concessional contributions cap for the relevant year. There may also be Division 293 tax consequences if the member's combined income and concessional contributions exceed the income threshold for the financial year the fund receives the contribution.

However, it is possible to apply to the Commissioner to exercise discretion to disregard excess contributions or reallocate them to another year. There are a number of factors that are considered in determining whether the discretion should be exercised, including the extent to which the member had control over the making of the contribution.

On this point, the fact sheet indicates that where compensation payments are correctly payable the member but paid directly to the super fund, the ATO will generally consider the payment to have been outside of the member's control if they have no control over whether the contribution is paid, when it is paid or who it is paid to. In those circumstances, the ATO may consider it appropriate to exercise the discretion so the contribution arising from the compensation payment does not count towards the contributions cap in the year in which it is made.

More information

- Super contribution caps factsheet

Rulings, Determinations & IDs

Travel deductions for accommodation, meals and incidental expenses

TR 2021/4 and PCG 2021/3

This ruling and practical compliance guideline are the finalised versions of the previously released TR 2021/D1 and PCG 2021/D1 that looked at whether accommodation, meal and incidental expenses are deductible (or otherwise deductible, from an FBT perspective) for employees travelling for work. At a very high level there don't seem to be any substantive differences between the draft and finalised versions of the ATO guidance although some minor clarifications have been made to some of the examples.

Broadly, the ATO confirms that accommodation and meal expenses are normally private in nature, although if employees travel overnight in the course of their employment it can be possible to claim deductions for those costs. However, where the employee is considered to be living away from home or relocating the costs should not be deductible.

The ruling states that the following factors would suggest that an employee is living away from home rather than merely travelling in the course of their work:

- There is a change in the employee's regular place of work;
- The length of the overall period the employee will be away from their usual residence is a relatively long one;
- The nature of the accommodation is such that it becomes their usual residence;
- The employee is, or can be, accompanied by family or visited by family and friends.

The ruling indicates that the reason for the expenses being incurred needs to be the employee's work activities rather than any choice made by the employee in order to be deductible. That is, the treatment of expenses on accommodation and meals will often match the treatment of transport costs associated with that trip.

The finalised practical compliance guideline sets out the ATO's approach to determining whether allowances paid by employers relate to travelling on or living away from home. Very broadly, the guideline provides that the ATO will accept that an employee is travelling for work when all of the following are satisfied by the employee (there are also requirements for the employer that must be met):

- They are away from their normal residence for work purposes;
- They do not work on a fly-in fly-out or drive-in drive-out basis;
- They are away for no more than 21 days at a time continuously, and an overall total

period of fewer than 90 in the same work location in an FBT year; and

- They must return to their normal residence when their period away ends.

Deductions for expenses relating to holding vacant land

TR 2021/D5

The ATO has released a draft ruling considering the application of the relatively recent provisions which prevent deductions from being claimed for holding costs relating to vacant land.

Section 26-102 applies from 1 July 2019 and can deny a deduction for losses or outgoings relating to holding land if there is no substantial and permanent structure in use or available for use on the land. There are some exclusions from the operation of these rules, such as where the land is used in carrying on a business by certain parties or if the taxpayer is a particular kind of entity (e.g., a company).

The draft ruling addresses some of the key issues that can arise when applying these rules. One of the key points made by the ATO is that it can potentially be possible to distinguish between expenses associated with holding land and expenses associated with constructing a building or other structure on the land.

The ATO indicates that section 26-102 only prevents deductions from being claimed for expenses that relate to holding land. If a taxpayer incurs interest or other holding costs directly in connection with constructing a building on the land then section 26-102 should not apply to these costs. Having said that, it is still necessary to consider whether these costs would be deductible under the general deduction provisions in section 8-1, TR 2004/4 provides detailed guidance in this area.

Cases

Rental property activities and carrying on a business in an SMSF

Allen v FC of T [2021] AATA 2768 and Allzams Trust v FC of T [2021] AATA 2767

Both of these cases relate to the same taxpayer and were heard together. The principal issue in each case was whether the relevant individual was carrying on a business of renting properties. This was relevant to the issue of whether the properties could be classified as 'business real property' and whether they could be transferred to an SMSF. In the *Allen* case, the AAT found that the taxpayer did carry on a business. The taxpayer was an individual who had purchased 9 properties, consisting of 2 houses and a block of 7 apartments. All of the properties were rented out. While the taxpayer had previously been employed by a bank, this employment was terminated and the taxpayer appeared to spend a considerable portion of the working week improving the returns from the rental portfolio.

While the ATO had taken the position that the taxpayer was merely a passive investor, the AAT concluded that the activities went beyond this and that the taxpayer was carrying on a business of renting properties in the relevant income years.

In reaching this conclusion, the AAT referred to the significant amount of capital that had been invested in the activity (current market value of $6 million), the level of activity involving in the tasks undertaken by the taxpayer was significant and time consuming and the properties were only geared (debt to market value) to 37.5%, suggesting a net rent or profit motive.

The ATO had sought to argue that the taxpayer had not kept records in a business-like manner and could not show that he had established a profit-making purpose. However, the AAT didn't agree with these points.

While the taxpayer was ultimately successful in convincing the AAT that a rental property business was carried on, this will always be a question of fact. The ATO is still likely to assume that most rental property owners are not carrying on a business, which means that clients who want to argue that they carry on a rental business need to carefully weigh up the relevant factors in reaching a conclusion on this issue and ensure that they gather and retain evidence which supports the position they are taking.

Whether a nil withholding obligation gives rise to cash flow boost entitlement

S & L Consulting Pty Ltd v FC of T [2021] AATA 2714

This case involved a taxpayer seeking to access cash flow boost payments on the basis that they had a PAYG withholding obligation in respect of amounts paid to a contractor. In particular, the case focused on the fact that the relevant requirement for eligibility for the cash flow boost payments is not that PAYG amounts are in fact withheld or paid to the ATO, but that the taxpayer was obliged to withhold an amount, 'regardless of whether the entity actually withholds the amount'.

With respect to amounts payable to contractors, the AAT considered that the taxpayer could only satisfy this requirement if it had entered into a voluntary withholding agreement with the contractor in the approved form. The taxpayer argued that it entered into a voluntary withholding agreement with the contractor, and that even though the amount required to be withheld under the agreement was nil, the Tribunal should accept that the agreement gave rise to an obligation to withhold an amount – even if the relevant amount was nil.

In rejecting the taxpayer's claim, the AAT found that the agreement between the taxpayer and the contractor was not sufficient to impose a withholding obligation on the taxpayer.

The key issue here was that a voluntary agreement with a contractor needs to specify a rate of withholding and this needs to be a rate of withholding that is available under the legislative provisions (i.e., a rate specified in a withholding schedule, or with reference to the contractor's PAYG instalment rate). The relevant section in the legislation does not contemplate an agreement to withhold at any rate that might be agreed between the payer and payee, even less so at the rate of nil. It contemplates an agreement to withhold at the rate specified.

The purported voluntary agreement in this case did not specify an appropriate rate, and as a result, the taxpayer was not eligible for the cash flow boost.

Legislation

Tax-free treatment of COVID-19 disaster payments

The COVID-19 Disaster Payments paid to eligible individuals who have lost hours of work and income due to lockdowns and other public health order restrictions in various States / Territories of Australia are now tax-free.

While all guidance relating to these payments initially suggested that these payments were taxable, the Government has passed legislation to ensure that Commonwealth COVID-19 disaster payments are treated as non-assessable non-exempt (NANE) income.

While the COVID-19 Disaster Payment is no longer taxable, the Pandemic Leave Disaster Payment remains taxable.

When it comes to other payments made to individuals and which don't relate to business activities, it seems these would normally be taxable if they relate to lost income unless further amendments are made to make specific payments tax-free.

The Bill received Royal Assent on 10 August 2021.

More Information

- Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021

NSW and Victoria COVID business relief payments made tax-free

Legislation was passed in 2020 and 2021 that allows the Treasurer to declare specific payments received by eligible businesses to be non-assessable non-exempt (NANE) income if certain conditions can be met.

Broadly, support payments relating to COVID-19 will be treated as NANE income if they are made under an eligible program (i.e., declared by the Treasurer), they are received in the 2021 or 2022 income year, the recipient carries on a business and has an aggregated turnover of less than $50 million.

A legislative instrument allows the following COVID-19 support payments to be treated as NANE income:

- 2021 COVID-19 business grant (NSW)
- 2021 COVID-19 JobSaver payment (NSW)
- 2021 COVID-19 micro-business grant (NSW)
- Performing Arts COVID Support Package (NSW)
- Alpine Resorts Support Program (Streams 1, 2 and 3) (Victoria)
- Business Continuity Fund (Victoria)
- Business Costs Assistance Program Round Two - July Extension (Victoria)
- Licenced Hospitality Venue Fund 2021 – July Extension (Victoria)
- Small Business COVID Hardship Fund (Victoria)

Other grants include:

- the Alpine Support Program;
- the Business Costs Assistance Program Round Two;
- the Impacted Public Events Support Program;
- the Independent Cinema Support Program;
- the Licensed Hospitality Venue Fund 2021;
- the Live Performance Support Program; and
- the Sustainable Event Business Program.

The key issue that is yet to be clarified by the ATO is whether business entities that receive COVID-19 support payments classified as NANE income will need to apportion expenses so that a portion is treated as non-deductible. It is not generally possible to claim a deduction for expenses that are incurred in gaining or producing income that is classified as NANE income (or exempt income).

More Information

- Income Tax Assessment (Eligible State and Territory COVID-19 Economic Recovery Grant Programs) Amendment Declaration (No. 2) 2021
- Income Tax Assessment (Eligible State and Territory COVID-19 Economic Recovery Grant Programs) Amendment Declaration (No. 1) 2021

Removing the need for some SMSF trustees to obtain actuarial certificates

The Government has introduced a Bill to Parliament which will remove the requirement for superannuation trustees to provide an actuarial certificate when calculating exempt current pension income (ECPI) using the proportionate method, as long as all members of the fund are fully in retirement phase.

The requirement to obtain an actuarial certificate currently arises in these circumstances because a fund that has disregarded small fund assets cannot use the segregated assets method to calculate ECPI.

From the 2017–18 income year, an SMSF is required to use the proportionate method to calculate ECPI for all members for the entire income year if it has at least one retirement-phase income stream at any time of the year and:

- A fund member has a total super balance over $1.6 million immediately before the start of the relevant income year; and
- That member is receiving a retirement-phase income stream from any source including the SMSF or another super provider.

In these cases, the fund's assets are disregarded small fund assets and won't be segregated current pension assets, even if the fund is 100% in retirement phase. It is therefore currently necessary for any SMSF in this category to obtain an actuarial certificate even if 100% in retirement phase. This Bill will remove this requirement so that a fund that is 100% in retirement phase and has disregarded small fund assets will no longer be required to obtain an actuarial certificate.

More Information

- [Treasury Laws Amendment (2021 Measures No. 6) Bill 2021]

Conditions for waiver of childcare gap fee

From 13 August 2021 child care providers will be allowed to waive gap fees in COVID-19 hotspot areas if certain conditions can be met. The gap fee is effectively the amount that parents are required to pay for child care, with the remainder being covered by the child care subsidy.

The rules will allow the waiver of the gap fee in two situations:

- For all COVID-19 hotspots, gap fee waivers will be permissible from the eighth day the child care service is in a COVID-19 hotspot; and
- For COVID-19 hotspots where a State or Territory public health order provides that only certain children are permitted to attend child care, gap fee waivers will be permissible from the first day the service is in a COVID-19 hotspot.

It is important to note that the rules do not require providers to waive gap fees, they are still able to recover those fees if they choose.

There are several conditions, the first being that the child did not attend any part of the session of care. The second is that the service is not closed on the relevant day.

These rules are intended to ease the financial burden of COVID-19 on families in a COVID-19 hotspot whose children are not attending care, and not to provide free care for families whose children are using child care.

More Information

- Child Care Subsidy Amendment (Coronavirus Response Measures No. 5) Minister's Rules 2021

Introducing a sharing economy reporting regime and removing the $250 cap for certain self-education expenses

The Government has introduced a Bill to Parliament which will impose an obligation on operators of electronic platforms which facilitate supplies for consideration between two entities to report information about the transaction to the ATO.

This sharing economy reporting regime will be implemented by applying the existing Taxable Payments Reporting System (TPRS) to certain transactions undertaken through electronic platforms. The TPRS currently applies with respect to transactions in the building and construction industry, supplies of cleaning, security or surveillance services, and supplies of information technology services among others.

The legislation provides that the reporting obligation will generally not apply if the transaction only relates to a supply of goods where ownership of the goods permanently changed (sales of goods), where title to real property is transferred, or the supply is a financial supply.

This reporting regime is being introduced to combat concerns regarding the black economy and the ease with which income derived through the sharing economy can avoid being reported to the ATO.

The Bill also removes the $250 non-deductible threshold for certain work-related self-education expenses by repealing section 82A ITAA 1936.

Section 82A applies to self-education expenses incurred by individuals for, or in connection with, an organised course of education provided by a school, college or university, on a full or part time basis – for example costs such as tuition fees, textbooks etc. This reduction was originally introduced in connection with a concessional tax rebate for expenditure on self-education. The rebate ended in 1985 however the $250 threshold was never repealed. The repeal of section 82A does not affect the types of self-education expenses that are deductible under section 8-1 or other provisions, but should simplify the calculation of deductible self-education expenses.

More information

- Treasury Laws Amendment (2021 Measures No. 7) Bill 2021