Coster Galgut
Chartered Accountants

Tax Update – October 2021

A round up of the important details for the month for accountants & advisers

Key dates

1 Nov 2021 – Director ID regime begins
22 Nov 2021 – Parliament sits
11 Nov – 16 Nov 2021 – final FASEA exam sitting

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The Director ID regime starts on 1 November. While existing Directors have a year to register, newly appointed Directors have 28 days.

Also of interest this month is the release of the four determinations from the ATO clarifying different applications of the concept of aggregated annual turnover. And, legislation before Parliament brings together a number of the 2021-22 Budget measures covering the extension of the temporary full expensing measures and a series of superannuation reforms including theremoval of the $450 SG threshold, a reduction in theeligibility age for the downsizer contribution, an increase the First Home Super Saver Scheme contribution cap, and a change to the work test contribution rules.

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

Coster Galgut Pty Ltd
03 9561 1266

From Government

Increased Child Care Subsidybrought forward

The start date for the additional subsidy for families with two or more children in care hasbeen brought forward from 11 July 2022 to 7
March 2022.

Families with two or more children aged five years and under in care will have their CCS rate increased by 30% for their second child and any younger children, up to a maximum rate of 95%.

The $10,655 annual CCS cap will also be scrapped on 10 December 2021 and applied retrospectively for the whole 2021-22 financial year. Anyone who reaches the cap before this date will have any additional out-of-pocket costs for the 2021-22 financial year reimbursed.

The measures were part of the 2021-22 Budget and enacted by the *Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021*.

More information

- Increased child care support brought forward

From the Regulators

Preparing for the director ID regime

The Director ID regime was covered in Knowledge Shop's May 2021 Your Knowledge client newsletter and is covered again in the November 2021 edition. Login and see Updates/Your Knowledge.

The Government has introduced a new director ID regime with the aim of preventing the use of false and fraudulent director identities and to reduce unlawful activity, such as phoenix activity. All directors who are subject to the rules will apply for a director ID once and will keep this ID forever, regardless of whether theychange companies, stop being a director or move overseas.

The ATO and Australian Business Services Registry (ABSR) have released new information on the new director ID requirements, indicating that individuals will be able to apply for a director ID from November 2021.

Tax practitioners will need to be across the new requirements to assist clients establishing new entities from 1 November 2021, for existing clients, and as part of the client induction for new clients.

While tax and BAS agents can potentially assist clients in determining whether they need to apply for a director ID, they cannot apply for a director ID on behalf of a client.

How to apply

There are two stages to the application process:

- Verifying the director's identify
- Linking the director to the business's ABN

In most cases directors will apply online through the ABSR using myGovID. myGovID is an identification verification app.

For clients who cannot obtain a myGovID then the best way to apply depends on their situation.

- **Individual has a TFN** - If the individual has an Australian TFN then they can apply by phone.
- **Individual does not have a TFN**. The individual will need to apply with a paper form (available to download from November 2021) and will need to provide certified copies of documents to verify their identity.

Foreign directors will need to apply using the paper form and have their primary and secondary identification documents verified by either a notary publics, or by an Australian embassy, high commission or consulate, including consulates headed by Austrade honorary consuls.

The individual's myGovID will need to be linked to the business's ABN through the Relationship Authorisation Manager (RAM). RAM will require one person acting on behalf of the business to act as the principal authority that will enable other directors to link to the ABN. RAM allows the director to act on behalf of a business online when the business is linked to their myGovID.

The Directors details will need to match the information held by ASIC.

Who needs to apply?

Individuals will need to obtain a director ID if they are a director or eligible officer of any of the following entities:

- A company;
- An Aboriginal and Torres Strait Islander corporation;
- A corporate trustee, for example, of a self-managed super fund;
- A charity or not-for-profit organisation that is a company or Aboriginal and Torres Strait Islander corporation;
- A registered Australian body, for example, an incorporated association that is registered with the Australian Securities and Investments Commission (ASIC) and trades outside the state or territory in which it is incorporated;
- A foreign company registered with ASIC and carrying on business in Australia (regardless of where the individual lives).

Individuals will not need a director ID if they are running a business as a sole trader or partnership.

Timing

When an individual must apply for a director ID depends on when the individual becomes a director:

Date you become a director	Date you must apply
On or before 31 October 2021	By 30 November 2022
Between 1 November 2021 and 4 April 2022	Within 28 days of appointment
From 5 April 2022	Before appointment

There are different timing requirements for directors of Aboriginal and Torres Strait Islander corporations.

More information

- Preparing for your director ID
- Who needs to apply and when
- Verifying your identify – document requirements

STP changes for 2022

Tax practitioners would be aware that from 1 July 2021 small employers with closely held payees and micro employers reporting quarterly will need to commence reporting through single touch payroll (STP). The STP report is due at the same time as the employer's activity statement.

Employers with closely held payees can choose to report:

- Actual payments each pay day;
- Actual payments quarterly; or
- A reasonable estimate quarterly.

The STP quarterly reporting concession for micro employers is only available to micro employers who meet certain eligibility requirements. For applications for a period commencing after 1 July 2021 the employer needs to meet the guidelines for exceptional circumstances.

Further, the mandatory start date for STP Phase 2 reporting (which involves providing more detailed information to the ATO) is 1 January 2022. Having said that, the ATO is providing some flexibility in terms of meeting this deadline. The ATO has advised that:

- If your Phase 2 reporting solution is ready for 1 January 2022, you should start Phase 2 reporting from 1 January 2022.
- If you can start Phase 2 reporting before 1 March 2022, you will be considered to be reporting on time and you will not need to apply for more time.
- If you need more time, you will be able to apply for a delayed transition from December 2021.
- The ATO will not impose penalties for genuine mistakes for the first year of Phase 2 reporting, that is, until 31 December 2022.

More information

- Due dates for STP quarterly reporting options
- Expanding Single Touch Payroll Phase 2

More cryptocurrency guidance

The ATO has released some additional (but brief) guidance on some of the key issues that tax practitioners should consider when clients are engaged in cryptocurrency investment or mining activities.

Many of the issues covered were asked during Knowledge Shop's Cryptocurrency Forum.

The ATO makes the comment that most people hold cryptocurrency as an investment which they hope grows in value over time to give them capital gains. It isn't entirely clear how the ATO has reached that view and we would always recommend looking carefully at each client's circumstances to determine whether they hold cryptocurrency on capital or revenue account.

When it comes to cryptocurrency that is held on capital account some of the main points raised by the ATO in this area include:

- A CGT event occurs when disposing of cryptocurrency. This can include selling cryptocurrency for a fiat currency (e.g., $AUD), exchanging one cryptocurrency for another, gifting it, trading it or using it to pay for goods or services.
- Each cryptocurrency is a separate asset for CGT purposes. When a client disposes of one cryptocurrency to acquire another, they are disposing of one CGT asset and acquiring another CGT asset.
- On the other hand, transferring cryptocurrency from one wallet to another, it is not considered a CGT disposal if ownership of the coin is maintained.
- Things like brokerage fees, transfer costs, platform costs, borrowing expenses, interest on loans and legal fees can be included in the cost base of the cryptocurrency.
- The longer someone holds cryptocurrency the less likely it will be classified as a personal use asset.
- Record keeping is extremely important – clients need receipts and details of the type of coin, purchase price, date and time of transactions in Australian dollars, records for any exchanges, their digital wallet and keys, and what they paid in commissions or brokerage fees, and records of tax agent, accountant and legal costs.

While the ATO considers that it is generally less likely that a client's cryptocurrency activities will amount to a business, it is possible for clients to be conducting cryptocurrency trading and/or mining businesses. In determining whether a business is carried on it is necessary to consider:

- The nature and purpose of their activities;
- The repetition, volume and regularity of their activities;
- Whether they have a business plan; and
- Whether their activities are organised in a business-like way.

Where a client carries on a cryptocurrency business, the trading stock rules apply rather than the CGT rules. This would mean that the cost of acquiring cryptocurrency held as trading stock is deductible, the full amounts received on sale are assessable as ordinary income (not as a capital gain) and movements in the closing value of stock need to be recognised for income tax purposes.

More information

- Cryptocurrency – investment or personal use asset

NSW commercial landlord hardship fund

The NSW government has introduced a hardship fund for smaller landlords whose main source of income is impacted by providing rental relief to retail or commercial tenants who have been financially impacted by the 2021 COVID-19 lockdown. Under the scheme, landlords can apply for a payment of up to $3,000 per month, per property affected by an impacted lease.

Landlords that have claimed land tax relief between 1 July 2021 and 31 December 2021 are ineligible for this hardship fund.

In order to be eligible for the payments, landlords musty first satisfy the following criteria:

- They have reached a rental abatement agreement to reduce rent payable with impacted tenants, per the Retail and Other Commercial Leases (COVID-19) Regulation 2021;
- They obtain the tenant's approval to disclose terms of the agreement for the purpose of applying for the Fund; and
- They retain evidence that the agreed reduction in rent has been applied to the month for which the Fund is being claimed.

Where a landlord is eligible, grants will be paid monthly from the Fund, up to the value of any rental relief provided (to a maximum $3,000 per month per property affected by an impacted lease) and continue for the term of the current rental abatement agreement, or until the relevant provisions are terminated by the government.

More information

- Commercial Landlord Hardship Fund – Guidelines

Loss carry back offset and franking accounts

The ATO has released a reminder for companies intending to access the loss carry back measure that they should confirm the balance in their franking account as this can limit the amount of loss carry back tax offset that is claimable.

Issues that should be considered when reviewing a company's franking account include:

- Checking that all transactions have been correctly recorded and there are no missing entries;
- Checking whether the company has any deferred franking debits that relate to R&D tax incentive refunds and that tax payments have been allocated correctly against these deferred debits;
- Checking that the balance has been calculated correctly to see if it is in a credit or debit position at the end of the relevant income year;
- Checking that the company has kept accurate and complete records about all transactions impacting on the franking account balance.

We have seen a number of examples of companies that meet the basic conditions for accessing the loss carry back tax offset, but have a relatively low franking account balance which limits the tax offset and cash refund that can be claimed by the company. Remember that you are focusing on the franking account balance at the end of the income year in which the company is claiming the tax offset.

More information

- Review your franking account for loss carry back

Reducing the need for an actuarial certificate

Self-managed super funds (SMSFs) no longer need to obtain an actuarial certificate for exempt current pension income (ECPI) in certain circumstances for the 2021-22 and later income years.

Prior to the amendments an SMSF that was 100% in pension phase but had disregarded small fund assets needed to obtain an actuarial certificate as the fund was required to calculate ECPI using the proportionate method. However, the amendments now allow a fund that is 100% in pension phase with disregarded small fund assets to use the segregated assets method to calculate ECPI.

A fund will have disregarded small fund assets when a member is in retirement phase and one of the members of the SMSF have a total superannuation balance above $1.6M on 30 June of the prior financial year.

More information

- Reducing actuarial certificate requirements – what auditors need to know

Rulings & Determinations

The 'games and sports' income tax exemption

TR 2021/D6

This draft ruling sets out the conditions to be satisfied for a not-for-profit entity (such as a sports club) to validly self-assess its eligibility as a tax exempt entity on the basis that its main purpose is the encouragement of a game or sport.

One of the main requirements for accessing tax exempt status is that the entity must be a not-for-profit entity. This generally means that the organisation must not be able to distribute profits or assets to members. The most common method of meeting this requirement involves the use of specific clauses in the governing documents. The ATO indicates that this requirement will not be failed merely because club members receive communal membership benefits, such as the use of facilities, that are incidental to the club's objects. The entity may also pay members reasonable remuneration for services they perform for the club.

Another requirement is that the entity have a main purpose of the encouragement of a game or sport. Whether an activity is a game or sport is a question of fact. For example, a common feature would be a set of conventions, expectations and rules. Written or defined rules are not essential, the imposition of such rules and conventions in an organised group of participants can convert an otherwise ordinary leisure activity into a game or sport (for example, hunting, fishing and walking). While competition is a very common feature of a game or sport, it is not essential.

These principles can cover a wide range of activities and do not necessarily limit the exemption to athletic activities. The ATO indicates that other pastimes such as board games (e.g., chess), card games, or activities such as motor racing may also potentially qualify. The draft ruling contains examples of the types of activities which may qualify, as well as some that are unlikely to be eligible.

Determining the main purpose of a club requires an objective evaluation of all material facts and circumstances. There is no set formula for weighing up the characteristics of a club to determine its main purpose. Entities with both sporting and non-sporting purposes will not qualify for the games and sports exemption unless the non-sporting purpose is merely ancillary and incidental to its sporting purpose or secondary to its sporting purpose.

While earning revenue from commercial operations will not necessarily mean a club does not qualify, there needs to be an objective determination of the extent to which commercial operations are a means to the end of advancing the sporting purpose, or are advancing some other purpose.

Direct or indirect activities that indicate the purpose of encouragement of a game or sport can include:

- Forming, preparing and entering teams and competitors in competitions in the game or sport;
- Co-ordinating activities;
- Organising and conducting tournaments;
- Improving the abilities of participants;
- Improving the standard of trainers and coaches;
- Providing facilities for the activities of the game or sport for the use of club members and visitors; and
- Encouraging increased and wider participation and improved performance.

Calculating aggregated annual turnover

TD 2021/7, TD 2021/D2, TD 2021/D3, TD 2021/D4

The concept of aggregated annual turnover is used for a range of purposes within the tax system. For example, whether entities can access a range of concessions aimed at small business entities and the temporary full expensing rules, the tax rate and maximum franking rate for companies, the R&D tax incentive tax offset rate and it is sometimes used in determining whether an entity can apply the small business CGT concessions. But, the concept can be difficult to apply in practice.

The ATO has been working on a number of documents in this area, with each determination focusing on a discrete area. This month, the ATO has finalised a determination and issued several new draft determinations that look at the concept of aggregated annual turnover and the connected entity rules.

TD 2021/7 looks at calculating the annual turnover of connected entities and affiliates that have a different income year from the entity that is being tested. The key point is that the definition of aggregated annual turnover only includes the annual turnover of connected entities and affiliates for the same period that matches the income year of the relevant entity that is being tested. For example, if the entity being tested has a standard 30 June year-end but a connected entity has a substituted accounting period ending 31 December, the connected entity's annual turnover would need to be calculated on a 30 June year-end basis in order to determine the aggregated annual turnover of the entity being tested.

TD 2021/D2 explains the application of the connected entity rules with respect to partnerships, foreign hybrids and non-entity joint ventures. While partnerships are not separate legal entities, for the purpose of these rules they are treated as if they were an entity. While the ATO confirms that a partnership can potentially be treated as a connected entity of another entity, a partnership is not capable of being treated as an affiliate of another entity.

As foreign hybrids are generally treated as if they were partnerships for Australian tax purposes, you would normally apply the connected entity rules to foreign hybrids in much the same way that you would apply the rules for a 'normal' partnership.

On the other hand, a non-entity joint venture is not a separate entity in its own right and is not treated as a separate entity for tax purposes. As a result, the relevant entities for these purposes are each of the parties to the non-entity joint venture, in their separate capacities.

In a similar fashion, TD 2021/D3 considers the connected entity rules with respect to corporate limited partnerships. As these entities are classified as companies for Australian tax purposes, you apply the control tests as if they partnership were a company.

TD 2021/D4 covers the public entity exception to the indirect control test. Generally, where one entity controls another (the second entity), and the second entity controls another (e.g., a third entity), the first entity is also taken to control the third entity. However, there is a specific exception from these rules which applies where the interposed entity (i.e., the second entity referred to above) is a public entity such as a listed company or a public unit trust. However, it is still possible that the first entity could directly control the third entity where it has a sufficient direct interest.

Determining when an employee is genuinely restricted from disposing of shares or options

TD 2021/D5

When a company provides shares or options relating to shares to an employee at a discount to market value then this can trigger tax implications for the employee under the employee share scheme (ESS) rules. While the default position is that the employee will be taxed upfront in relation to the shares or options that they have received, in some cases it is possible to defer the taxing point until certain events occur.

In some cases the deferred taxing point will be triggered when the employee is no longer genuinely restricted from immediately disposing of the shares or options. This draft determination sets out the principles for working out when shares or options are subject to genuine disposal restrictions and when an employee would no longer be subject to these restrictions.

In order to disposal restrictions to be 'genuine' they must be sufficiently identifiable (real and objectively demonstrable), certain and legally enforceable (not spurious or hypothetical). There must be serious and enforced consequences when a breach of a scheme's disposal restrictions occurs.

Unfortunately, the determination is vague on what meets these criteria, beyond some brief examples concerning situations where the taxpayer needs to apply to the directors and where the directors routinely exercise their discretion to allow disposal of the ESS interests (which should not be considered a genuine restriction).

A scheme's genuine disposal restrictions will no longer restrict the taxpayer on the first date on which they have an opportunity to dispose of the ESS interest. This will be the first time they can take some action to deal with or realise the ESS interest (for example, by way of sale, transfer or gift).

In these cases, it is generally necessary to consider the scheme rules documentation such as the offer document or other governing documents of the scheme, documented company policies, or the taxpayer's employment contract in determining the nature of the disposal restrictions in place and whether they are genuine.

Shortcut method for home office deductions

PCG 2020/3 has been amended to extend the period that taxpayers can use the 'shortcut' 80 cents per hour method for calculating deductions for additional running expenses incurred while an individual is working from home due to COVID-19.

Taxpayers will now be able to use this method in relation to the period from 1 July 2021 to 30 June 2022.

Electronic sales suppression tools

PS LA 2021/D2

The ATO has released this draft practice statement with respect to applying administrative penalties for the production, supply, possession and use of an electronic sales suppression tool (ESST). Broadly, these tools are essentially software designed to falsify, manipulate, hide, destroy or prevent the creation of electronic sales records. For example, this can include software that deletes or modifies point of sale (POS) records, or storage devices (such as back-up drives) containing software that deletes or modifies records.

To be an ESST, the tool must both be capable of interfering with a record and one of its principal functions must be to interfere with sales records.

The main test for whether a tool is an ESST is the capability test. This test is passed if the tool can interfere with a record that:

- An entity is required by a taxation law to keep or make, and
- Has been, or could be, created by a POS system which creates or feeds data into an entity's tax records.

An important point to note is that ATO officers do not need to find evidence that the tool has actually been used to interfere with a record, just that it is 'capable' of doing so.

In addition to the capability test, a tool must pass the principal function test. It passes this test if a reasonable person would conclude that one of its principal functions is interfering with records that an entity is required to keep under a taxation law.

The principal function test operates in conjunction with the capability test to ensure that it does not capture legitimate features of POS systems. For example, standard POS systems may allow the user to modify transactions to correct mistakes or to train staff and keep a history log to record all the modifications made. A system would not be an ESST solely because of that function.

An administrative penalty (ESST penalty) can be applied if an entity engages in the following conduct:

- Manufactures, develops, or publishes an ESST (60 penalty units each instance);
- Supplies or makes an ESST available for use (or a right to use an ESST) or provides a service to an entity that involves the use of an ESST (60 penalty units);
- Acquires, has possession or control of an ESST (or a right to use an ESST) (30 penalty units);
- Uses an ESST to keep, make or alter a record, or uses it to prevent a record being kept, made or altered (60 penalty units); or
- Aids, abets, counsels or procures any of the above conduct (30 or 60 penalty units depending on which of the above items applies).

The ATO confirms that penalties should not be applied if the conduct is undertaken for the purpose of preventing or deterring tax evasion or enforcing a taxation law. For example, researchers developing an ESST to assist them understanding and conducting training on how the tools function will not be liable to an administrative penalty when they do so for a law enforcement agency.

An entity will also not be liable to an administrative penalty where criminal prosecution has commenced for the same conduct.

Legislation

Extending temporary full expensing and superannuation amendments

Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Bill 2021

This Bill contains a number of Federal Budget announcements including amendments to the operation of the superannuation system and extension of the temporary full expensing measures.

The Bill extends the temporary full expensing provisions by 12 months, allowing immediate deductions to be claimed for the cost of qualifying depreciating assets to be claimed up

until 30 June 2023 without any limit on the cost of the asset (but subject to the luxury car limit rules).

Small business entities will also deduct the full balance of their general small business pool in the 2023 year and the 'lock out' rules that prevent small businesses from re-entering the simplified depreciation regime for five years if they opt out of the regime continue to be suspended for income years that include 30 June 2023. This means that clients will be able to opt-out for the 2022 year and opt back in for 2023.

The Bill also contains several amendments to the superannuation law. Broadly, these include:

- Removing the $450 a month threshold before an employee's salary or wages count towards the Superannuation Guarantee (SG). This will require employers to make SG contributions for eligible employees whose salary or wages are less than $450 per month.
- Increasing the total limit on the maximum amount of voluntary concessional and non-concessional contributions made from 1 July 2017 that are eligible to be released and used under the First Home Super Saver Scheme from $30,000 to $50,000. The change does not alter the limit on the amount of voluntary contributions from any one financial year that are eligible to be released (being $15,000). Broadly, this allows first home buyers to withdraw greater amounts from super in connection with the purchase of their property.
- Reducing the eligibility age for downsizer contributions to be made to super from 65 to 60 years of age. This also requires changes to the contribution acceptance rules, which requires amendments to regulations. Those are being progressed separately.
- A technical change involving an amendment to the superannuation regulations requiring individuals aged between 67 and 75 years to meet the work test to claim a deduction for personal superannuation contributions. The rules previously prevented the fund from accepting such contributions (rather than imposing the restriction on the individual). However, following earlier changes which allowed funds to accept non-concessional contributions (including under the bring-forward rules) or salary sacrifice contributions without individuals meeting the work test, the legislation is being changed to allow funds to accept the personal contributions of taxpayers aged between 67 and 75, but these would be non-concessional contributions unless the taxpayer passes the work test.

  The other change in this area allows individuals aged 67 to 74 years (inclusive) who were not previously able to bring forward non-concessional contributions due to their age (i.e., 66 was the upper limit) to do so, starting in the 2022-23 financial year.

These rules will allow a superannuation fund to choose the method to calculate exempt current pension income when the SMSF has both retirement phase and accumulation phase interests at one time but then only retirement phase interests at another time during the income year. Currently a SMSF is required to use the segregated assets method to calculate exempt current pension income when the fund is 100% in pension phase.

In practice a trustee will only be able to exercise this choice if all of the interests in the fund are in retirement phase for some, but not all of the income year and all of the income derived from the fund's assets is supporting retirement phase income stream benefits.

Simplifying access to Covid related financial advice

ASIC Corporations (Amendment) Instrument 2021/848

This instrument amends the *ASIC Corporations (COVID-19—Advice-related Relief) Instrument*

2021/268 to give effect to a temporary relief measure that facilitates access to timely and affordable personal advice for existing clients of financial advisers, where the advice is in connection with the adverse economic effects of COVID-19.

The changes remove the obligation of the providing entity (i.e., a financial adviser) to give a client a Statement of Advice (SOA) any earlier than 20 business days after providing the COVID-19 advice. However, it is still necessary to ultimately provide the SOA. Further, in the interim, the providing entity must keep sufficient records of the COVID-19 advice.