Coster Galgut
Chartered Accountants

Tax Update – September 2021

A round up of the important details for the month

Key dates

18.10.21 – Parliament sits
26.10.21 – applications to VIC public events support program grant ends.

Inside

COVID-19 support will roll back as states and territories reach vaccination targets.

COVID-19 Disaster payments to individuals will start phasing out from 70% full vaccination. For business, the way funding will unwind will differ from region to region. For NSW, JobSaver will start to taper off from 70% full vaccination and Commonwealth funding will withdraw at 80%. The NSW Government will continue funding JobSaver to 15% of payroll until 30 November.

In other regions, Commonwealth co-funded top-ups are likely to simply stop.

This month, we also explore the issue of whether deductions can be claimed for expenses relating to non-taxable COVID-19 support payments.

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

Coster Galgut Pty Ltd
03 9561 1266

From Government

Winding back COVID-19 support measures

COVID-19 support payments to businesses and individuals will be progressively phased-out as vaccination targets are met.

For **COVID-19 disaster payments**:

- 70% vaccination - Once a state or territory reaches 70% full vaccination, automatic renewal will end and individuals will have to reapply each week that a Commonwealth Hotspot remains in place to confirm their eligibility.
- 80% vaccination – payment will phase out over two weeks:
    - Week 1 – flat payment of $450 per week for those who have lost 8 hours or more of work, and $100 for those on income support.
    - Week 2 – Payment brought into line with JobSeeker at $320 per week for those who have lost 8 hours or more of work

The **Pandemic Leave Disaster Payment** will remain in place until 30 June 2022.

In **New South Wales**, JobSaver will phase out once vaccination targets are met:

- 70% vaccination – Payment rate reduced from 40% of payroll to 30% with maximum weekly payments reduced by 25%
- 80% vaccination – Commonwealth contribution to JobSaver will end. This is anticipated to occur by 31 October.
- The NSW Government has announced that they will continue funding JobSaver at 15% of payroll until 30 November 2021.

More information

- COVID-19 Disaster Payment
- Supporting Victorian businesses through to reopening
- JobSaver extension to boost boost business recovery

Expansion of JobSaver for some non-profit entities

Service NSW has confirmed that the JobSaver program has been extended to certain charitable non-profit entities that have experienced a decline in turnover of at least 15%, but less than 30%. Entities are only eligible for the expansion if they are charitable and their primary purpose under ACNC classifications is either:

- Advance social or public welfare (including disability and health social support services), or
- Prevent or relieve the suffering of animals (for example, animal welfare organisations).

In addition to this, the JobSaver guidelines have been updated to indicate that charities registered with the ACNC (other than schools or universities) should include gifts, donations and Government grants when calculating decline in turnover and aggregated annual turnover (although at this stage it doesn't appear that these changes apply for the purpose of the COVID-19 business grant).

Non-profit organisations that are not registered charities should exclude gifts but include Government grants when calculating decline in turnover and aggregated annual turnover.

More Information

- Apply for the JobSaver payment
- COVID-19 JobSaver payment - Guidelines

New and top-up COVID-19 support payments for business

Several new financial assistance packages or top-ups were announced across the month.

Another round of grant funding has been announced for **ACT businesses**:

- A top up to the **COVID-19 Business Support Grant** of $10,000 for employing businesses and $3750for non-employing businesses.
- Larger employing businesses will also receive another top up payment at the following rates:

Amount	Turnover
$10,000	$2m-<$5m
$20,000	$5m-<$10m
$30,000	$10m+

- Expansion of the COVID-19 Tourism, Accommodation Provider, Arts, Events, Hospitality & Fitness Grants. Grant amounts range from $5,000 for non-employing entities, and for employing entities:

Grant	Turnover
$8,000	<$2m
$15,000	>$2m-<$5m
$25,000	>$5m

Further information will be available in October.

For **Queensland tourism** businesses:

- **Grants of up to $4m** will be available for key drivers of significant interstate and/or international tourism, as well as major employers. The business will need to demonstrate a 50% reduction in turnover and visitation over the 3 month period from 1 July to 30 September 2021, compared to pre-COVID, and maintain staff levels during the assistance period.
- **A second round of grants between $15,000 and $50,000** will be available to employing entities that experienced a reduction in turnover of at least 70% for at least seven consecutive days between 1 July and 30 September.

Another round of grant funding has been announced for **Victorian business**:

- Automatic **Business Costs Assistance Program** grants ranging from $1,000 to $8,400 per week, rising according to payroll, will be provided until the end of October. Businesses that remain closed or severely restricted over the first two weeks of November will also receive automatic payments for that period (29 Oct to 13 November 2021)
- Automatic **Licensed Hospitality Venue Fund** top up payments of between $5,000 and $20,000 per week will be provided until the end of October.
- A new allocation of $600m has been made for the **Small business hardship fund** providing one-off grants of $20k.

More information

- Supporting Victorian businesses through to reopening
- Queensland tourism industry to benefit from $70m joint Federal State grants
- QLD Tourism and Hospitality Sector Hardship Program

Proposed new and updated tax treaties

The Government has commenced consultation and work on expanding the double tax agreements that Australia has with other nations. The aim is for Australia to enter into 10 new and updated tax treaties by 2023, building on the existing network of 45 tax treaties.

Negotiations with India, Luxembourg and Iceland are occurring this year as part of the first phase of the program. Negotiations with Greece, Portugal and Slovenia are scheduled to occur next year as part of the second phase.

As part of this process Treasury is working through a consultation process on the key outcomes Australia should seek in negotiating tax treaties and any other issues relating to

Australia's tax treaty network. Submissions close on 31 October 2021.

More Information

- Treasurer's media release
- Expanding Australia's Tax Treaty Network

Exposure draft legislation – retirement income covenant

Treasury is consulting on exposure draft legislation which proposes to impose addition al requirements on superannuation trustees to assist members in planning their retirement.

The draft legislation requires trustees of registrable superannuation entities (this does not include SMSFs) to develop a retirement income strategy for beneficiaries who are retired or are approaching retirement. The 'retirement income covenant' will require trustees to have a strategy to assist beneficiaries to achieve and balance three objectives:

- Maximising their expected retirement income;
- Managing expected risks to the sustainability and stability of their expected retirement income; and
- Having flexible access to expected funds during retirement.

The proposals appear to follow from the identification of a lack of guidance in this area in comparison to the assistance available to super fund members earlier in their accumulation phase.

The explanatory materials for the draft legislation indicate that in formulating the strategy trustees would be expected to identify the expected retirement income needs of beneficiaries and present a plan to build the fund's capacity and capability to service those needs. This could include providing a range of assistance, such as:

- Developing and/or offering specific retirement income products;
- Developing specific drawdown patterns that provide higher incomes throughout retirement;
- Providing tools such as expenditure calculators to identify income and capital needs over time;
- Providing information about key retirement topics, such as eligibility for the Age Pension, the concept of drawing down capital as a form of income, or the different types of income streams available; and
- Providing guidance to beneficiaries early in accumulation about potential income in retirement through superannuation calculators or retirement estimates.

At a very high level the proposals anticipate that super fund trustees will be able to fulfil the requirements of the covenant and create effective retirement income strategies without providing personal financial advice.

The Government has requested responses to this consultation, which is open until 15 October 2021.

More Information

- Retirement Income Covenant - September 2021

From the Regulators

Expenses relating to non-taxable government support payments

As mentioned in recent updates, the government has taken steps to ensure that certain state government support payments relating to COVID-19 can be treated as non-assessable non-exempt (foreign sourced income) income in the hands of the recipient. This means that some (but not all) COVID-19 payments received by business entities can be tax-free.

However, this raises the question of whether a business entity that has received NANE income will be prevented from claiming deductions for some of its expenses. Section 8-1 ITAA 1997 ensures that expenses are not deductible to the extent that they relate to gaining or producing NANE income (unless the expenses are specifically deductible under another provision).

The ATO has now provided some specific guidance in this area, confirming that it is not possible to claim a deduction for expenses incurred solely to receive a government grant that is classified as NANE income. For example, this could include fees paid to an accountant to assist with applying for a state government grant.

If an entity incurs an expense that partly relates to accessing a grant that is classified as NANE income, then it will be necessary to identify the portion of the expense that relates to gaining NANE income as this will not be deductible. The business entity needs to use a fair and reasonable basis for apportioning expenses.

The ATO has confirmed that receiving a grant that is classified as NANE income should not impact on the deductibility of normal business expenses that are incidentally related to receiving the grant. For example, a business entity might be required to maintain employee headcount in order to qualify for a COVID-19 business grant. The salary and wages normally paid to staff members should still be deductible even though the entity might receive a grant that is NANE income.

More Information

- Deductions for expenses incurred by businesses receiving government support payments that are non-taxable

Gifts or loans from related overseas entities

Taxpayers sometimes receive gifts or loans from relatives overseas that are used in their business activities. In these situations, it is important for the taxpayer to clearly document the nature of the receipt and any relevant terms in order to ensure appropriate tax treatment and reduce the risk of the amounts being treated as income for the recipient.

In addition to the Taxpayer Alert that has been released in this area (see the separate item below), the ATO has also released some guidance on documenting gifts or loans from overseas related parties.

The ATO indicates that to support the characterisation of a receipt as a genuine gift or loan all of the following need to be considered:

- Whether the transaction is supported by appropriate documentation;
- Whether the parties' behaviour is consistent with the amount being a gift or loan; and
- Whether there is evidence the receipt is sourced from funds genuinely independent of the taxpayer.

For these purposes the ATO's guidance indicates that appropriate supporting documents can include:

- Any contemporaneous declarations the donor has made in their country of residence about the nature of the amounts transferred;
- A deed of gift prepared by the donor;
- Formal identification of the donor (such as a copy of their photo identification from their passport or identity card);
- A certified copy of the donor's will or distribution statement for the estate;
- A copy of the donor's bank statements showing the gift and potentially also the source of the funds;
- Financial records reflecting the donor's transfer to the taxpayer.

While the ATO indicates that a deed of gift or statutory declaration might not be accepted as conclusive evidence of the nature of the arrangement on their own, these could still be taken into account in determining the whether the receipt is a genuine gift or loan.

More Information

- Gifts or loans from related overseas entities

Draft legal professional privilege protocol

The ATO has released a protocol concerning its approach for identifying communications covered by legal professional privilege (LPP) and how taxpayers should go about making LPP claims to the ATO in connection with requests for information and/or documents. At a high level, any claims of LPP should be discussed in detail with a client's legal advisers.

Very broadly the ATO sets out a three-step approach which it will follow when assessing whether to accept claims of LPP over certain documents.

The first step is to review the nature of the legal engagement (e.g., whether external practitioners or in-house counsel are involved, whether non-legal personnel or only legal practitioners are involved) and the nature of the relevant communications over which privilege is claimed. This step involves a separate consideration for each specific document.

An important point to note is that there can be a number of ways in which LPP may be considered 'waived'. For example, the ATO guidance notes that it is possible for an original document to be privileged but for a copy of that document to not be privileged. Beyond this, LPP may be waived by actions that are inconsistent with the maintenance of confidences, for example by communication with other parties.

The second step is for a taxpayer (or more commonly their legal advisers) to explain the LPP claims on or before the due date specified in the formal notice from the ATO seeking information and/or documents.

An additional step involves an explanation of the process by which the claim for LPP was reached. In this context, among other things the ATO is concerned with whether its protocol or another process was followed.

Some of the ATO's major concerns in relation to LPP claims include:

- Contrived arrangements or relationships which purport to attract LPP where there is a purpose of concealing communications;
- Routing advice through a lawyer merely for the purpose of obtaining privilege;
- Legal engagements entered into after the substance of advice was provided by non-legal persons;

- Communications exclusively between non-legal persons in circumstances where the involvement of a lawyer is not apparent.

More Information

- Legal professional privilege protocol

ATO lodgement deferral phone service

The ATO has provided some clarification concerning a new service enabling tax practitioners to request lodgement deferrals over the phone.

Tax practitioners can request lodgement deferrals over the phone for up to five clients for the following obligations:

- Monthly obligations – up to two weeks (14 days)
- Quarterly obligations – up to three weeks (21 days)
- Annual obligations – up to four weeks (28 days)

The request is made by calling 13 72 86 and using fast key code 1 3 2.

Note that requests for lodgement deferrals for large withholders, significant global entities or large businesses, including excise taxpayers, cannot be completed over the phone.

More Information

- How lodgment deferrals work

Re-contribution of COVID-19 early release super amounts

It is now possible for taxpayers to re-contribute amounts that were withdrawn under the COVID-19 early release of super program without the contributions counting towards their non-concessional contributions cap. These contributions can be made between 1 July 2021 and 30 June 2030.

The ATO guidance on these amounts indicates that they will be considered personal contributions that will be excluded from an individual's non-concessional contribution cap. It is necessary for the individual members to complete the approved form and send this to the ATO.

For superannuation funds receiving re-contribution amounts, once they receive a completed approved form from the member they need to:

- Check the COVID-19 re-contribution amount. An amount cannot be accepted where it exceeds $20,000.
- Provide the ATO with the information from the approved forms received on a monthly basis.

There is a list of frequently asked questions on the ATO website which should also be reviewed by funds receiving re-contributed amounts, which clarify the reporting and other obligations in accepting these.

More Information

- Re-contribution of COVID-19 early release super amounts

COVID-19 relief for SMSFs extended to 2021-22 financial year

COVID-19 relief that was issued last year in connection with SMSFs has been extended to include the 2021-22 financial year.

For example, relief is available in relation to the residency status of SMSFs where the member is stranded overseas due to COVID-19 and where this could potentially cause the fund to fail the

definition of an Australian superannuation fund. The ATO won't devote compliance resources to determine whether the fund meets the residency test in cases like this.

If rental relief has been provided by a SMSF or non-geared unit trust to a related party then the ATO will not take compliance action against the fund provided the relief is provided on commercial terms due to the financial impacts of COVID-19 and the fund has properly documented the arrangement.

The ATO won't take compliance action against a fund if it has provided loan repayment relief to a related party due to the financial impacts of COVID-19, provided the relief is provided on commercial terms and any changes to the loan are properly documented.

Also, the ATO is taking a more lenient approach in situations where a fund has breached the 5% in-house asset limit on 30 June 2021 due to the financial impacts of COVID-19 and is unable to reduce the market value of its in-house assets to below 5% by 30 June 2022. The ATO still expects

that a written plan is put in place regarding this but won't take compliance action against the fund if the plan cannot be executed by 30 June 2022 because of the financial impacts of COVID-19.

More information

- COVID-19 relief for SMSF trustees extended to 2021-22 financial year
- COVID-19 relief in ACR Addendum extended to 2021-22 financial year

Varying PAYG instalment amounts and COVID-19

Extending treatment that applied in respect of the 2021 income year, the ATO has again indicated that it will not be applying penalties or charging interest on varied instalments that relate to the 2022 income year if taxpayers have taken reasonable care to estimate the end of year tax liability.

Normally, the ATO can apply penalties where the value of the varied instalments is less than 85% of the total tax payable. Due to the impact of COVID-19, the ATO will not be pursuing this in 2022 where taxpayers have made a reasonable and genuine attempt to determine their liability.

However, the way the ATO's guidance has been worded indicates that this is not a complete guarantee that penalties will not be payable in all circumstances.

If clients make downward variations then they can also claim back a credit from the PAYG instalments paid earlier in the same income year.

More information

- Varying your PAYG instalments due to COVID-19

Rulings, Determinations

Disguising undeclared foreign income as gifts or loans

TA 2021/2

A taxpayer alert has been released by the ATO with respect to schemes that attempt to avoid or evade tax on foreign sourced assessable income by concealing the character of funds transferred to Australia. Commonly, this involves taxpayers disguising the receipts as gifts or loans from related overseas entities.

In particular, the ATO is concerned with arrangements where taxpayers are attempting

to conceal their foreign assessable income and/or interests in foreign assets. The ATO is currently undertaking reviews and audits and actively engaging with taxpayers who have entered into these arrangements. This involves using the ATO's exchange of information powers to gather information from other countries, including the foreign assessable income derived by taxpayers in those countries. Data from AUSTRAC is also used as part of this process.

Where taxpayers participate in arrangements similar to those described in the alert they may be liable for penalties of up to 75% of the tax shortfall (in addition to being required to pay any tax that is avoided).

The alert does not cover circumstances where an Australian resident taxpayer receives a genuine gift or loan from a related overseas entity. However, the ATO notes that taxpayers and practitioners should still take care when gifts or loans are received from overseas related parties because there could still be tax implications for the recipient. For example, if it appears that the funds have been received directly or indirectly from a foreign private company then it is necessary to consider the possible application of Division 7A. If it appears that funds have been received from a foreign trust then this could trigger tax implications under section 99B if the funds relate to income or gains that have been made by the trust.

Where clients are receiving funds from overseas it is increasingly important to ensure they have appropriate evidence which explains the nature and source of the funds.

Fuel tax credit overclaims arising from use of GPS technology products

TA 2021/3

The ATO has become concerned with fuel tax credit (FTC) calculations that are based on GPS telematics technology products. The ATO suggests that the methods used by some products can lead to an incorrect apportionment of FTCs.

While the appropriate use of these products can provide benefits in terms of simplifying record keeping and calculations for tax purposes, the products can sometimes contain errors or characteristics that may distort FTC claims. Some of the risks in this area include products:

- Classifying public roads as non-public roads (which increases the FTC rate for km's travelled);
- Using incorrect assumptions, inputs, algorithms, fuel consumption rates or results;
- Incorrectly using ATO simplified methods.

In order to reduce the risk, the ATO recommends that taxpayers utilising these products:

- Have sufficient internal controls and governance systems in place;
- Keep supporting evidence to justify classification of roads, fuel measurement or estimates, algorithms used and any other variable or input;
- Test the reasonableness of results with the actual use of fuel (for example, the data is checked against contemporaneous business records, comparing the distance computed by the product to similar paths or distances with odometer readings and/or reputable mapping data source);
- Reconcile product results with original and other supporting documentation;

- Consider whether the telematics technology product is covered by a Product Ruling or a Class Ruling.

Cases

Changes in pattern of payments to access cash flow boost

MJ and IT Holdings Pty Ltd v FC of T [2021] AATA 3250

This case concerns the application of the cash flow boost integrity provisions which can apply if the relevant parties have entered into a scheme for the sole or dominant purpose of increasing the amount of the cash flow boost for a particular entity.

The company in question had paid a director's fee of $25,000 at the end of March 2020 following the introduction of the cash flow boost legislation and the release of guidance from the ATO on how the rules operated.

Although originally disallowing the cash flow boost payment on the basis that the ATO didn't believe the payment had actually been made, the ATO subsequently introduced the issue of whether the integrity provisions should apply. The key question was whether the payment of the director's fee represented a scheme to increase the cash flow boost payment.

The AAT agreed with the ATO that the cash flow boost claim should be disallowed and noted the following key points which demonstrated that the payment of the director's fee was not consistent with the company's past practice and represented a scheme with a dominant (if not sole) purpose of increasing the cash flow boost amount:

- While director's fees were paid previously by the company, these were typically paid at the end of the income year.
- The amount paid on this occasion exceeded the usual amount. The typical director's fee amount would not have been sufficient to generate a PAYG obligation and hence an additional entitlement to the cash flow boost.
- The amount withheld in relation to the payment under the PAYG rules was not in line with the amount that would be expected to be withheld in these circumstances. The withholding amount was calculated as if the payment related to a single week whereas the payment was considered to be in respect of the year to date.

We have seen a number of cases in this area in recent months. The ATO is clearly investigating and taking action against entities which appear to have changed their ordinary business practices in order to obtain or increase an entitlement to the cash flow boost.

Legislation

Disclosure of JobKeeper payments for listed entities

Treasury Laws Amendment (2021 Measures No. 2) Bill 2021

This Bill (which has now received Royal Assent) was originally introduced primarily to amend the income tax legislation and require deductible gift recipients (DGRs) to be registered charities or government agencies in order to retain their DGR status. Transitional rules have been introduced to allow currently registered DGRs time to comply with the new rules.

However, a significant addition was made to the Bill before it was passed by Parliament which requires listed entities to disclose certain information relating to the JobKeeper scheme.

The final version of the Bill includes amendments which require listed entities to provide the relevant market operator with a notice which states the following information (including in relation to their subsidiaries):

- The number of employees for which JobKeeper payments were received;
- The sum of all JobKeeper payments received;
- Whether there was a voluntary repayment of JobKeeper amounts.

ASIC will also be required to publish the reports.

Note that this legislation does not have any direct bearing on the recent public stoush between the Senate and the Commissioner of Taxation, which relates to disclosing JobKeeper data for private companies.