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CHARTERED ACCOUNTANTS

Tax Update - May 2021

Inside

The new steps that clients need to take to utilise or opt-out of temporary full expensing and loss carry back measures.

Plus, the rush of measures to finalise the 2020-21 Budget measures including targeted CGT relief for granny flat arrangements and the FBT exemption for employers reskilling or retraining redundant workers.

And, the new guidance from the Tax Practitioners Board (TPB(PN) 4/2021) on client TFNs in emails and how you need to respond.

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

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From Government

Federal Budget lock-up arrangements confirmed

The Government has confirmed the 2021-22 Federal Budget will be released on Tuesday, 11 May 2021.

Should be an interesting one this year with several areas of the economy under pressure from the ongoing impact of the pandemic and an election in the wings – 2022 is the election year but Labor has reportedly been preparing for an October or November 2021 poll. Given the criticism of the vaccine rollout and the constant missteps with the treatment of women, we're betting on 2022.

More

- Budget 2021-22 lock-up arrangements

Targeted CGT exemption for granny flat arrangements

Treasury has released exposure draft legislation to enable the 2020-21 Budget measure to provide targeted CGT relief for granny flat arrangements.

This does not mean that every separate dwelling built out the back of a house will have a CGT exemption. The legal meaning of granny flat is derived from social security law; it describes an arrangement rather than a type of accommodation and can arise whenever money or other consideration is given in exchange for a right to use accommodation for life.

Typically, granny flat arrangements occur when an older person transfers some sort of consideration (often title to property or proceeds from the sale of property) to their adult child in exchange for the promise of ongoing care, support and housing.

The draft legislation provides that no CGT event will arise on entering into, varying or terminating a granny flat arrangement where certain conditions are met including where the individual having the granny flat interest has:

- Reached pension age or has a disability, and
- That the arrangement is in writing and is not of a commercial nature.

The CGT relief to the creation, variation or termination (as the case may be) of a granny flat interest. A granny flat interest in a dwelling under this measure is a right to occupy that dwelling for life.

The other benefit of this legislation is that it formalises granny flat arrangements, making older Australians less susceptible where they have transferred assets to their children only to find that through a falling out, divorce, death, or the changing financial circumstances of their children, they no longer have a place to live.

The explanatory materials indicate that the existence of a granny flat arrangement should not impact on the ability of the property owners to access the main residence exemption.

Submissions closed 29 April 2021.

More

- Exposure draft and explanatory materials - Supporting older Australians - exempting granny flat arrangements from Capital Gains Tax (CGT)

FBT exemption for retraining and reskilling redundant employees

Treasury has released exposure draft legislation to introduce an FBT exemption for employers if they provide training or education to a redundant, or soon to be redundant, employee for the purpose of assisting that employee to gain new employment.

FBT is generally payable when an employer provides education or training to employees and this does not have a sufficient connection with their current employment activities. This measure seeks to encourage employers to upskill and retrain people into new roles within the business or prepare them for roles with other employers.

Under the draft legislation, a benefit is exempt from FBT if all of the following conditions are satisfied:

- The benefit is provided in, or in respect of, the FBT year for education or training undertaken by an employee of an employer (this can include expenses associated with the training such as textbooks);
- The employee is redundant. The concept of redundancy for the purposes of the new FBT exemption is broad. It covers circumstances where an employee is made redundant in one part of the employer's business but is able to be redeployed to another part of its business (or within an associate's business). It also covers circumstances where the employer reasonably expects the employee to be redundant but has not yet been made redundant. If circumstances changed, and the employee is not actually made redundant (for example, because the employer restructures in a way that enables them to retain the employee), the employer will not be denied the FBT exemption as long as the redundancy test was satisfied at the time.
- The employer has complied with any obligations under the *Fair Work Act 2009* that applies in relation to the redundancy (such as any requirements to consult about the redundancy or, if the employee has been dismissed, any obligations regarding the dismissal);
- The education or training is for the primary purpose of enabling the employee to gain or produce salary or wages in respect of any employment to which the education or training relates. Education or training that is undertaken primarily for personal reasons or interest will not satisfy this test. There must be a close nexus between the education or training and the expected employment the employee is planning to pursue.

More

- Exposure draft Fringe benefits tax – exemption to support retraining and reskilling

TPB releases guidance on TFNs in emails

The Tax Practitioners Board has released a final practice guide on the disclosure of client TFN information in emails.

The Privacy Act contains a TFN Rule that regulates the collection, storage, use, disclosure, security and disposal of TFN information. TFN information must only be used or disclosed for:

- A purpose authorised by taxation law, personal assistance law or superannuation law; or
- The purpose of giving an individual any TFN information that the TFN recipient (i.e., tax agent) holds about that individual.

There are strict rules around how a TFN recipient (Tax or BAS agent etc.) manages client TFN information, including taking reasonable steps to protect that information from unauthorised access, modification or disclosure. The TPB indicates that taking these steps may also be required under Item 6 of the Tax Agent Code of Professional Conduct.

To minimise any risk of a breach of those provisions in circumstances involving disclosure of a client's TFN by email without the client's permission, the TPB strongly recommends that tax practitioners seek prior specific written authority for any proposed disclosure of a client's TFN, including advising the client of the entity that will receive the information and confirming that the information will be sent via email.

Whether communication of a client's TFN in an email breaches the relevant legislation will depend on the facts and circumstances, including whether the tax practitioner has taken reasonable steps to put IT controls in place to protect the security of the TFN.

The practice guide also provides a list of suggested steps that tax practitioners should consider when using and disclosing a client's TFN in email communications. This includes potentially using software which removes client TFNs from certain documents. These steps should be reviewed by tax agents to determine whether existing processes are appropriate.

More information

- TPB practice note TPB(PN) 4/2021 Use and disclosure of a client's TFN and TFN information in email communications

Financial Services Disciplinary Body Exposure draft released

Treasury has released exposure draft legislation to enable the creation of a single disciplinary body for financial advisers from 1 January 2022.

In a positive move for advisers, from 1 January 2022 registered advisers will not be required to maintain their registration with the Tax Practitioners Board (Tax (financial) advice) - unless they also provide Tax Agent or BAS Agent services.

The Bill implements the Government's response to the Hayne Royal Commission:

- Expands the role of the Financial Services and Credit Panel (FSCP) within ASIC to operate as the single disciplinary body for financial advisers
- Creates new penalties and sanctions, which apply to financial advisers and financial services licensees found to have breached their obligations under the Corporations Act (12 penalty units – currently $2,664 - per contravention).
- Introduces a new annual registration system for financial advisers, and
- Transfers the functions from FASEA to the Minister responsible for administering the Corporations Act and to ASIC to streamline the regulation of financial advisers.
- From 1 January 2022, introduces a single registration and disciplinary system under the Corporations Act for financial advisers who provide tax (financial) advice services to remove duplicate regulation.

There are broadly six circumstances that will be referred to the FSCP:

- Compromised ability to practice as a financial adviser, i.e., fraud, insolvency or been an officer of two companies unable to pay their debts, not a fit and proper person.
- Contraventions of financial services law, i.e., failing to fulfil annual consent requirements and accepting conflicted remuneration.
- Breach by association, I.e., involved with someone else's breach such as developing a business model that led to a contravention occurring.
- Providing advice when not registered.
- Fails to follow a previous sanction applied by the FSCP
- Failed to respond to a determination by the Australian Financial Complaints Authority (AFCA) – threshold is that the adviser was

twice linked to a failure or refusal to give effect to an AFCA determination.

For these matters, the FSCP can:

- Impose a range of administrative sanctions - a warning or reprimand, directions to the adviser to undertake additional training or supervision, or suspending or cancelling the adviser's registration for a specified period.
- An infringement notice in response to specific breach types which are carved out as Restricted Civil Penalty Provisions (RCPP). These include not complying with the Code of Ethics or the education and training standards, providing advice while unregistered, and breaching an existing order made by the FSCP.
- Recommend that ASIC commence court proceedings seeking a civil penalty.

The FSCP is not limited to just one of these options. For example, they can apply both administrative sanctions and infringements. The FSCP will regulate individual registered advisers (relevant providers). ASIC will continue to regulate Australian financial services (AFS) licence holders (unless they are a natural person).

The FSCP will not consider matters prior to 1 January 2022 unless a breach continues after that point.

More

- Single Disciplinary Body for Financial Advisers
- Single disciplinary body Q&As
- Media Release Senator Hume Strengthening and streamlining oversight of the financial advice sector

HomeBuilder construction requirements extended

The construction commencement requirements for the popular HomeBuilder scheme have been extended from 6 months to 18 months.
More than 121,000 Australians applied for the grant before its closing date on Wednesday 14 April 2021. The extension only applies to the construction requirement for existing applicants. The Government's decision to provide existing applicants with an additional 12 months to commence construction responds to unanticipated delays in the construction industry caused by COVID-19 related supply constraints including delays in global supply chains and recent natural disasters.

More Information

- Media release: HomeBuilder extended to support more jobs
- Treasury fact sheet: HomeBuilder

New Director ID regime – legislative instruments released

In the 2020 Budget the government announced the Modernising Business Registers Program which includes the introduction of a director identification number (director ID) which is a unique identifier that a director will keep forever. The director ID is aimed at helping prevent the appointment of fictitious directors and facilitate traceability of their profile and relationships with companies over time in order to combat pheonixing activity.

A new legislative instrument has been released which sets out some of the basics regarding the information to be collected and the process of applying. The instrument indicates that the applications will need to be made through a specific electronic platform, and appears to provide that it will need to be completed personally by directors (i.e., tax agents or other advisers will not be able to complete this on their clients' behalf).

More Information

- Modernising Business Registers
- ABRS 2021/1

From the Regulators

$9.4m promoter penalty for solicitor, accountant and planner

The ATO has extracted a pound of flesh in a long running promoter penalty case with the accountant losing his appeal and the Federal Court ordering $9.4m in penalties to be paid. The solicitor, who was central to the creation, operation and marketing of the schemes, has been ordered to pay $7.75m, the financial planner $1.455m, and the accountant, $210,000.

The penalty relates to an Emission Reduction Purchase Agreement scheme marketed to clients between the 2009 to 2012 financial years that claimed deductions for credits that did not exist. For a fee of a 15% non-refundable deposit, the promoters promised an immediate reduction to their clients' taxable income and a consequential tax saving that far exceeded their initial deposit. The effect of the schemes in each of the four years was that the approximately 200 or more investors could claim deductions totalling over $58 million. The 15% deposit charged to clients generated about $8.6m. The investors were left with nothing to show for their "investments" except the responsibility of paying the tax due after the reversal of the deductions that they were led by the promoters, falsely, to believe they could claim.

More information

- Commissioner of Taxation v Rowntree (No 3) [2021] FCA 306
- Commissioner of Taxation v Rowntree (No 2) [2021] FCA 268
- Commissioner of Taxation v Rowntree [2020] FCA 1322
- ATO Trio penalised over $9.4 million for their roles in tax exploitation scheme

Making the small business independent review service permanent

The ATO has announced that the independent review service available for eligible small businesses (turnover less than $10m) has now been implemented permanently. This service provides small business taxpayers with an additional option in resolving disputes with the ATO arising from audit activity. Eligible taxpayers should be offered the opportunity to obtain a review as part of the audit process.

It is important to note that requesting an independent review does not have any impact on other objection avenues the client may have. Further, the process will not generally be considering any new facts or arguments that have not previously been raised.

While the trial of the program has been considered successful, practitioners should be aware that the process involves review by another ATO officer who has not had any prior involvement in the matter, and there is still some concern that the process is not truly independent due to perceived bias and a reluctance to depart from the original ATO opinion.

More Information

- Small business newsroom - independent review for small businesses locked in
- Independent review for small businesses with turnover less than $10 million

Using the temporary full expensing and loss carry-back measures

The ATO indicates that business taxpayers will be required to complete additional labels in their 2021 tax returns if they are utilising these new provisions or opting out of the temporary full expensing or accelerated depreciation rules. When it comes to the temporary full expensing measures, taxpayers will need to provide the following details to the ATO:

- Whether they are making a choice to opt-out of temporary full expensing for some, or all of, their eligible assets
- The number of assets they are claiming or opting-out for
- The value of the assets (if applicable)
- The total amount of the temporary full expensing deduction
- Whether they are using the alternative income test (for companies); and
- Information about their aggregated turnover

Although we are waiting on the 2021 tax return forms to be released, the ATO has provided a specific schedule for use by entities that are required to complete returns for the 2021 year before 1 July 2021. This may include entities with substituted accounting periods, entities ceasing to be Australian residents, and businesses entering into liquidation. A copy of the schedule can be found at the link below. Companies wishing to take advantage of the loss carry-back measures will need to disclose the following information:

- The opening and closing franking account balance for the year
- The aggregated turnover for each loss year; and
- The amounts of the tax losses that are being carried back

More Information

- How to claim temporary full expensing and loss carry back this tax time
- Temporary full expensing and Backing business investment schedule

Rulings & determinations

Promoter penalty scheme approach defined

PS LA 2021/1 Application of the promoter penalty laws

Division 290 of Schedule 1 to the Taxation Administration Act 1953 contains the promoter penalty laws. In broad terms the rules are aimed at deterring the promotion of tax avoidance schemes.

The practice statement looks at:

- Some of the indicators of potential promoter behaviour;
- The ATO's process for making decisions about the promoter penalty laws; and
- The application of the promoter penalty laws, in particular, the sanctions and remedies available.

Some of the factors that may indicate someone is involved in promoter behaviour include where advisers have:

- Encouraged one or more taxpayers to seek a tax or superannuation benefit to which they are not entitled
- Advertised or marketed tax or superannuation schemes that seem 'too good to be true'
- Offered tax savings in return for a large fee or a percentage of the tax saved
- Marketed a scheme that was developed by others
- Multiple clients engaging in similar arrangements that are unnecessarily

complex, or seem designed primarily to get a tax or superannuation benefit
- Marketed schemes where the ATO has applied the anti-avoidance provisions (for example, in Part IVA of the Income Tax Assessment Act 1936)
- Offered or encouraged illegal early access to superannuation despite release criteria not being satisfied.

This last point is particularly relevant for any adviser that actively promoted early access to super under the COVID-19 relief measures despite clients failing the hardship tests.

Commissioner's discretion to retain income tax refunds

PS LA 2021/2 The ATO's administrative approach to the extension of the Commissioner's discretion to retain tax refunds

The ATO has finalised a practice statement concerning the ability of ATO officers to utilise the expanded powers of the Commissioner to retain tax refunds.

While the ATO notes that the law does not limit the application of the Commissioner's discretion to retain a refund, the practice statement recognises that the Commissioner's exercise of the extended discretion won't be taken lightly. The ATO states that the exercise of the discretion will be considered in circumstances where taxpayers are identified as engaged in high-risk behaviour, such as illegal phoenix activity.

The practice statement indicates that there is an increased risk of refunds being retained by the ATO where clients have a poor compliance history and other current outstanding lodgements. This means that there should be even greater incentive for clients to lodge documents and pay amounts owing to the ATO on time.

GST and property development in the ACT

GSTD 2021/1 development works in the Australian Capital Territory

The ATO has finalised a GST determination setting out its views on whether 'building works' and 'associated site works' carried out by property developers on land they have acquired under a long-term Crown lease (property in the ACT can only be acquired under lease arrangements – i.e., there is no freehold title). The determination confirms that these works are not treated as consideration for the supply of that lease by a government agency (on behalf of the Government). That is, the value of the work performed is not taken into account in determining the amount of input tax credits available to the developer.

These arrangements generally involve a requirement for the developer to complete certain works within a specified time period as a condition of the granting of the lease. The ATO's view is that the obligation to undertake the works only arises after the Crown lease has been granted to the developer.

The nature of a Crown lease in the ACT means that effectively, the developer is constructing buildings on its own land. The developer is the entity that obtains the benefit of the buildings that are required to be constructed on the land, and therefore undertaking the building works and the associated site works is for the developer's own benefit and the works are not a supply to the government agency.

Approach to super and non-arm's length expenditure

[PCG 2020/5 Applying the non-arm's length income provisions to 'non arm's length expenditure' - ATO compliance approach for complying superannuation entities]

The ATO has amended this practical compliance guideline to give effect to their decision to extend their compliance approach by another 12 months - to cover the 2022 income year. The PCG deals with the complex issue of determining whether a SMSF has derived non arm's length income, specifically in situations where this is considered to be the case because the SMSF incurred non-arm's length expenditure. Changes to the law made in 2018 had the effect that some funds could be deemed to derive non arm's length income, which can significantly impact on the tax treatment for the fund. The ATO's extension of the compliance approach outlined in this PCG means they will not allocate compliance resources to determine whether the non-arm's length income provisions apply where a super fund incurred non arm's length expenditure of a general nature.

Further guidance can be found at the following link.

Cases

AAT upholds disqualification of Billabong founder as SMSF trustee over related party share transfer

[Merchant and Commissioner of Taxation [2021] AATA 915 (19 April 2021)]

The AAT has upheld the ATO's decision to disqualify Billabong founder Gordon Merchant, and former director Collette Paull, as a trustees or responsible officers of corporate trustees of superannuation entities.

The dispute originates from the transfer of 10,344,828 shares in Billabong International Limited from the trustee for Merchant Family Trust to the Gordon Merchant Superannuation Fund of which Mr Merchant is the sole member.

The ATO notified Mr Merchant and Ms Paull in July 2020 of its initial decision to disqualify them as a result of the contraventions. This decision was based on the ATO's view that the transactions were in contravention of a range of superannuation provisions, including the sole purpose test and the rules preventing the use of fund assets to provide assistance to the members (this was on an indirect basis).

The present case involved an application from the taxpayer to stay the decision to disqualify them from acting as superannuation trustees (or directors of corporate trustees) until a decision on an income tax objection had been reached. The taxpayer contended that the disqualification decision was based on a requirement under specific provisions relating to administration of the taxation laws which meant that the AAT was bound to consider the income tax objection as effectively decided in the ATO's favour (broadly a requirement to consider a notice of assessment as valid).

The AAT however rejected this argument and concluded that the decision to disqualify the taxpayer was not predicated on the decision in the income tax matter but rather based on a separate consideration of the use of the funds and the relevant superannuation laws. Accordingly, the appeal was dismissed.

Legislation

Parliament does not sit again until Budget night, 11 May 2021.