Coster Galgut
Chartered Accountants

Tax Update – July 2022

Inside

From Government 2
COVID-19 related relief payments reinstated 2
ACNC regulations to be remade 2
From the Regulators 2
Guidance on reporting cryptocurrency transactions 2
Managing share investments in the tax return 3
Top 10 things to remember for tax time 3
Making objections 4
The ATO's compliance approach to *Everett* assignments 4
Minimum pension drawdown rates reduced for 2023 5
Viewing super contribution cap information 5
ATO rental property focus 5
Main residence exemption and occupancy expenses 6
Rulings, determinations & guidance 6
Division 7A and UPEs 6
ATO warning on treaty shopping 7
Cases 7
Dividends from capital profits 7
Another employee v contractor dispute 8
Legislation 9
Exempting electric cars from FBT 9
Increased income test limit for Commonwealth Seniors Health Card ....
Knowle9
Cyclone Seroja recovery grants NANE 10

Parliament is back and the election promises have started taking tangible form.

Electric cars will be exempt from FBT under a new bill before Parliament. We explore the details.

Plus, what changed between the draft and final determination on Division 7A and unpaid present entitlements to a corporate beneficiary? We look at the detail of TD 2022/11.

And, the interesting case mounted by an aggrieved taxpayer about the tax treatment of dividends from capital profits. What can we learn from Douglas v FC of T?

Coster Galgut Pty Ltd
03 9561 1266

From Government

COVID-19 related relief payments reinstated

At a meeting of the national cabinet in July the Federal Government agreed to reinstate the Pandemic Leave Disaster Payment for the period from 1 July to 30 September 2022. This payment is available to individuals who are required to self-isolate due to COVID-19 and are unable to work. These payments are included in the assessable income of the recipient.

Similarly, the Crisis Payment - National Health Emergency (COVID-19) has also been reinstated for the same period. This payment is available to individuals receive who receive an income support payment or ABSTUDY Living Allowance from Services Australia and who are in severe financial hardship.

More information

- Media Release – Meeting of national cabinet

ACNC regulations to be remade

Treasury has released exposure draft legislation that remakes the regulations that relate to the operation of the ACNC, which were due to sunset in 2023. There are no substantive changes to the regulations which need to be noted.

More information

- Remake of ACNC Regulations

From the Regulators

Guidance on reporting cryptocurrency transactions

The ATO has provided some brief guidance intended to assist taxpayers with correctly reporting income and losses from cryptocurrency transactions. The ATO reiterates its position that most cryptocurrency will be held on capital account, but it is always necessary to consider whether clients could potentially be taxed on revenue account.

A CGT event needs to be triggered in order to crystallise a capital gain or loss. That is, unrealised gains and losses do not generally need to be reported for tax purposes. However, it is important to remember that a CGT event will normally be triggered if a taxpayer exchanges one crypto asset for another crypto asset, converts crypto to a fiat currency (e.g., to $AUD) or uses crypto to obtain goods or services.

Other income generated from cryptocurrency, such as airdrops or staking rewards, will

normally need to be included in tax returns as other income.

Taxpayers need to keep accurate and appropriate records of their cryptocurrency transactions and the notes that it has expanded its use of data matching in this area. This is clearly an area of ATO focus at the moment.

More information

- Taking the cryptic out of crypto this tax time

Managing share investments in the tax return

The ATO has also issued specific guidance relating to share investments. The ATO provides a list of tips to prevent mistakes in tax returns including the following:

- Wait until pre-filling is available, as some investments take longer than others.
- Check pre-filling, and if a transaction is not there, add it in.
- Note that even if a dividend or distribution is automatically reinvested into a reinvestment plan, these need to still be reported as income.
- Remember that CGT events can be driven by actions a company takes, not just by client actions. This can include liquidations, mergers, demergers or returns of capital.
- Reporting capital losses on tax returns is important so they can be easily carried forward to offset future capital gains.

It is also necessary to ensure that you question clients about any new investment acquisitions or sales that have occurred during the year and whether clients have sufficient records to support these transactions.

The ATO has also published a fact sheet which explains how to calculate capital gains or losses on shares or units. This includes guidance on how to calculate the cost base of share investments, how to deal with the sale of part of a parcel of shares, dealing with deceased estates and tax issues for non-residents.

More information

- Tips to get shares right this tax time
- Capital gains tax on sale of shares or units

Top 10 things to remember for tax time

The ATO has published a list of 10 key points to note in completing individual tax returns for the 2022 year. Some of the more critical items include:

- Make sure to check if the client's COVID-19 support payments and natural disaster payments need to be included in their 2021–22 tax return, as the tax treatment can vary depending on the type of payment that has been received.
- If the client is claiming a deduction for the cost of buying work-related COVID-19 tests, make sure they are eligible.
- If the client is claiming working from home expenses, they can choose from either the temporary shortcut method, the fixed rate method or actual cost method, as long as they meet the eligibility and record-keeping requirements of the method they choose. Make sure these methods are applied correctly.
- Make sure the client has correct records to substantiate their deduction claims – no receipts, logbook or diary, means no deduction.

- Clients need to calculate and declare gains and losses from the disposal of crypto assets (coins, tokens and non-fungible tokens) during the 2021–22 financial year. If the client has received staking rewards or airdrops, make sure to include these as ordinary income. If the client is in the business of trading crypto, income tax will also apply.
- If the client received any income from their rental property throughout the year, this will need to be reported their return. This includes income from short-term rental arrangements, insurance payouts and bond money that was retained.

More information

- 10 things to know this tax time

Making objections

The ATO has provided some updated guidance on the types of assessments and decisions that taxpayers can object to. Importantly, the guide provides a summary of the time limits that apply in each circumstance.

It is also important to note that if a taxpayer is outside of the normal time limit for objecting against an assessment or decision they can often request the Commissioner to grant an extension of time by including a written request together with the objection.

More information

- Decisions you can object to and time limits

The ATO's compliance approach to *Everett* assignments

Following the finalisation of PCG 2021/4 which deals with the allocation of profits of professional firms, the ATO website has been updated to include specific guidance on how the ATO assesses the risk of *Everett* assignments and its compliance approach in this area.

The key points to note from a tax perspective in relation to the key cases in this area (*Everett* and *Galland)* are as follows:

- The effect of this type of assignment is that the assignor (the partner in the partnership) holds that assigned partnership interest on trust for the assignee (usually a related party such as a spouse or a trust).
- The assignment does not make the assignee a partner in the partnership or give the assignee any entitlement to the assets, management or administration of the partnership or the right to inspection of books and accounts.
- A partner's income is not income from personal exertion but income from property, with the property being the partner's fractional interest in the partnership.

The ATO's guidance indicates that it will consider these arrangements to be high risk where:

- They purport to admit an individual who is not an owner or equity holder in the partnership as a partner of the partnership.
- A partner's relationship with the partnership has characteristics indicating that the relationship is akin to a contractor or employee of the partnership.
- The partner does not have rights to full participation in management and the benefits of partnership.
- The partner receives a fixed salary and they have limited or no exposure to the risks and benefits associated with the performance of the partnership.
- The partner is indemnified by other partners for any professional liability in respect of actions against the partnership.

The ATO indicates that the approach to assessing the risk associated with *Everett* assignments that do not exhibit high risk factors will be determined in accordance with the risk assessment framework set out in PCG 2021/4.

On the other hand, where the *Everett* assignment has high risk features, the ATO indicates that this is likely to result in closer attention to the individual facts and circumstances of the arrangement, including consideration of whether Part IVA could apply.

More information

- Everett assignments

Minimum pension drawdown rates reduced for 2023

The ATO has confirmed that the minimum pension drawdown rates remain reduced by 50% for the 2023 income year. This reduces the minimum annual payment required for account-based pensions and annuities, allocated pensions and annuities, and market-linked pensions and annuities.

More information

- Minimum drawdown rates reduced for new financial year
- Minimum annual payments for super income streams

Viewing super contribution cap information

It is now possible for superannuation fund members to view and manage their non-concessional contributions using ATO online services (accessed via myGov). A member will be able to see the remaining cap amount for the financial year, whether they are close to exceeding the cap, and if
they have exceeded the cap, the excess amount.

This is in addition to the existing concessional contributions and unused concessional contribution cap information that is displayed.

More information

- New way to view super contribution cap information

ATO rental property focus

The ATO has indicated that it will once again be focusing on the reporting of rental income and deductions as this continues to be an area where mistakes are frequently made.

The first point made by the ATO is to ensure that all rental income is included, such as income from short-term rental arrangements, renting part of a home, and other rental-related income like insurance payouts and rental bond money that has been retained.

Advisers should also check to ensure that all expenses are accounted for correctly, for example as either deductible upfront, over time, and/or as being included in the cost base of a property. It is necessary to ensure that deductions are only claimed to the extent that the property is used for income producing purposes. This can also be an issue with respect to apportioning interest expenses on a loan used partly to acquire the property and partly for private purposes.

The ATO provides some comments on the tax calculations that need to be performed when selling a rental property. The cost base will typically include the cost of the property when purchased and any costs associated with acquiring or selling it. This can include things like stamp duty, legal fees, valuations and real estate sales fees. Capital works deductions sometimes need to be subtracted from the cost base. Beyond the comments made by the ATO in the guide it is important to ensure that appropriate adjustments are made when clients sell depreciating assets with a rental property. These are separate assets from the property and it is

necessary to perform separate calculations in relation to these assets.

More information

- Tax time focus on rental property income and deductions

Main residence exemption and occupancy expenses

There has been an update to the ATO's 'employee's guide for work expenses' which was mentioned in the June 2022 Tax round-up.

The ATO has amended the document to clarify the point that if you are eligible to claim occupancy expenses for a property (such as interest on the loan to acquire the property) then this will mean you are not eligible for a full main residence exemption. This is the case whether or not the taxpayer claims a deduction for the expenses in the tax return.

This means that if a taxpayer is entitled to claim interest expenses, but doesn't, they still won't be able to claim the full main residence exemption.

The ATO is clarifying the key point that if a taxpayer is eligible to claim a deduction then they cannot generally choose not to claim the deduction in order to access more beneficial tax treatment in another area.

More information

- Employees guide for work expenses

Rulings, determinations & guidance

Division 7A and UPEs

TD 2022/11

The ATO has finalised its updated guidance on the treatment of unpaid present entitlements (UPEs) owed by a trust to a corporate beneficiary for Division 7A purposes.

The key point to note is that the ATO has backtracked on the approach taken in the draft determination in terms of when a UPE will start being treated as a loan. That is, the ATO indicates that a UPE will normally start being treated as a loan for Division 7A purposes in the income year following the year in which the UPE arose, regardless of how the entitlement is expressed (e.g., as a fixed dollar amount, percentage etc). This is largely consistent with the approach that has applied since 16 December 2009.

The ATO indicates that the loan arises at the point in time when the private company beneficiary has knowledge of an amount that it can demand immediate payment of from the trustee and does not demand payment of the amount.

Where the private company beneficiary and the trustee are part of the same family group, the company is taken to have knowledge of the amount that it can demand immediate payment of from the trustee when the trustee does. This will normally occur in the following year when the accounts for the trust have been finalised. The ATO expects that there would only be limited exceptions to this, such as where a trust

is wound up part-way through an income year and the accounts are finalised early.

The other key issue covered in the final determination relates to sub-trust arrangements. The ATO basically confirms its updated view that sub-trust arrangements will no longer be effective in preventing a UPE from being treated as a loan for Division 7A purposes. Sub-trust arrangements will only be effective for Division 7A purposes in very limited situations, such as where the funds are transferred into a separate account, this is held for the sole benefit of the company and the funds are not used by the trust or any other related parties.

ATO warning on treaty shopping

TA 2022/2

The ATO has released a taxpayer alert with respect to 'treaty shopping' arrangements that are designed to obtain the benefit of a reduced withholding tax (WHT) rate under a double tax agreement (DTA) in connection with royalty or dividend payments from Australia.

These arrangements can potentially involve the use of interposed entities between an Australian resident entity and the ultimate recipient of the royalty or dividend, where the interposed entity is a resident of a treaty partner country. The ultimate recipient is generally located in a country that either does not have a DTA with Australia or, where it is a treaty partner of Australia, the DTA provides a less favourable treaty benefit.

The ATO indicates that it may be reviewing arrangements which include the following features:

- Structures and restructures involving the interposition of an existing or newly incorporated entity between Australia and the ultimate recipient of royalties or unfranked dividends.
- The interposed entity may have significant existing operations and employees and the taxpayer may contend that commercial benefits and/or synergies flow to the Australian operations or the interposed entity.
- Royalty or unfranked dividend payments (or potential future royalty or unfranked dividend payments) to the interposed entity are (or would be) subject to WHT at reduced rates under the relevant DTA compared with Australian domestic law or the applicable WHT rate under the DTA between Australia and the country of residence of the ultimate recipient.

The taxpayer alert states that these types of arrangements may be subject to both the operation of the anti-avoidance rules provided under Australia's DTAs and the anti-avoidance rules in Australia's domestic tax laws (such as Part IVA).

Cases

Dividends from capital profits

Douglas v FC of T [2022] AATA 2056

The AAT has confirmed that dividends paid to a shareholder of a company will normally be included in assessable income and taxed on revenue account, even if the dividend is traced back to capital profits made by the company paying the dividend.

In this case an individual taxpayer received a payment from a company (BHP) which was described as a special dividend and which was sourced from the capital proceeds generated from the sale of assets by the company.

After initially including the dividend in the tax return the taxpayer amended the return to treat

this as a return of capital. As the taxpayer had acquired the shares in the company pre-CGT they treated this as an exempt capital gain. The ATO subsequently issued an amended assessment on the basis that the payment was in fact a dividend and should be included in assessable income. After the taxpayer's objection was rejected they brought the case to the AAT.

The AAT effectively confirmed that a company and its shareholders need to be looked at separately when applying the tax rules. The fact that a company has generated profits from the sale of capital assets doesn't mean that the shareholder can treat dividends sourced from those profits as a capital amount for tax purposes.

When a company makes a distribution to a shareholder this will normally be taxed as a except to the extent that the distribution is debited to the company's share capital account. This was not the case here, so the AAT confirmed that the dividend was taxable on revenue account.

Practitioners should note that the tax outcome can sometimes be different in situations where the company has been able to apply the small business 15 year exemption or retirement exemption. Different tax implications can also sometimes arise for shareholders when a listed company undertakes an on-market share buyback or a liquidator makes distributions to shareholders that are sourced from exempt capital gains made by a company.

The case also provides a warning on self-representation. Taxpayers who have little experience with the tax system and don't apply a highly technical approach to the dispute tend to have limited success before the AAT.

Another employee v contractor dispute

JMC Pty Limited v Commissioner of Taxation [2022] FCA 750

The Federal Court has handed down another decision dealing with the employee / contractor distinction, which builds on the recent High Court decisions in this area (the *Jamsek* and *Personnel Contracting* cases). Once again, the Federal Court has placed significant emphasis on the terms of the arrangement between the parties.

In this case the ATO had assessed the employer entity (JMC) for superannuation guarantee liabilities on the basis the relevant worker was either an employee under the ordinary meaning of the term or was engaged under a contract wholly or principally for their labour. The Federal Court confirmed that the contracts had that character and that the individual should be treated as an employee. It was ultimately found that the individual was an employee under the ordinary meaning of the term.

The Federal Court followed the approach recently applied by the High Court and indicated that where the rights and duties of the parties are comprehensively committed to a written contract, the legal rights and obligations established by the contract are decisive of the character of the relationship provided that the validity of the contract has not been challenged as a sham.

The contractual provisions that might be relevant in determining the nature of the arrangement include, but are not limited to, those that deal with the mode of payment, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax, the delegation of work and the right to exercise direction and control.

In this particular case the contracts indicated that the employer had a significant degree of control over the worker, there was only limited ability for the worker to delegate work, while the individual provided invoices to the employer he was paid on an hourly rate, and the relevant equipment was largely provided by the employer. Accordingly, the Federal Court held that the individual was a common law employee.

Legislation

After a few months break, Parliament is back and some tax related Bills have been introduced.

Exempting electric cars from FBT

Treasury Laws Amendment (Electric Car Discount) Bill 2022

This Bill provides for an FBT exemption for cars that are classified as zero or low emission vehicles and are provided by employer to an employee as a car fringe benefit. The Government expects this measure will increase demand for electric vehicles, although the fact that the concession is provided in the form of an FBT exemption limits the scope of the concession.

Some key points to note in relation to this measure include:

- The exemption is limited to vehicles that have a value below the luxury car tax threshold for fuel efficient cars.
- The exemption is intended to apply to benefits provided from 1 July 2022, but won't generally be available to cars that were already owned on this date.
- The exemption can apply to cars that are provided under a salary sacrifice arrangement.
- It is important to confirm whether the specific car model in question will qualify for the exemption. For example, certain hybrid vehicles could potentially qualify for the exemption, while other hybrid vehicles won't.
- While the measure provides an exemption from FBT in relation to qualifying vehicles, the value of the benefit will still be taken into account in determining the reportable fringe benefits amount of the employee.

Increased income test limit for Commonwealth Seniors Health Card

Social Services and Other Legislation Amendment (Lifting the Income Limit for the Commonwealth Seniors Health Card) Bill 2022

Currently to be eligible for a CSHC adjusted taxable income plus deeming of account-based pensions (unless grandfathered) needs to be below $57,761 for singles of $92,416 for couples. This Bill increases the income test limits to $90,000 and $144,000 respectively.

Although the ancillary benefits are not as broad as the pension concession card, a CSHC will provide eligible self-funded retiree clients access to benefits such as:

- Cheaper medicine under the Pharmaceutical Benefits Scheme (PBS). Prescriptions become free to card holders after a safely net of $326.40 for the calendar year has been met.
- Earlier access to the Medicare safety net.

- Bulk billed medical appointments – subject to approval from your doctor

The increase proposed in the Bill substitutes indexation in line with the CPI that was set to occur on 20 Sept 2022 (for 2022 only).

Cyclone Seroja recovery grants NANE

Treasury Laws Amendment (2022 Measures No. 1) Bill 2022

This Bill makes a number of minor amendments to the income tax laws including:

- Grants received in relation to Cyclone Seroja under Category C of the Disaster Recovery Funding Arrangements 2018 will be non-assessable and non-exempt (NANE) income for income tax purposes.
- The Bill provides income tax and withholding tax exemptions for FIFA and its wholly owned subsidiary in association with delivering the 2023 FIFA Women's World Cup in Australia.