Coster Galgut
Chartered Accountants

Tax Update – January 2022

Key dates

08.02.22 Parliament sits
08.02.22 Knowledge Shop PD
29.03.22 Federal Budget

Inside

In this round up, we cover the key issues and announcements for December 2021 and January 2022.

The final guidance on the Profits of Professional Services Firms has been released confirming the start date of the new approach on 1 July 2022.

Also of interest is the ATO's decision impact statement on the Addy case ("Backpacker case"). While accepting the High Court's decision, the ATO does not believe the decision will impact on many taxpayers.

Finally, a new fact sheet ATO fact sheet on the tax treatment of transfers from foreign superannuation funds warrants a second look.

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

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From Government

Expansion of the digital games tax offset

The digital games tax offset was announced in May 2021 and broadly involves a 30% refundable tax offset for eligible businesses that spend a minimum of $500,000 on qualifying Australian development expenditure from 1 July 2022. For these purposes, eligible businesses must be either an Australian resident company or a foreign resident company with a permanent establishment in Australia.

In December 2021, the Government announced that this offset will be expanded to include ongoing development work after the initial release of the relevant game. The Government intends to release draft legislation in the first quarter of 2022 for comment.

More information

- Media Release - $19.6 million extra to backin our games developers
- Digital Economy Strategy – Digital GamesTax Offset

Business eInvoicing consultation

Treasury released the *Supporting business adoption of electronic invoicing Consultation Paper* in December 2021. The consultation looks at options to fast track business adoption of electronic invoicing (eInvoicing) including enforcing Peppol eInvoicing for business-to-business (b2b) transactions.

Treasury estimates that Australian businesses exchange more than 1.2 billion invoices a year and around 90% of invoice processing is still fully or partly manual, with only about 10,000 of the estimated 2.4 million businesses in Australia currently registered for Peppol eInvoicing (the name of the eInvoicing standard adopted by the ATO and in many other jurisdictions).

The consultation paper discusses the potential introduction of a 'Business eInvoicing Right (BER)' to accelerate/enforce business adoption of Peppol eInvoicing. To exercise the BER, a business would need to set up its systems so that it can receive Peppol eInvoices. Once a business has this capability, the business would be able to exercise its 'right' and ask other businesses to send them Peppol eInvoices during transactions. Only businesses covered by the regulatory scope of the BER would be able to exercise the BER or be obligated to send eInvoices in response to a request made under the BER.

The scheme would only apply to b2b transactions and would not cover transactions involving consumers.

Initially, it is proposed that only large businesses would be legally required to send Peppol eInvoices upon receiving a valid request (expanded on later in the paper) from any business covered by the BER. However, the paper suggests that the intention is for the obligation to expand over time to cover medium-sized businesses and eventually small businesses.

The consultation seeks views on the adoption of BER, other methods of improving adoption, who should be covered, the regulatory framework, and potential exemptions.

More information

- Supporting business adoption of eInvoicing

Super co-contribution regulations

The existing regulations relating to the super co-contribution are due to sunset on 1 April 2022. Treasury has released new draft regulations 2022 to ensure the continued operation of the super co-contribution after this point. There are minimal changes to the way these rules will operate, however the major substantive changes in the new draft regulations are:

- Amending the definition of an eligible superannuation account so that it excludes those which only provide terminal medical condition benefits; and
- Clarifying the operation of Section 7 (relating to where a Government co-contribution is to be directed in specific circumstances). The new draft regulations ensure that only one item will apply in the event of multiple circumstances being applicable.

More information -
Remake of the sunsetting super co-contribution regulations

Education requirements for existing financial advisers and 'on the job' experience

From 1 January 2022, the Minister for Superannuation, Financial Services and the Digital Economy will assume responsibility for setting the minimum education and training standards for financial advisers. The existing standards made by FASEA, including the education requirements, will continue to apply unless they are amended or replaced by the Minister.

The Education Standards for Financial Advisers policy paper looks at streamlining the minimum education requirements and recognise on-the-job experience, while ensuring there is a base level of knowledge.

The paper outlines two broad options:

Experience pathway: as of 1 January 2026, individuals who have 10 or more years of full-time experience as a financial adviser in the last 12 years will only need to complete a tertiary level unit on the Code of Ethics in order to continue providing financial advice. Advisers using the experience pathway must also have a clean record prior to 1 January 2026, meaning no sanctions from the Financial Services and Credit Panel (FSCP), excluding warnings.

Qualification pathway: individuals (existing providers or new entrants) who do not meet the requirements under the "experience pathway" must complete a bachelor's degree or higher with at least 8 units in a related field of study in any combination. Units must either be at Bachelor's (AQF7), Graduate Diploma (AQF8) or Master's (AQF9) level. Existing providers continue to have until 1 January 2026 to complete any required units.

The attachment to the consultation paper sets out the potential areas of study which include financial planning, accounting, business and finance law, banking, economics, and wealth management.

Submission close 1 February 2022.

More information

- Financial adviser education standards

Employee Share Scheme simplification

Treasury has released exposure draft legislation and a consultation paper in connection with proposed amendments to corporate law rules relating to employee share schemes (ESS). The Government is aiming to remove certain regulatory barriers in offering ESS so that it is easier for businesses to attract and retain talent.

These proposed amendments relate to corporate law matters rather than the tax rules dealing with ESS arrangements.

More information

- Employee share schemes - December 2021
- Consultation paper
- Explanatory materials to draft legislation

From the ATO

eInvoicing adoption

Following the release of the Treasury consultation paper relating to eInvoicing, the ATO has also released some guidance in this area. There is specific information for businesses, tax professionals, and in dealing with government agencies.

The ATO notes that there are a number of potential benefits of eInvoicing, including cost savings, reduced risk of errors and reduced payment times. The guide also explains the steps that can be followed by businesses looking to implement eInvoicing.

The ATO guide also looks at this area from the perspective of tax professionals with the ATO suggesting that this represents an opportunity for practitioners because the adoption of eInvoicing by clients can improve efficiency and productivity so that practitioners can shift their focus to higher-value services.

Neither the consultation or the guidance from the ATO mention transparency but this is a clear advantage for the regulators of the adoption of einvoicing.

More information

- eInvoicing

Tax treatment of transfers from foreign super funds

Amounts transferred from foreign super funds can potentially be taxed in Australia. Clients might also be subject to tax obligations in the relevant foreign country. This can be a very complex area to manage in practice.

The ATO has updated its guidance in this area and outlines the specific rules which apply in common circumstances, such as where a client is transferring funds into their Australian super fund or to themselves personally. The ATO also provides some specific comments on transfers from UK funds and in relation to the Trans-Tasman Retirement Savings Portability scheme.

While the tax outcome will always depend on the taxpayer's circumstances, in some cases the transfer of funds from a foreign super fund to an

Australian super fund or to the taxpayer personally will cause the taxpayer to be taxed in Australia on the "applicable fund earnings" amount. This is broadly the earnings on the foreign superannuation account which have accrued since the taxpayer became a resident of Australia. In situations involving transfers to Australian super funds it is sometimes possible to make an election for the amount to be taxed in the fund instead.

Another important point to note is that the "applicable fund earnings" amount can be treated as non-assessable non-exempt income (i.e., not taxable) where the taxpayer is a temporary resident at the time of the transfer (i.e., as this is considered to be a foreign sourced amount derived by a temporary resident which is excluded from assessable income).

While not addressed in any detail in the ATO guide, it is important to remember that not all foreign retirement or pension funds will qualify as superannuation funds from an Australian tax perspective. For example, sometimes clients will be receiving funds from a trust that is not classified as a superannuation fund, in which case the tax outcome can be different. As a result, the starting point is to determine the nature of the foreign fund and how it will be classified under the Australian tax rules.

This can be a very complex area and we normally recommend that clients obtain formal advice or consider seeking a private ruling from the ATO before withdrawing funds from a foreign retirement or pension fund.

More information

- Tax on transfers from foreign super funds

Trans-Tasman retirement savings portability scheme for individuals

The ATO has provided an overview of how the Trans-Tasman retirement portability scheme affects individuals, including answers to some frequently asked questions.

The transfer under the scheme is voluntary for members. Accepting transferred retirement savings is also voluntary for Australian super funds and New Zealand KiwiSaver providers. Note that only complying super funds regulated by APRA, or New Zealand KiwiSaver scheme providers can participate in these transfers.

Generally, in order for a taxpayer to transfer retirement funds to an Australia super fund from a KiwiSaver scheme it is necessary to check with both the Australian fund and KiwiSaver scheme to see if they participate in the scheme and/or whether they will charge any fees for transferring or accepting funds. Taxpayers will need an Australian tax file number (TFN) to transfer their retirement savings to an Australian super fund.

In processing these applications, the Australian fund may request details of:

- Any Australian-sourced or New Zealand-sourced amounts that form part of the transfer
- Any tax-free component of an Australian-sourced amount
- Any amount not previously counted towards the non-concessional contributions cap
- Any restricted non-preserved or unrestricted non-preserved amounts.

These details must be provided by the KiwiSaver scheme if requested. The details must be provided before the Australian super fund will accept the transferred amount.

Once a transfer has been made the retirement savings transferred to Australia from New Zealand will be held in the Australian super fund in two parts:

- The New Zealand-sourced component – taxpayers will need to reach the New Zealand age of retirement (currently 65) to access these amounts.
- The Australian-sourced component – taxpayers will need to be 60 years old and satisfy the Australian definition of retirement to access these amounts.

A transfer from a New Zealand KiwiSaver scheme to a participating Australian super fund is not taxed. It should also be tax-free to withdraw these amounts from the super account once a condition of release is satisfied.

The transfer to an Australian super fund is not deductible as a personal contribution. Also, it is not treated as an eligible personal contribution for the purpose of receiving the super co-contribution. Transfers are also not eligible for a spouse contribution tax offset.

New Zealand-sourced retirement savings transferred to Australia are treated as non-concessional (or personal) contributions and relevant caps need to be kept in mind (ie, clients may have to pay excess contributions tax of the cap is exceeded).

It is also important to note that transfers from New Zealand KiwiSaver schemes to complying Australian super funds must be the whole balance of the account – partial transfers are not allowed.

Specific guidance is also available with respect to transfers from Australia to NZ.

More information

- Trans-Tasman retirement savings portability scheme for individuals

Paying a travel allowance or a living away from home allowance

The ATO has published some guidance for employers in determining whether allowances they are paying to employees should be classified as travel allowances or living away from home allowances. The distinction is important because different tax implications can arise depending on the nature of the allowance.

The key distinguishing factor will generally be whether the employee is considered to be travelling for work or living at a location. This issue is discussed in TR 2021/4 and there is also a 'safe harbour' style approach outlined in PCG 2021/3 specifically for this purpose.

Travel allowances are generally assessable to the employee although the employee might then be entitled to claim deductions for some of the travel expenses incurred.

Living away from home allowances are dealt with through the FBT system as a fringe benefit. The taxable value of the benefit is usually the amount paid. However, if certain conditions can be satisfied it is possible for some or all of the allowance to be an exempt benefit.

More information.

- Living away from home allowance fringe benefits

Vaccination incentives and rewards

The ATO has provided a fact sheet covering the tax implications of employers providing incentives and rewards to their employees in connection with receiving the Covid-19 vaccine and/or booster doses.

Where employees are paid a cash payment for getting vaccinated, this is treated similarly to a payment of salary and wages, and employers should:

- Report the payment via STP as part of the employee's salary or wages
- Withhold tax from the amount under the PAYG withholding rules, and
- Include the amount in the employee's ordinary time earnings for the purpose of determining super contributions for the employee.

Providing or paying for an employee's transport to get their COVID-19 vaccination is treated as a fringe benefit, however there should generally be no FBT payable. The travel is associated with work-related preventative health care and is normally exempt from FBT.

The provision of other non-cash benefits as rewards (such as providing goods or gift vouchers etc.) could give rise to FBT implications. The position would depend on the type of reward provided and whether the benefit is available to employees only or to the public more broadly. For example, if the benefits are provided generally to people who have been vaccinated (and not just to employees), no FBT will apply to benefits provided to employees as the benefit is not provided in respect of the employment of the employee.

If your clients are providing incentives or rewards for employees to encourage vaccination then it is important to consider the tax implications that can arise for both the employer and employee.

More information

- COVID-19 vaccination incentives and rewards - your tax and super obligations

Rulings, determinations & guides

Final guidelines on the allocation of professional firm profits

PCG 2021/4 Allocation of professional firm profits

The ATO has finalised its updated guidance on the allocation of profits from professional firms. This has been an area of ATO focus in recent years and it is vital for practitioners to understand the ATO's approach as this is likely to impact on a range of professional services firms.

The ATO is primarily concerned that some principal practitioners who hold an equity interest in a professional firm (directly or indirectly) are inappropriately structuring their affairs so that income is redirected to related individuals or entities, resulting in the principal practitioner receiving and paying tax on an amount that is artificially low. The ATO is seeking to ensure that principal practitioners pay an appropriate amount of tax personally. The guidelines are used to determine a risk rating for each principal practitioner, which will be used by the ATO in determining whether compliance resources should be allocated to reviewing the arrangement.

The starting point when looking at this area is to determine whether the income generated by the business is classified as personal services income (PSI). This is because the ATO's guidelines are not applicable if the firm generates PSI. In those circumstances it will be necessary to work through the PSI tests as well as other ATO guidelines on the possible application of Part IVA. These guidelines are only aimed at firms which generate income from a business structure (eg, employees, goodwill etc).

While the draft version of the PCG indicated that the new approach would apply from 1 July 2021, the ATO has confirmed that the start date has been deferred to 1 July 2022. In the meantime, taxpayers with pre-existing arrangements can continue to rely on the previously suspended guidelines for the 2018 – 2022 income years as long as their arrangement complies with those guidelines, is commercially driven and does not exhibit any of the high-risk features outlined in the PCG.

In addition to this, the ATO recognises that certain arrangements that were considered low risk under the suspended guidelines may have a higher risk rating under the new guidelines. Those practitioners may continue to apply the suspended guidelines to their arrangements until 30 June 2024.

When it comes to applying the finalised guidelines it is necessary to initially work through two 'gateway' conditions. If the 'gateway' conditions cannot be satisfied then the arrangement should be considered high risk. Gateway 1 considers whether there is commercial rationale for the business structure and the way in which profits are distributed. The ATO expects that the arrangement would reflect the commercial needs of the business.

Gateway 2 requires an assessment of whether any high-risk features are present. For example, this would be the case if the arrangement exhibits features covered by a Taxpayer Alert or any of the following features (this is not an exhaustive list):

- Financing arrangements relating to non-arm's length transactions;
- Exploitation of the difference between accounting standards and tax law;
- Arrangements where a partner assigns a portion of a partnership interest that are materially different in principle from the *Everett* and *Galland* cases; or
- Multiple classes of shares and units held by non-equity holders.

If Gateways 1 and 2 can be satisfied, then the practitioner can self-assess their risk level against the ATO's risk assessment factors. Very broadly:

- Risk assessment factor 1 provides a score based on the proportion of the profit entitlement returned personally in the hands of the practitioner to the total amount of income to which the practitioner and their associated entities are collectively entitled (whether directly or indirectly) from the firm (including service entities etc).
- Risk assessment factor 2 provides a score based on the total effective tax rate paid by the practitioner and their associated entities.
- Risk assessment factor 3 requires consideration of the remuneration returned in the hands of the practitioner as a percentage of the commercial benchmark for the services they have provided to the firm.

Practitioners will then add up the scores from each factor to determine their risk rating and risk zone (i.e., low risk, moderate risk or high risk). In some cases practitioners might choose only to use the first 2 risk assessment factors.

The ATO confirms that the guidelines don't create any safe harbour administrative concessions or relieve taxpayers of their obligation to comply with all areas of the tax law. The guidelines will be used to differentiate risk and enable the ATO to tailor its engagement with professional practitioners.

While the guidelines don't take effect until the start of the 2023 income year, it will be important for practitioners to consider their potential risk rating under current arrangements and what steps would need to be taken to move into a lower risk category (if applicable).

Temporary full expensing

LCR 2021/3 Temporary full expensing

The ATO has finalised its law companion ruling on the temporary full expensing measures that apply from 6 October 2020 until 30 June 2022 (although the Government is planning to extend the measure until 30 June 2023).

The final version of the ruling is substantially the same as the draft version that was released in June 2021. The ATO looks at a range of key issues that can arise when seeking to claim deductions under these rules, including entities that are eligible for this measure, assets that can and cannot qualify for an immediate deduction and how to apply these rules in the context of consolidated groups. The ATO also provides specific guidance applying the rules to small business entities and how these rules interact with the R&D tax offset provisions.

One of the key things to remember is that when dealing with clients who are classified as a SBE there are a number of assets that won't normally qualify for the simplified depreciation rules, such as assets that are subject to a depreciating asset lease. However, the ATO confirms that these assets could potentially still qualify for the temporary full expensing rules if the relevant basic conditions can be met.

The challenge in situations involving assets subject to a depreciating asset lease is that the rules can only apply if the entity carries on a business under general principles and where the asset will be used in carrying on a business. The ATO notes that these particular conditions would generally be easier to satisfy when the taxpayer is a company (refer to the ATO's guidance on this issue in TR 2019/1).

R&D tax offset and the 'at risk' rule

TR 2021/5 research and development tax offsets - the 'at risk' rule

This is the final version of draft ruling TR 2021/D3 and outlines the two major aspects of the 'at risk' rule and its application to calculating the R&D tax offset that can be claimed.

Very broadly, the 'at risk' rule compares the consideration received (or receivable) by a taxpayer in connection with R&D expenditure that has been incurred. The rule can deny or reduce the amount an eligible taxpayer can claim for the R&D tax offset. The notional deduction is denied in full where the amount of consideration received is equal to or greater than the expenditure incurred. Where the amount of consideration received is less than the expenditure, the notional deduction is reduced by that amount. The Commissioner's view is that the term 'consideration' includes non-monetary benefits.

There are two main components to the 'at risk' rule. The first is in respect of the consideration that the taxpayer (or an associate) has received or could reasonably be expected to receive as a direct or indirect result of expenditure being incurred (the nexus to expenditure test).

This test reduces the R&D tax offset to the extent that payments will be received due to conducting the R&D activities. A simple example would be where a taxpayer performs R&D activities in exchange for a payment from a third party who obtains a partial ownership interest in the results.

This aspect of the test focuses on whether the taxpayer or associate has received, or has a reasonable expectation to receive, consideration at the time the R&D expenditure is incurred. For example, the ‘at risk’ rule does not apply to include consideration received from a contract the taxpayer had not reasonably expected to enter into at the time the R&D expenditure was incurred.

The other aspect of test requires taxpayers and advisers to consider whether any consideration is received (or receivable) regardless of the results of the activities on which the taxpayer incurs the expenditure (the regardless of results test). This test is a question of fact which looks at whether payments will be received (or could reasonably be expected to receive) regardless of the results of the R&D activities. Examples could include situations where the consideration depends only on:

- The fact the expenditure is incurred;
- The completion of the activities on which the expenditure is incurred; or
- Supplying an effective ownership interest in the outcomes of the R&D activities whatever those outcomes may be.

Practitioners with clients claiming the R&D tax offset should review the final version of the ruling to determine whether the ‘at risk’ rule could potentially have an impact on the R&D tax offsets that can be claimed.

JobKeeper payments and the R&D tax incentive

TD 2021/9 JobKeeper payments received or expected as a result of research and development expenditure

This determination specifically considers how the 'at risk' rule applies to JobKeeper payments received by an entity seeking to claim the R&D tax offset.

Broadly, the ATO confirms that where an entity received a JobKeeper payment in relation to its employees then this should trigger the 'at risk' rule, which means that the entity cannot notionally deduct the portion of the salary / wage expenditure incurred on R&D activities that has attracted the JobKeeper payment.

Similarly, where JobKeeper payments have been received for eligible employees who were partially engaged in R&D activities during a particular JobKeeper fortnight the notional deduction needs to be partially reduced.

On the other hand, where the JobKeeper payment was received in connection with an eligible business participant (e.g., a shareholder of the company) this should not trigger the 'at risk' rule.

Expenditure incurred on R&D activities that cannot be notionally deducted cannot be taken into account in calculating the R&D tax offset. This also means that for the portion of JobKeeper payments that trigger the 'at risk' rule, no extra income tax should be payable under the R&D clawback rules.

Super benefits released illegally

TD 2021/D6 and PS LA 2021/D3

The draft determination considers the tax treatment of super benefits that have been paid to members in breach of relevant superannuation regulations (e.g., such as where a condition of release was not met).

Ordinarily, these amounts are included in the member's assessable income under Division 304 ITAA 1997 and taxed at the relevant marginal tax rate. However, a super benefit is not included in a member's assessable income under Division 304 if the Commissioner is satisfied that this would be unreasonable, having regard to the matters in section 304-10(4).

The draft determination indicates that where the Commissioner is satisfied that it would be unreasonable to tax the benefit as 'ordinary' assessable income, the super benefit is subject to the general tax treatment set out in Divisions 301, 302 or 303. Broadly, these are the 'normal' rules that apply in taxing super benefits received from complying super funds.

The draft practice statement provides guidance for ATO officers in determining when and how to apply the discretion in section 304-10. At a high level, the draft practice statement indicates that the discretion should generally be exercised where:

- There are no tax avoidance implications, and
- 'The excessive benefit arose fortuitously or in other circumstances beyond the effective control of the recipient or the employer'.

The ATO indicates that the following factors are not generally considered to be important:

- That the person was suffering financial hardship or distress when accessing the benefit
- Attempted rectification of the transaction by paying an amount equivalent to the superannuation benefit to the superannuation fund immediately or shortly after receiving the benefit
- Disqualification of the person from being a superannuation fund trustee
- Whether the tax consequences under Division 304 are undesirable or difficult for the person to meet

Withholder Payer Number (WPN) exemption extended for STP

STP 2022/1

The exemption for employers with a withholder payer number (WPN) reporting using STP has been extended again to cover the 2022-23 financial year. This means that WPN holders won't need to start using STP from 1 July 2022.

Cases

Whether there is a deadline for JobKeeper decisions and payments

Physiotherapy Rehab Centre Pty Ltd v FC of T [2021] AATA 4760

This case is notable not for any discussion of facts or the application of tax provisions to the taxpayer but rather for the discussion concerning whether there is a deadline by which AAT decisions concerning JobKeeper payments must be made.

The parties here requested an expedited timetable for their case based on a contention by the Commissioner that reviews relating to the JobKeeper scheme must be concluded promptly so that if the application is resolved in favour of the business, the payment must be made by 31 March 2022.
While it appears that no definitive answer was reached on that point, the AAT did indicate that the timetable should be expedited given the risk involved. The AAT noted that other parties (including the Commissioner) should keep this deadline in mind as the Tribunal does not have an unlimited capacity to deal with a late rush of applications as the purported deadline looms.

If you have clients who have outstanding JobKeeper claims or reviews etc. in progress then it would be prudent to try and speed up the process as much as possible to prevent any possible issues should the 31 March 2022 deadline apply.

ATO response on the backpacker tax case

Decision impact statement - Addy v Commissioner of Taxation

The ATO has released its decision impact on the Addy case, which looked at whether the backpacker tax was valid. In broad terms the

ATO has accepted the decision of the High Court in this case but believes that it will impact on very few taxpayers.

The High Court held that Australia's working holiday tax rates (the "backpacker tax") are inconsistent with the non-discrimination clause in the double tax agreement (DTA) between Australia and the UK when the taxpayer is a resident of Australia. Similar provisions can be found in the Australian DTAs with Chile, Finland, Japan, Norway, Turkey, Germany and Israel.

While the High Court found in favour of the taxpayer in the Addy case, the Commissioner points out that in order to be entitled to any protection under the provisions of the relevant DTA, the working holiday visa holder must be both a national of a country with which Australia has a DTA with a non-discrimination clause in the same form as the non-discrimination clause in the UK double-tax convention and they must also be a resident of Australia for tax purposes.

As a result, taxpayers who are nationals from one of the relevant DTA countries must consider if they are likely to be residents of Australia. The Commissioner's view is that most people in Australia on a working holiday visa will be here on holiday and will not be residents for tax purposes.

If you have any clients who may be impacted by the decision and potentially eligible for a tax refund, the ATO has now released some further guidance on amending returns to claim the refund.

Legislation

Parliament sits again from 8 February 2022.