Coster Galgut
Chartered Accountants

Tax Update – November 2021

Key dates

2.12.2021 – Parliament concludes for 2021

22.12.2021 – Knowledge Shop closes for the holiday period

03.01.2022 – Knowledge Shop back on deck!

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Small business CGT concessions, and their use by large private and wealthy groups, are under scrutiny.

Letters have been sent to some practitioners asking them to check the claims to ensure that they satisfy the conditions to access the concessions.

And, a new Practice Statement looks at remission or reduction of the Part 7 penalty that applies when an employer lodges their super guarantee statement late.

Finally, the working holiday maker case that made it all the way to the High Court has reached a conclusion. The decision found that Australia's backpacker tax is inconsistent with the non-discrimination clause in the UK double tax agreement.

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

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From Government

Proposed extension of the LMITO

In an interview with *The Herand Sun* the Prime Minister hinted that the low and middle-incometax offset (LMITO) which is currently due to expire on 30 June 2022 might be extended to continue to provide relief to lower income earners following the impacts of the pandemic. However, no concrete proposal or draft legislation has yet been released and we will need to wait and see whether this change does eventuate.

From the Regulators

Errors in claiming the small business CGT concessions

The ATO has indicated that some larger and wealthier businesses have been mistakenly claiming the small business CGT concessions when they are not entitled to.

The ATO notes that it will sometimes send letters to tax agents or clients when those clients have claimed the concessions in their tax return. These letters will generally ask tax agents to check the claims made by their clients and to ensure that they satisfy the relevant conditions and have appropriate records to substantiate the claim.

The ATO has provided a list of common issues that can arise when clients are seeking to access the small business CGT concessions including:

- Failing the small business turnover tests (e.g., entities that don't carry on a business under general principles or that have an aggregated annual turnover of greater than $2 million)
- Failing the maximum net asset value test
- Assets not passing the active asset test
- Taxpayers not meeting the additional conditions which need to be satisfied when the CGT event relates to shares in a company or units in a trust
- Not correctly identifying significant individuals and CGT concession stakeholders
- Entities restructuring for the primary purpose of enabling access to small business CGT concessions which might not otherwise be available
- Claiming the small business rollover, but not reporting CGT event J5 at the end of the replacement asset period when they fail to acquire a replacement asset
- Not meeting the additional conditions that need to be satisfied to apply some of the specific conditions such as the 15 year exemption or retirement exemption
- Failing to correctly report or apply the 15-year exemption.

In order to minimise mistakes, the ATO notes that clients can potentially contact the ATO for an early engagement discussion, seek a pre-lodgement compliance agreement for commercial deals and restructure events or apply for a private ruling to seek clarity on the application of the concessions before lodging tax returns.

More information

- Small business capital gains tax concessions

Claiming the loss carry back tax offset

The ATO has provided some specific guidance on how to correctly claim the company tax return to ensure that loss carry back offset claims are processed as quickly as possible. The ATO notes that a number of companies have made errors in their tax returns when seeking to claim this tax offset.

In order to claim the offset it is necessary to complete the following items in the company tax return:

- The loss carry back labels in Item 13 of the company tax return
- The opening and closing franking account balance labels in Item 8 of the return
- The refundable tax offsets label (Label E) in the calculation statement, where you add the loss carry back tax offset amount from label 13S

More Information

- Complete Label E to get your loss carry back refundable tax offset

Boiler room schemes (trading / investment scams)

The ATO has released some broad guidance on 'boiler room' schemes which are broadly scams involving salespersons cold-calling or emailing taxpayers they have targeted through identity fraud or technology and offering investment opportunities. These commonly include offering opportunities in foreign exchange currency trading, lay trading (gambling related methodology) or cryptocurrency.

Victims are persuaded to pay significant upfront amounts for the investments to be held by another party (e.g., to acquire shares in a holding company), or to obtain 'expert trading advice' or a 'software licence fee' for in-house designed trading prediction software, in return for a promise of high returns. On investment, victims receive fabricated examples of significant investment returns. A 'critical incident' then occurs, causing the company to fail and the investments to be lost. In most cases there is never any actual investment made.
The ATO indicates that the risk of being targeted by a boiler room syndicate tends to be higher if you have completed an online survey and included details of your salary or interest in self-managed superannuation. Individuals who have searched for investments online or attended investment seminars are at higher risk as their details are sometimes sold to other parties.
From a tax perspective it is sometimes possible to claim a capital loss for the money that has been lost. If a client has lost money in connection with this type of scam it may be worth obtaining a private ruling to confirm whether they could claim a capital loss due to the essentially fraudulent nature of the transaction.

More Information

- Boiler room schemes

Luxury car tax claims

The ATO has released some updated guidance on correctly accounting for luxury car tax (LCT). This guidance is particularly relevant for luxury car dealers or exporters.

The ATO confirms that LCT can be deferred in some circumstances when the business quotes their ABN to the dealer / wholesaler. To substantiate the claim it is necessary to provide all relevant information including records showing that the business conducts an enterprise that involves trading in luxury cars, how it acquired or imported and paid for the cars, how the car was used while held, and how the business sold, exported or otherwise resupplied the car.

Common errors found by the ATO with respect to reporting or claiming LCT include:

- Taxpayers using an incorrect formula or the wrong LCT threshold
- Dealers / resellers who deferred LCT, not reporting and paying LCT on their BAS immediately after they sell the car or start to use it for a non-quotable purpose
- Primary producers or tourism operators claiming a refund via the BAS and not via the Application for luxury car tax refund – primary producers and tourism operators form
- Claiming a GST credit for the GST and LCT, when the taxpayer cannot claim back the full GST or the LCT.

The ATO is particularly concerned with situations where individuals attempt to pass off private luxury car purchases as a trading enterprise to fraudulently access LCT and GST benefits. This can include taxpayers falsely asserting that luxury cars are being held solely as trading stock when the cars are being used frequently for 'extended' test drives, personal use or informally leased or sold.

More information

- Get your LCT right

Stapled super fund rules

From 1 November 2021 an employer may be required to request an employee's stapled super fund details from the ATO. A stapled super fund is an existing super account that is linked, or 'stapled', to an individual employee so it follows them as they change jobs. This aims to reduce account fees, avoiding new super accounts being opened every time an employee starts a new job. If an employer does meet their choice of super fund obligations, then penalties may apply.

The employer will need to request stapled super fund details for new employees who start on or after 1 November 2021, when:

- Super guarantee payments are made for the employee
- The employee is eligible to choose a super fund but does not choose one.

An employer may need to request stapled super fund details for some employees who aren't eligible to choose their own super fund. This includes employees who are:

- Temporary residents, or
- Covered by an enterprise agreement or workplace determination made before 1 January 2021.

Once an employee tells the employer their choice of super fund, the employer has two months to start paying contributions into that fund. In situations where the employer has received a choice of super fund form from a new employee from 1 November 2021 and must contribute before this time, if the employer doesn't pay to the employee's choice fund then they should pay into their stapled super fund or the employer nominated account if the ATO advises the employer that the employee does not have a stapled super fund.

Once the employer has established the individual is an employee of their organisation they can then access the employee's stapled super fund details with the ATO. The details can be obtained online through ATO online services or through a tax agent.

More information:

- Stapled Super Funds for Employers

Checklist for entities with contractors

The ATO has provided some updated guidance for taxpayers who engage contractors to help in determining whether they have met their tax obligations. This includes a checklist relating to tax and super obligations that can arise when hiring a contractor.

While many business entities are aware of the key obligations that need to be satisfied in connection with payments to employees, the compliance obligations on businesses that hire contractors have increased over recent years. The ATO's checklist initially focuses on determining whether a worker should be classified as an employee or contractor. Even if a worker is a contractor they can still potentially be treated as a deemed employee for superannuation guarantee purposes and the business.

The ATO guide summarises key features of the PAYG withholding system, superannuation system and taxable payments annual reporting rules which can apply when paying a contractor. The ATO also provides guidance on steps that might need to be taken when a contractor leaves and is no longer working for the business.

More information

- Contractor – checklist

Rulings

Remission of super guarantee penalties

PS LA 2021/3

When an employer fails to meet superannuation guarantee obligations by the quarterly due date this will automatically trigger the superannuation guarantee charge (SGC) rules for the employer. In addition to the 'normal' SGC components that are payable by the employer, an additional penalty can be imposed on the employer if the SG statement is not lodged by the due date. This is referred to as the Part 7 penalty and is initially 200% of the SGC amount. However, the ATO can potentially remit this penalty in whole or in part.

This practice statement sets out guidance for ATO officers to consider in determining whether to remit a Part 7 penalty in whole or in part. ATO officers are to work through the following four step process in determining whether to remit the penalty:

- Consider the extent to which the employer has attempted to comply with their obligations by making late payments to the employees' super funds;
- Consider whether the employer has attempted to comply with their obligations by lodging an SG statement to self-assess their SGC liability;
- Consider the employer's compliance history;
- Consider any other mitigating factors and circumstances that may warrant remission.

The practice statement also provides guidance on the extent to which the ATO has the discretion to remit the Part 7 penalty in relation to periods to which the recant SG amnesty could have applied.

At a very high level, it employers lodged SG statements for historical quarters within the SG amnesty period (from 24 May 2018 to 7 September 2020) then no Part 7 penalty is imposed on the SGC assessments. However, the ATO clarifies that an employer who is notified they are disqualified from the amnesty is treated as though they were never eligible for the amnesty. In these cases, the Part 7 penalty will be imposed and remission will need to be considered.

Employers who did not lodge SG statements with the ATO during the amnesty period but could have will generally be subject to a minimum Part 7 penalty of 100%.

Goods taken from stock for private use

TD 2021/8

Updated estimate amounts that can be used in determining the value of goods taken from trading stock for private use for 2021-22 have been released by the ATO and are summarised below:

Type of Business	Amount (ex GST) for adult / child over 16	Amount (ex GST) for child aged 4 to 16
Bakery	$1,350	$675
Butcher	$920	$460
Restaurant/café (licensed)	$4,640	$1,830
Restaurant/café (unlicensed)	$3,660	$1,830
Caterer	$3,870	$1,935
Delicatessen	$3,660	$1,830
Fruiterer/greengrocer	$960	$480
Takeaway food shop	$3,790	$1,895
Mixed business (includes milk bar, general store and convenience store)	$4,590	$2,295

Extending the in-house asset exclusion for COVID-19 rent deferrals

SPR 2021/D3

The ATO has released a draft legislative instrument which extends the exclusion from in-house asset treatment available for rent deferral amounts owing to the fund from related parties. The draft instrument provides that if during the 2021-22 income year a fund allows a related party to defer the payment of rent under a lease agreement (on arm's length terms) because of the financial impact of COVID-19 which creates an asset held by the fund, the asset (i.e. the receivable owed to the fund) is not an in-house asset of the fund in the 2021-22 income year when the rent was deferred, nor any future income years.

The instrument also covers similar circumstances where the rent deferral is provided to a tenant by a company or unit trust in which the fund holds a membership interest.

Structured arrangements that avoid LCT

TA 2021/4

A taxpayer alert has been released setting out the ATO’s concerns in relation to arrangements involving sales of both new and second-hand luxury cars between participating entities which are designed to improperly obtain refunds of luxury car tax (LCT) and evade LCT on the retail sale of the cars.

At a very high level, the arrangements typically involve the following features:

- The supply of a luxury car to a pre-determined recipient identified by the controlling mind of the arrangement

- A number of wholesale sales of the car are purportedly made, along a chain of participating entities often acting in collusion, prior to the final retail sale to the pre-determined recipient
- One of the entities claims a refund of LCT while creating a consequential liability to another entity in the supply chain
- One or more of the participating entities (described as a 'missing trader') does not correctly report and pay their purported LCT liabilities to the Commissioner.

The main example cited by the ATO involves a purchaser entity acquiring a car from a third party dealer then claiming a decreasing adjustment (refund) for the LCT paid on the basis that it intended to use the vehicle as trading stock (or for another quotable purpose). That entity then transfers the car to an associate entity without charging LCT or the purchaser reporting the transaction. The related entity may then transfer the car to an unrelated party, charging LCT which is not remitted to the ATO. This results in the related entities improperly retaining a LCT refund and potentially also a LCT amount on the re-sale of the vehicle.

The ATO indicates that it is currently reviewing high risk refund cases to ensure compliance with the LCT Act. Where these schemes are carried out the ATO considers that the anti-avoidance provisions in Division 165 of the GST Act may apply, and that parties who obtain a benefit from these arrangements will be liable for LCT and penalties where:

- transactions in the supply chain are artificial, contrived and not commercial in their design and execution
- in the absence of the scheme, the end user would have purchased the car directly from the compliant car dealer.

Cases

Validity of the 'backpacker tax'

[Addy v FC of T [2021] HCA 34]

The High Court has held that Australia's backpacker tax is inconsistent with the non-discrimination clause in the double tax agreement (DTA) between Australia and the UK. This means that some individuals who have been in Australia on working holiday visas in recent years might be eligible for a tax refund, but this will depend on the facts.

This case involved an appeal by the taxpayer from the earlier decision of the Full Federal Court which held that the working holiday maker tax rates were valid and that the DTA did not prevent the backpacker tax from applying to the taxpayer.

The High Court has now overturned that decision and found that the flat working holiday maker tax rates is not valid in some situations. Article 25(1) of the DTA between Australia and the UK basically seeks to ensure that nationals of the UK shall not be subject to more burdensome taxation in Australia compared with the tax that is imposed on Australian nationals in the same circumstances (including their residency status). In this case the taxpayer's tax liability under the backpacker tax rules was higher than it would have been had she been taxed like Australian citizens who are residents of Australia. This is because the backpacker tax basically imposes a flat 15% rate of tax without taking into account the tax-free threshold that normally applies to Australian tax residents.

As a result of this decision, some individuals who have been taxed under the backpacker tax rules may be able to obtain a tax refund from the

ATO. However, there are a couple of key points to bear in mind.

Firstly, one of the key features of the Addy case was that the taxpayer was classified as a resident of Australia for tax purposes. Many individuals who are living or working in Australia on a working holiday visa will be classified as non-residents in which case this decision will be less relevant.

Secondly, it is important to remember that the decision is only likely to be relevant to individuals who are a citizen / national of a country that has a DTA with Australia containing a non-discrimination clause that is similar to the clause found in the UK DTA. At this the Australian DTAs with Chile, Finland, Japan, Norway, Turkey, the UK, Germany and Israel contain similar non-discrimination clauses.
Now is the time for practitioners to identify clients who could potentially be impacted by this decision and who might be able to obtain a tax refund. The ATO has yet to release details on how it will be approaching this from an administrative point of view and it isn't clear whether the ATO will set out a specific approach that affected taxpayers should use to seek tax refunds.

Asset protection and family property

Commissioner of Taxation v Bosanac [2021] FCAFC 158

While this case was decided back in August, it has become apparent that the decision could have a reasonably broad impact on asset protection arrangements.

The central dispute in this case involved a property that was acquired solely in the name of Ms Bosanac although the purchase price was funded from joint funds and a joint loan account in the name of Ms Bosanac and Mr Bosanac. The ATO was seeking payment of a judgement debt owed by Mr Bosanac and was trying to argue that Mr Bosanac had a beneficial interest in this property under the principles of equity. This would allow the ATO to recover part of the debt from the sale of the property.

At a very high level, from a tax perspective the ownership of a property is generally based on the legal ownership (i.e., 100% by Ms Bosanac) unless there is evidence to show that beneficial ownership is different. On this point, there are a number of equitable principles concerning dealings between parties where there are 'presumptions' that interests in assets are held in a certain way despite the legal ownership. While this can be a complex area (and very much involves legal issues), a summary of the two relevant presumptions in this case, extracted from the judgement, is included below:

> *"(1) The first presumption concerns resulting or presumptive trusts. Relevantly, a declaration of trust may be presumed where two parties contribute to the purchase price of property, but legal title to the property is put only in the name of one of them. Equity presumes there was a declaration of trust because it presumes it was intended that the person holding legal title would do so for both contributors (or that the purchaser did not intend to gift his or her contribution to the other person).*
> *(2) The second is the presumption of advancement. Where it applies, the presumption of advancement operates to prevent a resulting trust from arising because the relationship between the relevant parties provides a reason against presuming a trust. The*

presumption operates on the hypothesis that, because a certain relationship exists between two parties, a benefit provided by one party to the other at the cost of the first was intended to be provided by way of "advancement"; absent evidence to the contrary, the relationship supplies a reason for why a gift was intended."

To some extent, these can be 'competing' principles. For example, in this case the contribution by Mr Bosanac could be considered to give rise to an implication that an interest in the property was being held by Ms Bosanac on trust for him. On the other hand, the presumption of advancement could indicate no such trust arises as their personal relationship implies the contribution to the purchase price is effectively a gift.

The key point emphasised by the case here was that these presumptions could be overcome by specific evidence as to the intention of the parties. In finding that Mr Bosanac did hold a beneficial interest in the property the Court considered the fact that Ms and Mr Bosanac purchased the property as their matrimonial home and moved in together shortly after purchase. As the parties contributed equally to the purchase of the property there was sufficient evidence that at the time of purchase they intended that the property would be for their joint use and for the benefit of them both. As a result, even though the property was registered in Ms Bosanac's name alone, the conclusion was that Mr Bosanac did not intend that his contribution to the purchase be by way of gift to Ms Bosanac for her 'advancement'. This decision raises concerns about the effectiveness of splitting assets between spouses as an asset protection strategy. The decision in this case indicates that there is an increased risk of assets held by one spouse being attacked by credits of the other spouse. Clients who are concerned about risk and asset protection issues should be encouraged to discuss this further with their legal advisers. The case also raises questions around the tax treatment on sale of assets that are held by one or both spouses and who should be taxed on the sale of the relevant assets. On this point we are waiting to see if the ATO releases a decision impact statement or other guidance to confirm how the ATO will be approaching this issue.

Deductibility of employee share scheme payments

Clough Ltd v FC of T (No 2) [2021] FCAFC 197

This case involved a company making payments to employees to end their rights under an employee share scheme. The company claimed a deduction for these payments but the ATO denied the deduction on the basis the payments were capital in nature. The ATO considered that the company made the payments as part of facilitating a takeover and securing an enduring advantage, rather than as part of the day to day income producing activities of the company. In agreeing with the Commissioner, the Court held that the payments were better characterised as payments made pursuant to the agreement to secure a change in control (i.e., for the takeover to proceed). While there was no doubt that the payments would not have been made unless the employees had entitlements under the employee share schemes and that those schemes had been designed to incentivise and reward those employees (i.e., having a connection with gaining or producing assessable income), the primary reason for making the payments in this situation was to facilitate the takeover and bring to an end of the employees' rights.

Accordingly, the payments were not payments by way of reward to the employees and did not

have the required connection with the company’s income producing activities. The expense was incurred as part of the steps required for the takeover to proceed. As such, the payments were on capital account.

While the payments were not deductible under section 8-1 the taxpayer was allowed to claim a deduction for the payments over five years under the blackhole expenditure rules in section 40-880 which deal with capital expenditure that relates to business activities but which doesn’t qualify for any other form of tax relief.